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SHRI AMAR NATH RAINA
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ALLAHABAD HIGH COURT

1955

CHIEF JUSTICES :

The Hon'ble Bidhubhusn Malik, M.A., LL.B., Bar-at-law. (Retired with effect from 9.1.1955.
" Orby Howell Mootham, Bar-at-law. (Sworn in on 11-1-1955).

PUISNE JUDGES :

The Hon'ble Mr. Justice Orby Howell Mootham, Bar-at-law.
" " Raghubar Dayal, I. C. S.
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" " Basil Reginald James, I. C. S. (Took seat on 23rd August 1954).
" " Anand Narain Mulla, M.A., LL. B. (at Lucknow) (Took seat on 23-8 1954).
" " Radha Krishna Chowdhry, M.A., LL.B. (Took seat on 11-11-1954).
" " Sri Narain Sahai, B.A., LL.B. (Took seat on 11th Nov. 1954).
" " Vishnu Datta Bhargava, B.A., LL. B. (Took Seat on 31.3-1955).
" " Balram Upadhya M.A., LL.B. (Took seat on 31-3-1955).
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" B. K. Dhawan, B.A., LL.B., Bar-at-law *(Senior)* (at Lucknow).
" B. N. Roy, M.A., LL.B. *(Junior)* (at Lucknow).
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	1953 All L J	665
173	1953 All L J	544
	1953 AllWR(HC)	542
	1954 Cri L J	379
175	1953 AllWR(HC)	571
	1953 All L J	638
	1954 Cri L J	384
176	ILR (1952) 2 All	331
182	1953 All L J	582
183	1953 AllWR(HC)	601

AIR	Other Journals	
183*con*	1953 All L J	661
	1954 Cri L J	388
184	1953 AllWR(HC)	608
	1953 All L J	600
185	1953 All L J	640
	1953 AllWR(HC)	763
	1954 Cri L J	399
186	1953 AllWR(HC)	637
	1953 All L J	689
	1954 Cri L J	405
188	1953 AllWR(HC)	617
	1953 All L J	702
191	1953 AllWR(HC)	615
	1953 All L J	687
192	1953 All L J	642
	1953 AllWR(HC)	717
193	1953 AllWR(HC)	603
	1953 All L J	673
	1954 Cri L J	413
195	1953 AllWR(HC)	590
	1953 All L J	656
198	1953 AllWR(HC)	697
	1953 All L J	732
199	1953 AllWR(HC)	634
	1953 All L J	705
201	1953 AllWR(HC)	632
	1953 All L J	700
	1954 Cri L J	426
202	1953 All L J	651
203	1953 AllWR(HC)	582
	1953 All L J	676
	1954 Cri L J	432
204	1953 All L J	644
(FB)	1953 AllWR(HC)	657
	1954 Cri L J	438
	ILR (1954) 1 All	379
209	1953 All L J	613
	1953 AllWR(HC)	704
210	1953 All L J	663
211	1953 All L J	636
212	1953 AllWR(HC)	602
	1953 All L J	672
213	1953 AllWR(HC)	625
	1953 All L J	654
	1954 Cri L J	447
214	1953 AllWR(HC)	628
	1953 All L J	686
	1954 Cri L J	455
215	1953 AllWR(HC)	665
	1953 All L J	696
218	1953 AllWR(HC)	626
	1953 All L J	684
219	1953 All L J	649
	1953 AllWR(HC)	701
221	1953 AllWR(HC)	671
	1953 All L J	708
222	1953 All L J	653
	1953 AllWR(HC)	722
223	1953 AllWR(HC)	606
	1953 All L J	660
	1954 Cri L J	459
225	1954 AllWR(HC)	23
	1954 Cri L J	482
	1954 All L J	241
227	1953 All L J	678
(FB)	1953 AllWR(HC)	684
	ILR (1954) 1 All	447
231	1953 AllWR(HC)	654
	1953 All L J	727
	1954 Cri L J	492
232	...	
234	1953 AllWR(HC)	674
	1953 All L J	710

AIR	Other Journals	
235	...	
244	1953 AllWR(HC)	663
	1953 All L J	670
245	1953 AllWR(HC)	690
	1954 All L J	15
247	1954 All L J	69
	1953 AllWR(HC)	715
	1954 Cri L J	498
249	1954 AllWR(HC)	45
	1954 Cri L J	507
	1954 All L J	237
252	1954 All L J	18
	1954 Cri L J	512
	1955 AllWR(HC)	292
255	1953 AllWR(HC)	689
	1954 All L J	145
	1954 Cri L J	524
257	...	
291	(1954) 25 I T R	472
	ILR (1953) 2 All	758
305	1953 All L J	694
	1954 AllWR(HC)	19
306	1953 All L J	731
	1954 Cri L J	663
307	1953 All L J	677
	1953 AllWR(HC)	694
308	1953 AllWR(HC)	682
	1954 All L J	60
	1954 Cri L J	665
309	1954 Cri L J	677
310	...	
313	1953 AllWR(HC)	699
	1954 All L J	95
314	1953 AllWR(HC)	695
	1954 All L J	72
315	1954 All L J	6
	1954 AllWR(HC)	34
	1954 Cri L J	685
317	1954 All L J	12
	1954 AllWR(HC)	63
	1954 Cri L J	726
319	1954 Cri L J	691
340	1954 AllWR(HC)	29
	1954 All L J	10
	1954 Cri L J	736
342	1953 AllWR(HC)	680
	1954 Cri L J	744
343	1953 AllWR(HC)	707
	1954 All L J	40
348	1954 AllWR(HC)	7
	1954 All L J	147
351	1953 AllWR(HC)	719
	1954 Cri L J	354
353	1953 All L J	716
	1954 AllWR(HC)	54
355	1953 AllWR(HC)	731
	1954 All L J	38
356	1953 All L J	714
	1954 AllWR(HC)	32
	1954 Cri L J	765
358	1953 All L J	713
	1954 Cri L J	720
359	1954 AllWR(HC)	16
	1954 All L J	149
360	1953 AllWR HC)	733
	1954 All L J	36
361	...	
362FB	1953 AllWR(HC)	736
381	1954 AllWR(HC)	1
	1954 All L J	103
	1954 Cri L J	790
384	1954 AllWR(HC)	27
	1954 All L J	144
	1954 Cri L J	804
385	...	
391	1954 AllWR(HC)	143

AIR	Other Journals	
391*con*	1954 All L J	200
	1954 Cri L J	847
393	ILR (1954) 1 All	582
415	1953 All L J	667
	1953 AllWR(HC)	676
418	1954 AllWR(HC)	22
419	1954 All L J	90
	1954 AllWR(HC)	101
420	1954 AllWR(HC)	51
	1954 All L J	304
421	1954 All L J	22
(FB)	1954 AllWR(HC)	89
	1954 Cri L J	856
	ILR (1954) 1 All	373
422	1954 AllWR(HC)	60
	1954 All L J	118
424	1954 AllWR(HC)	10
	1954 All L J	246
	1954 Cri L J	860
428	1954 AllWR(HC)	156
	1954 All L J	172
433	1954 All L J	114
	1954 AllWR(HC)	135
434	1954 AllWR(HC)	86
	1954 All L J	121
436	1954 AllWR(HC)	52
	1954 All L J	116
438	1954 AllWR(HC)	138
	1954 Cri L J	874
	1954 All L J	316
441	1954 AllWR(HC)	94
	1954 All L J	187
445	1954 All L J	65
	1954 AllWR(HC)	182
447	1954 AllWR(HC)	155
	1954 All L J	198
	1954 Cri L J	879
448	1954 AllWR(HC)	174
	1954 All L J	228
449	...	
450	1954 All L J	32
	1954 AllWR(HC)	57
452	1954 AllWR(HC)	61
	1954 All L J	92
454	1954 All L J	154
	1954 AllWR(HC)	256
455	1954 All L J	34
	1954 AllWR(HC)	163
456	1954 All L J	156
	1954 AllWR(HC)	230
457	1954 All L J	223
	1954 AllWR(HC)	254
458	1954 AllWR(HC)	312
	1954 Cri L J	962
459	1954 AllWR(HC)	287
	1954 All L J	427
461	1954 AllWR(HC)	285
	1954 Cri L J	976
462	1954 All L J	213
(FB)	1954 AllWR(HC)	263
	ILR (1954) 1 All	319
475	1954 AllWR(HC)	167
480	1954 AllWR(HC)	149
	1954 All L J	160
484	1954 All L J	154
	1954 AllWR(HC)	203
486	1954 All L J	185
	1954 AllWR(HC)	175
	1954 Cri L J	1031
487	1954 AllWR(HC)	246
	1954 All L J	308
490	1954 AllWR(HC)	235
	1954 All L J	344
492	1954 All L J	276
	1954 AllWR(HC)	376

AIR	Other Journals	
493	1954 All L J	265
	1954 AllWR(HC)	02
495	1954 All L J	159
	1954 AllWR(HC)	226
496	1954 All L J	194
	1954 AllWR(HC)	205
497	1954 All L J	259
(FB)	1954 AllWR(HC)	305
	ILR (1954) 1 All	499
501	1954 Cri L J	1072
	1954 AllWR(HC)	406
515	1954 All L J	231
	1954 AllWR(HC)	281
516	1954 AllWR(HC)	502
520	1954 AllWR(HC)	422
521	1954 All L J	230
	1954 AllWR(HC)	425
522	1954 All L J	264
523	1954 All L J	378
(FB)	1954 Cri L J	1141
	1954 AllWR(HC)	472
	1954 AllWR(HC)	475
	ILR (1954) 1 All	394
537	1953 All L J	712
	1954 Cri L J	1168
538	1954 All L J	452
(FB)	1954 AllWR(HC)	428
	ILR (1954) 1 All	457
550	1954 AllWR(HC)	448
	1954 All L J	576
553	1954 AllWR(HC)	289
	1954 All L J	348
555	1954 All L J	569
	1954-24 Com Cas	388
557	1954 Cri L J	1185
	1954 AllWR(HC)	463
	1954 All L J	572
559	1954 AllWR(HC)	103
562	1954 AllWR(HC)	334
	1954 Cri L J	1212
570	1954 All L J	125
	ILR (1954) 1 All	289
578	1954 All L J	91
	1954 AllWR(HC)	154
	1954 Crl L J	1264
579	1954 AllWR(HC)	227
	1954 All L J	371
	1954 Cri L J	1257
580	1954 All L J	256
	1954 Cri L J	1288
	1954 AllWR(HC)	454
583	1954 All L J	97
	1954 AllWR(HC)	191
	1954 Cri L J	1293
587	1954 AllWR(HC)	210
	1954 All L J	235
588	...	
591	1954 AllWR(HC)	198
	1954 All L J	320
	1954 Cri L J	1302
592	1954 All L J	195
	1954 AllWR(HC)	257
594	1954 AllWR(HC)	213
	1954 All L J	297
	1954 Cri L J	1312
595	1954 AllWR(HC)	108
599	1954 AllWR(HC)	220
	1954 All L J	443
600	1954 All L J	124
	1954 AllWR(HC)	120
	1954 Cri L J	1332
601	1954 All L J	355
	1954 Cri L J	1317
606	...	
607	1954 All L J	321
(FB)	1954 AllWR(HC)	415

AIR	Other Journals	
608	...	
623	1954 All L J	293
(FB)	1954 AllWR(HC)	354
624	...	
626	1954 All L J	351
	1954 AllWR(HC)	313
	1954 Cri L J	1326
629	...	
633	1954 Cri L J	1341
	1954 All L J	614
636	...	
638	1954 All L J	411
639	1954 All L J	364
641	1954 All L J	278
	1954 AllWR(HC)	352
642	1954 All L J	229
	1954 AllWR(HC)	283
	1954 Cri L J	1348
643	1954 All L J	255
	1954 AllWR(HC)	424
644	1954 All L J	303
645	1954 All L J	343
	1954 Cri L J	1366
646	1954 All L J	305
648	1954 All L J	314
	1954 Cri L J	1326
	1954 AllWR(HC)	462
649	1954 All L J	346
	1954 AllWR(HC)	369
650	1954 All L J	232
	1954 AllWR(HC)	284
	1954 Cri L J	1408
651	1954 All L J	361
	1954 AllWR(HC)	359
652	1954 Cri L J	1377
653	1954 All L J	469
	1954 Cri L J	1392
655	1954 Cri L J	1399
	1954 All L J	681
660	1954 All L J	656
661	(1954) 25 I T R	287
	ILR (1954) 1 All	519
665	(1954) 25 I T R	17
668	1954 AllWR(HC)	200
	1954 All L J	270
669	1954 All L J	334
	1954 Cri L J	1413
671	1954 All L J	119
	1954 AllWR(HC)	137
	1954 Cri L J	1416
672	1954 AllWR(HC)	261
	1954 All L J	367
673	1954 AllWR(HC)	250
	1954 All L J	332
674	1954 AllWR(HC)	170
	1954 All L J	236
	1954 Cri L J	1421
675	1954 All L J	405
680	1954 AllWR(HC)	330
	1954 Cri L J	1424
683	1954 AllWR(HC)	207
	1954 All L J	295
684	1954 AllWR(HC)	69
	1954 Cri L J	1439
687	1954 All L J	93
	1954 AllWR(HC)	121
	1954 Cri L J	1445
689	1954 All L J	474
	1954 Cri L J	1450
690	1954 AllWR(HC)	201
	1954 All L J	296
691	1954 All L J	273
	1954 Cri L J	1462
693	(1954) 26 I T R	530
	(1954) 24 ComCas	106

AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
700	1954 All L J	659	728	1954 All L J	477	747	1954 AllWR(HC)	232	770	...	
705	...			1954 Cri L J	1485		1954 All L J	288	771	1954 Cri L J	1710
715	1954 AllWR(HC)	260		1954 AllWR(HC)	529	749	1954 All L J	341	773	...	
716	1954 AllWR(HC)	132	735	1954 All L J	400	750	1954 AllWR(HC)	317	779	1954 Cri L J	1705
	1954 All L J	178		1954 Cri L J	1498	751	1954 AllWR(HC)	208	782	1954 All L J	541
717	1954 All L J	68	736	...			1954 All L J	271	783	1954 Cri L J	1720
	1954 AllWR(HC)	164	738	1954 All L J	440	753	1954 AllWR(HC)	540	785	...	
719	1954 All L J	301		1954 Cri L J	1474	756	1954 AllWR(HC)	514	786	1954 All L J	537
720	1954 AllWR(HC)	280	739	1954 AllWR(HC)	237		1954 Cri L J	1607	789	...	
721	1954 All L J	142		1954 All L J	433		1954 All L J	665	795	1954 AllWR(HC)	553
	1954 Cri L J	1480	742	1954 AllWR(HC)	292	758	1954 Cri L J	1581		1954 Cri L J	1762
722	1954 All L J	416		1954 All L J	421	768	1954 AllWR(HC)	513	801	...	
(FB)	1954 AllWR(HC)	544	745	1954 AllWR(HC)	222		1954 All L J	669	812	1954 All L J	769
726	1954 All L J	447		1954 All L J	225	769	1954 AllWR(HC)	509	813	...	

Other Journals=All India Reporter

ILR (1954) Allahabad

ILR	AIR		
1	1952	A	35
9	"	"	813
13	"	"	937
17	"	"	845
28	"	"	890
32	1953	"	232
45	"	"	110
57	"	"	115
61	"	"	182
68	1954	"	53
76	1953	"	318
93	"	SC	456
103	1952	All	816
107	"	"	818
113	"	"	849
117	1953	"	144
122	"	"	194
127	"	"	415
131	"	"	326
136	1954	"	113
145	1953	"	347
147	"	"	472
156	"	"	709
159	"	"	678
168	"	SC	521
189	"	All	57
191	"	"	96
193	"	"	340
198	"	"	531
214	"	"	668
251	"	"	773
258	"	"	775
268	"	"	637
280	"	"	664
289	1954	"	570
319	"	"	462
363	1953	"	630
373	1954	"	421
379	"	"	204
394	"	"	523
447	"	"	227
457	"	"	538
499	"	"	497
512	1953	"	165
519	1954	"	661
535	1953	"	686
546	"	"	545
554	"	"	683
559	1954	"	123
582	"	"	393
675	1953	"	406

ILR (1954) All

ILR	AIR		
685	1953	All	691
691	"	"	620
696	"	"	657

ILR (1954) 2 Allahabad

ILR	AIR		
1	1952	All	804
4	1953	"	88
14	"	"	356
23	"	"	523
30	"	"	732
36	"	"	623
41	"	"	681

1954 A L J

ALJ	AIR		
1	1954	SC	194
6	"	All	315
10	"	"	340
12	"	"	317
15	"	"	245
18	"	"	252
22	"	"	421
25	1953	SC	495
32	1954	All	450
34	"	"	455
36	"	"	360
38	"	"	355
40	"	"	343
48	"	SC	179
50	"	"	173
54	1953	"	487
60	1954	All	308
65	"	"	445
68	"	"	717
69	"	"	247
72	"	"	314
73	"	SC	75
81	"	"	61
90	"	All	419
91	"	"	578
92	"	"	452
93	"	"	687
95	"	"	313

1954 ALJ

ALJ	AIR		
97	1953	All	583
103	"	"	381
106	1953	SC	521
114	1954	All	433
116	"	"	436
118	"	"	422
119	"	"	671
121	"	"	434
124	"	"	600
125	"	"	570
136	1953	SC	491
142	1954	All	721
144	"	"	384
145	"	"	255
147	"	"	348
149	"	"	359
152	"	"	454
154	"	"	484
156	"	"	456
159	"	"	495
160	"	"	480
172	"	"	428
178	"	"	716
185	"	"	486
187	"	"	441
194	"	"	496
195	"	"	592
198	"	"	447
200	"	"	391
203	"	SC	224
209	"	"	204
213	"	All	462
223	"	"	457
225	"	"	745
228	"	"	448
229	"	"	642
230	"	"	521
231	"	"	515
232	"	"	650
235	"	"	587
236	"	"	674
237	"	"	249
241	"	"	225
246	"	"	424
255	"	"	643
256	"	"	580
259	"	"	497
264	"	"	522
265	"	"	493
270	"	"	668
271	"	"	751
273	"	"	691
276	"	"	492

1954 ALJ

ALJ	AIR		
278	1953	All	641
280	"	SC	245
288	"	All	747
291	1955	"	259
295	1954	"	683
296	"	"	690
297	"	"	594
299	"	"	623
301	"	"	719
303	"	"	644
304	"	"	420
305	"	"	646
308	"	"	487
314	"	"	648
316	"	"	438
320	"	"	591
321	"	"	607
324	"	SC	369
332	"	All	673
334	"	"	669
341	"	"	749
343	"	"	645
344	"	"	490
346	"	"	649
348	"	"	553
351	"	"	626
355	"	"	601
361	"	"	651
364	"	"	639
367	"	"	672
371	"	"	579
378	"	"	523
400	"	"	735
405	"	"	675
411	"	"	638
413	"	SC	459
416	"	All	722
421	"	"	742
425	1955	"	46
427	1954	"	459
429(S)	1955	"	124
432(S)	"	"	127
433	1954	"	739
436	1955	"	63
438	1954	SC	457
440	"	All	738
443	"	"	599
446(S)	1955	"	96
447	1954	"	726
450	1955	"	230
452	1954	"	538
469	"	"	653

1954 ALJ

ALJ	AIR		
471(S)	1955	All	98
474	1954	"	689
475	1955	"	105
477	1954	"	728
486(S)	1955	"	64
497	"	"	109
508(S)	"	"	81
512(S)	"	"	126
514(S)	"	"	125
525	1954	SC	513
529	"	"	417
537	"	All	786
541	"	"	782
544(S)	1955	"	104
545	"	"	97
546	1954	SC	345
551	"	"	340
557	"	"	557
561	"	"	560
569	"	All	555
572	"	"	557
576	"	"	550
590	"	"	520
591	1955	"	51
595	"	"	56
609(S)	"	"	231
614	1954	"	633
618(S)	1955	"	33
626(S)	"	"	320
635	"	"	22
638	"	"	19
641	"	"	1
645(S)	"	"	4
651	"	"	318
653	"	"	112
654(S)	"	"	420
656	1954	"	660
659	"	"	700
665	"	"	756
669	"	"	768
670	1955	"	128
673(S)	"	"	12
681	1954	"	655
688	1955	"	8
689	"	"	95
690	"	"	257
696(S)	"	"	384
697	"	"	184
710	"	"	319
711	"	"	48
712(S)	"	"	41
718	"	"	307
721(S)	"	"	53

1954 ALJ

ALJ			AIR
726	1955	All	59
730	"	"	223
737(S)	"	"	78
742(S)	"	"	416
743(S)	"	"	186
745(S)	"	"	169
749(S)	"	"	159
752(S)	"	"	154
759	1954	SC	749
767(S)	1955	"	610
769	1954	All	812

1954 AWR (HC)

AWR			AIR
1	1954	All	381
7	"	"	348
16	"	"	359
19	"	"	305
22	"	"	418
23	"	"	225
27	"	"	384
29	"	"	340
32	"	"	356
34	"	"	315
45	"	"	249
51	"	"	420
52	"	"	436
54	"	"	353
57	"	"	450
60	"	"	422
61	"	"	452
63	"	"	317
69	"	"	684
75	"	"	164
86	"	"	434
89	"	"	421
94	1954	All	441
101(1)	"	"	419
101(2)	"	"	170
103	"	"	559
108	"	"	595
120	"	"	600
121	"	"	687
123	"	SC	44
132	"	All	716
135	"	"	433
137	"	"	671
138	"	"	438
143	"	"	391
146	"	SC	73
149	"	All	480
154	"	"	578
155	"	"	447
156	"	"	428
163	"	"	455
164	"	"	717
167	"	"	475
174	"	"	448
175	"	"	486
179	"	"	674
180	"	SC	193
182	"	All	445
186	"	SC	186
191	"	All	583
198	"	"	591
200	"	"	668
201	"	"	690
203	"	"	484
205	"	"	496
207	"	"	683
208	"	"	751
210	"	"	587
213	"	"	594
220	"	"	599
222	1954	All	745
226	"	"	495
227	"	"	579
230	"	"	456
232	"	"	747
235	"	"	490
237	"	"	739
246	"	"	487
250	"	"	673
254	"	"	457
256	"	"	454
257	"	"	592
260	"	"	715
261	"	"	672
263	"	"	462
280	"	"	720
281	"	"	515
283	"	"	642
284	"	"	650
285	"	"	461
287	"	"	459
289	"	"	553
292	"	"	742
302	"	"	493
305	"	"	497
312	"	"	458
313	"	"	626
317	"	"	750
325	"	SC	69
330	"	All	680
334	"	"	562
349	1955	"	230
351(S)	"	"	96
352	1954	"	641
354	"	"	623
356	1955	"	259
359	1954	"	651
360	"	SC	194
365	1955	All	109
369	1954	"	649
371	"	SC	396
376	"	All	492
382	"	SC	173
392	"	"	362
395	"	"	359
406(1)	"	All	501
415	"	"	607
422	"	"	520
424	"	"	643
425	"	"	521
426	1955	"	51
428	1954	"	538
448	"	"	550
452	"	"	648
454	"	"	580
457	"	SC	457
459	1955	All	56
463	1954	"	557
472	"	"	523
475	"	"	523
496	"	SC	459
499	"	"	554
502	"	All	516
509	"	"	769
510	1955	"	128
512	"	"	95
513	1954	"	768
514	"	"	756
517	1955	"	257
529	1954	"	728
540	"	"	753
544	"	"	722
552	1955	"	97
553(1)	1954	"	812
553(2)	"	"	795
558	"	SC	409
570	1955	All	19
574	"	"	22
577	"	"	1
585	"	"	112
586(S)	"	"	4
592(S)	"	"	231
593	"	"	307
596(S)	"	"	226
601(S)	"	"	320
615	"	"	184
617	"	"	319
619	"	2	223
631	"	"	86

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27	1954	"	31
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35	"	Pepsu	81
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49	1954	SC	462
54	"	"	375
60	"	Punj	37
61	"	"	294
63	"	SC	465
69	"	"	436
74	"	"	455
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80	1954	N	265
90	"	SC	517

THE
All India Reporter
1955

Allahabad High Court

A.I.R. 1955 ALLAHABAD 1 (Vol. 42, C.N. 1)
FULL BENCH
MALIK C. J. AGARWALA AND
V. BHARGAVA JJ. (14-9-1954)

Bankey Behari Lal, Appellant v. Lala Babu Respondent; Raja Babu and another, pro forma Respondents.

Second Appeal No. 2218 of 1945, from decision of Dist. J., Budaun, D/- 17-7-1945.

(a) Evidence Act (1872), Ss. 101-103 — Plea of grant of land revenue — Proof of — (Pensions Act (1871), S. 4)

Where the plaintiff wants to prove the fact that a grant had been made to his ancestors of land revenue alone and that they were not ordinary Muafidars, he should produce proper material before the Court, and facts mentioned in various judgments could not be used as evidence to prove his contention. (Para 5)

Anno: Ev. Act, Ss. 101 to 103 N 35.

(b) Pensions Act (1871), S. 4 — "Pension" — Meaning of — (Words and phrases)

The word "pension" has been held to mean a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past service or particular merits or as compensation to dethroned princes, their families and dependants. In S. 4 onwards in the Pensions Act the word "pension" has been used in contradiction to the words "grant of money or land revenue." 4 Bom 432, Foll. (Para 9)

Anno: Pensions Act, S. 4 N 2.

(c) Pensions Act (1871), S. 11 — Scope.

Section 11 is narrower and deals only with pensions while the other sections, such as Ss. 4 to 10, deal with pension or grant by Government of money or land revenue. (Para 9)

Anno: Pensions Act, S. 11 N 1

(d) Pensions Act (1871), S. 12 — Scope and applicability.

Section 12 deals only with pension, pay or allowance mentioned in S. 11, and not with grants by Government of money or land revenue, nor with such pensions which may not come under S. 11. A comparison of Ss. 8 and 9 makes it clear that grant of land revenue is different from pension. While a right is given to bring a suit for the recovery of land revenue, no such right is given with respect to pension. (Para 9)

Anno: Pensions Act, S. 12 N 1

(e) Pensions Act (1871), Ss. 11 and 12 — Grant of land revenue — Applicability of Ss. 11 and 12 — Applicability of Crown Grants Act — (Crown Grants Act (1895), S. 2)

Sections 11 and 12 of the Pensions Act do not apply to the grant of land revenue and even if, therefore, the plaintiff is a grantee of land revenue, he cannot claim that the transfers of the villages, the subjects of the alleged grant, to which he is a party are invalid and he is entitled, in spite of those transfers, to claim the money as arrears of land revenue.

Even if the Crown Grants Act is applicable, plaintiff's suit for recovery of land revenue must fail as the transfers of the villages will in that case be invalid and the plaintiff will not be entitled to claim land revenue from the transferee. 1902 All W.N. 161; AIR 1936 All 298; AIR 1936 All 666, Rel. on; AIR 1940 All 373 (FB), Expl. Case law Ref. (Paras 11, 12)

Anno: Pensions Act, S. 11 N 1; S. 12 N 1

CASES REFERRED:	Paras
(A) ('79-80) 4 Bom 432	9
(B) ('02) 1902 All WN 161	10
(C) (V9) AIR 1922 All 22: 44 All 354	10
(D) (V12) AIR 1925 All 565: 47 All 557	10
(E) (V16) AIR 1929 All 781: 124 Ind Cas 534	10
(F) (V17) AIR 1930 All 681: 52 All 868	10
(G) (V23) AIR 1936 All 298: 1936 All LJ 161	10
(H) (V23) AIR 1936 All 666: 1936 All LJ1281	10
(I) (V24) AIR 1937 All 533: 1937 All LJ 567	11
(J) (V27) AIR 1940 All 373: ILR (1940) All 603 (FB)	11

H. N. Seth and S. Sadiq Ali, for Appellant; Baleshwari Prasad and N. P. Asthana, for Respondents.

MALIK C. J.:

In this case we had to devote considerable time in ascertaining the facts. The lower appellate Court purported to record certain findings, which normally would be findings of fact but those findings were challenged on the ground that they were not based on evidence but on facts stated in certain judgments that were filed by the plaintiff.

(2) It seems to have been assumed in several judgments that in the days of Emperor Babar the land revenues of a half share of village Lakhanpur and of village Mohammadpur Biyar were assigned to some ancestor of the plaintiff and the defendants, Raja Babu and Moti Lal, in lieu of his past services as a Hakim. There is nothing on the record to bear out this claim, and as a matter of fact, it appears from the District Gazetteer of the United Provinces, Vol. 15, relating to Budaun, that Budaun came under the Muslim domination for the first time when it was conquered by the nephew of Mahmud of Ghazni, when he invaded Rohilkhand. It is not necessary to go into the ancient history in detail which is based mostly on tradition. But from the Gazetteer it appears that Budaun was under the domination of Khilji Sultans, and then Saiyid Sultans and then Lodi Sultans, and it was not till the reign of Emperor Akbar that the Moghuls seem to have had anything to do with this district.

(3) The British first came into occupation of Budaun when it was ceded to them under a treaty with the Nawab Wazir of Oudh on 14-11-1801, on which date the treaty was signed. There is nothing to show what the position in that year with respect to these two villages was, and it was not till the year 1853 that, it is said, the British Government ratified the grant in favour of Hakim Dalpat Rai, who was a descendant of the original grantee. The document dated 30-7-1853 by itself proves very little. A report was made to the Secretary, Sadar Board of Revenue, N. W. P., Agra about the grants in various districts including Budaun, and after enquiry 54 perpetual grants were recognised and 10 were struck off the register. It may be that 10 biswas of village Lakhanpur and village Mohammadpur Biyar were recognised as grants in perpetuity.

(4) In the settlement reports of Budaun District of the year 1873 at page 55 it is given that in pergana Budaun there were 43 entire Muafi villages, the details of which are given in a statement No. 4 at page 440 and villages Lakhanpur and Mohammadpur Biyar are mentioned against Nos. 18 and 20 as revenue-free grants. At page 56 of this report there is a note to the effect that there were certain villages in which revenue had been granted in perpetuity, and for the purposes of calculating the amounts of this revenue the Muafidars were asked to submit return of their incomes, and land-revenue was calculated at 55 per cent. of the income. Whether these two villages were of that nature or not is not clear at all. But since they are included under a different head of rent-free grants, probably they were not.

(5) The learned Judge has relied on the fact that in one of these villages there were certain other persons who were Zemindars and who were in possession up to the year 1208 Fasli, which probably is a mistake for 1228 Fasli, and it is from that that he has deduced that the plaintiff's ancestors must have been grantees of land revenue. As we have already said, if the plaintiff wanted to prove the fact that a grant had been made to his ancestors of land revenue alone and that they were not ordinary 'Muafidars', he should have produced proper material before the Court, and facts mentioned in various judgments could not be used as evidence to prove his contention.

(6) Assuming, however, that the plaintiff's ancestors were grantees of land revenue, though it does not appear from the records available that any land revenue was ever assessed since 1801 when the property for the first time came into the possession of the British Government, the question has been raised whether it comes under S. 11, Pensions Act (23 of 1871). The plaintiff and his predecessors have all along been entered in village papers as 'Muafidars'. They owned the Zemindari rights, but since when it is not clear. The lower Court has said that they acquired the Zamindari rights in 1208 Fasli, but there appears to be no evidence on the record to prove that fact.

(7) The plaintiff and his co-sharers have by various transactions transferred their rights in both these villages to the defendants or their predecessor-in-interest. They executed the sale deeds dated 18-7-1917, 27-1-1921 and 30-4-1930, in which they claimed that they were 'Muafidars' and were transferring their entire 'Muafi' rights to the vendees. The plaintiff brought the suit out of which this appeal has arisen for recovery of land revenue for the years 1345 Fasli to 1348 Fasli. He first went to the Revenue Court with a prayer that revenue be assessed. But the Revenue Court refused to assess land revenue at the instance of the plaintiff on the ground that these were 'Muafi' villages. Failing to get the land revenue determined by the Revenue Court the plaintiff worked out the land revenue at a certain percentage of the cess payable and claimed a sum of Rs. 555-10-0 as the plaintiff's one third share of the land revenue for the years 1345 to 1348 Fasli. The defendant raised a number of pleas. It is not necessary to give those pleas in detail.

(8) The plaintiff's contention was that even if they had transferred their rights in the two villages to Pahladi Lal, predecessor-in-interest of the defendants, Pahladi Lal, who had thus become the owner of the Zamindari rights, was liable to pay land revenue to the plaintiff as grant of land revenue was 'pension', and under S. 12 of the Pensions Act its transfer was void. The contention was accepted by the lower Courts, and the defendant has appealed to this Court. The case went up before a learned single Judge who referred it to a Division Bench. The Division Bench, on account of certain rulings which appeared to be conflicting, referred the case to a larger Bench, and it has come up before us today for decision.

(9) The preamble to the Pensions Act provides that it is an Act to consolidate and amend the law relating to "Pensions and grants by Government of money or land-revenue". The expression "grant of money or land-revenue" has been de-

fined as including anything payable on the part of the Government in respect of any right, privilege, perquisite or office. The word "pension" has not been defined in the Act, but the meaning assigned to it in the — 'Secretary of State v. Khemchand Jeychand', 4 Bom 432 (A) has been accepted by all the High Courts. The word "pension" has been held to mean a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of past service or particular merits or as compensation to dethroned princes, their families and dependants. In S. 4 onwards in the Pensions Act the word "pension" has been used in contradiction to the words "grant of money or land-revenue". In every section dealing with pension or grant of money or land-revenue all the three words have been used in the Act. Sections 4, 5, 6, 8 and 10 will make that abundantly clear. Section 9 deals with grant of land-revenue and the word "pension" is omitted from that section. In S. 11, which is the relevant section, the expression "grant of money or land-revenue" is omitted and the section provides that:

> "No pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance.....shall be liable to seizure, attachment, etc."

It would be, therefore, clear that S. 11 is narrower and deals only with pensions while the other sections deal with pension or grant by Government of money or land-revenue. Section 12 provides that:

> "All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance mentioned in S. 11, in respect of any money not payable at or before the making thereof, on account of any such pension, pay or allowance, or for giving or assigning any future interest therein, are null and void."

Section 12, therefore, deals only with the pension, pay or allowance mentioned in S. 11, and not with grants by Government of money or land-revenue, nor with such pensions which may not come under S. 11. A comparison of Ss. 8 and 9 makes it clear that grant of land-revenue is different from pension. While a right is given to bring a suit for the recovery of land-revenue no such right is given with respect to pension.

(10) The trend of authorities of this Court seem to favour the view that we are inclined to take. The earliest decision of this Court is — 'Bal Krishna Bhau v. Govind Rao', 1902 All WN 161 (B). Stanley C. J. and Banerji J. observed:

> "In that Act a distinction is clearly made between a pension and a grant by Government of money or land revenue. Section 11 of that Act exempts pensions from liability to seizure, attachment, or sequestration by process of any Court at the instance of a creditor. That section does not relate to grants made by Government of money or land-revenue."

The next case in order of date is — 'Harnam Das v. Faiyazi Begam', AIR 1922 All 22 (C). That was a case entirely different from the case before us and the learned Judges did not hold that the grant of land-revenue was a pension. They held on the facts of that case that Rs. 60/- payable to the plaintiff from the treasury was a pension. It is not necessary to give the facts in any detail. All that we need mention is that income of certain villages had been assigned for the maintenance of the tomb of a saint Salim Chisti in Fatehpur Sikri and for the maintenance of his descendants. The British Government, after it took over the management of that part of the country, recognised the endowment and by 1846 the Government decided that the income of the villages would be realized by the Government as land-revenue, and the Government would undertake the repair and the maintenance of the tomb,

> "and a specified amount was set aside to be applied in the maintenance of the saint's decendants regarding whom it was declared that they were pensioners of the Government entitled to draw their pensions in perpetuity from the treasury."

The amount so drawn by the plaintiff Faiyazi Begam was held to be a pension. The Government undertook the liability to pay the amount as pension from the treasury and the descendants of saint Salim Chisti had no right to realize the amount as land-revenue under S. 9 of the Pensions Act. In other words, that was a case where the original grant of land revenue was converted into a pension by the orders of the Government.

The next case, — 'Lalla Babu v. Lal Bahadur', AIR 1925 All 565(D) cited by the learned counsel is not very helpful. The only point that the learned Judges seem to have decided is that a grant of immovable property is not to be treated as a pension within the meaning of the Pensions Act and that where the land-revenue has been granted the mere fact that the grantee has also acquired the Zamindari interest does not merge the two interests. There is no discussion in the judgment whether the word "pension" in S. 11 includes a grant of land-revenue. In the next case — 'Bhoopal Rai v. Shiam Sundar Lal', AIR 1929 All 781 (E), there was a difference of opinion between Sen J. and Ashworth J. Sen J. was of the opinion that the grant of land-revenue was not a pension. He observed that:

> "A grant of land-revenue as such cannot be comprised in the term 'pension'. A grant of Government revenue can in no case be created as a political pension which is a pension granted on political considerations for reasons of State. A right to share in the Government revenue granted in perpetuity by the sovereign power cannot be described either as a pension or as a political pension. Such a grant may be a hereditary grant as in the present case and partakes of the nature and character of a Jagir. Its liability to resumption would be dependent upon the terms under which it was created and upon the will of the sovereign power.....The assignment of such a grant is not prohibited by S. 12, Pensions Act. The rule of expediency prohibiting the transfer of pension which is founded upon the idea of ensuring the enjoyment of the pension by the pensioners in comfort cannot be invoked in the case of an assignment of Government revenue which is not shown

to partake the nature and character of a pension."

The point again arose in 1930 in — 'Lakhmi Chand v. Madho Rao', AIR 1930 All 681 (F). The question for consideration was whether the 'Muafi' in suit was transferable and the learned Judges seem to assume that the word "pension" included a grant of money or land-revenue by the Government. They purported to follow the decision in — 'Harnam Das v. Faiyazi Begam (C)' without taking notice of the fact that in that case a grant of land-revenue had under the orders of the Government been altered into a fixed pension payable year after year from the treasury, the Government itself undertaking to realize the revenue of the villages in which the 'Muafi' rights had been granted. The next two cases support the view that we have taken and they are — 'Mumtaz Husain v. Brahmanand', AIR 1936 All 298 (G) and — 'Mt. Kulsoomun Nissa v. Noor Mohammad', AIR 1936 All 666 (H). In — 'Mumtaz Husain's case (G)', the learned Judges (Thom J. and Smith J.) pointed out that:

"Certain sections of the Act clearly recognise the difference between pensions, and grants of money, or grants of land-revenue. (Vide Ss. 4 and 8). The phraseology of Ss. 11 and 12, however, is narrower, and in our opinion must be presumed to be designedly so."

After discussing certain cases that were cited before them they held that grant of land-revenue was not a pension within the meaning of Ss. 11 and 12, Pensions Act. In — 'Mt. Kulsoomun Nissa's case (H)' Sulaiman C. J. and Bennet J. followed the decision in — 'Lakhmi Chand's case (F)' and — 'Mumtaz Husain's case (G)' cited above and held that the grant of land revenue was not a pension within the meaning of Ss. 11 and 12 of the Act.

(11) Learned counsel for the respondents relied on a decision in — 'Hiba Ahmad v. Mt. Ram Piari', AIR 1937 All 533 (I). In that case reliance was not placed on the Pensions Act, but it was said to be a grant covered by the Crown Grants Act (15 of 1895). In that case the grant was held to be for maintenance of the grantee's family from generation to generation, and it was held that the right was, therefore, restrictive in its enjoyment to the family and it was for its maintenance. It was said that the grant was not intended to be capable of transfer. Reliance has not been placed in this case on the Crown Grants Act in this Court or in the lower Court; nor can reliance be placed on it in view of the nature of the claim. The plaintiff was not challenging the transfers made by him and his co-sharers. He recognised the validity of the transfers but urged that being an assignee of land-revenue, he was entitled to recover land-revenue from the defendant. Before this claim can be made the plaintiff will have to prove that land-revenue was payable by the defendant to the Government and he being the assignee thereof was entitled to claim it instead. Very little evidence has been given in this case as regards the nature of the grant, but even if the Crown Grants Act was applicable, plaintiff's suit must fail as the transfers would in that case be invalid and the plaintiff would not be entitled to claim land-revenue from the transferee.

The only other case referred to us is the Full Bench case in — 'Saadat Husain v. Ram Kishan Das', AIR 1940 All 373 (FB) (J). We do not think that the case is really in point, but it is significant that it was held in that case that on the materials placed before the Court the grantee was nothing more nor less than a 'Muafidar', that is to say, that plaintiff was a Zemindar who was not liable to pay land-revenue and his 'muafi' rights were transferable like any other right in property and that the grant of a 'muafi' village could not be construed to mean a grant of a pension.

(12) We are, therefore, of the opinion that Ss. 11 and 12, Pensions Act, do not apply to the grant of land-revenue and even if, therefore, the plaintiff was a grantee of land-revenue, he cannot claim that the transfers to which he was a party are invalid and he was entitled, in spite of those transfers, to claim the money as arrears of land-revenue.

(13) The result, therefore, is that this appeal is allowed. The decrees passed by the lower Courts are set aside and the plaintiff's suit is dismissed with costs.

V.S.B. Appeal allowed.

(S) A.I.R. 1955 ALLAHABAD 4 (Vol. 42, C.N. 2)

(FULL BENCH)

MALIK C. J., AGARWALA AND V. BHARGAVA JJ. (13-9-1954)

Mst. Satwati and another, Defendants-Appellants v. Kali Shanker and others, Plaintiffs-Respondents.

Second Appeals Nos. 600 and 256 of 1945, against decision of Dist. J., Farrukhabad, D/- 5-7-1944.

(a) Hindu Law — Maintenance — Charge — No rights of residence against transferee — (Hindu Law — Widow — Maintenance).

Though on marriage a husband becomes both legally and morally bound to maintain his wife and to provide her with a suitable place of residence according to his status and circumstances, it is the personal right against the husband and the widow has got no charge on any property belonging to the husband if a charge has not been created either by a Court of law or under a proper deed executed by the husband.

Where, therefore, the husband has transferred a property in his life-time, his widow cannot claim that she has a right to reside in the house as against the transferee. 2 Bom 494 and AIR 1918 All 408, Ref.

(Para 6)

(b) Civil P. C. (1908), O. 34, R. 1 and S. 99 — Necessary parties — Person having a paramount title — Decree against — Validity.

It is now well settled that a person having a paramount title is not a necessary party in a mortgage suit and need not be implead-

ed. But if a mortgagee in a suit brought on a mortgage impleads certain other persons who were setting up an adverse title to the mortgagor, the Court may on an objection made by such defendants discharge them from the array of parties and leave the dispute for decision in another litigation.

(Para 8)

Where, however, the defendants having paramount title take up contradictory pleas and on that account they do not claim to be discharged and an issue is framed as regards their rights for decision on the merits and the issue is decided, the decision is binding on the parties and it cannot be said that the Court either went beyond its jurisdiction or did anything which was so improper or illegal that the Court of appeal must even in the absence of any prejudice interfere. The rule as to impleading persons having paramount title, is more a rule of convenience and prudence than a rule affecting the jurisdiction of the Court. Case law discussed. AIR 1918 All 81 and AIR 1937 All 251, Expl.

(Para 8)

Anno: C. P. C., O. 34, R. 1, N. 5; S. 99, N. 4, Pts. 4 to 6.

CASES REFERRED: Paras

(A) ('07) 5 Cal LJ 95: 11 Cal WN 284 4

(B) (V24) AIR 1937 All 251: 1937 All LJ 536 4, 11

(C) (V5) AIR 1918 All 81: 40 All 584 5, 11, 12

(D) ('78) 2 Bom 494 6

(E) (V5) AIR 1918 All 408: 40 All 96 6

(F) (V3) AIR 1916 PC 18: 43 Ind App 187 (PC) 10

(G) (V7) AIR 1920 PC 81 (2): 47 Cal 662 (PC) 10

(H) ('06) 33 Cal 425: 3 Cal LJ 205 10

(I) (V38) AIR 1951 All 794: 1951 All LJ 490 (FB) 11

K. C. Saksena, for Appellants; B. R. Avasthi, for Respondents.

MALIK C. J.:

These two appeals are connected and arise out of the same suit. Raj Kumar on 8-5-1935 had executed a mortgage deed in favour of Uma Shankar. Both the mortgagor and the mortgagee are dead. The mortgagee's legal representatives filed the suit out of which these appeals have arisen for sale of the mortgaged property by enforcement of the mortgage transaction. Besides the mortgagor's widows, Satyavati and Ram Dulari, the plaintiffs impleaded two other defendants, Kailash Nath Misra defendant 3 and Kalka Prasad defendant 4. Kailash Nath Misra was a half brother of the mortgagor and after the death of the mortgagor Raj Kumar he had sold a half share in the mortgaged property to Kalka Prasad, defendant 4. The plaintiffs alleged in the plaint that the property in suit was the self-acquired property of Raj Kumar of which he was the sole owner and after his death it was inherited by his two widows and defendant 3 had no right, title or interest in the said property which he could transfer and therefore neither he nor defendant 4, the transferee from him, had any interest in the property included in the mortgage.

(2) The defendants contested the suit on various grounds. The only plea taken by defendants 1 and 2 with which we are now concerned is that they had a right of residence in the residential house which had been mortgaged and the property could only be sold subject to their right of residence. Defendants 3 and 4 filed separate written statements and while defendant 4 took up the plea that Raj Kumar and Kailash Nath were brothers and members of a joint Hindu family and the mortgage executed by Raj Kumar was not binding on Kailash Nath, Kailash Nath took up the plea that the property belonged half and half to him and Raj Kumar and that Raj Kumar had no right to mortgage anything more than his half share. In the written statement filed by Kailash Nath, the second paragraph of the additional pleas was as follows:

"No cause of action to file this suit against the contesting defendant accrued to the plaintiffs."

No clear plea was taken in the written statement of Kailash Nath that he was claiming a paramount title to the property, that he had been unnecessarily impleaded and should be discharged. On the date the written statements were filed the learned Munsif framed the issues in the presence of counsel and no issue was framed on the point whether defendants 3 and 4 had been unnecessarily impleaded and should be discharged. The issues framed by the learned Munsif read as follows:

1. Whether the mortgage deed in suit was duly executed and was it for consideration?

2. Is the mortgage deed binding on all or any of the defendants? If so, to what extent is it binding on the property mortgaged? Whether defendant 3 had a half share in this property?

3. Are the plaintiffs not entitled to interest and costs under Ss. 32, 34 and 39, U. P. Agriculturists' Relief Act?

4. To what relief, if any, are the plaintiffs entitled?"

(3) The learned Munsif held that Raj Kumar was the sole owner of the property mortgaged and decreed the plaintiffs' suit. The defendants filed appeals before the learned District Judge and in the appeal filed on behalf of defendants 3 and 4, the ground No. 2 was to the following effect:

"2. That when the plaintiffs-respondents' case was that the entire mortgaged property belonged to Raj Kumar, it was improper to make the appellant, who asserted his paramount title, a party to the suit relating to the mortgage-deed and according to law the appellants' right of ownership cannot be finally decided in this suit. The Court below has erred in law in adjudicating the appellants' rights."

(4) The learned District Judge carefully went into this ground of appeal and held that, though in a suit based on a mortgage a person setting up a paramount title was not a necessary party and it might be more convenient if the disputes between him and the claimants under the mortgage are left for decision to another case, yet where the defendant had not asked for his discharge and the case was fought out on the merits and the defendant had suffered a decree to be passed against him, it could not be said

that that decree was invalid and must be set aside. The learned Judge relied on a decision of the Calcutta High Court in — 'Bhaja Chaudhri v. Chunni Lal', 5 Cal LJ 95 (A) and as regards the claim of the widows that they had a right of residence the learned Judge relied on a decision of this Court in — 'Bisheshwar Dayal v. Mst. Jafri Begam', AIR 1937 All 251 (B) where the widow's claim that she had a right of residence as against the mortgagee was overruled.

(5) In the present case the widows have filed in this Court Second Appeal No. 600 of 1945 and defendant 3 has filed Second Appeal No. 256 of 1945. Both these appeals came up before a Bench of this Court on 11-10-1950 and the learned Judges thought that the decision in AIR 1937 All 251 (B) was in conflict with an earlier decision of this Court in — 'Gobardhan v. Manna Lal', AIR 1918 All 81 (C), and referred the case to a larger Bench.

(6) On behalf of the widows the only point taken is that the widows had a right to claim a right of residence and maintenance against their husband and after his death they are entitled to have their rights declared as against the mortgagee. It is true that on marriage a husband becomes both legally and morally bound to maintain his wife and to provide her with a suitable place of residence according to his status and circumstances, but the widow has got no charge on any property belonging to the husband if a charge has not been created either by a Court of law or under a proper deed executed by the husband. If the husband in his life-time had transferred the property, the widow could not have claimed that she had a right to reside in the house and proceed to enforce her right, which is a personal right against the husband, as against the transferee. Learned counsel has cited two cases, — 'Lakshman Ramchandra Joshi v. Satyabhama Bai', 2 Bom 494 (D), and — 'Ramzan v. Mt. Ram Daiya', AIR 1918 All 408 (E). Neither of these cases helps the appellants. As a matter of fact the observations in both of them are against his contention.

The main point for decision in 2 Bom 494 (D) was whether a widow of a member of a joint Hindu family could claim a right of maintenance and residence against the other members of the family after her husband's death or her right was merely a personal right against her husband which ceased on his death. It is now well-settled that wife of a member of a joint Hindu family has a right to be maintained from the joint family property if her husband was a member thereof and after his death her right to be maintained out of the income of the joint family property continues and the right of maintenance includes the right of residence. After the Hindu Women's Rights to Property Act, 1937, she is now entitled to her husband's share but we need not go into it for the purposes of this case. But even in 'Lakshman Ramchandra Joshi's case (D)' it was recognised that such a right would not be available to her against a transferee to whom the property had been validly transferred by the joint family. In AIR 1918 All 408 (E) it was also pointed out that a wife has no right to claim a right of residence as against the person to whom the property might have been transferred. Second Appeal No. 600 of 1945 has, therefore, no force.

(7) In the appeal filed on behalf of Kailash Nath Misra, learned counsel has urged that Kailash Nath Misra was not a necessary party and that his name should have been removed from the array of defendants and we should now set aside the decree against him and discharge him and leave the dispute between him and the plaintiffs for decision in another suit.

(8) Proceedings for the enforcement of a mortgage and a decree based thereon are specifically provided for in O. 34 of the Code of Civil Procedure. The forms of the decrees to be passed by the Court in suits on mortgages are given and they are different from decrees that are passed in suits for the determination of title. In a suit on a mortgage O. 34, R. 1 provides that all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. This provision is mandatory and in a suit by a mortgagee for the enforcement of a mortgage all persons interested in the right of redemption or in the mortgage-security must be impleaded as defendants to the suit. If a person has a paramount title, he is not interested and his rights cannot be affected by the enforcement of the mortgage as against the mortgagor. Order 34 deals with suits on mortgages in which only the mortgagees or the persons interested in the right of redemption or the mortgaged security are interested. Any person having any claim paramount to the claim of the mortgagor can stand out and claim a right to have his rights determined in separate proceedings.

A mortgage decree has to be drawn up in accordance with the rules in O. 34 and probably in most cases it would result in confusion if a person who is not interested either in the mortgage-security or in the right to redeem, is impleaded. It is therefore now well-settled that a person having a paramount title is not a necessary party in a mortgage suit and need not be impleaded. A mortgagor may be content in a suit to redeem his mortgage to implead only his mortgagee or the mortgagee's representatives and other persons interested in the equity of redemption. Similarly a mortgagee may be content in obtaining a decree for the enforcement of his mortgage for whatever it is worth against the mortgagor and his representatives. But if a mortgagee in a suit brought on a mortgage impleads certain other persons who were setting up an adverse title to the mortgagor, the Court may on an objection made by such defendants discharge them from the array of parties and leave the dispute for decision in another litigation.

But if, as in this case, the defendants take up contradictory pleas and it may be that it was on that account that they did not claim to be discharged and an issue is framed as regards their rights for decision on the merits and the issue is decided, it cannot be said that the Court either went beyond its jurisdiction or did anything which was so improper or illegal that the Court of appeal must even in the absence of any

prejudice interfere. The rule is more a rule of convenience and prudence than a rule affecting the jurisdiction of the Court.

In a suit brought on a mortgage the question that is generally raised is a question relating to the validity of the mortgage. The validity of the mortgage was challenged in this suit on three grounds, by the widows on the ground that the mortgage deed was a fictitious transaction and had not been properly attested, on behalf of the transferee defendant 4 on the ground that the mortgaged property was joint family property and Raj Kumar had no right to transfer the same and on behalf of his transferor defendant 3 Kailash Nath on the ground that Raj Kumar had only a half share in the property and therefore he could not mortgage the whole property. Order 34, Rule 1 no doubt provides for the impleading of persons interested in the right of redemption or the mortgage-security but it nowhere lays down that, if the plaintiff has impleaded a person who is claiming a paramount title the Court has no jurisdiction to decide the same and its decision must be set aside by the appellate Court. Where the Court is of the opinion that it would lead to complications and prejudice it can always direct that persons who were claiming paramount title in the mortgaged property should be excluded from the array of parties.

(9) In the case before us, on the pleas taken by the defendants themselves, they could not claim that they be discharged. The cases set up by the transferor defendant 3 and the transferee defendant 4 were conflicting and it may be that it was on that account that the learned counsel did not ask that an issue be framed on the point. Section 99, Civil P. C., provides that

> "no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

Parties produced such evidence as they considered necessary, the case was decided on the issues framed by the Court and it is not even suggested to us that the decision has in any way affected the merits of the case. We are clearly of the opinion that there is no question of jurisdiction and that the Court was competent to decide the question of title raised by the appellant.

(10) Learned counsel has referred us to a number of cases. The first case relied on was — 'Radha Kunwar v. Reoti Singh', AIR 1916 PC 18 (F). In that case in a suit brought on a mortgage a paramount title was set up by one of the defendants as regards a part of the mortgaged property. An issue was framed on the point and it was decided that the person setting up the paramount title had an interest in the property to the extent of half of what he had claimed. There was an appeal in this Court and it varied the decision of the trial Court and held that the person claiming the paramount title had no interest at all in the property. The decree was thus not a decree of affirmance and an application was made for leave to appeal to the Privy Council which was granted. Before the Board an objection was taken that leave should not have been granted as the valuation of the subject-matter in dispute did not exceed Rs. 10,000/- and the subject-matter in dispute, it was urged, was only the portion of the property with respect to which the paramount title had been set up.

Their Lordships agreed with this contention and held that leave should not have been granted and dismissed the appeal. The decision, therefore, is not in favour of the appellant, but on behalf of the appellant. Learned counsel has relied on a sentence in the judgment that the joinder of the parties who were setting up a paramount title was irregular and that it could only tend to create confusion. These observations, however, do not help the learned counsel. We have already said that in a mortgage suit a person setting up a paramount title is not a necessary party and he need not be impleaded at all. But if he has been impleaded and the question of paramount title has been gone into and decided on the merits, then it cannot be said that the decision was not binding on the parties.

As a matter of fact in — 'Radha Kishun v. Khurshed Husain', AIR 1920 PC 81 (2) (G) where the question was whether in a previous decision in which a person claiming a paramount title had been impleaded was barred from claiming in a subsequent suit a declaration as to his title to the property, their Lordships pointed out that in the previous suit the paramount title had not been challenged and therefore the previous decision could not operate as 'res judicata'. Their Lordships pointed out that if in the previous suit the paramount title of the plaintiff had been challenged and had been decided against him, he could not subsequently have that matter reagitated. The relevant portion of the judgment reads as follows:

> "Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of 'res judicata' it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority."

In — 'Jaggeswar Dutt v. Bhuban Mohan Mitra', 33 Cal 425 (H) in the judgments of Rampini and Mookerjee JJ. though Mookerjee J. said in the body of the judgment that

> "It is not competent for the mortgagee to make as party defendant, one who claims adversely to the title of the mortgagor and mortgagee. He is a stranger to the mortgagee, has no connection with the mortgage, and as his adverse claim of title cannot in any way be affected by the mortgage suit, in which he has

no interest, he cannot be made a party for the purpose of litigating such claim of title."

the learned Judge held that the question was not one of jurisdiction and where in a mortgage suit a question of paramount title, raised by the defendant, is tried without objection, neither party can ask for reversal on the ground that the issue was not properly triable in the action.

(11) The facts in AIR 1918 All 81 (C) were entirely different. There were two suits; Munna Lal was made a party and impleaded as a subsequent mortgagee of a one-biswa share. Munna Lal did not appear and the suit was decreed ex parte. No dispute was raised in the plaint as against Munna Lal with respect to 3 3/4 biswa share. In the second suit Munna Lal put in a defence and claimed that he was the owner of 3 3/4 share and that the mortgagee had no right to mortgage that share. The entire share mortgaged was 4 3/4 biswas of which Munna Lal claimed to be the owner of 3 3/4 and the subsequent mortgagee of one biswa. The Court held that Munna Lal's paramount title as to 3 3/4 biswa share could not be tried in that suit and refused to go into that question. Munna Lal then filed a suit of his own for a declaration of his title to 3 3/4 biswa share and the plea of 'res judicata' was repelled by the Court on the ground that the plea of Munna Lal as to 3 3/4 biswa share was clearly outside the scope of the mortgage suit.

We can find no conflict between that decision and the decision in the other case mentioned by the learned Judges who referred the case to the Full Bench, i.e. AIR 1937 All 251 (B) where the defendant had been impleaded as a subsequent transferee on whom the mortgage was claimed to be binding and the defendant did not appear and the suit was decreed. It was held that if Jafri Begam's contention was that she was the prior mortgagee and not a subsequent mortgagee she should have entered appearance and contested the claim. The point was considered at some length by one of us in a decision of this Court in — 'Ajai Verma v. Ram Bharosey Lal', AIR 1951 All 794 (I). At page 800 it was said:

"A defendant is not bound to put forward his independent title at the risk of being barred from setting it up in future, if such paramount title has not been challenged by the plaintiff, but, if the plaintiff has impleaded a person claiming a paramount title to the mortgaged property as a defendant in the suit on the ground that the defendant has no such paramount title and the property is liable to be sold free from any such claim, the question of paramount title can be decided in the mortgage suit and if the question is decided there is no reason why the decision should not operate as 'res judicata'."

We need not repeat what was said in that case, but it was recognised that though it may not be necessary in a suit brought on a mortgage to put forward a paramount title and such a plea may be outside the scope of a mortgage suit, yet if a plea had been taken and decided, the decision would be binding on the parties.

(12) The only portion of the judgment in 'Gobardhan's case (C)' on which reliance is placed is the observations at p. 83 which read as follows:

"We must take it as settled law that in a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit."

(13) The learned Judges made those observations with respect to the facts of that particular case where the Court had disallowed the point to be raised and left it for decision in another case. The word "cannot" does not mean that the Court has no jurisdiction to decide the point and that if the Court has entertained the plea and decided the point on the merits the decision of the Court would be without jurisdiction. In fact in a later part of the judgment the learned Judges point out:

"If Munna Lal had allowed the question of his paramount title to be determined in the suit, he might not be permitted in appeal to contend that the decree of the Court below was vitiated by reason of the determination of that question, but that was not the case here."

(14) The result, therefore, is that this appeal also has no force.

(15) The second appeals are dismissed with costs.

D.R.R. Appeals dismissed.

A.I.R. 1955 ALLAHABAD 8 (Vol. 42, C.N. 3)

SPECIAL BENCH

MOOTHAM, BRIJ MOHAN LALL AND M. L. CHATURVEDI JJ. (17-9-1954)

Mrs. Georgians G. Marks Gideon, Petitioner v. Edward Nathnial Gideon, Respondent; Sm. Ram Pyari, Co-Respondent.

Matrimonial Reference No. 1 of 1954, submitted by Dist. J., Agra.

(a) **Divorce Act (1869), Ss. 3(9) and 10 — Desertion — Failure to provide maintenance.**

The fact that the husband has failed to provide the wife with any maintenance by itself is not enough to prove desertion. (Para 3)

Anno: Divorce Act, S. 3 N. 3; S. 10 N. 9.

(b) **Divorce Act (1869), S. 14 — Alleged matrimonial offence must be proved beyond reasonable doubt.** **(Para 4)**

Anno: Divorce Act, S. 14 N. 1.

CASES REFERRED: Paras

(A) (1954) 1954 LRP 252 4
(B) (1951) 1951 AC 391: 1951-1 All ER 124 4
(C) (1874) 2 Sc & D 374: 23 WR 12 4

D. S. Chaudhry, for Petitioner.

MOOTHAM J.:

This is a wife's application under S. 17, Divorce Act, for the confirmation of the decree of the learned District Judge of Agra dissolving the petitioner's marriage with the respondent on the

grounds of her husband's adultery, cruetlty and desertion. The learned District Judge was satisfied that each of these charges had been satisfactorily proved, but we are unable to take that view.

In our opinion, the evidence is wholly insufficient to establish any one of these allegations. The averment in the petition with regard to adultery is that the respondent had an illicit connection with a woman, Shrimati Ram Piari, in the year 1952 and the only evidence in support of this allegation is the statement of the petitioner that "My husband continued to carry on his connections with Shrimati Ram Piari. Her husband kicked up a row."

(2) The parties were married in the year 1946. It is stated in the petition that from this time onwards, that is for a period extending for a number of years, the respondent repeatedly assaulted the petitioner by beating her. On this allegation there is no evidence other than that of the petitioner herself, and that evidence goes no further than saying that she was beaten on unspecified occasions.

(3) The first respondent is said to have deserted the petitioner in the year 1949 when he left Tundla for Delhi. It is, however, in evidence that he returned to Tundla in July, 1950, and again for a short time in 1952. The petitioner swears that since the year 1949 the respondent has failed to provide her with any maintenance, but that fact by itself is not enough to prove desertion.

(4) It has been laid down in a number of cases, the most recent of which is — 'Galler v. Galler', 1954 LRP 252 (A), a decision of the Court of Appeal in England, that an alleged matrimonial offence must be proved beyond reasonable doubt. The reason for the rule is to be found in the sanctity which the law attaches to the marriage tie which is not to be disrupted save on strict proof of the commission by the respondent of the acts which he is alleged to have committed. As Lord MacDermott said in — 'Preston-Jones v. Preston-Jones', 1951 AC 391 at p. 417 (B):

"The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be 'satisfied', in respect of a ground for dissolution, with something less than proof beyond reasonable doubt.

I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in — 'Mordaunt v. Moncreiffe', (1874) 2 SC & D 374 (C) that the two jurisdictions "are other than distinct". The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

(5) The learned counsel for the petitioner asks this Court to send back the proceedings to the Court of the learned District Judge in order that the petitioner may have a further opportunity of adducing evidence in support of her allegations. In the circumstances we think we should accede to this request. We accordingly direct that the record be returned to the learned District Judge who will afford the petitioner an opportunity of adducing evidence. All such additional evidence as may be recorded will be certified by the learned District Judge and returned to this Court with as little delay as possible.

V.R.B. Order accordingly.

(S) **A.I.R. 1955 ALLAHABAD 9 (Vol. 42, C.N. 4)**

MALIK C. J. AND V. BHARGAVA J. (27-7-1954)

Durga Prasad, Applicant v. The State and others, Opposite Parties.

Civil Writ No. 7890 of 1951.

Constitution of India, Art. 14 — Police Act (1861), Ss. 15(5) and 15A(3) — Validity — (Police Act (1861), Ss. 15(5) and 15A(3)).

It is not open to the Legislature to give arbitrary power to the State Government or any person or authority to do what it likes and in any manner it chooses, unrestrained by any directions as to how the power is to be exercised. If from the other provisions of the Act, however, it can be gathered how the discretion is to be exercised and in what circumstances, then even though the provision may be widely worded, it is not necessarily void. In case, however, the discretion is abused such exercise of discretion can be challenged and annulled under Art. 14 which includes within its purview both executive and legislative acts. The whole scheme of Ss. 15 and 15A of the Police Act lays down the principles which should govern the grant of exemptions under Sub-ss. (5) and (3) of the said sections respectively and, when there is no allegation that the power has been abused by the State Government, the High Court will not interfere. Case law discussed. (Para 8)

Anno: Const. of India, Art. 14 N. 1, 3, 42.

CASES REFERRED: Paras

(A) (V39) AIR 1952 SC 75: 1952 Cri LJ 510 (SC) 5, 8

(B) (V40) AIR 1953 SC 215: 1953 SCR 1129 (SC) 5

(C) (V41) AIR 1954 SC 224: 1954 SCR 803 (SC) 6

(D) (V40) AIR 1953 SC 404: 1953 Cri LJ 1621 (SC) 8

(E) (V41) AIR 1954 SC 465: 1954 SCA 824: 1954 Cri LJ 1322 (SC) 8

(F) (V39) AIR 1952 SC 123: 1952 Cri LJ 805 (SC) 8

(G) (1886) 30 Law Ed 220: 118 US 356 8

S. N. Misra, for Applicant; Standing Counsel, for Opposite Parties.

MALIK C. J.:

This is a petition under Art. 226 of the Constitution by one Durga Prasad who is a resident of village Sisaiya, Police Station Izatnagar, District Bareilly.

(2) The affidavit in support of the petition has been filed by one Murari Lal, a resident of village Kesarpur, police station Izatnagar, district Bareilly. A riot took place in village Kesarpur on 23-3-1951. A large number of Hindus, including the petitioner, was arrested and the papers were sent to the Additional District Magistrate (Judicial), Bareilly for enquiry. We are, however, not concerned with those proceedings. As a result of the riot, a notification was issued under sub-s. (1) of S. 15, Police Act, 1861 (5 of 1861), declaring village Kesarpur and certain other villages in Police Circle Izatnagar and village Saidpur within Police Circle Baradari in the district of Bareilly to be in a disturbed state. This proclamation was to remain in force for a period of five months.

As a result of this notification, additional police force had to be sent to these villages. The cost of this additional police force was made payable by the inhabitants of the locality who were responsible for the disturbed state of the area. On the recommendation made by the District Magistrate, Bareilly, the State Government passed an order under sub-s. (5) of S. 15, Police Act, exempting (1) Government servants, (2) Muslims, (3) invalids and (4) persons who neither participated in nor were in any way connected with the rioting from the liability of paying the costs of the additional police. A claim was also made for payment of compensation by certain persons who had suffered as a result of the disturbances, and this was done within one month as required by S. 15A, Police Act.

The Sub-Divisional Magistrate made enquiries and found that a sum of Rs. 4,875/- was payable as compensation to the Muslim inhabitants of the locality. The persons exempted from payment of cost of the additional police under sub-s. (5) of S. 15 were also exempted from paying compensation under sub-s. (3) of S. 15A, Police Act. Learned counsel urged that the State Government had passed a most unjust and discriminatory order in exempting Muslims from paying costs of the additional police and in awarding them compensation as they were responsible for the disturbed condition of the area.

In the affidavit filed in support of the petition or in the rejoinder affidavit, no such allegation has, however, been made. The language used in paragraph 4 of the affidavit of Murari Lal filed on 15-11-1951, is in most guarded language and reads as follows:

> "4. That enquiry proceedings are pending against 107 Hindus and 'it is said for the defence that the Muslim inhabitants of the locality had taken law into' their own hands and the Hindus are absolutely innocent."

From the portion underlined, (here in ' ') it would appear that the deponent was not taking the responsibility for the truth of the allegation but was making a statement to the effect as to what the defence was of the 107 Hindus against whom proceedings were pending.

As a result of our pointing this out to learned counsel, he confined his arguments only to a short point that the provisions of sub-s. (5) of S. 15 and sub-s. (3) of S. 15A, Police Act, are invalid as they give an arbitrary power to the State Government to exempt from payment of the cost of additional police and compensation anybody they liked irrespective of the fact whether he was or was not a person responsible for the disturbed condition of the area.

(3) The scheme of S. 15 is that if there is a local disturbance in any part of the country, the State Government can declare that a particular area has been found to be in a disturbed or dangerous state. It can, in the alternative, issue a proclamation that it is expedient to increase the number of police in that particular area due to the conduct of the inhabitants of that area or of any class or section of them. Sub-section (5) of S. 15 then provides as to who should pay for this additional police. It says that the costs for the additional police shall be borne by the inhabitants of the area described in the proclamation. Though the proclamation may cover the inhabitants described in it, the State Government has been given the power under sub-s. (5) of S. 15 to grant exemptions.

Sub-section (5) of S. 15, Police Act, reads as follows:

> "15(5) It shall be lawful for the State Government by order to exempt any persons or class or section of such inhabitants from liability to bear any portion of such cost."

The expression "such inhabitants" must here refer to inhabitants described in the proclamation under sub-s. (3) of S. 15A and the words that are important are that the State Government can, by order, exempt any persons or class or section of the inhabitants described in the proclamation. The power of exemption given to the State Government under sub-s. (5) of S. 15 thus appears to be very wide and from the mere reading of the sub-section, it would appear as if it is uncontrolled by any other provision and the State Government can exempt even those who may have been responsible for the disturbed condition of the area.

The language of sub-s. (3) of S. 15A is more or less in the same terms and, practically, the same argument has been advanced with respect to that sub-section. The scheme of S. 15A is that if death or grievous hurt or loss of, or damage to property has been caused by or has ensued from the misconduct of the inhabitants of any such area or any class or section of them, then an application can be made within one month to the Magistrate of the district or of the sub-division of a district, within which that area is situate, for compensation.

The Magistrate has been given the power to hold an enquiry and, after the enquiry, he is to

> "(a) declare the persons to whom injury has been caused by or has ensued from such misconduct;

(b) fix the amount of compensation to be paid to such persons and the manner in which it is to be distributed among them; and

(c) assess the proportion in which the same shall be paid by the inhabitants of such area other than the applicant who shall not have been exempted from liability to pay under the next succeeding sub-section."

There is a proviso which, however, limits the power of the Magistrate and he must first be satisfied that damage or injury has been caused as a result of a riot or unlawful assembly in the area and that person, who has suffered the injury, was himself free from blame in respect of the occurrences which led to that injury. This, therefore, gives the Magistrate a quasi-judicial power to determine the compensation payable and the responsibility for the payment of the same.

(4) As we have already said, the only two provisions, which are being challenged, are the provisions contained in sub-s. (5) of S. 15 and sub-s. (3) of S. 15-A, Police Act.

(5) Reliance has been placed by learned counsel on two decisions of the Supreme Court, — 'State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 (A) and — 'Ram Prasad Narayan Sahi v. State of Bihar', AIR 1953 SC 215 (B). These two cases, however, are not in point. In the former case, the question arose whether the West Bengal Special Courts Act (10 of 1950) offended against the provisions of Art. 14 of the Constitution and was, therefore, 'ultra vires'. It was held that the provisions of the Act did offend against the provisions of Art. 14 of the Constitution and were 'ultra vires' and the reason for the decision in short was that for the same offence one person may be tried in accordance with the normal procedure, while another under the West Bengal Special Courts Act.

The Act gave the State Government unfettered power to have any accused person tried in accordance with the provisions of the said Act, who would ordinarily be triable under the provisions of the Code of Criminal Procedure. It was admitted that the procedure prescribed in the Code of Criminal Procedure was more elaborate and provided greater protection and safeguards to an accused person, compared to which the provision of the West Bengal Special Courts Act could be said to be summary proceedings. That question does not really arise in the present case and certain sentences in the judgments of the learned Judges about the reason why all people should have equality before the law cannot be held to be of much help in the decision of the present case.

In — 'Ram Prasad Narayan Sahi's case (B)', the Bihar State Legislature had passed a special Act (Sathi Lands (Restoration) Act, 1950) to deprive the appellants of certain rights conferred on them under a lease by the Court of Wards. Mukherjea J. pointed out that what Art. 14 of the Constitution "aims at is to strike down hostile discrimination or oppression of inequality". This Bihar Act, as was pointed out by their Lordships, had singled out two individuals and one single transaction and was thus discriminatory.

(6) The case, however, which is more in point is the decision of their Lordships of the Supreme Court in — 'Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh', AIR 1954 SC 224 (C).

In dealing with Cl. 3(2)(b) of the Coal Control Order, 1953, their Lordships said that the provision contained in Cl. 3(1) of the U. P. Coal Control Order that

"no person shall stock, sell, store for sale or otherwise utilise or dispose of coal except under a licence granted under this Order"

was quite unexceptional as a general provision and pointed out that, in fact, that was the primary object which the U. P. Coal Control Order was intended to serve but there were two exceptions engrafted upon the general rule.

One of the exceptions provided that nothing in Cl. 3(1) would apply to any person or class of persons exempted from any provision of the above sub-clause by the State Coal Controller to the extent of such exemption. Their Lordships remarked:

"An unrestricted power has been given to the State Controller to make exemptions, and even if he acts arbitrarily or from improper motives, there is no check over it and no way of obtaining redress. Clause 3(2)(b) of the Control Order seems to us, therefore, 'prima facie' to be unreasonable."

The point, however, did not arise in that case and their Lordships, therefore, did not express a final opinion. They then dealt with Cl. 4(3) of the U. P. Coal Control Order and held that to be 'ultra vires' as it offended against the provisions of Art. 19(1)(g) of the Constitution.

(7) Learned counsel for the State has urged that though the provisions of sub-s. (5) of S. 15 and sub-s. (3) of S. 15-A, Police Act, may, in terms, by very wide and may not appear to lay down any restrictions, the sub-sections read as a whole and reasonably interpreted make it clear that exemptions should only be granted to those who were not responsible for the disturbed or dangerous state of that area and had no connection with it. As a matter of fact, in the exemption granted, the fourth class of persons are those who neither participated in, nor were, in any way, connected with the riot and this clause is wide enough to include people of all denominations, whether Hindus, Muslims or others.

The first, second and third class of persons, viz., Government servants, Muslims and invalids, could also be included in class 4 but they were specifically mentioned as the State Government was satisfied that they were not responsible for the riot. It has not been urged before us nor there is anything in the affidavit to establish that the exemption order passed under sub-s. (5) of S. 15 and sub-s. (3) of S. 15A, Police Act, was either arbitrary or unjust, or, that the State Government was guilty of having discriminated between one class and another.

(8) The two cases relied upon by learned counsel appearing on behalf of the State are — 'Kedar Nath Bajoria v. State of West Bengal', AIR 1953 SC 404 (D) and — 'Harishankar Bagla v. State of Madhya Pradesh', AIR 1954 SC 465 (E). In — 'Kedar Nath Bajoria's case (D)', the question arose

about the validity of certain provisions of the West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949), under which offences were made triable by special Courts.

Dealing with the question whether the Court should confine merely to the language of a particular provision, their Lordships said:

"The argument overlooks the distinction between those cases where the Legislature itself makes a complete classification of persons or things and applies to them the law which it enacts, and others where the Legislature merely lays down the law to be applied to persons or things answering to a given description or exhibiting certain common characteristics, but being unable to make a precise and complete classification, leaves it to an administrative authority to make a selective application of the law to persons or things within the defined group, while laying down the standards or at least indicating in clear terms the underlying policy and purpose, in accordance with, and in fulfilment of which the administrative authority is expected to select the persons or things to be brought under the operation of the law."

Their Lordships pointed out the difference between the Saurashtra case, — 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (F) and the West Bengal Special Courts Act case — 'AIR 1952 SC 75(A)' and said:

"The majority decision in the Saurashtra case would seem to lay down the principle that if the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation does not itself make a complete and precise classification of the persons or things to which it is to be applied, but leaves the selective application of the law to be made by the executive authority in accordance with the standard indicated or the underlying policy and object disclosed is not sufficient ground for condemning it as arbitrary and, therefore, obnoxious to Art. 14."

After the Coal Control case quoted above, the question arose whether any discretion given to the State Government or to its officers not canalised within a definite channel must be held to be arbitrary power in all cases. It was pointed out by the learned Chief Justice in 'Harishankar Bagla's case (E)' that S. 4(3) of the U. P. Coal Control Order was declared void on the ground that it committed to the unrestrained will of single individual the discretion to grant, withhold or cancel licences in any way he chose and there was nothing in the Order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same.

In 'Harishankar Bagla's case (E)', dealing with the provisions of the Essential Supplies (Temporary Powers) Act, 1946, and the Cotton Textiles (Control of Movement) Order, 1948, their Lordships of the Supreme Court observed:

"The policy underlying the Order is to regulate the transport of cotton textile in a manner that will ensure an even distribution of the commodity in the country and make it available at a fair price to all. The grant or refusal of a permit is thus to be governed by this policy and the discretion given to the textile commissioner is to be exercised in such a way as to effectuate this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power, there is ample power in the Courts to undo the mischief. Presumably, as appears from the different forms published in the Manual, there are directions and rules laid down by the Central Government for the grant or refusal of permits."

These three cases read together indicate that it is not open to the Legislature to give arbitrary power to the State Government or any person or authority to do what it likes & in any manner it chooses, unrestrained by any directions as to how the power was to be exercised. If from the other provisions of the Act, however, it can be gathered how the discretion is to be exercised and in what circumstances, then even though the provision may be widely worded, it is not necessarily void. In case, however, the discretion is abused, it was pointed out by their Lordships in 'Kedar Nath Bajoria's case (D)', such exercise of discretion can be challenged and annulled under Art. 14 which includes within its purview both executive and legislative acts. In — 'Yick Wo v. Peter Hopkins', (1886) 30 Law Edn. 220 (G)', though the Act was on the face of it, innocuous and the same was to apply to all laundry men, the provisions were utilised to discriminate against Chinese laundry men and it was held that they were, therefore, invalid. In the case before us, we are inclined to the view that the whole scheme of Ss. 15 and 15A, Police Act, laid down the principles which should govern the grant of exemptions under sub-ss. (5) and (3) of the said sections and, there being no allegations that the power has been abused by the State Government, there is no reason to interfere.

(9) The petition is, therefore, dismissed with costs which we assess at Rs. 200/-.

D.H.Z. Petition dismissed.

(S) **A.I.R. 1955 ALLAHABAD 12** (Vol. 42, C.N. 5)

MOOTHAM AND M. L. CHATURVEDI JJ.

(4-2-1954)

H. P. Khandewal and another, Petitioners v. State of Uttar Pradesh and another, Opposite Parties.

Civil Misc. Writ Nos. 7810, 7840, 7841, 7842, 7888 and 7976 of 1951.

† (a) **U. P. Land Acquisition (Rehabilitation of Refugees) Act (26 of 1948), S. 11(1), Provisos — Validity — (Constitution of India, Art. 31(2) and (5) (a)).**

The provisions with regard to compensation when land is acquired, to be found in the two provisos to sub-s. (1) of S. 11 of the U. P. Land Acquisition (Rehabilitation of Refugees) Act, are invalid. But the invalid provisions can be severed from the remainder of the Act. Denuded of the offending provisos to S. 11(1),

and the first paragraph of that sub-section not being called in question in these proceedings the Act must be held to make provision for compensation within the meaning of Art. 31(2). (Para 30)

Assuming that the amount of compensation determined in accordance with the provisions of the first paragraph of S. 11(1) of the impugned Act represents the monetary equivalent of the property on the date of acquisition, it is clear from the provisos to that sub-section that in the case of property acquired by an owner before 1-9-1939, or after 31-3-1948, the amount payable cannot exceed the market value of the property on the first of these dates. In the case of property purchased by the owner after 1-9-1939, and before 1-4-1948, the amount payable is the purchase price actually paid. In either case if the owner of the land acquired under the Act will not receive compensation equal to the market value of the property at the date upon which it was acquired, such payment is not compensation within the meaning of Art. 31(2) of the Constitution or S. 299(2), Government of India Act. AIR 1951 All 674 (FB), Applied. (Para 6)

As the impugned Act does not provide for the payment of compensation in respect of the property acquired within the meaning of S. 299(2), Government of India Act, 1935, the Act was not an Act which the Provincial Legislature had power to make; and if it had not the power to make the Act, then that Act was not, prior to the commencement of the Constitution, an "existing Indian Law" nor was it, after the commencement of the Constitution, an "existing law." It does not, therefore, come within the ambit of Art. 31 (5) (a). (Para 14)

This conclusion is in accordance with the intention of the framers of the Constitution, for, the purpose of Art. 31(5)(a) is to exempt from the application of the provisions of Art. 31(2) a law which, although it contravenes the provisions of the latter clause was nevertheless a valid law immediately prior to the Constitution coming into force. It was not the intention of the Constituent Assembly, in effect, to validate a law which a Provincial Legislature had no power to make, save in the exceptional case for which special provision is made in cl. (6) of Art. 31. (Para 15)

Anno: Constitution of India, Art. 31 N. 10 and 31.

(b) Constitution of India, Arts. 31(2), (5) (a) and (6) and 366(10) — Scope — 'Existing law' in Art. 31(5)(a), meaning of.

Article 31(2) lays down the broad principle that no property can be taken possession of or acquired by the State unless it be for a public purpose and under a law which makes provision for compensation, but this general rule is subject inter alia to the provisions of Cls. (5) (a) and (6). The effect of these provisions is that Art. 31(2) has no application to a law made more than 18 months before the Constitution, provided it is an existing law; whereas a law enacted within that period, provided it is certified by the President, cannot be called in question if either (i) it contravenes the provisions of Art. 31(2), or (ii) it has contravened the provisions of S. 299 (2) of the 1935 Act. Clause (6) therefore embraces two categories of law, namely certain laws which upon being certified by the President cannot be challenged on the ground that they contravene the provisions of Art. 31 (2), and also certain other laws which upon certification cannot be challenged on the ground that they contravene the provisions of S. 299(2). There is nothing in cl. (6) to show that both categories must be 'existing law'. The phrase used in Cl. (5) (a)—"existing law other than a law to which the provisions of Cl. (6) apply" does not mean that the law to which Cl. (6) applies must be existing law. The phrase should, and can without any straining of the language, be construed to mean any of those laws for which provision is made in Cl. (6) which come into the category of existing laws. There is, therefore, no reason to hold that the context requires a special meaning to be given to the expression 'existing law' as used in Art. 31(5) (a). That expression must be given the meaning assigned to it in Art. 366(10). (Paras 8, 9)

Anno: Constitution of India, Art. 31 N. 10, 31, 34.

(c) Constitution of India, Art. 366(10) — 'Existing law' — Meaning of.

The comma after the word 'Legislature' in Art. 366(10) is merely a substitute for the word 'or', and the concluding words of the definition apply no less to an enactment passed by a Legislature than to one made by an authority or person. Article 366 (10) appears to be no more than an adaptation of the definition of 'existing Indian Law' in S. 311 (2), Government of India Act, 1935, which makes it abundantly clear that a law passed by a Legislature would not come within the definition of an "existing India Law" unless such Legislature had power to make the law in question. (Para 12)

† (d) U. P. Land Acquisition (Rehabilitation of Refugees) Act (26 of 1948), S. 11(1), Provisos — If contravene Art. 14 — (Constitution of India, Art. 14).

There is no doubt that the U. P. Acquisition of Land (Rehabilitation of Refugees) Act omits some of the provisions to be found in the Land Acquisition Act, and lays down a procedure which is less advantageous to the owner of property than that provided by the Land Acquisition Act. (Paras 17, 19)

But a guiding principle to control the application of the discriminatory provisions can be discovered in the impugned Act itself. It is not correct to say that the State Government has an unfettered discretion as regards the application of the Act. The special procedure for acquiring property for which provision is made in the Act is intended, and indeed can be applied only, where property is required for a special purpose, namely, the rehabilitation of refugees from Pakistan. In any case in which land is required for this purpose the State

Government will seek to apply the provisions of this Act rather than those of the Land Acquisition Act, not only because the procedure is simpler but because the compensation payable is less. (Para 20)

The impugned Act can be called in question both on the ground that, as regards compensation, it discriminates (a) between different persons whose property has been acquired thereunder and (b) between persons whose property has been so acquired and persons whose property has been acquired under the Land Acquisition Act. In each case the provisions for payment of compensation, which are admittedly discriminatory, cannot be correlated to the object of the impugned Act. (Para 23)

Whether the purpose of the Act be the expeditious acquisition of property for the rehabilitation of particular refugees or the speedy settlement of claims for compensation therefor, there is no nexus between such purpose and the payment of an amount of compensation which depends on whether the owner of the property acquired it before 1-9-1939, between that date and 1-4-1948 or at a later date. As Art. 31(2) has no application, compensation could have been based on the market price of the property at any specified date, but a method which adopts what appears to be a purely arbitrary classification divorced from the purpose of the Act cannot be sustained. (Para 24)

There is no rational basis for discriminating, as regards compensation, either between different persons whose property has been acquired under the impugned Act, or between persons whose property is acquired under that Act and persons whose property is acquired under the Land Acquisition Act. The owner of property which is acquired by the State for the purpose of erecting a school will receive therefor compensation under the Land Acquisition Act; but a person whose property is acquired for erection of a shop for the rehabilitation of refugees will under the impugned Act receive compensation at a lower rate. There is no rational basis for holding that a man whose property is required for the one purpose should receive by way of compensation a sum less in amount than the man whose property is required for the other. (Paras 16, 25)

Anno: Const. of India, Art. 14 N. 1, 3.

(e) Interpretation of Statutes — Object of Act.

The object of an Act if not fully stated in the preamble can be ascertained from the provisions of the Act itself. (Para 20)

(f) Constitution of India, Arts. 14 and 31 — Distinction between Art. 31(4) and (5) (a) — Existing law coming under Art. 31 (5) (a) if can be challenged on ground that it denies equality before law.

Article 31(5)(a) is worded differently to Art. 31(4); for instead of providing that an existing law cannot be challenged because it contravenes Art. 31(2) it provides, in effect, that Art. 31(2) shall not apply at all to such a law (other, of course, than a law to which the provisions of cl. (6) apply). But if Art. 31 (2) does not apply to an existing law the bar which that clause constituted to a challenge under Art. 14 disappears, and an existing law can be called in question on the ground that it denies equality before the law. Article 31(4) presupposes the existence of a law which contravenes the provisions of Art. 31(2); Art. 31(5)(a) makes Art. 31(2) inapplicable to an existing law. AIR 1951 All 674 (FB), Distinguished. (Para 22)

Anno: Constitution of India, Art. 31 N. 29, 31.

(g) U. P. Land Acquisition (Rehabilitation of Refugees) Act (26 of 1948), S. 2 (viii) — Notification declaring Improvement Trust as 'builder' — Effect of — (U. P. Town Improvement Act (1919), Ch. IV).

Even if a scheme for the erection of houses, shops and workshops for the use of refugees may not be improvement scheme which comes within the ambit of Ch. IV of the Town Improvement Act, the effect of a declaration that an Improvement Trust is a 'builder' within the meaning of U. P. Land Acquisition (Rehabilitation of Refugees) Act, 1948 is, in law, to constitute it a 'builder' for the purposes of that Act, and if necessary statutorily to enlarge its objects to enable it to perform its functions thereunder. (Para 27)

(h) Constitution of India, Art. 31 — Public purpose, meaning of — Rehabilitation of refugees — (Words and phrases).

The concept of public purpose is not fixed and unalterable, and is regarded at the present time as more nearly meaning a purpose useful to the public rather than use by the public. AIR 1952 SC 252 and AIR 1950 SC 222, Ref. to. (Para 28)

Acquisition of land for the rehabilitation of refugees is one for a public purpose. (Para 29)

Anno: Constitution of India, Arts. 226 and 32, N. 19.

(i) Constitution of India, Art. 226 — New point.

Where a ground is not disclosed in the petition under Art. 226 the High Court will not allow it to be raised for the first time at the late stage of arguments unless the opposite party is given an opportunity of filing a further counter affidavit to meet that ground. (Para 29)

Anno: Constitution of India, Arts. 226 and 32 N. 54.

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 674: 1951 All LJ 365 (FB) 6, 21

(B) (V39) AIR 1952 Bom 16: 53 Bom LR 837 11

(C) (V39) AIR 1952 SC 235: 1952 Cri LJ 1167 (SC) 18

(D) (V39) AIR 1952 SC 123: 1952 Cri LJ 805 (SC) 19

(E) (V1) AIR 1914 PC 20: 42 Ind App 44 (PC) 28

(F) (V39) AIR 1952 SC 252: 1952 SCR 889 and 1056 (SC) 28

(G) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 28

A. K. Kirty, for Petitioners; Standing Counsel, for Opposite Parties.

MOOTHAM J.:

These are six petitions under Art. 226 of the Constitution in which common questions of law arise and which can conveniently be dealt with in a single judgment. The petitioners challenge the validity of certain sections of the U. P. Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U. P. Act 26 of 1948).

(2) That Act came into force on 5-6-1948. The purpose of the Act, as stated in the preamble is to enable land to be acquired for the rehabilitation of refugees from Pakistan and to prescribe an expeditious procedure for the determination of the compensation to be paid on account of such acquisition. The Act in fact makes provision both for the requisition and acquisition of land, but it is only with the latter that we are concerned in these petitions. Section 5 of the Act provides that a "builder" (as defined in the Act) may ask the State Government to acquire specified land for the purpose of erecting buildings, shops and workshops for the rehabilitation of refugees and for the provision of amenities connected therewith. Section 6 provides that if the State Government is then satisfied, after such enquiries as it may consider necessary, that the land is needed and is suitable for any of these purposes it shall require the builder to enter into an agreement with it with regard to a number of matters, including the payment to the State Government of the cost of the acquisition and the transfer on such payment of the land to the builder.

Section 7 makes provision for the actual acquisition of the land. Sub-section (1) of this section provides that after the agreement mentioned in S. 6 has been made and the builder has deposited such amount as the State Government shall require, the State Government may acquire the land by publishing in the official gazette a notice to the effect that it has decided to do so, and sub-s. (2) enacts that upon publication of such notice the land so acquired shall vest absolutely in the State Government. Section 11 is an important section for it makes provision for the payment of compensation. The relevant part thereof is sub-s. (1) which reads as follows:

"11. (1) Whenever any land is acquired under S. 7 or 9 there shall be paid compensation the amount of which shall be determined by the Compensation Officer, in accordance with the principles set out in clauses first, second and third of sub-s. (1) and sub-s. (2) of S. 23 of the Land Acquisition Act, 1894:

Provided that the market value referred to in clause first of the said sub-section shall be deemed to be the market value of such land on the date of publication of the notice under S. 7 or 9, as the case may be, or on the first day of September, 1939, whichever is less:

Provided further that where such land has been held by the owner thereof under a purchase made before the first day of April, 1948, but after the first day of September, 1939, by a registered document, or a decree for pre-emption between the aforesaid dates, the compensation shall be the price actually paid by the purchaser or the amount on payment of which he may have acquired the land in the decree for pre-emption, as the case may be."

(3) The petitioners are all owners of land in the district of Agra. Early in 1950 the Agra Improvement Trust, a statutory body constituted under the U. P. Town Improvement Act, 1919, made an application to the State Government under S. 5 of the Act in respect of an area of land which included the several pieces of land owned by the petitioners. On 28-4-1950, the State Government declared the Trust to be a "builder" under S. 2 (viii) of the Act. Thereafter on various dates in 1950 and early in 1951 it entered into agreements with the Trust with regard to the matters specified in S. 6 of the Act in respect of several portions of the area proposed to be acquired, and on 11-7-1951, the State Government acquired the land by issuing a Notification under S. 7 of the Act. Notices were thereafter issued to the petitioners requiring them to appear before the District Land Acquisition Officer on 31-8-1951; for the purpose of determining the amount of compensation to them for it. The compensation payable to the petitioners under the Act has not however yet been determined.

(4) In these petitions the prayer is that the Court may be pleased

"to grant a writ, direction or other suitable order prohibiting the State Government from acquiring the petitioners' land or interfering with their rights in any other manner, and to grant such other suitable relief as the Court may deem fit."

At the hearing, however, learned counsel for the petitioners stated more specifically that the relief which the petitioners sought was a writ in the nature of certiorari to quash the State Government's Notification under S. 7 of the Act made on 11-7-1951 or, in the alternative, the issue of a writ of mandamus directing the Compensation Officer in calculating the compensation payable to them under the Act to disregard the two provisos of sub-s. (1) of S. 11 of the Act.

(5) The argument has covered a wide field. The principal submission made on behalf of the petitioners is that the Act contravenes the provisions of Art. 31(2) of the Constitution and is not saved by the provisions of Art. 31(5); secondly it is argued that the Act infringes Art. 14, and thirdly that the Act has in the circumstances no application as (a) there was no public purpose and (b) the Agra Improvement Trust could not be a "builder" within the meaning of the Act.

(6) On the first question it is argued, and in our opinion rightly, that the Act does not make provision for the payment of compensation within the meaning either of Cl. (2) of Art. 31 or sub-s. (2) of S. 299, Government of India Act, 1935.

In — 'Suryapal Singh v. U. P. Govt.', AIR 1951 All 674 (A), a Full Bench of this Court held that compensation in S. 299 (2) means the monetary equivalent of the property taken or acquired, and that the same meaning must be attached to that word in Art. 31(2) subject to the qualification that such equivalent need not be paid in money;

the relevant date in each case being the date of acquisition. Assuming that the amount of compensation determined in accordance with the provisions of the first paragraph of S. 11(1) of the impugned Act represents the monetary equivalent of the property on the date of acquisition (an assumption the correctness of which it is not necessary for us to examine in the present petitions), it is clear from the provisos to that subsection that in the case of property acquired by an owner before 1-9-1939, or after 31-3-1948, the amount payable cannot exceed the market value of the property on the first of these dates. In the case of property purchased by the owner after 1-9-1939, and before 1-4-1948, the amount payable is the purchase price actually paid. The properties in dispute of five of the petitioners were acquired by them after 1-4-1948, and therefore the compensation payable to them under the Act is limited to the market value of the property on 1-9-1939. It needs we think no argument to show that such a payment is not compensation within the meaning of Art. 31(2) or S. 299(2). The date upon which the remaining petitioner purchased his property is not clear, but it is not in dispute that he will not, under the Act, receive compensation equal to the market value of the property at the date upon which it was acquired thereunder.

(7) It is however said by the State that the Act cannot now be challenged as it is an existing law to which Cl. (2) of Art. 31 has no application in view of the terms of Cl. (5) (a) thereof. That clause provides that

> "Nothing in Cl. (2) shall affect the provisions of any existing law other than a law to which the provisions of Cl. (6) apply."

It is common ground that the Act is not a law to which the provisions of Cl. (6) apply, and the question is whether it is an 'existing law' within the meaning of Cl. (5) (a). The petitioners say it is not, and they rely on the definition of 'existing law', in Art. 366 (10). The expressions specified in that Article have however the meanings therein assigned to them only if the context does not otherwise require, and it is the contention of the respondents that 'existing law' as used in Cl. (5) (a) has a meaning which can be ascertained from the context and that reference to the definition in Art. 366 is consequently unnecessary. The argument is that 'existing law' in Cl. (5) (a) and "law of the State" in Cl. (6) mean the same thing, and that as it is clear that Cl. (6) applies (in certain circumstances) to a law which would otherwise be invalid under S. 299 (2) of the 1935 Act the expression 'existing law' in Cl. (5) (a) must be construed as including a law which was invalid at the commencement of the Constitution. This argument in our opinion breaks down at more than one point.

(8) Article 31(2) lays down the broad principle that no property can be taken possession of or acquired by the State unless it be for a public purpose and under a law which makes provision for compensation, but this general rule is subject (so far as we are here concerned) to the provisions of Cls. (5) (a) and (6). The effect of these provisions is we think this: Article 31(2) has no application to a law made more than 18 months before the Constitution, provided it is an existing law; whereas a law enacted within that period, provided it is certified by the President, cannot be called in question if either (i) it contravenes the provisions of Art. 31(2), or (ii) it has contravened the provisions of S. 299(2) of the 1935 Act. Clause (6) appears therefore to embrace two categories of law, namely certain laws which upon being certified by the President cannot be challenged on the ground that they contravene the provisions of Art. 31(2), and also certain other laws which upon certification cannot be challenged on the ground that they contravene the provisions of S. 299(2). There is nothing in Cl. (6) to show that both categories must be 'existing law', but it is said that the phrase used in Cl. (5) (a) — "existing law other than a law to which the provisions of Cl. (6) apply" — means that the law to which Cl. (6) applies must be existing law. We do not think this is so, for in our opinion the phrase which we have quoted should, and can without any straining of the language, be construed to mean any of those laws for which provision is made in Cl. (6) which come into the category of existing laws.

(9) We see therefore no reason to hold that the context requires a special meaning to be given to the expression 'existing law' as used in Article 31(5)(a), and hold that that expression must be given the meaning assigned to it in Art. 366(10).

(10) The second question is whether the Land Acquisition (Rehabilitation of Refugees) Act, 1948, is an 'existing law' as defined in that Article. 'Existing law' is there defined as meaning

> "any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation."

(11) The learned Standing Counsel contends that the effect of the insertion of a comma after the word 'Legislature' is to limit the application of the words "having power to make such a law, Ordinance, order, bye-law, rule or regulation" to the immediately preceding words "authority or person", and has drawn our attention to the case of — 'State of Bombay v. Heman Santlal Alreja', AIR 1952 Bom 16 (B), in which it was held that in order that a law should be an "existing law" the only qualification laid down by the Constitution is that it should have been passed before the commencement of the Constitution.

(12) Grammatically we do not think that learned counsel's contention is well-founded, for we are of opinion that the comma after the word 'Legislature' is merely a substitute for the word 'or', and that the concluding words of the definition apply no less to an enactment passed by a Legislature than to one made by an authority or person. Article 366 (10) appears to be no more than an adaptation of the definition of "existing India law" in S. 311(2), Government of India Act,

1935. "Existing Indian law" was there defined as meaning

"any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation,"

a definition which makes it abundantly clear that a law passed by a Legislature would not come within the definition of an "existing Indian law" unless such Legislature had power to make the law in question.

(13) Now sub-s. (2) of S. 299 of the 1935 Act, so far as it is relevant, reads as follows:

"Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any kind.....unless the law provides for the payment of compensation for the property acquired....."

(14) As we are of opinion that the Land Acquisition (Rehabilitation of Refugees) Act does not provide for the payment of compensation in respect of the property acquired within the meaning of S. 299(2), it appears to us on a plain reading of this section that the Act was not an Act which the Provincial Legislature had power to make; and if it had not the power to make the Act then that Act was not, prior to the commencement of the Constitution, an "existing Indian Law" nor was it, after the commencement of the Constitution, an "existing law". It does not therefore come within the ambit of Art. 31(5)(a).

(15) This conclusion is we think in accordance with the intention of the framers of the Constitution, for it appears to us that the purpose of Art. 31(5)(a) is to exempt from the application of the provisions of Art. 31(2) a law which, although it contravenes the provisions of the latter clause was nevertheless a valid law immediately prior to the Constitution coming into force. We do not think that it was the intention of the Constituent Assembly, in effect, to validate a law which a Provincial Legislature had no power to make, save in the exceptional case for which special provision is made in Cl. (6) of Art. 31.

(16) It is then contended that the impugned Act contravenes the provisions of Art. 14 in two ways. In the first place it is said that the procedure laid down in the Act for the acquisition of property by the State contrasts unfavourably, from the stand-point of the land-owner, with that which has to be followed when land is to be acquired under the provisions of the Land Acquisition Act, 1894; and that as the decision as to which of these two Acts shall be applied rests in the unfettered discretion of the Government there is a denial of the equal protection of the laws. The second contention is that there is no rational basis for discriminating, as regards compensation, either between different persons whose property has been acquired under the impugned Act, or between persons whose property is acquired under that Act and persons whose property is acquired under the Land Acquisition Act.

(17) There is no doubt that the impugned Act omits some of the provisions to be found in the Land Acquisition Act. No preliminary notification is needed as is required under S. 4 (1) of the latter Act, there is no provision for the filing of objections such as is to be found in S. 5A, nor is there any provision, such as is to be found in S. 9 of the earlier Act, requiring notice to be given to persons interested before the land is acquired. There are certain other minor variations, but these are the more substantial differences to which counsel have drawn our attention.

(18) The question as to what constitutes discrimination has been considered in a number of cases, it is sufficient we think to refer to what Mr. Justice S. R. Das said in — 'Lachmandas v. State of Bombay', AIR 1952 SC 235 (C), where at page 244 that learned Judge said:

"It is now well established that while Art. 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act."

(19) Now the impugned Act lays down a procedure which is less advantageous to the owner of property than that provided by the Land Acquisition Act. The question is whether there is, in the words of Fazl Ali J. in — 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (D), a

"principle to be found in the Act to control the application of the discriminatory provisions or to correlate those provisions to some tangible and rational objective."

In that case the principal question was whether the Saurashtra State Public Safety Measures (Third Amendment) Ordinance, 1949, was void under Art. 13(1) on the ground that it violated the provisions of Art. 14. The Ordinance empowered the State Government by notification to constitute Special Courts of criminal jurisdiction for such area as may be specified in the notification, it further provided that a Special Judge shall try such offences, or classes of offences or such cases or classes of cases as the State Government may direct, and it also laid down a form of procedure which differed in a number of matters of importance from that for which provision is made in the Code of Criminal Procedure. It was argued for the appellant that S. 11 of the Ordinance was invalid because it, in effect, vested in the executive government an unfettered discretion as to what persons should be tried by the Special Judge.

The Supreme Court, by a majority, rejected this contention on the ground that it was possible

to discover in the Ordinance a guiding principle, which would have the effect of limiting the application of the special procedure to a particular category of offences and thus establish a connection between offences of that category and the object for which the Ordinance was promulgated. The majority held that the preamble to the Ordinance indicated a definite objective, and that so long as the State Government applied the special procedure only to those cases or offences which have a rational connection with that objective, the legislation was not discriminatory.

"If the legislature" Mr. Justice Mukherjea said "indicates a definite objective and the discretion has been vested in the State Government as a means of achieving that object, the law itself .....cannot be held to be discriminatory, though the action of the State Government may be condemned if it offends against the equal protection clause, by making an arbitrary selection."

(20) In our opinion a guiding principle can readily be discovered in the impugned Act. The object of an Act if not fully stated in the preamble can be ascertained from the provisions of the Act itself, and in our opinion it is clear that one of the purposes of the impugned Act was not only, as stated in the preamble, to acquire land for the rehabilitation of refugees from Pakistan but to acquire such land expeditiously. We think therefore that it is not correct to say that the State Government has an unfettered discretion as regards the application of the Act. It appears clear that the special procedure for acquiring property for which provision is made in the Act is intended, and indeed can be applied only, where property is required for a special purpose, namely, the rehabilitation of refugees from Pakistan. It is also clear that in any case in which land is required for this purpose the State Government will seek to apply the provisions of this Act rather than those of the Land Acquisition Act, not only because the procedure is simpler but because the compensation payable is less. In our opinion this objection fails.

(21) The second argument is more substantial, but it is necessary to consider a preliminary question whether, in view of the decision of the Full Bench of this Court in — 'AIR 1951 All 674 (FB) (A), it is open to the petitioners to raise the question of discrimination in the matter of compensation. In our opinion this case is not a bar to their doing so. In 'AIR 1951 All 674 (FB) (A), this Court held that a provision in an Act with regard to the payment of compensation which contravened the provisions of Art. 14 because it was discriminatory, necessarily contravened the provisions of Art. 31(2); and that, therefore, if the Act could not be challenged under Art. 31(4) because it contravened Art. 31(2) it could not be challenged because it also contravened Art. 14.

(22) Article 31(5)(a) is, however, worded differently to Art. 31(4); for instead of providing that an existing law cannot be challenged because it contravenes Art. 31(2) it provides, in effect, that Art. 31(2) shall not apply at all to such a law (other, of course, than a law to which the provisions of Cl. (6) apply). But if Art. 31(2) does not apply to an existing law the bar which that clause constituted to a challenge under Art. 14 disappears, and an existing law can be called in question on the ground that it denies equality before the law. Article 31(4) presupposes the existence of a law which contravenes the provisions of Art. 31(2); Art. 31(5)(a) makes Art. 31(2) inapplicable to an existing law.

(23) The impugned Act can therefore in our opinion be called in question both on the ground that, as regards compensation, it discriminates (a) between different persons whose property has been acquired thereunder and (b) between persons whose property has been so acquired and persons whose property has been acquired under the Land Acquisition Act. The question in each case is whether the provisions for payment of compensation, which are admittedly discriminatory, can be correlated to the object of the impugned Act. We find it difficult to hold that is so in either case.

(24) Whether the purpose of the Act be the expeditious acquisition of property for the rehabilitation of particular refugees or the speedy settlement of claims for compensation therefor, we can find no nexus between such purpose and the payment of an amount of compensation which depends on whether the owner of the property acquired it before 1-9-1939, between that date and 1-4-1948 or at a later date. As (in our view) Art. 31(2) has no application, compensation could have been based on the market price of the property at any specified date, but a method which adopts what appears to us to be a purely arbitrary classification divorced from the purpose of the Act cannot in our opinion be sustained.

(25) The second ground of complaint is more debatable but is, we think, well founded. We do not doubt the desirability of making provision for the rehabilitation of refugees & for the avoidance of unnecessary delay. Land will not however be acquired any quicker by paying less for it, and there seems to be no justification for a classification the effect of which appears to be to throw on the shoulders of one section of the community — those persons whose land is acquired for the rehabilitation of refugees — a burden which should be shared by all. The owner of property which is acquired by the State for the purpose of erecting a school will receive therefor compensation under the Land Acquisition Act; but a person whose property is acquired for erection of a shop for the rehabilitation of refugees will under the impugned Act receive compensation at a lower rate. We can find no rational basis for holding that a man whose property is required for the one purpose should receive by way of compensation a sum less in amount than the man whose property is required for the other.

(26) Two further points were raised.

(27) The Agra Improvement Trust was, by a Notification dated 28-4-50 issued under S. 2(VIII) of the Act, declared to be a 'builder' within the meaning of that Act, but it is contended that such notification was ineffective in law as the

powers which a builder can exercise under the Act are in excess of those conferred upon an Improvement Trust by the Town Improvement Act. We are not satisfied that a scheme for the erection of houses, shops and workshops for the use of refugees may not be an improvement scheme which comes within the ambit of Ch. IV of the Town Improvement Act, but it is not necessary for us to consider whether this is the case for in our opinion the effect of a declaration that an Improvement Trust is a 'builder' within the meaning of the impugned Act is, in law, to constitute it a 'builder' for the purposes of that Act, and if necessary statutorily to enlarge its objects to enable it to perform its functions thereunder.

(28) It was further submitted that the requisition was bad as it was not for a public purpose, the argument being that the property acquired under the impugned Act was acquired in the interest of individuals — the refugees — as opposed to the general interest of the community, reliance being placed on the well known case of — 'Hamabai Framjee Petit v. Secretary of State', AIR 1914 PC 20 (E). As has however been pointed out by the Supreme Court the concept of public purpose is not fixed and unalterable, and is regarded at the present time as more nearly meaning a purpose useful to the public rather than use by the public. This view was expressed by Das, J. in — 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252 at p. 290 (F), when he said that

> "whatever furthers the general interests of the community as opposed to the particular interest of the individual must be regarded as a public purpose",

and a similar view was stated by Mahajan J., as he then was, in — 'Raja Surya Pal Singh's case', AIR 1952 SC 252 at pp. 306, 311 (F). Indeed Mr. Kirty with great fairness drew the Court's attention to a passage in the judgment of Mr. Justice Mukerjea in — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 SC 222 at p. 246 (G), when that learned Judge gave it as his opinion on the same ground, that the housing of refugees may certainly be a public purpose. In our opinion this general submission must fail.

(29) It was, however, argued by Mr. Khare (Kirty?) on behalf of the petitioners in petition Nos. 7840, 7841 and 7842 that on the particular facts, it was apparent that there was no public purpose. Learned counsel relied on two resolutions of the Agra Improvement Trust, dated respectively the 24th February and 31st March 1951 and a letter dated 13-4-1951 sent by the Trust to these petitioners (copies of which are attached to the affidavit in support of the petitions as Annexures D, E and F) in which the Trust stated its willingness, in certain circumstances, to release the petitioners' land from acquisition. Apart however from the fact that these documents do not necessarily exclude the existence of a public purpose at the time of acquisition, the argument is not based on any ground disclosed in the petition, and the learned Standing Counsel, properly in our opinion, submits that if it is to be considered he should have an opportunity of filing a further counter affidavit stating the circumstances in which the resolutions were passed and the letter written. In the circumstances we are of opinion that we should not allow this point to be raised at this late stage.

(30) For the reasons which we have given earlier in this judgment we are of opinion that the provisions with regard to compensation when land is acquired to be found in the two provisos to sub-s. (1) of S. 11 of the Act are invalid. We are not called upon to express any opinion with regard to the first paragraph of this sub-section as its validity was not challenged in these petitions. The question which remains to be considered is the order which should be made, and this in fact depends on whether the invalid provisions can be severed from the remainder of the Act. On this point we entertain no doubt, and indeed it is common ground that this can be done. Denuded of the offending provisos to S. 11(1), and the first paragraph of that subsection not being called in question in these proceedings the Act must be held to make provision for compensation within the meaning of Art. 31 (2). Consequently the order of the State Government of 11-7-1951 was a valid order, and the prayer for a writ of certiorari fails.

(31) Nor do we think that we should order the issue of a mandamus directing the Compensation Officer in determining the compensation payable to the petitioners to ignore the provisos to S. 11 (1). We have held these provisos to be invalid. The Compensation Officer, for some reason of which we are not aware, has not yet embarked on the task of determining the compensation, but when he does so we assume that he will be guided by the opinion we have expressed : we cannot assume that he will act otherwise.

(32) In the result, therefore, these petitions must be dismissed ,but in the circumstances we consider that the petitioners are entitled to their costs which we assess at Rs. 100/- in each case.

K.S.B. Petitions dismissed.

A.I.R. 1955 ALLAHABAD 19 (Vol. 42, C.N. 6)

FULL BENCH

MALIK C. J., AGARWALA AND BRIJ MOHAN LALL JJ. (21-9-1954)

Bhagwan Dass, Judgment-debtor, Appellant v. L. Pyare Lal, Decree-holder, Respondent.

Ex. Second Appeal No. 153 of 1948, from decision of Civil J., Agra, D/- 4-12-1947.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), Ss. 3, 14, 15 — Permission of District Magistrate.

The three Sections, 3, 14 and 15, should be read together as regulating the rights and liabilities of the landlord and the tenant which, as far as possible, must be the same under the three sections and in interpreting those sections the wordings of the sections, the scheme of the Act and the object behind it must all be borne in mind. Interpreted that way, permission of the District Magistrate

for the eviction of a tenant from an accommodation must be deemed to be one of the grounds mentioned in S. 3 and under S. 14 the tenant shall not be evicted from the accommodation unless the sanction of the District Magistrate has been obtained before his eviction and under S. 15 a decree for eviction shall not be passed unless the permission has been obtained before the date of the decree.

(Paras 7, 8, 9, 12)

CASES REFERRED: Paras

(A) (V39) AIR 1952 All 584: 1952 All LJ 3 6
(B) (V38) AIR 1951 All 396: 1951 All LJ 154 6
(C) (V41) AIR 1954 All 111: 1953 All LJ 555 6, 7
(D) (V41) AIR 1954 All 480: 1954 All LJ 160 6, 10

J. N. Takru, for Appellant; J. Swarup and H. Swarup, for Respondent.

MALIK C. J.:

This case has been referred to us by a Bench for reconsideration of certain decisions of this Court referred to in the referring order.

(2) The facts of the case are that a suit No. 366 of 1944 was filed by the respondent, Pearey Lal, for ejectment of the appellant from house No. 395/417 situate in Kaserat Bazar, Tajganj, Agra, and for arrears of rent due. The suit was decreed on 12-1-1945. The defendant filed an appeal—Civil Appeal No. 35 of 1945—and on 28-1-1946, the lower appellate Court affirmed the decree for ejectment but dismissed the claim for arrears of rent. A rider was added in the decree that the decree-holder will not be entitled to execute the decree for ejectment without the previous sanction of the District Magistrate or the Additional District Magistrate.

This was by reason of the provisions of the Defence of India Rules, R. 81(2)(bb)(ii), which was as follows:

"81(2). The Central Government or the Provincial Government, so far as appears to it to be necessary or expedient for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may by order provide—

....

(bb) for regulating the letting and sub-letting of any accommodation or class of accommodation, whether residential or non-residential, whether furnished or unfurnished and whether with or without board, and in particular,—

....

(ii) for preventing the eviction of tenants and sub-tenants from such accommodation in specified circumstances and;"

(3) The application for execution of the decree was made in January, 1947, but without the sanction of the District Magistrate, and in the execution application it was claimed that the landlord applicant wanted the house for his own 'bona fide' use. On 10-7-1947, however, the decree-holder amended the application for execution and claimed that the tenant had misused the premises and had brought it to non-residential use by converting it into a 'Bhatti'. On 17-7-1947, the decree-holder obtained the permission of the District Magistrate for the eviction of the tenant. In the meantime the U. P. Control of Rent and Eviction Act (3 of 1947) was passed. It received the assent of the Governor-General on 28-2-1947, and was published in the U. P. Gazette Extraordinary, dated 1-3-1947. It was, however, provided in the Act that it would be deemed to have come into force on 1-10-1946.

(4) An objection was taken to the execution of the decree on the ground that S. 14 of the Act applied and the decree for eviction could not be executed except on one of the grounds mentioned in S. 3. This objection was allowed by the executing Court and the execution application was dismissed. On appeal, however, the lower appellate Court reversed the decision of the executing Court.

(5) Two grounds have been urged by learned counsel for the appellant:

1. that the District Magistrate's permission could not be considered to be a 'ground' mentioned in S. 3 of the Act; and

2. that in any case the permission of the District Magistrate should have been obtained before the application for execution was filed.

(6) A number of Division Bench cases of this Court were cited before us. In all of them the same view was taken and there is no conflict of opinion. The cases cited are — 'Raj Narain v. Sita Ram', AIR 1952 All 584 (A); — 'Manzoor Ali Usmani v. Mt. Lal Devi', AIR 1951 All 396 (B); — 'Sunder Lal v. Mohammad Ishaq', AIR 1954 All 111 (C) and — 'Mohan Lal v. Lala Kanwar Sen', AIR 1954 All 480 (D).

(7) The first point has been considered at some length in — 'Sunder Lal's case (C)' and it is not, therefore, necessary for us to repeat what has been said there. We agree that the permission of the District Magistrate can be treated as an additional ground for filing a suit for eviction under S. 3 of the Act. If S. 3 is redrafted as suggested in — 'Sunder Lal's case (C)', ground (g) after the grounds (a) to (f) can be added in these terms:

"(g) that the permission of the District Magistrate for the eviction of the tenant from the accommodation has been obtained."

In adding it as a ground it cannot be said that we have made any change in the meaning of the section or any substantial change in the language. As was pointed out in — 'Sunder Lal's case (C)' S. 3, read as a whole, means that if grounds (a) to (f) are there, then a landlord can file a suit for eviction of a tenant, as those grounds were considered by the Legislature to be good grounds which should entitle a landlord to evict his tenant, even though the tenant may be put to hardship by reason of there being dearth of available house-accommodation.

It was also realised that there may be cases where, even though grounds (a) to (f) did not exist, there may be other good grounds for evicting a tenant, the needs of the landlord may be greater and considering everything it may be a fit case where the landlord should not be deprived of the right to eject the tenant. In all such cases, as the Legislature was not able to visualise all possible situations, the residuary power was given to the District Magistrate, in a fit case, to

grant permission. The exercise of this power is now subject to correction in revision by the Commissioner and then by the State Government. It is, therefore, expected that the District Magistrate, before he grants permission to a landlord to evict his tenant, would carefully consider the facts and see that it is a fit case where permission should be granted. It would not amount to straining the language of S. 3, if the right given to the Magistrate in the beginning of the paragraph is put in as a separate clause at the end and the section redrafted as suggested by us above for purposes of interpretation.

In this view, the interpretation of Ss. 14 and 15 also becomes simple and all the three sections, 3, 14 and 15, are brought in line so that the rights of the landlords and the tenants are the same whether the suit is instituted after the Act came into force, or the suit had been instituted before the Act came into force but was pending on that date or whether a decree had been obtained before the Act came into force but had not yet been executed by eviction of the tenant.

(8) Bearing this interpretation of S. 3, in mind, if S. 15 is now examined and redrafted as indicated below, there will be, in our view, no difficulty. Section 15 reads as follows:

> "In all suits for eviction of a tenant from any accommodation pending on the date of the commencement of this Act, no decree for eviction shall be passed except on one or more of the grounds mentioned in S. 3."

Instead of 'one or more of the grounds mention in S. 3' we may substitute 'grounds (a) to (f) plus ground (g)' as suggested and the section would then include a provision to the effect that a decree for eviction can be passed if the permission of the District Magistrate for the eviction of the tenant from the accommodation has been obtained. The material date, it would appear from S. 15, is the date on which the decree for eviction is passed and the permission, therefore must be obtained before that date. In treating the material date as the date on which the decree for eviction is passed no great innovation can be said to have been introduced by the Legislature.

In pre-emption cases also the Legislature has provided that the right to obtain a decree for pre-emption must exist on the date of the decree. Section 15 deals with suits previously instituted and it, therefore, provides that a decree for eviction cannot be passed unless the grounds mentioned above exist on the date of the decree. It is the date of the decree, therefore, that is material under S. 15 and not the date of the institution of the suit. Learned counsel has suggested that there is no reason why there should be a difference in the point of time between Ss. 3 and 15, but the difference is not of our making; it has been made by the Legislature itself. While in S. 3 the words are that 'no suit shall,..... be filed', in S. 15 the words are that 'no decree for eviction shall be passed.'

(9) Coming now to S. 14, on redrafting the section in the same way, we get the same result. The relevant portion of S. 14 reads as follows:

> "No decree for the eviction of tenant from any accommodation passed before the date of commencement of this Act shall, in so far as it relates to the eviction of such tenant, be executed against him as long as this Act remains in force, except on any of the grounds mentioned in S. 3."

Instead of the words 'except on any of the grounds mentioned in Section 3' we can easily substitute 'except on any of the following grounds' and re-introduce grounds (a) to (g) mentioned above, so that the section may be complete by itself and it may not be necessary to refer back to S .3. Reading in that way, the permission of the District Magistrate will be one of the grounds for execution of the decree and the material date will be the date on which the decree is executed by eviction of the tenant. If, therefore, the permission has been obtained before the tenant has been evicted, the requirements of S. 14 would be deemed to have been satisfied.

(10) In — 'Mohan Lal's case (D)', dealing with the three sections, 3, 14 and 15, it was said that the words 'to file a suit' in a case where the decree had already been passed before the Act came into force should mean 'to institute proceedings for execution by ejectment of the tenant' and in the case of a suit pending on the date when the Act came into force 'to continue the same'. In the view that we have taken, these observations do not appear to be correct or necessary. While S. 3 provides for the filing of a suit, S. 15 provides for the passing of a decree and S. 14 provides for the execution of a decree by eviction of the tenant. All that we need borrow from S. 3, for the purposes of Ss. 14 and 15, are the grounds given in that section and it is not necessary, therefore, to interpret the words 'to file a suit' as including 'to institute proceedings for execution by ejectment of the tenant' or 'to continue the same."

(11) We are also of the opinion that S. 14 does not require that the grounds must exist before the application for execution is filed. All that S. 14 requires is that the decree shall not be executed by eviction of the tenant and, therefore, on the date the question of eviction arises, the grounds mentioned in S. 3 must exist. That this would not lead to any hardship, but on the other hand it would be more reasonable and will bring the three sections in line, would be clear from an illustration, e.g., if a decree was passed for ejectment of a tenant on 1-10-1934, and the application for execution had been filed in the year 1945 before the 12 years' period of limitation provided for in S. 48, Civil P. C., had expired and was pending, after the Act came into force on 1-10-1946, the execution proceedings cannot be continued if S. 14 is interpreted in the way suggested by learned counsel for the appellant and it would be necessary for the decree-holder to obtain the permission of the District Magistrate and then file a fresh application for execution, which would clearly be time barred under S. 48 of the Code.

(12) In our view, the three sections, 3, 14 and 15, should be read together as regulating the rights and liabilities of the landlord and the tenant which, as far as possible, must be the same under the three sections and in interpreting those sections the wordings of the sections, the scheme of the Act and the object behind it must all be borne in mind. Interpreted that way, permission

of the District Magistrate, for the eviction of a tenant from an accommodation, must be deemed to be one of the grounds mentioned in S. 3 of the Act and under S. 14 the tenant shall not be evicted from the accommodation unless the sanction of the District Magistrate has been obtained before his eviction and under S. 15 a decree for eviction shall not be passed unless the permission has been obtained before the date of the decree.

(13) The appeal has, therefore, no force and is dismissed with costs.

(14) The stay order is discharged.

D.H.Z. Appeal dismissed.

A.I.R. 1955 ALLAHABAD 22 (Vol. 42, C.N. 7)

FULL BENCH

MALIK C. J., AGARWALA AND BRIJ MOHAN LALL JJ. (21-9-1954)

Narain (dead) and after him his son Reotinandan, Applicant v. Faqir Chand, Opposite Party.

Civil Revn. No. 1282 of 1951, against Order of Civil J., Agra, D/- 24-2-1942.

Debt Laws — U. P. Debt Redemption Act (13 of 1940), Ss. 4, 8 — Amendment of decree.

Even if the decree is not executable against land, agricultural produce or person of the agriculturist, the decree-holder is entitled to give a declaration under S. 4 and on such a declaration being given, the provisions of the Debt Redemption Act will not be applicable and the decree can no longer be amended. Case law discussed. (Para 6)

CASES REFERRED: Paras

(A) (V29) AIR 1942 All 390: 1942 All LJ 578 (FB) 4

(B) (V38) AIR 1951 All 69: 1951 All LJ 30 (FB) 4

(C) (V39) AIR 1952 SC 218: 1952 All LJ 420 (SC) 4

(D) (V33) AIR 1946 All 509: 1946 All LJ 204 5

(E) (V39) AIR 1952 All 635: 1949 All LJ 266 5

(F) (V32) AIR 1945 Oudh 19: 20 Luck 168 5

J. Swarup, for Applicant; Gopal Behari, for Opposite Party.

MALIK C. J.:

A mortgage deed without possession was executed by the applicant in favour of the decree-holder opposite party, Faqir Chand, on 2-2-1926. A suit was brought on this mortgage in the year 1939 and a decree obtained on 25-9-1939. On 28-1-1941, an application was made under S. 8, U. P. Debt Redemption Act 13 of 1940 for amendment of the decree. On 19-4-1941, the decree-holder made a declaration that the decree shall not be executed against the land, agricultural produce or person of the agriculturist. On the declaration having been made the Court refused to amend the decree. That order was affirmed by the learned Civil Judge and this civil revision was filed by the judgment-debtor under S. 115, Civil P. C.

It was referred by a learned single Judge to a Division Bench and the Division Bench has referred the following question of law for decision by a larger Bench:

"Whether or not a decree recoverable from an agriculturist can be amended under the provisions of the U. P. Debt Redemption Act if the creditor declares that such decree shall not be executed against the land, agricultural produce or person of such agriculturist even though the decree is, for some reason, not executable against the land, agricultural produce or person of the agriculturist?"

In other words, whether a declaration under S. 4 can be made by a decree-holder only in a case where he can proceed in execution of the decree against the person of the judgment-debtor or against his land or agricultural produce or whether such a declaration can also be made in a case where, for some reason, the decree was not executable against the land, agricultural produce or person of the judgment-debtor.

(2) Learned counsel has urged that the Debt Redemption Act was concerned with and wanted to save the 'land' belonging to an agriculturist, which was defined in S. 2(3) as meaning land in [illegible]ahal in the Uttar Pradesh but not including land occupied by buildings or appurtenant thereto or land within the limits of any municipality, cantonment or notified area; the 'agricultural produce', which was defined in sub-s. (2) of S. 2 as meaning agricultural produce of any agriculturist raised by him or by his servants or by labour hired by him and including crops, whether standing or gathered, and the fruit and flowers of trees and plants; and the 'person of the agriculturist'; that if, therefore, there was no question of saving land or agricultural produce or the person of the agriculturist then there was no point in asking the decree-holder to make a declaration.

If this argument is accepted one would except that to a case where land, agricultural produce or person of a judgment-debtor is not in a jeopardy and cannot be proceeded against in execution of a decree the Act will not be at all applicable. The argument of Mr. Jadish Swarup, however, is that in such a case the decree-holder cannot prevent the decree being amended under the Act, while where land, agricultural produce or the person of the judgment-debtor could be proceeded against in execution, the decree-holder can prevent the amendment of the decree by giving a declaration that he will not proceed against land, agricultural produce or person of the agriculturist.

(3) In the case before us, the suit was filed more than six years after the mortgage debt had become payable. The personal remedy was, therefore, barred. The property mortgaged, the learned counsel has informed us, was house property and, therefore, it could not be included in the definition of the words "land or agricultural produce".

(4) Learned counsel has urged that sub-s. (3) of S. 4 should be applied only to a case where the decree was 'recoverable from an agriculturist', meaning where a simple money decree had been passed against an agriculturist or a decree under which he was personally liable and not to a decree passed on the basis of a mortgage for sale of the mortgaged property specially where no per-

sonal decree under O. 34, R. 6 could be passed against the judgment-debtor by reason of lapse of time. Reliance is placed on the definition of 'loan' and on the decision in — 'Mt. Ketki Kunwar v. Ram Saroop', AIR 1942 All 390 (FB) (A). The word 'loan' means (see S. 2(9)) (1) an advance in cash or kind made before 1-6-1940, (2) recoverable from an agriculturist or a workman (3) or from any such person and other persons jointly, (4) or from the property of an agriculturist or workman. The rest of the section need not be quoted as it is not relevant for our purpose.

Then the proviso is to the effect that an advance recoverable from an agriculturist or from an agriculturist and other persons jointly shall not be deemed to be a loan for the purposes of the Act unless such advance was made to an agriculturist or to an agriculturist and other persons jointly. In — 'Ketki Kunwar's case (A)', the learned Judges pointed out that the proviso applied only to a case where the advance was recoverable from an agriculturist or from an agriculturist and other persons jointly and it did not apply to a case where the advance was recoverable from the property of an agricultuirst or from a workman. 'Ketki Kunwar's case (A)' was followed in another Full Bench case of this Court in — 'Surendra Nath v. Naraini Devi', AIR 1951 All 69 (B).

It came up for consideration before the Supreme Court in — 'Girjadharji v. Lachmanji Panth', AIR 1952 SC 218 (C). But their Lordships did not decide the point and merely observed that it was by no means free from doubt. It is not necessary for us in this case to consider whether — 'Ketki Kunwar's case (A)' was rightly decided. The learned Judges analysed the definition of the word 'loan', divided it into various sub-heads, and pointed out that the proviso applied only to some of those parts of the main definition and not to others. It was, however, not held in — 'Ketki Kunwar's case (A)' that wherever in the Act the words "recoverable from an agriculturist" occur it must be interpreted to mean that the debt must be recoverable from the person of the agriculturist.

As a matter of fact in S. 4(3) the words are "decree recoverable from an agriculturist" and not an "advance recoverable from an agriculturist". The words "recoverable from an agriculturist" are not terms of art and it cannot be said, therefore, that they were used in a special sense wherever they occur in the body of the Act. An examination of the provisions of S. 4 would show that this contention is untenable. Sub-section (1) of S. 4 deals with a declaration made in the plaint before the suit is instituted. Sub-section (2) deals with a case where a suit was pending on the date of the commencement of the Act and a declaration had to be made in that case at any time before the decision of the suit. Sub-section (3) applies to cases where a decree had already been passed and a declaration had to be made at the time of the execution of the decree. The three sub-sections would, therefore, ordinarily be deemed to be of equal amplitude.

Sub-section (1) is in these terms:

> "The provisions of this Act shall not apply to a suit for the recovery of a loan from an agriculturist where the creditor declares in accordance with the provisions of sub-s. (2) that if a decree is passed in his favour either for the whole or part of the claim such decree shall not be executed against the land, agricultural produce or person of such agriculturist."

The word 'loan' in this sub-section must mean loan as defined in sub-s. (9) of S. 2, and it would, therefore, include not only an advance recoverable from an agriculturist but recoverable from an agriculturist and another jointly or recoverable from the property of an agriculturist. The same interpretation must be given to the provisions of sub-s. (2) of S. 4. There was, therefore, no reason why sub-s. (3) should apply only to a case where there was a personal decree and not a decree recoverable from the property of an agriculturist.

The word 'recoverable' can easily be replaced by the word 'realisable' in S. 4 and the learned counsel has conceded that if 'recoverable' is replaced by the word 'realisable' then his argument must fail. Section 8 of the Debt Redemption Act provides for amendment of decree in these words:

> "Notwithstanding the provisions of any decree or of any law for the time being in force, an agriculturist or a workman liable to pay the amount due under a decree to which this Act applies passed before the commencement of this Act, may apply to the civil Court which passed the decree or to which the execution of the decree has been transferred, for the amendment of the decree."

The expression 'decree to which this Act applies' has been defined in S. 2(6) as a decree passed in 'a suit to which this Act applies'. And 'a suit to which this Act applies' have been defined in S. 2(17) as a suit for the recovery of a 'loan'. Section 8 would, therefore, clearly apply not only to a personal decree against an agriculturist but to any decree passed against an agriculturist for the recovery of a 'loan' as defined in S. 2(9) and whether the money is realisable from his person or from his property does not seem to matter. Section 4, therefore, should apply to all cases to which S. 8 is applicable.

(5) The argument of the learned counsel is that since the decree could not be executed against land, agricultural produce or person of an agriculturist, no declaration can be made that the decree-holder will not proceed against land, agricultural produce and person of the agriculturist inasmuch as he cannot proceed against them in any case and such a declaration will therefore be meaningless. It is true that the decree being a mortgage decree and the personal remedy being barred, the decretal amount can be realised only from the house mortgaged. But the judgment-debtor being an agriculturist he can claim, and it has been admitted by the learned counsel that he has a right to claim, that the decree be amended under S. 8.

The language of S. 8, as we have said above, makes it abundantly clear that the amount due under the decree being recoverable from the property of the agriculturist, he can apply for amendment of the decree and there seems to be no rea-

son why in such a case the decree-holder should not be allowed to avail himself of the provisions of S. 4 and make a declaration. The section does not provide that such a declaration can only be made where a decree can be executed against land, agricultural produce or person of such an agriculturist.

No doubt in a case where a person has no right to proceed against certain property, it appears to be meaningless for him to say that he will not proceed against it but law is not always logic and there is no reason why the decree-holder should be in a worse position when land, agricultural produce or person of an agriculturist is not in jeopardy, when those are the three things that the Act intends to protect. This view was also taken by a Bench of this Court in — 'Karam Husain v. Muhammad Khalil', AIR 1946 All 509 (D) and in — 'Inder Singh v. Bishambhar Sahai', AIR 1952 All 635 (E), and by a Bench of the Oudh Chief Court (as it then was) in — 'Narain Lal v. Kanhaiya Lal', AIR 1945 Oudh 19 (F).

(6) Our answer to the question, therefore is: "That even if the decree is not executable against land, agricultural produce or person of the agriculturist, the decree-holder is entitled to give a declaration under S. 4 of the Debt Redemption Act and on such a declaration being given, the provisions of the Debt Redemption Act will not be applicable and the decree can no longer be amended."

D.H.Z. Answer accordingly.

(S) A.I.R. 1955 ALLAHABAD 24 (Vol. 42, C.N. 8)

MALIK C. J. AND GURTU J. (16-7-1954)

Sampat Ram and others, Appellants. v. Baboo Lal, Respondent.

First Appeal No. 203 of 1944 connected with First Appeal No. 393 of 1944, against decree of Civil J., Agra, D/- 22-1-1944.

(a) Civil P. C. (1908), O. 6, R. 4 — Fraud.

No party is allowed to prove fraud, unless it has pleaded fraud. (Para 5)

Anno: C. P. C., O. 6, R. 4 N. 2.

(b) Specific Relief Act (1877), S. 27(b) — Knowledge of prior agreement.

Where there is an agreement to sell immovable property executed in favour of the defendant prior to the agreement to sell in favour of the plaintiff in respect of the same property, the plaintiff can claim no equities against the defendant and cannot enforce his agreement and the fact that the plaintiff had no knowledge of the prior agreement would hardly make any difference. (Paras 7, 6)

Anno: Specific Relief Act, S. 27 N. 3.

(c) Limitation Act (1908), Art. 113 — Starting point.

A contract to sell can be specifically enforced within three years if time was not of the essence. (Para 7)

Anno: Lim. Act, Art. 113 N. 6, 9.

(d) Specific Relief Act (1877), S. 27(b) — Priority between two agreements.

If an agreement is executed in favour of A on the 1st July and two months' time is given for the execution of the sale-deed and another agreement is executed in favour of B on the 15th of July and the time fixed for execution of the sale-deed is one month, though A may have the right to claim performance of his contract on a later date, the contract of the 1st July cannot be made a subsequent contract to the contract of the 15th July and the equities in favour of B, therefore, cannot be said to have come into existence before the equities in favour of A. (Para 9)

Anno: Specific Relief Act, S. 27 N. 3..

(e) Deed — Construction — Date of coming into force of document.

An agreement for sale of immoveable property provided as follows:

"An important condition between me and the vendee that has been agreed upon is that I, the vendor, shall have a right to sell the property that has been sold, to any other person, if I so desire, within the stipulated period of 3 months, that is, upto 24-9-1942, but after 24-9-1942 this agreement shall become final".

Held, that it was a binding document from the date that it was entered into but an option was given to the vendor that he could sell the property to any one else within three months, and it could not be held that though there was an agreement dated 25-6-1942, it must be deemed to have come into operation on 25-9-1942. (Para 10)

(f) Transfer of Property Act (1882), Ss. 3, 55 — Duty of purchaser.

The usual thing when a person purchases property is to find out from the Municipal office whether there are any arrears of taxes due and further to find out from the registration office whether there are any encumbrances. (Para 11)

Anno: T. P. Act, S. 3 N. 33 and 34; S. 55 N. 1, 2.

(g) Evidence Act (1872), Ss. 101 to 103 — Onus in appeal — (Civil P. C. (1908), O. 41, R. 1).

Where the lower Court has held that a party was guilty of breach of contract the burden of proving that that decision is wrong is on that party. (Para 13)

Anno: Evidence Act, Ss. 101 to 103 N. 10; Civil P. C., O. 41, R. 1 N. 11.

Jagdish Swarup, for Appellants; B. R. Awasthi, S. N. Katju and Ambika Pd., for Respondent.

MALIK C. J.:

One Abdul Majid was the owner of certain properties described in the plaint. On 25-6-1942, he entered into an agreement to sell these properties to defendant 2, Lala Sampat Ram alias Champa Ram and his adopted son, Lala Ram Gopal, defendant 3. On 17-7-1942 Abdul Majid entered into another agreement with the plaintiff Babu Lal to sell the same properties to him for Rs. 37,000/-. Though in the first agreement the price stipulated is Rs. 36,000/-, there is really not much difference between the sale prices fixed under the two agreements as in the agreement dated 25-6-1942, the

vendees agreed to incur the entire expenses of execution, completion and registration of the sale-deed, while under the document dated 17-7-1942, the entire costs of execution, completion and registration of the document and brokerage, etc., had to be paid by the vendor and by way of stamp duty alone, on the sale-deed, roughly about Rs. 542/8/- had to be paid.

On 25-9-1942, Abdul Majid executed a sale-deed in favour of Sampat Ram and Ram Gopal and had it registered on the 26th of September. On 26-9-1942, the plaintiff filed the suit for specific performance on the agreement in his favour, dated 17-7-1942.

(2) The suit was decreed by the trial Court. Two appeals were filed in this Court. First Appeal No. 203 of 1944 was filed by Sampat Ram and Ram Gopal, while First Appeal No. 393 of 1944 was filed by Abdul Majid. The appeal filed by Abdul Majid was dismissed for want of prosecution.

(3) Learned counsel for the appellants, Sampat Ram and Ram Gopal, has urged that the plaintiff cannot claim specific performance of the contract as the agreement in his favour was of a later date, namely, 17-7-1942, and that the appellants had no knowledge of that agreement.

(4) Learned counsel for the plaintiff-respondent has attempted to support the judgment on two grounds: firstly, that the agreement dated 25-6-1942, was executed subsequent to 17-7-1942, and the document had been purposely ante-dated to defeat the plaintiff's claim. The other ground is that even though the agreement may have been entered into on 25-6-1942, it must be deemed to have come into existence on 25-9-1942, when Sampat Ram and Ram Gopal had the right to enforce that contract.

(5) As regards the first ground, there is no mention made in the plaint that the defendants were fraudulently setting up a prior agreement of 25-6-1942, that there was in fact no such agreement entered into between the parties on that date and the document had been ante-dated to defeat the plaintiff's claim. Learned counsel has relied on paragraph 3(a) which was introduced by way of amendment on 1-10-1942. But that paragraph does not raise the point. It is as follows:

> "After institution of this suit, the defendant executed a fictitious and ostensible sale-deed in respect of the property in dispute, in favour of defendants 2 and 3 and defendants 2 and 3 with full knowledge of all the facts obtained in their favour the fictitious, ostensible and improper sale-deed which has no effect on the rights of the plaintiff. As a safeguard against a future dispute, they are, however, impleaded."

The defendants specifically relied on the agreement of the 25th June and yet at the time when the issues were framed, the plaintiff did not challenge the date of the agreement entered into between defendant 1 and defendants 2 and 3. The learned Civil Judge framed five issues and then two issues were subsequently added, but this matter was not put in issue at all. The law on the point is well-settled that no party is allowed to prove fraud, unless it has pleaded fraud. From the judgment of the learned Civil Judge it appears that no arguments were advanced before him that this agreement of 25-6-1942 was not executed on that day, but had been later manufactured for the purpose of defeating the plaintiff's claim.

Abdul Majid and Ram Gopal, both the parties to the agreement, went into the witness-box and no question was put to them that the document of 25-6-1942 was not executed on that day and it had been executed later and a wrong date had been given to it. Kunj Behari Lal broker came into the witness-box and he said in cross-examination that he could not deny

> "if Sampat Ram got an agreement through some other broker with Abdul Majid. Exhibit G-2 dated 25-6-1942 bears the signature of Abdul Majid."

Babu Lal plaintiff was examined as his own witness. He too does not say that there was in fact no agreement between defendant 1 and defendants 2 and 3 on 25-6-1942. There was, therefore, not only no pleading on the point but even in the witness-box there was no assertion by anybody that there was no agreement entered between the defendants on 25-6-1942 and the document was a fabricated document.

Though there was no pleading and no assertion in the lower Court, the learned counsel wanted to place before us a register, Exhibit JJ-2, which was maintained by the stamp vendor. Before we stopped arguments on the point on the ground that the matter was not put in issue and it could not be raised before us, we looked at the document and we did not find anything suspicious in the entry of the 25th of June as to the sale of stamp of twelve annas to Abdul Majid. A number of sale-deeds were filed to show that Imam Uddin the stamp vendor was not a man who had an exemplary character, but those judgments (sic; sale-deeds?) can hardly be considered to be relevant. It must, therefore, be held that there was an agreement on 25-6-1942 between Abdul Majid and Sampat Ram and Ram Gopal as has been proved by Ram Bharosey, Ram Gopal and Abdul Majid.

(6) The agreement in favour of Sampat Ram and Ram Gopal being of a prior date, namely, 25-6-1942, the plaintiff can claim no equities against Sampat Ram or Ram Gopal and cannot, therefore, enforce his agreement of a subsequent date 17-7-1942 as against them.

(7) Two points have, however, been raised, firstly, that the plaintiff had no knowledge of this prior agreement. So far as we can see, that would hardly make any difference, but we agree with the learned Civil Judge that there was sufficient evidence on the record to indicate that the plaintiff knew of the agreement dated 25-6-1942 when he agreed to purchase the properties for Rs. 37,000/- on 17-7-1942. The plaintiff and the defendants 2 and 3 are residents of the same Mohalla in the city of Agra, Haveli Kanha Patail, Loha Mandi, Agra. They are related to each other, Sampat Ram being nephew of the plaintiff. Sampat Ram being very old could not come into the witness-box. Ram Gopal was examined as a witness and he stated in his examination-in-chief that Babu Lal knew of the agreement in his favour. Though Ram Gopal was

cross-examined on various other points, not a single question was asked challenging this part of his statement.

There is on the record the evidence of Kunj Behari Lal, plaintiff's witness, the broker who negotiated the contract between defendant 1 and the plaintiff. His evidence indicates that it was known to him that there was this prior agreement between Abdul Majid and Sampat Ram and Ram Gopal. Kunj Behari Lal said in his examination-in-chief that Abdul Majid asked him first to approach Sampat Ram and Ram Gopal and find out from them whether they would like to purchase the properties and on the 17th of July, after the plaintiff had agreed to purchase the properties for Rs. 37,000/-, Kunj Behari Lal went to Sampat Ram and Ram Gopal and wanted to know from them whether they would like to have the properties for that price as Abdul Majid would like to sell the properties first to them and that it was on their refusal to pay Rs. 37,000/- that he brought Babu Lal to the house of Abdul Majid and the agreement in favour of the plaintiff was entered into.

Babu Lal also said in cross-examination that Sampat Ram had told him 10 or 15 days before the agreement that he would not purchase the properties of Abdul Majid. Sampat Ram and the plaintiff Babu Lal had, therefore, some talk about the sale of these properties by Abdul Majid and there does not appear to be any reason why Sampat Ram should have kept back from him the information about the agreement dated 25-6-1942. Further the conduct of the plaintiff after the middle of September indicates the great anxiety to have the sale deed executed early and this can be explained only with reference to the terms of the agreement of 25-6-1942. Upto 31-8-1942, the plaintiff does not seem to have taken any steps to have the sale deed executed in his favour.

No doubt the agreement dated 17-7-1942, provided that the sale-deed would have to be executed and completed within 60 days but for the first 40 or 45 days of that period the plaintiff does not seem to have done anything and even on 31-8-1942, all that he did was to send a letter blaming Abdul Majid for not having executed the document. Abdul Majid sent a reply on 8-9-1942, that the plaintiff should get a draft prepared and sent to him and then the plaintiff got a draft prepared and had it sent to Abdul Majid. The sixty days provided for the execution of the sale-deed, calculated from 17-7-1942, the date of the agreement, expired on 15-9-1942.

The contract could be specifically enforced within three years if time was not of the essence. The anxiety to have the sale-deed executed before 24-9-1942, is some indication of the fact that the plaintiff knew that some importance attached to that date. On the 24th September, the plaintiff sent a letter to Ram Gopal, though this letter did not reach Ram Gopal because his parentage and address were wrong, yet there was no necessity to send that letter unless the plaintiff wanted to fasten defendants 2 and 3 with notice of the agreement in his own favour and he would have anxiety to do that only if he knew that there was an agreement with them. We, therefore, agree with the finding of the lower Court that the plaintiff had knowledge of the agreement in favour of defendants 2 and 3 dated 25-6-1942.

(8) We shall now deal with the argument advanced by learned counsel that though there was an agreement in favour of Sampat Ram and Ram Gopal dated 25-6-1942, it must be deemed to have come into operation on 25-9-1942.

(9) Before we come to this point, we may dispose of the point, on which the lower Court decided in plaintiff's favour, a point, however, which has not been attempted to be supported by learned counsel. It was argued before the lower Court that the date of the agreement did not matter and if an agreement can be enforced on an earlier date that agreement must be deemed to have priority though it may be of a later date and that person would have a preferential right to buy the property. In other words, if an agreement is executed in favour of A on the 1st of July and two months' time is given for the execution of the sale-deed and another agreement is executed in favour of B on the 15th of July and the time fixed for execution of the sale-deed is one month, then since B's right to claim specific performance would arise on the 16th of August, he would be deemed to have a preferential right to buy the property as against A, the contract in whose favour would become enforceable on the 1st of September. This proposition is only to be stated to be rejected.

One agreement was entered on the 1st of July and the other on the 15th July and the rights, therefore, in favour of A accrued on the 1st of July, while the rights in favour of B accrued on the 15th July. Though one may have the right to claim performance of his contract on a later date, there is no provision of law which would make the contract of the 1st July a subsequent contract to the contract of the 15th July and the equities in favour of B, therefore, cannot be said to have come into existence before the equities in favour of A.

(10) Taking up now the proposition advanced by learned counsel that is based on an interpretation of the agreement dated 25-6-1942, in this agreement, after having set out how the property came to Abdul Majid and what debts he had to pay which made it necessary for him to transfer it, the terms agreed upon between the parties were set out and the first of these was as follows:

> "I shall execute a sale-deed in respect of the property bounded as given below and get it registered within a period of 3 months from this day i.e., by 25-9-1942 ....."

Paragraph 2 of it runs as under:

> "I have received this day in cash a sum of Rs. 1,000/- as earnest money from the vendee out of the total amount of consideration."

Paragraph 5 then provided:

> "An important condition between me and the vendee that has been agreed upon is that I, the vendor shall also have a right to sell the property that has been sold to any other person, if I so desire, within the stipulated period of 3 months that is upto 24-9-1942 and to pay to

the vendee aforesaid the amount due under the ruqqas and hypothecation bond aforesaid and the amount of earnest money with interest at the rate of Rs. 1-8-0 per cent per mensem but after 24-9-1942 this agreement shall become final and I the vendor shall have no right either to make a sale or gift of the property to any one. If I do not complete the sale-deed, the vendee shall have power to file a suit against me for performance of the contract and have registration formally made."

Reading these three paragraphs and reading the document as a whole it is clear that the agreement was entered into on 25-6-1942, and it was binding on the parties from that date. Neither party could claim after 25-6-1942, that there was anything in the document which provided that the agreement would not bind the parties from the date of its execution. Abdul Majid undertook to sell the property to Sampat Ram and Ram Gopal and Sampat Ram and Ram Gopal undertook to buy it. Sampat Ram and Ram Gopal, after 25-6-1942, could not say that they were not bound to purchase these properties. It was not open to them to say that upto 24-9-1942, there was no contract between them and, therefore, they could resile from it. If Abdul Majid did not want to avail himself of the concession of three months to try to get a better offer and had insisted on selling the property to Sampat Ram and Ram Gopal for Rs. 36,000/-, as agreed to on 25-6-1942, Sampat Ram and Ram Gopal could not refuse to purchase the property by reason of the concession given in paragraph 5.

The contract must, therefore, be deemed to be of the date that it bears, i.e., 25-6-1942. The only proper way, therefore, of interpreting the document would be that it was a binding document from the date that it was entered into but an option was given to Abdul Majid that he could sell the property to any one else within three months and pay up the debts due to Sampat Ram or Ram Gopal within that period. The deed provided that if he failed to avail himself of the concession he would have no right to transfer the properties to any one else after 24-9-1942.

Admittedly, the property was not sold to any one else within the period of three months and, on the expiry of that period in accordance with the terms of the contract, the properties were sold to Sampat Ram and Ram Gopal on 25-9-1942. In these circumstances we fail to see what equities could arise in favour of the plaintiff as against Sampat Ram and Ram Gopal to entitle him to enforce his contract as against them. The reason why an agreement is specifically enforceable against a subsequent transferee with notice is that having had notice of the prior agreement he buys the property subject to all the equities against the vendor. In the case before us there being a prior agreement in favour of Sampat Ram and Ram Gopal, it cannot be said that there were any equities which affected the title of the vendees. In our view, the suit was wrongly decreed for specific performance against Sampat Ram and Ram Gopal.

(11) As against Abdul Majid, the lower Court held that he was guilty of breach of the contract. Abdul Majid filed an appeal here but learned counsel appearing for him made a statement that he had no instructions and the appeal No. 393 of 1944 was dismissed by a Bench of this Court on 4-8-1953. Abdul Majid was represented by counsel who has also not appeared before us probably because he has no instructions. We have been informed by learned counsel that Abdul Majid has left for Pakistan and his estate, whatever it is, has vested in the Custodian. Notice of this appeal was sent to the Custodian who has, however, not chosen to enter appearance. We have carefully gone through the various correspondence and have not been able to find out the reason why Babu Lal and Abdul Majid fell out. Babu Lal had paid to Abdul Majid a sum of Rs. 5,000/- as earnest money on 17-7-1942. The agreement provided that the sale deed would be executed within sixty days.

No party seems to have done anything for about a month and a half and on 1-8-1942, Babu Lal sent the first letter to Abdul Majid and though under the terms of the agreement the draft had to be prepared by Babu Lal, he asked Abdul Majid to send him a draft. On 8-9-1942, Abdul Majid sent a reply through counsel that the draft should be sent by Babu Lal, that Babu Lal had probably not the funds to make the purchase and was, therefore, causing delay and that Abdul Majid was ready and willing to execute the sale-deed. The agreement provided that out of the sum of Rs. 5,000/- paid as earnest money, Abdul Majid would pay off the mortgage. Abdul Majid had not paid up the mortgage and in this notice he said that either he would clear up the encumbrance before the date of sale or would leave sufficient money in the hands of the vendee to pay up the mortgage. On 10-9-1942, Babu Lal sent a reply through a lawyer.

It is not usual for parties to send letters through lawyers at such an early stage of the correspondence, but in this case the parties seem to have desired almost from the very beginning to be at arms length. It is also surprising that though the lawyers were all practising in the same Court and probably meeting in the court-rooms and the bar-rooms, letters were sent by post and telegrams were exchanged while a talk in the bar-room could have made them settle the matter within a few minutes. However, on the 10th of September, Abdul Majid was sent a draft and was asked to come to the registration office along with the plan and Municipal tax receipts. Again the usual thing, when a person purchases property, is to find out from the Municipal office whether there are any arrears of taxes due and further to find out from the registration office whether there are any encumbrances. But that does not appear to have been done.

In this notice, it was mentioned that Babu Lal had plenty of funds and would be found ready with the balance of the purchase money in cash at the registration office at the time of the execution of the sale-deed. We may, however, mention that from the bank accounts filed by the plaintiff, it does not appear that he had in his bank Rs. 32,000/- before the 14th of September which

amount he quickly withdrew by October. However, from the fact that the money was not in deposit with the bank, it cannot be said that the plaintiff was not in a position, if need had arisen, to buy the properties on an earlier date. After the letter of the 10th September, Babu Lal sent another letter through a lawyer on the 14th of September and this time he mentioned that the sum of Rs. 32,000/- was in the Allahabad Bank, Agra and we find from the bank account that the money was to his credit on that date in the Allahabad Bank.

After that we have two letters and two telegrams from Abdul Majid raising various objections to the draft asking for a copy of the agreement and also mentioning that on the 14th of September, Abdul Majid had purchased the necessary stamp for the execution of the sale-deed. Nothing, however, happened and though the objections to the draft were sent and it was mentioned that on the 16th September Abdul Majid would be present in Court the whole day, the sale-deed was not executed. On the 16th, Babu Lal through his learned Advocate sent two letters, Exhibits 11 and 12. Each party was protesting that he was ready to perform his part of the contract and it was the other party who was not doing anything. Abdul Majid, in his turn, sent two telegrams on the same date, Exhibits 13 and QQ1, each claiming that he was present in the court-building the whole day and blaming the other for his absence. After the 16th of September, Abdul Majid repudiated his liability and Babu Lal threatened to file a suit.

(12) As we have said, it is difficult from these letters or telegrams to find out the exact reason why the sale-deed was not executed. There is just a sentence in the statement of the plaintiff which might give some indication. The plaintiff said in his cross-examination in answer to a question put to him on behalf of Abdul Majid that if Abdul Majid had failed to procure rent notes from tenants, Babu Lal would have had to consider whether or not he would have the sale-deed completed. It appears that this house is in the occupation of a number of tenants to whom it had been let out by one Mohammad Hafiz. Abdul Majid mostly lived in Aligarh and there was a lease in favour of Hafiz Ullah or Mohammad Hafiz dated 31-10-1927 giving him the property on lease for a period of three years, he being liable to pay to Hafiz Abdul Aziz, the then owner, Rs. 65/- a month.

After Hafiz Abdul Aziz, the property came to Abdul Majid and though there does not appear to have been any fresh agreement executed, Hafiz Ullah continued to let out the house to tenants and to realise rents from them and to pay the same to Abdul Majid. The amount that Abdul Majid was getting at the time that the agreement was entered into was Rs. 100/- a month. In the agreement dated 25-6-1942 in favour of Sampat Ram and Ram Gopal, there was a mention that the vendor will either get a lease executed by the lessee or get rent-notes from the tenants who were in possession of the property in favour of the vendees. In the agreement in favour of Babu Lal dated 17-7-1942, however, Abdul Majid undertook to get rent-notes from the tenants and no mention was made of Mohammad Hafiz.

When Sampat Ram and Ram Gopal purchased the properties, on the date of the purchase a lease was executed by Mohammad Hafiz in favour of the vendees for a period of three years and Mohammad Hafiz undertook to pay them Rs. 110/- per month and collect the amount due from the tenants. Evidently Babu Lal was not agreeable to this arrangement that Mohammad Hafiz should continue to realise the rents and pay a lesser amount to the owner of the property.

(13) Be that as it may, the lower Court has held that Abdul Majid was guilty of breach of contract and the burden of proving that that decision is wrong is now on Abdul Majid. As we have already said, no one has appeared on his behalf nor is it clear that it was Babu Lal who was to blame for the non-execution of the sale-deed in accordance with the terms of the agreement of 7-7-1942. In the circumstances, we think that Abdul Majid should be made to refund the sum of Rs. 5,000/- which he received as earnest money. This amount will carry simple interest at the rate of 3½ per cent from the date of the suit to the date of realisation.

(14) The appellants Sampat Ram and Ram Gopal will be entitled to their costs from Babu Lal of both the Courts. Babu Lal will bear his own costs.

D.H.Z. Appeal allowed.

(S) A.I.R. 1955 ALLAHABAD 28 (Vol. 42, C.N. 9)

MUKERJI AND ROY JJ. (9-6-1954)

Gopal Ji and others, Applicants v. Shree Chand and another, Opposite Parties.

Criminal Misc. Writ No. 19 of 1954.

(a) Criminal P. C. (1898), S. 491 — Delay in making application.

The fact that a long time of 7 months lapsed or was permitted to lapse between the period of the removal of the children and the petition being made to the High Court for their custody or their recovery back, indicates that the petition was made not because the detention of the children was illegal, at any rate, in the point of view of the petitioner, from its inception, or that there was any danger, to begin with, to the lives of the children if they remained in the custody of the opposite parties. (Para 4)

Anno: Criminal P. C., S. 491 N. 10.

(b) Criminal P. C. (1898), S. 491 — Exercise of discretion.

Under S. 491 the High Court is not bound to act; the relief which the Court grants is a discretionary relief, and the discretion which the Court is enjoined to exercise is only when the Court thinks it fit to exercise such a discretion. AIR 1930 All 260, Rel. on. (Para 7)

Anno: Criminal P. C., S. 491 N. 6.

(c) Constitution of India, Art. 226 — Habeas Corpus — Custody of minors — (Criminal P. C. (1898), S. 491).

It is possible for a legal guardian to initiate proceedings by a petition of 'habeas corpus' to recover the custody of minors if those minors are in illegal custody or if the minors are being detained in custody which would be detrimental to the interest of the minors. In determining whether or not relief is to be granted to a petitioner, the paramount consideration should be the welfare of the minors. If in the circumstances of any particular case, it appears to the Court that the paramount interests of the minors do not demand that action be taken, then it is open to the Court to refuse the prayer. (Para 8)

Anno: Criminal P. C., S. 491 N. 8.

(d) Interpretation of Statutes — Special and general Acts — (Civil P. C. (1908), Pre.)

Where there is a special Act dealing with a special subject, resort should be had to that Act instead of to a general provision which is exercisable or which is available under extraordinary circumstances only. AIR 1935 All 55, Rel. on. (Para 7)

Anno: Civil P. C., Pre. N. 7.

CASES REFERRED: Paras

(A) (V17) AIR 1930 All 260: 1930 All LJ 615: 31 Cri LJ 719 7

(B) (V22) AIR 1935 All 55: 1934 All LJ 946: 36 Cri LJ 554 7

(C) (V35) AIR 1948 Mad 103: 49 Cri LJ 60 8

Jagdish Narain Agarwala, for Applicants; M. B. Bhatnagar, for Opposite Parties; J. R. Bhatt Asst. Govt. Advocate, for the State.

MUKERJI J.:

This is an application by three persons, Gopal Ji, Laxmi Devi and Radha Krishna, under S. 491, Criminal P. C., as also under Art. 226 of the Constitution of India. Article 226 has apparently been added because the prayer which has been made is a prayer that is generally made in applications for 'habeas corpus'. The prayer is that a writ of 'habeas corpus' be issued to set at liberty Gopal Ji and Laxmi Devi, applicants Nos. 1 and 2, from illegal detention and illegal custody of the opposite parties.

(2) The allegations on which this application was founded were that Gopal Ji and Laxmi Devi are two minor children of applicant No. 3, Radha Krishna. Gopal Ji is a boy of about six years, while Laxmi Devi is a little girl of about two years of age. The mother of these two minor children suddenly died of cholera on 2-11-1953 at the Colvin Hospital, and that Shri Chand and Kamta Prasad, the opposite parties, thereafter took away the two minor children to their house, that the opposite parties have refused to send back the children to their father and they are demanding a sum of Rs. 500/- as a kind of ransam for sending back these children.

In the affidavit it was alleged that the children were in danger of harm, and that if they were not forthwith released from the custody of the opposite parties then there was grave danger to their life. It may be here stated that in the affidavit of the petitioner no mention was made as to there being any relationship between Srichand and Kamta Prasad on the one hand and the three petitioners on the other. From the affidavit and the petition it appeared as though the opposite parties were total strangers, and that they were detaining the two minor children in order to make unlawful gain out of their detention.

(3) Notices were issued to the opposite parties to show cause, and in answer to that notice the opposite parties have shown cause and have also produced the two minor children in Court today in order to receive final orders in regard to their custody from us.

(4) The counter-affidavit filed by Kamta Prasad on behalf of the opposite parties discloses that Kamta Prasad is the Mausa (a kind of maternal uncle) of the two minors, and opposite party Srichand is the maternal uncle of the minors. From the counter-affidavit it is clear that when Gayatri Devi, the mother of the two minors, was taken seriously ill on 22-11-1953, then her sister, that is to say, Kamta Prasad's wife, rushed to see her. While this lady was in the company of the very ill Gayatri Devi, she told her that she was dying and she wanted her to look after her little children in the event of her death. Gayatri Devi died in hospital the same night as she had an attack of virulent cholera and the children were, according to the allegations in the affidavit, removed the same night to the house of Kamta Prasad by his wife who was the maternal aunt of the minor children.

It is beyond controversy that from that time onwards the children have been in the custody of these maternal relations of theirs. The period of their stay with these relations has been seven months—this application having been made on 21-5-1954. The fact that such a long time lapsed or was permitted to lapse between the period of the removal of the children and the petition being made to this Court for their custody or their recovery back, indicates to us that the petition was made not because the detention of the children was illegal, at any rate, in the point of view of the petitioner, from its inception, or that there was any danger, to begin with, to the lives of the children if they remained in the custody of the opposite parties. We have a feeling that this petition has been made for other reasons than those disclosed to us in the affidavit filed on behalf of the petitioner.

(5) We examined Gopalji, the little boy of six years, and we were impressed by the intelligent manner in which he understood our questions and replied to them. He was perfectly at ease when we talked to him, and from our conversation with him it was clear to us that he would be most unhappy if we direct his removal from where he is at the present moment to the custody of the father. He even alleged that his father unnecessarily beat him. We may mention that on behalf of the opposite parties there was no such allegation in the counter-affidavit so that it could not be said that the little child had been coached to say this in order to support an allegation made on behalf of the opposite parties.

We have been unable to believe the allegation made in the affidavit of the petitioner that there

was any demand of ransom by the opposite parties. We are also unable to believe that there is any danger to the lives of the minors if they remain in the custody of the opposite parties. We are on the other hand satisfied that the children are quite happy where they are. It may be pointed out that the children are, strictly speaking, not in the custody of either Srichand or Kamta Prasad, but they are in the custody of Kamta Prasad's wife who is not an opposite party to these proceedings but who has been looking after the children as any mother can look after any children. In the counter-affidavit it has been averred that Kamta Prasad has no children, and that he and his wife have been very fond of these children ever since their birth. This allegation to us appears to be true.

(6) As we pointed out earlier, the children came into the custody of Kamta Prasad's wife not illegally but they came into her custody because their dying mother made a request to Kamta Prasad's wife to look after these children if she were to die. It appears to us that Kamta Prasad's wife has been honouring that sentiment and, possibly, that pledge that she gave to her dying sister.

(7) It was contended on behalf of the applicant that the father who has made this application was the natural and the legal guardian of the two minors, and that he cannot be defeated in the matter of the guardianship of his own children by their maternal relations. As a bald proposition of law we do not dispute it. But the question that we have to consider in this application is not, as to the right of the father—his preferential right—to the guardianship of these two minor children, but the father's right in these proceedings to obtain the custody of the two minor children. It will be noticed that under S. 491, Criminal P. C., this Court is not bound to act: the relief which this Court grants is a discretionary relief, and the discretion which this Court is enjoined to exercise is only when this Court thinks it fit to exercise such a discretion. In the case of — 'Sultan Singh v. Maya Ram Radha Swami', AIR 1930 All 260 (A), Dalal J. held that S. 491 (1) (b) gave this Court power to act only when it thought fit to direct that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction be set at liberty. It was pointed out that in the very nature of things the power would be exercised in cases of urgency, where, for instance, the father is suddenly deprived of the custody of his children and there is danger to the life of the children in the transferred custody.

The equivalent writ of 'habeas corpus' was used as a high prerogative writ in England in appropriate cases to restore minors to proper custody when they were in illegal detention. The writ was never utilized or used for purposes of merely determining the rival claims of competing guardians: that claim has to be determined under the appropriate law, namely under the Guardians and Wards Act. In — 'Mt. Haidari Begum v. Jawad Ali', AIR 1935 All 55 (B), Bennet J. under similar circumstances held:

> "That the power under S. 491, Criminal P. C. is a general power of the nature of a 'habeas corpus'. The power under the Guardians and Wards Act is a power under a Special Act dealing with a special subject, that is, the subject of minors."

He further took the view, and in our opinion rightly, that where there was a special Act dealing with a special subject, resort should be had to that Act instead of to a general provision which was exercisable or which was available under extraordinary circumstances only.

(8) On behalf of the applicants reliance was placed on certain cases which held that where a legal guardian or a "preferential" guardian, at law, makes an application for the custody of children who are in the custody of people who have no such right, then action can be taken under S. 491, Criminal P. C., and the children can be restored to the guardianship or custody of the preferential guardian. We have no doubt that in appropriate cases this can be done and should be done. The question which has to be seen in every case is whether on the facts and circumstances of that particular case action was called for under S. 491, Criminal P. C., or not. The cases which were cited to us were cases where there was nothing to indicate that an order in favour of the legal guardian was not called for under the circumstances of those cases, or there was anything in the circumstances of those cases on which the Court could have justly refused to act under the provisions of S. 491, Criminal P. C.

In the case of — 'Venkataramaniah Chetty v. Pappamah', AIR 1948 Mad 103 (C), Rajamannar J. passed a conditional order in regard to the custody of a married girl who was below the age of thirteen years. Although Rajamannar J. held that the custody of the girl by the opposite party was not lawful when the question was raised in comparison with the custody which was sought by the applicant—husband, yet he held that the husband was not to have the custody of his minor wife, but that she was to be put in an institution for a period of one year and that the husband was to incur the expenses of such stay, so that the girl may be of age when there could be a proper and timely consummation of marriage. This order was made because it was contended by the opposite party that she was being kept away from the husband for the fear that if she went to his house the husband would prematurely consumate the marriage.

As we have stated earlier, we do not dispute the proposition that it is possible for a legal guardian to initiate proceedings by a petition of 'habeas corpus' to recover the custody of minors if those minors are in illegal custody or if the minors are being detained in custody which would be detrimental to the interest of the minors. We are of the opinion that in determining whether or not relief was to be granted to a petitioner, the paramount consideration should be the welfare of the minors: We are of the opinion that if, on the circumstances of any particular case, it appears to the Court that the paramount interest of the

minors do not demand that action be taken, then it is open to the Court to refuse the prayer.

This is what we have felt in the present case, namely, that we are satisfied that it is not in the best interest of the minors that we should give any relief to the petitioner. We should further point out that in this case, on the allegations made in the counter-affidavit, there would be no female in house of the petitioning father who could take care of the infant girl Laxmi Devi. The father has an old mother who sometimes stays with him but she, though she was present in Court and watched these proceedings, gave no undertaking to us that she was prepared to accept the responsibility of looking after and caring for the minors.

(9) Learned counsel for the petitioners wanted us to say that the observations which we have made in this judgment of ours should not be taken to prejudice the case of the father in the event of the father initiating appropriate proceedings under the Guardians and Wards Act. Left to ourselves, we would have thought it unnecessary to make any such observation but as learned counsel has specifically requested us to say so, we do state that our observations made in these proceedings should not be used to prejudice the decision of any proceedings that may be initiated under the Guardians and Wards Act hereafter.

(10) For the reasons given above, we dismiss this application, but under the circumstances of this case we make no orders as to the costs of this petition.

D.H.Z. Application dismissed.

(S) A.I.R. 1955 ALLAHABAD 31 (Vol. 42, C.N. 10)

MALIK C. J. AND V. BHARGAVA J. (7-5-1954)

T. G. Jog, Applicant v. Sri Ram Sarup and others, Opposite Parties.

Civil Revn. No. 644 of 1952, against order of 1st Civil J., Kanpur, D/- 16-4-1952.

Civil P. C. (1908), O. 1, R. 8 — Addition of parties.

The plaintiffs, the share-holders of a company which was defendant 1, brought a suit in a representative capacity on behalf of the share-holders other than those who had been impleaded as defendants 2 to 15, for a declaration that the resolutions passed on 20-10-1947 appointing defendant as Managing Agents and amending the Articles of Association were void and inoperative. Certain other declarations and injunctions were also prayed for. Subsequently, two of the share-holders filed an application for being added as co-plaintiffs on ground that the plaintiffs had not asked for all the reliefs that could be asked and that not only certain resolutions passed on 20-10-1947 were bad but the resolutions passed earlier on 26-5-1947 were also invalid. They also wanted that certain further reliefs should be asked for by amendment of plaint. Another application was filed by a batch of 51 share-holders for being impleaded as co-defendants on ground that the plaintiffs did not represent their interest and that since they had acquired their shares after the said resolutions were passed on 20-10-1947 it was not to their interest to challenge those resolutions. The Court dismissed these applications:

Held, that (i) in the circumstances it would have been proper for the lower Court to implead the applicants as defendants to the suit. It was, however, not possible to impose on the plaintiffs a person who claimed that his interests were adverse to those of the plaintiffs and to force the plaintiffs to amend their plaint and claim a relief which they did not want. All that could be done in the circumstances of the case was to make it clear that the plaintiffs did not represent these objecting share-holders who should be impleaded as defendants: (1878) 9 Ch D 552; (1882) 21 Ch D 718, Rel. on. (Paras 4, 5)

(ii) in the application filed by 51 share-holders who all claimed to have the same interest, an order impleading them all will result in unnecessary delay. It will be enough if these 51 persons are represented by one or two of their number who may be impleaded under O. 1, R. 8 of the Code as representing others. It will be for the lower Court to decide which of these applicants out of 51, not exceeding two, shall represent that body. (Para 8)

Anno: Civil P. C., O. 1, R. 8 N. 18.

CASES REFERRED: Paras

(A) (1878) 9 Ch D 552: 39 LT 413 6

(B) (1882) 21 Ch D 718: 51 LJ Ch 575 6

K. L. Misra, and S. N. Katju, for Applicant; R. S. Pathak, Brij Lal Gupta, and G. S. Pathak, for Respondents.

ORDER: These two civil revisions under S. 115, Civil P. C., are against two orders passed by the First Civil Judge of Kanpur on 16-4-1952, in a suit pending in his Court. The suit was filed on 24-8-1950, by Ram Sarup Bhartiya and Anandi Lal Bhartiya against the Kanpur Muir Mills Company, Ltd., Indian Textile Syndicate, Ltd., and 13 others. The reliefs claimed in the plaint are as follows:

(1) For a declaration that the special resolutions 1 and 2 passed on 20-10-1947, appointing defendant 2 as Managing Agents and amending the Articles of Association of the Company are void and inoperative.

(2) For a declaration that the appointment of defendant 2 as Managing Agents is void, inoperative and not binding on the company and on its share-holders.

(3) For a declaration that the appointment of defendant 13 Cotton Textile Corporation, Ltd., and thereafter of the Kanpur Agencies, Ltd., defendant 15 as the Selling Agents is void, inoperative and not binding on the company and on its share-holders.

(4) For a declaration that the appointment of Textile Distributors, Ltd., as distributors of the company's products, is void, inoperative and not binding on the company and its share-holders.

(5) For a declaration that, in any case, the present Art. 99 does not debar or disentitle a share-

holder from casting one vote for each share held by him on a poll.

(6) For an injunction restraining the company and the defendants from giving effect to and acting on the above special resolutions.

(7) For an injunction restraining defendant 2 from acting as Managing Agents of the company.

(8) For an injunction restraining defendants 13 and 15 from acting as Selling Agents of the company.

(9) For an injunction restraining defendant 14 from acting as distributors of the company's products.

(10) For an injunction restraining defendants 3, 4, 7, 8, 9, 10 from taking any step to act as such Board of Directors or from passing any resolution as such Board of Directors for issue of any such debentures by or on behalf of the company.

(11) For a declaration that the defendants Nos. 3, 4, 7, 8, 9 and 10 do not constitute a valid and proper Board of Directors of the Company.

(12) For appointment of a Receiver or a Manager or a Committee of Management.

(13) For account of such profits as have been made by defendants by using the position and offices referred to above and for a decree for Rs. 5,000/- or for such sums as may be found due to the company from the defendants.

(14) For costs of the suit.

(15) For such other relief or reliefs as may be deemed fit and proper.

(2) The plaintiffs are the share-holders in the Muir Mills Company Ltd., Kanpur, defendant 1 and, on 24-8-1950, they filed an application that they were filing the suit on behalf of themselves as also on behalf of other share-holders of the said company, except those who had been arrayed as defendants in the case. Since the number of share-holders of the Kanpur Muir Mills Company, Ltd., was very large and aggregated several hundreds and it was not possible to implead all of them either as plaintiffs or as defendants, the plaintiffs prayed for permission under O. 1, R. 8, of Civil P. C., to institute this suit in a representative capacity on behalf of share-holders other than the share-holders who had been impleaded as defendants.

Information regarding this suit was published in the Statesman, and in other newspapers, such as, the Citizen of Kanpur, the Amrit Bazar Patrika, the Hindustan Times, Kanpur Edition, the Pratap, the Jagran and the Vir Bharat. These publications were made in August and September, 1950. An application was filed by Shri T. G. Jog and Shri Subhkaran, who held ordinary shares in the Muir Mills Company, Ltd., Kanpur, on 31-1-1951, and another application was filed by 51 share-holders of the mill on 2-2-1951.

In the first application filed by Shri T. G. Jog and Shri Subhkaran, it was claimed that the plaintiffs had not asked for all the reliefs that could be asked and that not only certain resolutions passed on 20-10-1947, were bad but the resolutions passed earlier on 26-5-1947, were also invalid. Shri T. G. Jog and Shri Subhkaran, therefore, wanted to be added as co-plaintiffs and they also wanted that certain further reliefs should be asked for by amendment of the plaint.

In the other application filed on behalf of 51 share-holders, it was pleaded that they may be impleaded as defendants since they had acquired shares in the company after 20-10-1947, and they were not prepared to challenge the resolutions of that date. They claimed that the plaintiffs did not represent their interest.

(3) It is not necessary for us, in this case, to go into the facts in greater detail. We may, however, briefly mention that, on 26-5-1947, Arts. 4 and 161 of the Articles of Association were amended and preference share-holders were placed on a footing of equality with the ordinary share-holders in the matter of payment of dividends. On 20-10-1947 certain other amendments were made in the Articles of Association and Art. 161 was re-numbered as 166 and a new set of Articles were adopted though most of them were similar to the old ones.

We may also briefly indicate that the plaintiffs have challenged the amendments made on 20-10-1947, while Shri T. G. Jog and Shri Subhkaran have claimed that they want to go beyond the reliefs asked for by the plaintiffs and have challenged the amendments made on 26-5-1947, placing the preference share-holders on the same footing as the ordinary share-holders in the matter of participation in the division of dividends. We have already indicated that the other 51 share-holders claim that since they had acquired their shares after 20-10-1947, it was not to their interest to challenge those resolutions. This position has been accepted by the learned Civil Judge. Dealing with the application of Shri T. G. Jog and Shri Subhkaran, the learned Judge has remarked:

"It is clear that the plaintiffs and the present applicants do not have the same interest in the present suit. The applicants want to introduce allegations and reliefs which are diametrically opposed to the allegations and the reliefs of the plaint and which are really aimed against the plaintiffs rather than against the defendants. It is thus clear that the applicants are not at all interested in obtaining the reliefs sought in the plaint, but they are interested in getting other reliefs in which the plaintiffs are not interested.

The reliefs claimed in the plaint and the reliefs sought to be added by the applicants are really aimed at each other. The addition of the reliefs proposed by the applicants would change the nature of this suit and would start a dispute amongst the share-holders."

Dealing with the other application, the learned Civil Judge has said:

"The applicants Hira Lal Sootwala and fifty others do not assert in their application that the suit has been instituted for their benefit, but they alleged on the other hand that the plaintiffs are not entitled to get the proceedings of the general meeting of the Company held on 20-10-1947, set aside to the detriment of the applicants amongst others and that the applicants became share-holders of the Company after the said date in the belief that the acts of the Company on that date were valid and proper."

(4) In spite of these findings, the learned Judge dismissed the applications on the ground that there were no allegations that the plaintiffs were not prosecuting the suit diligently. The result, however, of the decision of the lower Court is that though the lower Court has held that the plaintiffs' interest is not identical with the interest of the applicants, the plaintiffs have been allowed to represent them and obtain a decree which either they do not want or which is different from what they want. In the circumstances, we consider that it would have been proper for the lower Court to implead the applicants as defendants to the suit.

On behalf of the applicants, Shri T. G. Jog and Shri Subh Karan, the learned Advocate General has pleaded that the applicants should have been impleaded as co-plaintiffs and Shri S. N. Katju on behalf of the Muir Mills Company, Ltd., Kanpur, has urged that the plaint should have been allowed to be amended as otherwise it might lead to multiplicity of suits.

(5) It is, however, not possible to impose on the plaintiffs a person who claims that his interests are adverse to those of the plaintiffs and to force the plaintiffs to amend their plaint and claim a relief which they do not want. All that we can do in the circumstances of the case is to make it clear that the plaintiffs do not represent these objecting share-holders who should be impleaded as defendants. In the plaint, it is mentioned that the suit is on behalf of all the share-holders, except defendants 2 to 15. It is necessary to indicate that the suit is not only not on behalf of defendants 2 to 15 but also not on behalf of Shri T. G. Jog and Shri Subhkaran and Shri Hira Lal Sootwala and 50 others who have made the other application.

(6) The above order proposed by us is in line with the course adopted by the Courts in England in such circumstances. In — 'Wilson v. Church', (1878) 9 Ch D 552 (A), Jessel, M. R., observed:

> "As regards the latter claim, inasmuch as O. 14, R. 9, requires that there shall be 'numerous parties' where one defends on behalf of others, and as he has not proved that there is anybody who dissents but himself, it is quite clear that I cannot make him a party in a representative way, and he cannot be a representative without a constituency. That is not the modern practice of legislation or pleading; but it does not at all follow that he is not entitled to be made a party. He has an interest even as an individual. He says, in effect, 'my rights will be affected', and they certainly will, if judgment is given in favour of the plaintiffs, 'and I insist that I should be here to dispute the contention of the plaintiffs'. I think that is too plain for argument."

His Lordship, after this observation, directed that the applicant should be impleaded as a defendant.

In — 'Fraser v. Cooper', (1882) 21 Ch D 718 (B), the plaintiff, a bondholder of a railway company, sued on behalf of himself and all the bondholders of the company other than defendant B but did not obtain an order under O. 16, R. 9, that B should be sued as representing all bondholders who dissented from the plaintiff's claim. One of the bondholders took out a summons whereby he stated that neither the plaintiff nor the defendant B properly represented the interest of himself and certain other bondholders, and applied to be made a defendant. The learned Judge held that the proper order would be to direct that the applicant be made a defendant.

(7) Since it is necessary that all the share-holders, who want to be represented in the case, be parties before the court, we direct that Shri T. G. Jog and Shri Subhkaran be impleaded as defendants to the suit.

(8) In the other application filed by Hira Lal Sootwala and 50 others, who all claim to have the same interest, an order impleading them all will result in unnecessary delay. It will be enough if these 51 persons are represented by one or two of their number who may be impleaded under O. 1, R. 8 of the Code as representing others. It will be for the lower Court to decide which of these applicants out of 51, not exceeding two, shall represent that body.

(9) Counsel have complained to us that there has been some delay in the conduct of this case. We are informed that though the suit was instituted on 24-8-1950, it has not made much progress. It appears to us, therefore, to be necessary that we should give some directions to the lower Court so that the hearing of the suit may not be unnecessarily delayed. The record, we understand, has been summoned to this Court. It shall be sent down to the lower Court as early as possible. On receipt of the record, the lower Court will grant reasonable time to Shri T. G. Jog and Shri Shubhkaran to file their written statement and, after the learned Judge has decided as to who should be brought on the record out of the 51 applicants (Hira Lal Sootwala and others), he shall grant them reasonable time to file their written statement.

The learned Judge will not grant unnecessary adjournments nor should he allow parties to delay the proceedings. It is necessary that he should be in a position to finish this suit as early as possible. If the other defendants want to file supplementary written statements, they may also be given reasonable time for that purpose. After the written statements have been filed, the learned Judge will fix an early date for filing all papers and framing of issues. After that, an early date should be fixed for the hearing of the suit which should proceed from day to day. Shri Pathak has prayed that a Special Judge be appointed for the trial of the case. We consider that it is a fit case where if possible a Special Judge may be appointed to hear the case after it is ready.

(10) We do not think it necessary to make any orders as to costs.

(11) The stay order is discharged.

K.S.B. Order accordingly.

(S) A.I.R. 1955 ALLAHABAD 33 (Vol. 42, C.N. 11)

MALIK C. J. AND CHATURVEDI J. (24-8-1954)

Banarsi Das and others, Applicants v. State of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ No. 45 of 1954.

(a) Constitution of India, Arts. 16, 14 — Scope and object — U. P. G. O. dated 7-3-1953 — Validity — Equality of opportunity for employment under State — Discrimination.

Article 16 of the Constitution was not intended to prevent the State Government from laying down the qualifications for a service, within which term should be included not only educational qualifications but also physical fitness, age, character, sense of discipline, etc. What are the qualifications that are required and what should disqualify a person from Government service are matters in which the discretion should vest in the State Government and unless there has been a flagrant abuse of power, or there has been discrimination which has contravened any provision of the Constitution, the Courts should not lightly interfere. (Para 12)

Held that the State of U. P. was entitled to lay down that it would not reappoint those Patwaris who had taken part in the mass agitation with the object of putting undue pressure on the State Government and that the rule in U. P. G. O. dated 7-3-1953 which excluded those Patwaris who had resigned and who had not withdrawn their resignations by 4-3-1953 from re-appointment was not contrary to the provisions of Art. 16. The fact that some of those who had resigned and had before the due date withdrawn their resignation was a relevant factor which might have influenced the State Government in deciding to re-appoint them provided their character rolls were good and they had not attained a particular age.

(Paras 12, 13)

It could not also be said that there was any discrimination within Art. 14 if there was some reasonable basis for excluding the Patwaris who had resigned 'en masse' and had not withdrawn their resignations. (Para 14)

Anno: Const. of India, Art. 16, N. 2, 3.

(b) Constitution of India, Arts. 226 and 14 — Presumption as to existence of state of facts — (Evidence Act (1872), S. 114).

If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. No grievance can, therefore, be made of the fact that in the counter-affidavit filed on behalf of the State the reasons have not been set out which prompted the State Government to exclude the petitioners from re-appointment. AIR 1951 SC 41, Ref. to. (Para 15)

Anno: Const. of India, Article 226, N. 42; Evi. Act, S. 114 N. 1.

CASE REFERRED: Para

(A) (V38) AIR 1951 SC 41: 1950 SCR 869 (SC) 15

Jaganandan Lal and G. S. Pathak, for Petitioners; Advocate-General, for Opposite Parties.

ORDER: This writ petition has been filed on behalf of 734 applicants who have impleaded as opposite parties the State of Uttar Pradesh, Minister for Revenue and Agriculture, U. P., Land Reforms Commissioner, Uttar Pradesh, Lucknow, Collector of Meerut, Collector of Muzaffarnagar, ten Sub-Divisional Officers of various sub-divisions in Meerut, Muzaffarnagar and Ghaziabad as also 609 persons who have been appointed Lekhpals.

(2) A preliminary objection was raised by the learned Standing Counsel that an application by 734 petitioners against 609 Lekhpals would give rise to confusion as the facts may not be same in every case and the considerations that might have weighed in each case might have been different.

(3) It is, however, not necessary to go into the preliminary objection as Mr. Pathak has stated that he will not go into the individual cases of the 734 petitioners or the 609 Lekhpals but would confine himself to general questions which affect them all.

(4) In the State of Uttar Pradesh there was a class of Government servants who were known as Patwaris. Their number was about twenty-eight thousand. They were appointed under the rules made under S. 234, Land Revenue Act (3 of 1901). The relevant portion of S. 234 reads as follows:

"234. The State Government may make rules consistent with this Act in respect of matters under clauses.....

(a) ....

(b) regulating the appointment and transfer of Kanungos and patwaris, their salaries, qualifications, duties, removal, punishment, suspension, and dismissal."

Section 21 of the Act provides that the Collector with the previous sanction of the State Government may arrange the villages of the district in halkas and may, from time to time, alter the number limits of such 'halkas'. Section 23 then lays down that "The State Government shall appoint a Patwari to each 'halka'."

(5) It is not necessary to deal here with the duties of the Patwaris. They are contained in the Land Revenue Act and the Land Records Manual. Their main function, however it may be mentioned, was to maintain village records and make periodical entries therein as to the person in possession of the holdings and in what capacity, the crops grown therein, the conditions of the crops and other similar information. The salary drawn by the Patwaris was Rs. 25-1-40 and ten per cent. of the total cadre could be given the special grade of Rs. 40-1-45 plus of course the usual dearness allowance.

(6) The Patwaris were dissatisfied with the salary paid to them and their conditions of service and they formed a Provincial Patwaris Association which was recognised by the Government in the year 1940. From time to time they made demands for improvement of those conditions of service and the rate of pay fixed by the State Government. In the first week of June, 1952, they held a Provincial Conference at which they passed certain resolutions which are contained in Schedule A to the affidavit of Banarsi Das and sent them to the authorities concerned. The demands mostly were for improvement in their conditions of service and an increase in the emoluments of the Patwaris. A reply was received that the demands will be placed before the Government. On 24-12-1952, a reminder was sent for an early reply. On 8-1-1953, a letter was sent to the Land Reforms Commissioner press-

ing the demands already made. On 9-1-1953, there was a pen down strike. Thereafter on 11-1-1953, an emergent meeting was held of the Working Committee of the Association to consider the situation arising on account of the publication of the new Land Records Manual in Hindi which it was said had made their conditions of service still worse.

On the 25th and 26th of January, 1953, there was an emergent meeting of the Association at which it was decided that, as the Government had not acceded to their demands, the Patwaris had no other choice but to resign and between the 2nd and the 4th of February, 1953, resignations were sent by 26,134 Patwaris. A copy of the resignation letter is Schedule B to the affidavit of Banarsi Das. The relevant portion of the letter of resignation may be translated as follows:

"I am, therefore, sending this my letter of resignation to you with a request that you may kindly accept it by 3-3-1953, and relieve me of my responsibilities, otherwise after the expiry of the said date I shall consider myself free of the responsibility of my office."

On 5-2-1953, the Land Reforms Commissioner sent out a circular letter that no pourparlers should be held with the Patwaris, that it was not necessary to wait till 4-3-1953, and that the resignations might be accepted forthwith, except in cases where disciplinary proceedings were pending against any Patwari. Mr. Pathak, learned counsel for the petitioners, 734 in number, has informed us that the petitioners had tendered their resignations which were accepted on various dates before 4-3-1953, and the petitioners had not withdrawn their resignations before that date. On 7-3-1953, a G. O. was published by the State Government which provided for the recruitment of Lekhpals as a result of the re-organization of the service of Patwaris. It provided that—

"(1) This class of functionaries would now be known as Lekhpals and not Patwaris.

(2) The cadre of the service of Lekhpals would be two-thirds of the present strength of Patwaris in each district and out of this two-thirds strength, three-fourth would be recruited on a permanent basis and the remaining one-fourth on a temporary basis for future adjustments. The temporary appointment would be made on the clear understanding that they would be terminable at one month's notice from either side.

(3) The cadre would be made as follows:

(a) All Patwaris who did not resign would be absorbed provided they do not attain the age of 60 years on 31-3-1953.

(b) Of the Patwaris who resigned but withdrew their resignations by 4-3-1953.

(i) Before they were accepted or before they were ordered to hand over charge.

(ii) After the acceptance of their resignations only those will be reabsorbed who have had an excellent record of work, and who have not taken an active part into agitation.

(c) Fresh recruits.

(4) The service will be permanent and pensionable ....

(5) ....

(6) ....

(7) ....

(8) The scale of pay will be Rs. 35-1-55 and fifteen per cent. of the posts will be in the selection grade of Rs. 55-2-65.

(9) Dearness allowance would be admissible at Rs. 12/- per month."

Paragraphs Nos. 10 and 11 of the Order provided for certain travelling and stationery allowance. It is not necessary to quote the other portions of this Order. After the publication of this Order the petitioners wrote on 27-3-1953, withdrawing their resignations which had already been accepted. We have not been able to check up the facts whether every one of these petitioners had purported to withdraw his resignation on 27-3-1953, as it did not seem to be necessary in view of the admission made by learned counsel, Mr. Pathak, that all the petitioners had tendered their resignations, that they had not withdrawn their resignations before 4-3-1953, and that their resignations had been accepted before that date.

(7) Mr. Pathak has urged that the petitioners should have been allowed to compete for reappointment along with the fresh recruits, under paragraph 3(c) of the Government Order, and the letter of the Land Reforms Commissioner dated 16-3-1953, appended as Sch. IV to the supplementary affidavit of Banarsi Das, filed on 25-2-1954, to the effect that the Patwaris who had resigned and whose resignations had been accepted and who had not withdrawn their resignations by 4-3-1953, were not eligible for appointment as fresh recruits under paragraphs 2 and 3(c) of the Government Order, dated 7-3-1953, and the circular letter, dated 30-3-1953, Sch. H to the affidavit of Banarsi Das, issued by the Land Reforms Commissioner on the subject of recruitment of Lekhpals, reproducing more or less the Government Order mentioned above, and dividing the candidates into four categories, those who had not resigned, those who had resigned but had withdrawn their resignations before 4-3-1953, and those who had resigned but had not withdrawn their resignations before the due date, and fresh recruits, and providing that those who had resigned and had not withdrawn their resignations by 4-3-1953, would not be eligible for appointment as Lekhpals, was discriminatory.

(8) The contention of learned counsel is that this exclusion was contrary to the provisions of Art. 16 of the Constitution as it deprived the petitioners of their fundamental right of equality of opportunity in matters relating to employment or appointment to any office under the State. Learned counsel has urged that it was permissible to the Patwaris to form themselves into an association, that their association had been recognised by the Government in the year 1940, that every citizen of the State has a right to agitate for improvement of his conditions of service, so long as the agitation is carried on on peaceful lines, that every citizen has a right to tender his resignation if he does not wish to

work and that the exclusion of the petitioners from fresh appointment amounted to discrimination and deprivation to them of equal opportunities of employment.

(9) On behalf of the State it is not denied that those Patwaris who had tendered their resignations and had not withdrawn the resignation before 4-3-1953, and whose resignation had been accepted were ineligible for appointment as Lekhpals, but learned Advocate General appearing for the State has urged that Art. 16 of the Constitution does not take away the right of the State to lay down the qualifications for appointment to Government service so long as the qualifications laid down do not contravene any provision of the Constitution. Article 16 provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State but it cannot mean that the State cannot lay down the qualifications for a post. The qualifications would include not only educational qualifications but age, character, fitness for the post etc. It is no doubt true that the salary that the Patwaris were drawing was very low and there may have been some justification for their carrying on propaganda for the improvement of their conditions of service and their emoluments but it cannot be denied that the sudden tendering of resignation, by 26,134 Patwaris, early in February, 1953, soon after the abolition of the zamindari, when the Government was taking over the estates of the intermediaries, was intended to put such pressure on the Government that it would yield to their demands, which learned counsel has characterised as just demands.

(10) The question before us is not whether the demands of the Patwaris were just or unjust. The point is whether Art. 16 of the Constitution prohibits the State Government from making rules that persons, whom they consider to be agitators or people who, according to Government, lack sense of discipline and had once resigned from Government service, should not be eligible for re-appointment.

(11) Mr. Pathak has urged that if these Patwaris were efficient in their work a day before their resignation the mere fact that they had sent in their resignations did not make them inefficient and there was, therefore, no nexus between the rules as regards their exclusion and the efficiency of the service. He has also urged that the mere fact that some of the Patwaris had withdrawn their resignations before 4-3-1953, did not show that they were more efficient or were in any way better men than those who had stuck to their original resignations.

(12) A person who had resigned but had before the due date withdrawn his resignation may be allowed a 'locus paenitentiae' and it may be, to our minds, a relevant consideration which may prompt the State Government to overlook their past conduct. We do not think that Art. 16 was intended to prevent the State Government from laying down the qualifications for a service, within which term we would include not only educational qualifications but also physical fitness, age, character, sense of discipline etc. What are the qualifications that are required and what should disqualify a person from Government service are matters in which we think the discretion should vest in the State Government and unless there has been a flagrant abuse of power, or there has been discrimination which has contravened any provision of the Constitution, the Courts should not lightly interfere. In our view the State was entitled to lay down that it would not re-appoint those who had taken part in the mass agitation with the object of putting undue pressure on the State Government and, if they made any such rule excluding those Patwaris who had resigned and who had not withdrawn their resignations by 4-3-1953, such a rule, to our minds, would not be contrary to the provisions of Art. 16.

(13) Learned counsel, as we have already said, wanted that all those who had resigned, irrespective of the fact whether some of them had or had not withdrawn their resignations, should be placed on the same footing. This, again to our minds, is not of much substance as the fact that some of those who had resigned and had before the due date withdrawn their resignations was a relevant factor which might have influenced the State Government in deciding to re-appoint them provided their character rolls were good and they had not attained a particular age.

(14) Some argument was also advanced on the basis of Art. 14 of the Constitution that there was discrimination. We do not think that it can be said that there was any discrimination if there was some reasonable basis for excluding the Patwaris who had resigned 'en masse' and had not withdrawn their resignations.

(15) Learned counsel for the petitioners have made a grievance of the fact that in the counter-affidavit filed on behalf of the State the reasons have not been set out which prompted the State Government to exclude the petitioners. We do not think it was necessary to set out the reasons. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. (See Willis on Constitutional Law, 579). In — 'Charanjit Lal v. Union of India', AIR 1951 SC 41 at p. 44 (A), Fazl Ali J. quoted this passage from Willis with approval.

(16) In our view, therefore, this petition has no force and it is dismissed. In view, however, of the fact that the petitioners have suffered greatly in being deprived of their means of livelihood by reason of the fact that they had foolishly resigned and were not considered for re-appointment, we do not think we should allow counsel for the State any costs.

K.S.B. Petition dismissed.

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FULL BENCH

LUCKNOW BENCH: MALIK C. J.
V. BHARGAVA AND H. S. CHATURVEDI JJ.

(13-10-1954)

Abdul Hamid, Defendant-Appellant v. Smt. Fatima Begum, Plaintiff-Respondent.

Second Appeal No. 81 of 1951, against decree of Civil J., Malihabad, Lucknow, D/- 24-1-1951.

Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 3 — Permission granted by Rent Control and Eviction Officer to file suit for ejectment of tenant — District Magistrate held could cancel the same in the circumstances of the case.

The plaintiff had applied under S. 3, U. P. (Temporary) Control of Rent and Eviction Act, 1947, on 15-1-1949, to the District Magistrate for permission to file a suit for ejectment of the defendant. On 27-2-1948, the District Magistrate had passed an order under Cl. (d) of S. 2 of the Act, authorising Mr. N, the Deputy Town Rationing Officer (Cloth) Lucknow, to perform any of the functions of the District Magistrate, under the Act. By the same order he was to be designated as Rent Control and Eviction Officer, Lucknow. The application of 15-1-1949, was, however, not addressed to Mr. N, the Rent Control and Eviction Officer, Lucknow, but to the District Magistrate. On 24-1-1949, the District Magistrate passed an order permitting the plaintiff to file a suit after two months. On receipt of this order the Rent Control and Eviction Officer, passed the following order: "Shrimati Fatima Begam w/o Shri Abdul Mahbood (the plaintiff) wants her house at present occupied by Shri Abdul Hamid, (Defendant) for personal use. She has no independent place and has purchased the house for personal use. In view of her genuine need she is allowed to take ejectment proceedings against the occupant after two months." When the defendant, the tenant, came to know of it he sent an application dated 22-2-1949, to the District Magistrate, Lucknow, that he was an old retired official and had been living in the house for the last 20 years, that Srimati Fatima Begum was living in a three storied house in the same mohalla for about 26 years and her claim that she wanted to live in the house which was in the occupation of the defendant was a device to get the permission, and that the permission had been granted without issuing any notice to the tenant and without giving him a chance to be heard and he, therefore, prayed that the permission be withdrawn and proper orders be passed after hearing him. On 26-2-1949, the tenant sent another application to the District Magistrate similarly worded. On 6-4-1949, the District Magistrate passed an order cancelling the permission granted by the R. C. E. O. It was further directed that the notice should be issued and both the parties be heard. In pursuance of this order the R. C. E. O. heard the parties and on 4-5-1949, he sent the report to the District Magistrate recommending that the original order granting permission to file suit should be maintained. On receipt of the report, however, the District Magistrate wrote on 5-5-1949 disagreeing with the recommendations. On 8-5-1949, the Rent Control and Eviction Officer passed the following order: "Permission applied for by Mst. Fatima Begum to eject Shri Syed Abdul Hamid from her house in Ghasiarimandi is refused as the case does not appear to be genuine and there is no alternative accommodation for the occupation of the tenant. Parties be informed."

On 23-8-1949, the suit was filed by the plaintiff. The maintainability of the suit was based entirely on the permission given by the Rent Control and Eviction Officer on 28-1-1949:

Held that in the circumstances of this case, the order passed by the Rent Control and Eviction Officer on 28-1-1949, could be cancelled by the District Magistrate by his order dated 6-4-1949; (2) that the order dated 8-5-1949, was an order by the Rent Control and Eviction Officer which amounted in fact to a withdrawal of the permission already granted by him; and (3) that the permission to file a suit for ejectment once granted could be withdrawn under the circumstances of the case. Case law Ref. (Para 17)

CASES REFERRED: Paras

(A) (V24) AIR 1937 Cal 718: ILR (1938) 1 Cal 62 9

(B) (V36) AIR 1949 Assam 37: 50 Cri LJ 754 9

(C) (V37) AIR 1950 Mad 100: 51 Cri LJ 424 9

(D) (1890) 25 QBD 391: 59 LJ QB 559 9

(E) (1948) 1948-1 KB 349: 1948-1 All ER 85 9

(F) (V39) AIR 1952 All 819: 1952 RD (HC) 79 9

(G) (V39) AIR 1952 All 432: 1951 All LJ 479 9

(H) (V41) AIR 1954 All 745: 1954 All WR (HC) 222 9

(I) (V35) AIR 1948 All 435: 49 Cri LJ 740 9

(J) (V39) AIR 1952 All 859: 1952 All LJ 278 10, 11, 12

Farooq Hasan, for Appellant; Niamatullah and D. P. Khare, for Respondent.

MALIK C. J.:

This case was referred to a Full Bench by a learned single Judge as he considered that the point of law that arose for decision was sufficiently important to need an authoritative pronouncement.

(2) This second appeal was filed by the defendant against a decree passed by the Civil Judge of Lucknow confirming a decision of the Munsif decreeing the plaintiff's suit for ejectment of the defendant from certain premises situate in Lucknow. The learned Munsif had granted to the defendant one month's time to vacate the premises and had directed that he should pay to the plaintiff a sum of Rs. 26/4/- as rent for this period. It is not disputed that the defendant is plaintiff's tenant. The defence is that the plaintiff could not file the suit as the plaintiff had not obtained the permission of the District Magistrate to file the suit and grounds (a) to (f) of S. 3 of the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) did not exist.

(3) The plaintiff, Srimati Fatima Begum, had applied under S. 3 of the Act on 15-1-1949, to the District Magistrate for permission to file a suit for ejectment of the defendant. On 27-2-1948, the District Magistrate had passed an order (Ex. 4) which reads as follows :

"Under Cl. (D) of S. 2, U. P. (Temporary) Control of Rent & Eviction Act, 1947, I hereby authorise Mr. S. S. Nigam, Deputy Town Rationing Officer (Cloth) Lucknow, to perform any of the functions of the District Magistrate, under the Act and he will be designated as Rent Control & Eviction Officer, Lucknow.

Sd/- A. D. Pandit,
I. C. S.,
District Magistrate,
LUCKNOW.
27-2-48."

(4) The application of 15-1-1949, was, however, not addressed to Mr. S. S. Nigam, Rent Control & Eviction Officer, Lucknow, but to Sri A. D. Pandit, District Magistrate. On 24-1-1949, the District Magistrate passed the following order :

"R. C. E. O. This is a hard case and may be permitted to file a suit after two months. The occupant may be asked to make his arrangements in the meantime."

On receipt of this order the Rent Control and Eviction Officer passed the following order :

"Shrimati Fatima Begam w/o Shri Abdul Mahbood, wants her house No. 171, Ghasiari Mandi, Lucknow, at present occupied by Shri Abdul Hamid, for personal use. She has no independent place and has purchased the house for personal use. In view of her genuine need she is allowed to take ejectment proceedings against the occupant after two months.

Sd/- S. S. Nigam,
R. C. E. O.
28-1-49."

When the defendant-appellant, the tenant, came to know of it he sent an application dated 22-2-1949, to the District Magistrate, Lucknow, that he was an old retired official and had been living in the house for the last 20 years, that Srimati Fatima Begum was living in a three storied house in the same mohalla for about 26 years and her claim that she wanted to live in the house which was in the occupation of the defendant was a device to get the permission, and that the permission had been granted without issuing any notice to the tenant and without giving him a chance to be heard and he, therefore, prayed that the permission be withdrawn and proper orders be passed after hearing him. On 26-2-1949, the tenant sent another application to the District Magistrate similarly worded as he was afraid that his first application might not have reached him, the District Magistrate being on tour. On 6-4-1949, the District Magistrate passed the following order (Ex. A-9) :

"It was necessary to give the applicant due opportunity to contest the landlord's application for obtaining permission to file a suit for ejectment. This was not done in this case. I, therefore, order the cancellation of the permission granted to the landlord by the R. C. E. O. I further direct that the notice should be issued and both parties heard in this case before final orders are passed."

(4A) On 4-5-1949, the Rent Control and Eviction Officer sent the following report to the District Magistrate :

"D. M.,

Kindly see your orders flag A. In this case permission had been given to the applicant but subsequently cancelled as the order was 'ex parte'.

Both the parties appeared on 30-4-49 and pleaded their cases. The applicant's case is that she has purchased the house in question occupied by the opposite party for her use and that she has no suitable accommodation. The opposite party says that he has been occupying the house for several years and that he has no other place. But his son who is Secretariat employee is already having a house in Babooganj. This is admitted fact. The applicant says that the opposite party should shift over there. Under these circumstances I think the permission originally granted under your instruction flag B should be maintained.

Sd/- S. S. Nigam,
R. C. E. O.
4-5-49."

On receipt of the report, however, the District Magistrate wrote as follows on 5-5-1949 :

"It will be unfair to turn out a tenant of long-standing without giving him alternative accommodation. The house suggested by Nigam is said to be too small for his family".

On 8-5-1949, the Rent Control and Eviction Officer passed the following order :

"Permission applied for by Mst. Fatima Begam to eject Shri Syed Abdul Hamid from her house in Ghasiarimandi is refused as the case does not appear to be genuine and there is no alternative accommodation for the occupation of the house (tenant?). Parties be informed.

Sd/- S. S. Nigam,
R. C. E. O.,
For D. M.
8-5-49."

(5) On 23-8-1949, the suit was filed out of which this Second Appeal has arisen. In the plaint a number of grounds were alleged which, under S. 3 of the U. P. Control of Rent and Eviction Act, entitled the plaintiff to file the suit, but all those grounds were ultimately given up and the question of the maintainability of the suit was based entirely on the permission given by the Rent Control and Eviction Officer on 28-1-1949. The trial Court held that permission once granted under S. 3 of the Act could not be cancelled or withdrawn and decreed the suit.

(6) The lower appellate Court came to the conclusion that permission to sue was granted by the Rent Control and Eviction Officer on 28-1-1949, that the District Magistrate had no power to cancel this permission and the order of 8-5-1949 could not be construed as an order of the Rent

Control and Eviction Officer withdrawing the permission given by him on 28-1-1949. Great significance was attached to the fact that he had signed this order "for District Magistrate."

(7) When the case came up before the learned single Judge arguments at great length were advanced before him and the learned Judge referred the case to a Full Bench as he thought that there was some conflict of decisions and also because the point was of general importance.

(8) The questions, therefore, that have to be considered are:

1. Whether the permission to sue granted by the Rent Control and Eviction Officer on 28-1- 1949, could be cancelled by the District Magistrate by his order dated 6-4-1949?

2. Whether the order dated 8-5-1949 could be considered to be the order of the Rent Control and Eviction Officer and could it amount to a withdrawal of the permission already granted?

3. Whether permission to file a suit for ejectment once granted could ever be withdrawn?

(9) Learned counsel for the defendant-appellant has, in support of his argument that the District Magistrate had authority to pass the order dated 6-4-1949, cited cases to show that by mere delegation of power the authority delegating does not cease to have jurisdiction in the matter. It is urged that the order of 27-2-1948, appointing Mr. S. S. Nigam, Rent Control and Eviction Officer did not take away the jurisdiction of the District Magistrate conferred on him by the Act.

Learned counsel has relied on the decision of — 'Nasim Ali and Remfry, JJ. in Subodh Chandra v. Janenedra Nath', AIR 1937 Cal 718 (A). That case was under the Bengal Local Self-Government Act. The suit was for a declaration that a decision of Mr. R. L. Dey, Senior Deputy Magistrate, Faridpur, under S. 18-B, Bengal Local Self Government Act, setting aside the election of the plaintiff as a member of the Local Board was without jurisdiction. The Magistrate of the district was authorised by R. 1-A of the Election Rules framed by the Local Government under S. 138-A, Bengal Local Self Government Act, to decide disputes relating to elections.

Section 5 of the Act defined 'Magistrate of the District' as including any Magistrate subordinate to the Magistrate of the District to whom he may delegate all or any of his powers under the Act. The District Magistrate delegated his powers to decide election disputes to the Sub-Divisional Officer of Madaripur. The Sub-Divisional Officer had on an objection made by the principal defendant refused to postpone the election and had intimated to the District Magistrate that the allegation of the defendant that there were irregularities and illegalities in the recording of votes was unfounded.

Thereafter the defendant filed an application before the District Magistrate under S. 18-B of the Act for setting aside the election of the plaintiff and the pro forma defendant. The District Magistrate transferred this application for disposal to the Senior Deputy Magistrate, Mr. R. L. Dey, who decided the matter in favour of the defendant and against the plaintiff. The argument was that after the District Magistrate had delegated his powers to the Sub-Divisional Officer he had no power to entertain the application under S. 18-B and transfer it to a Magistrate subordinate to him. The learned Judges pointed out that the word 'includes' in the definition of the "Magistrate of the District" in S. 5, Bengal Local Self-Government Act, indicated that the District Magistrate was not divested of his authority after he had delegated his powers, that the Sub-Divisional Officer had not decided the matter but had made a report probably because he thought it was an important matter which the District Magistrate had better himself decide and that the District Magistrate had jurisdiction to entertain an application under S. 18-B and to transfer it to Mr. Dey for disposal.

In — Nirendra Mohan v. Govt. of Assam', AIR 1949 Assam 37 (B), a case under the Assam Maintenance of Public Order Act (5 of 1947), the Government of Assam purporting to act under S. 9 of the Act had by an order directed that the powers and duties conferred on the Provincial Government by S. 21 shall be exercised and discharged by the District Magistrate in each District of the Province. It was held that this did not mean that the Provincial Government had divested itself of the power to take action.

In — 'P. Ramiah v. Chief Secy. to the Govt. of Madras', AIR 1950 Mad 100 (C), a similar view was taken that delegation does not imply a parting with powers by the person who grants the delegation but merely to conferring an authority to do things which otherwise that person would have no right to do.

Reliance was placed on certain observations in — 'Huth v. Clarke', (1890) 25 QBD 391 (D) and the decision in — 'Blackpool Corpn. v. Locker', 1948-1 KB 349 (E), was distinguished.

In — 'R. N. Seth v. Girja Shanker', AIR 1952 All 819 (F), the learned Judges followed the decision in — 'Huth v. Clarke (D)', that delegation does not imply a parting with power by the person who grants the delegation and went on to hold that the District Magistrate cannot be said to have deprived himself of the power to perform his functions under the Act (U. P. (Temporary) Control of Rent and Eviction Act) by authorising another Magistrate to do the work for him and that either of them would be able to perform those functions. Having held that, the learned Judges went on to hold that once the District Magistrate had authorised the Rent Control and Eviction Officer to grant permission he could not revoke or cancel a permission granted by that officer by constituting himself an appellate or revisional authority.

In — 'C. D. Hans v. Shri Munnu Lal', AIR 1952 All 432 (G), Misra, J. took the view that the authority empowered to grant the sanction for the commencement of a suit under S. 3, U. P. (Temporary) Control of Rent and Eviction Act, must be deemed to have also the power to revoke that sanction in suitable cases and that the Rent Control and Eviction Officer in either grant-

ing the sanction or revoking it does not act in judicial or quasi-judicial capacity.

In — 'Jang Bahadur v. Dist. Magistrate, Banaras', AIR 1954 All 745 (H), V. Bhargava, J. held that if two officers exercised the same powers one cannot revise the order of another but if the jurisdiction is concurrent it may be possible for one to review the order of another. It was held that the Rent Control and Eviction Officer, who had been authorised by the District Magistrate to perform his functions, exercised concurrent jurisdiction, and the District Magistrate could review an order passed by the Rent Control and Eviction Officer.

In — ' Hariharanand Saraswati v. Supdt., Central Jail, Benares', AIR 1948 All 435 (I), a learned single Judge of this Court held that there was no rule of law or of natural justice which required that before an authority which had the power to delegate could delegate its function to another, it must divest itself completely of the power so delegated, that even though the powers had been delegated to the District Magistrate the notification showed that the Government had reserved to itself powers to act under S. 3 of the Act and that did not make the delegation 'ultra vires' or void.

(10) In the U. P. (Temporary) Control of Rent and Eviction Act, so far as we can see, there is no section authorising the District Magistrate to delegate his powers and the question whether even after delegation he must be deemed to have retained the powers does not arise. The Act has conferred certain powers on the District Magistrate and there is no section in the Act which entitles him to divest himself of those powers either by delegation or in any other manner. The only provision on which reliance has been placed in support of the argument that the District Magistrate can delegate his powers is the definition of "District Magistrate" in S. 2, Cl. (d), which is as follows

> " "District Magistrate" includes an officer authorised by the District Magistrate to perform any of his functions under this Act."

The definition, however, would make it clear that the District Magistrate can authorise a person to perform any of his functions and this does not mean that he can divest himself of the duty imposed on him under the Act. All that it suggests is that wherever the words "District Magistrate" occur in the Act they should be read as if they mean 'the District Magistrate and the officer authorised by the District Magistrate to perform any of his functions under the Act'.

The section widens the definition of a District Magistrate and does not provide for taking away the authority of the District Magistrate.

In — 'Mannu Lal v. Chakradhar Hans', AIR 1952 All 859 (J), it was pointed out that there was no specific provision in the Act authorising the District Magistrate to delegate his powers to the Rent Control and Eviction Officer. It would, therefore, necessarily follow that wherever under this Act any function has to be performed by the District Magistrate it would be understood that that function could be performed by the District Magistrate as also by the person authorised by him to act on his behalf.

(11) In — 'Mannu Lal's case (J)', already cited it was pointed out that when considering the question of granting or refusing permission to file a suit the District Magistrate was performing an administrative or executive function and not a judicial or quasi judicial function. Chaudhri Niamat Ullah, on behalf of the respondent, has not urged that the Magistrate performs a judicial or a quasi judicial function. He has, however, pointed out that, if the District Magistrate and the Magstrate authorised by him both have the same powers, there is a likelihood of conflict and that if the District Magistrate can set aside an order of the Rent Control Officer, the Rent Control Officer, exercising the same jurisdiction, may set aside an order of the District Magistrate.

Though, in theory, there may be no bar to the Rent Control and Eviction Officer setting aside an order of the District Magistrate, if a District Magistrate can set aside the order of the Rent Control and Eviction Officer, in practice there is no likelihood of there being any such conflict.

As was pointed out in — 'Mannu Lal's case (J)', there can be no objection to an administrative or executive power being exercised subject to the control and guidance of the superior officer. The District Magistrate being the superior officer would no doubt have the right to supervise and control the action of the Magistrates working under him and, even though both of them may be exercising the same jurisdiction, the subordinate officer would not, without consulting his superior officer, ever think of interfering with an order passed by him.

(12) Learned counsel has not contended that the permission once granted under S. 3 of the Rent Control and Eviction Order can never be recalled but he has urged that the observations made in — 'Mannu Lal's case (J)', that the power being merely administrative it cannot be said that

> "if on further consideration the Magistrate thought it proper to revise his previous order he had no jurisdiction to do so"

must be confined within certain well defined limits. The only limit that we can suggest is, what has already been suggested in that case, that the District Magistrate must exercise his discretion honestly and not capriciously.

(13) We may mention here that the application filed by the tenant on 22-2-1949, for reconsideration of the matter was recommended by two Members of the Legislative Assembly, one of whom was also the Secretary of the U. P. Congress Committee, and the application of 26-2-1949, bore strong recommendation of an I. C. S. Officer. If the recommendations made by the two M. L. As. and the I. C. S. Officer had not been there, it could not have been suggested that there was any impropriety in the permission which had been granted 'ex parte' being recalled and the matter being reconsidered after giving both parties a hearing.

Though the District Magistrate has a complete discretion in the matter, yet this discretion must be exercised in accordance with rules of natural justice and it is, therefore, proper that he should give the persons, who are likely to be affected, a chance of placing their view points before him. The question of granting permission to the plaintiff had, therefore, to be reconsidered after notice to the defendant.

(14) We have been addressed only on one ground, i.e., whether the permission granted on 28-1-1949, was or was not withdrawn on the date the suit was filed.

(15) Coming now to the question whether the permission granted on 28-1-1949, had or had not been withdrawn, we must bear in mind that the Rent Control and Eviction Officer had been acting throughout under the directions of the District Magistrate. The order passed by him on 28-1-1949, was in accordance with the directions given by the District Magistrate on 24-1-1949. It cannot, therefore, be said that the order of the 28th of January was passed by the Rent Control and Eviction Officer in the exercise of his independent views in the matter.

Though the Rent Control and Eviction Officer had not, in so many words, said that he was withdrawing the permission granted by him on 28-1-1949, his order of 8-5-1949, showed that he took it that the permission stood cancelled and the application dated 15-1-1949, was up before him for orders. After having heard the parties he refused to grant the permission by his order of 8-5-1949. The addition made by him of the words "for D. M." are, to our minds, of no importance as he was all the time acting for the District Magistrate, having been authorised by him in that behalf by the order dated 27-2-1948.

The order of 8-5-1949, was passed by him as the Rent Control and Eviction Officer and probably by adding the words "for D. M." he intended to make it clear that he was passing that order at the instance of the District Magistrate. He had, however, passed the order of 28-1-1949, also at the instance of the District Magistrate. Reading both the orders of the Rent Control and Eviction Officer in the light of the facts stated above it must be deemed that the order of 28-1-1949, stood recalled.

(16) If the Rent Control and Eviction Officer had been acting independently and had passed final orders which are now revisable by the Commissioner and then by the Local Government the District Magistrate who has neither appellate nor revisional powers may not be entitled to interfere, but where, as in this case, the District Magistrate has all along been functioning through the Rent Control & Eviction Officer & bearing in mind that the orders passed were administrative or executive orders, it cannot be said that the order passed by the Magistrate on 6-4-1949, was without jurisdiction as by that order he was merely recalling a permission which had been granted at his instance.

(17) The conclusions, therefore, are that

1. in our view, in the circumstances of this case, the order passed by the Rent Control and Eviction Officer on 28-1-1949, could be cancelled by the District Magistrate by his order dated 6-4-1949;

2. that the order dated 8-5-1949, was an order by the Rent Control and Eviction Officer which amounted in fact to a withdrawal of the permission already granted by him; and

3. that the permission to file a suit for ejectment once granted can be withdrawn under the circumstances indicated in our judgment.

(18) The result, therefore, is that this appeal is allowed, the decrees passed by the lower Courts are set aside and the plaintiff's suit is dismissed.

(19) In view of the peculiar circumstances of the case we, however, think that the parties should be directed to bear their own costs throughout.

R.G.D. Appeal allowed.

(S) A.I.R. 1955 ALLAHABAD 41 (Vol. 42, C.N. 13)

FULL BENCH

MALIK C. J., AGARWALA, V. BHARGAVA, MUKERJI AND MEHROTRA JJ. (12-10-1954)

Firm Kamta Prasad Jagannath Prasad, Plaintiff-Appellant v. Gulzari Lal and another, Respondents.

Letters Patent Appeal No. 1 of 1948, against order of Sinha J. D/- 18-9-1947, in Second Appeal No. 131 of 1946.

(a) **Limitation Act (1908), Art. 85 — Accounts mutual, open and current.**

(From Order of Reference): Where the accounts between the parties are mutual, open and current, then at any time it is open to the parties to enter into a fresh transaction which would have been entered in the accounts and become a part of the same old mutual, open and current account. The mere fact that there are no dealings for a period does not necessarily entitle the Court to hold in retrospect that the accounts had ceased to be mutual, open and current. (Para 4)

Anno: Lim. Act, Art. 85 N. 14 Pt. 7a.

†(b) **Limitation Act (1908), Ss. 19, 20 and 3—U.P. Temporary Postponement of Execution of Decrees Act (10 of 1937), S. 5 — Suit for settlement of accounts — Original period expired — Period extended by U. P. Act — Acknowledgment during extended period — Effect on limitation for suit —ILR (1938) All 363:AIR 1938 All 217:175 Ind Cas 556 (FB); ILR (1946) All 532: AIR 1947 All 199: 226 Ind Cas 440, Overruled.**

The U. P. Temporary Postponement of Execution of Decrees Act (10 of 1937) has received the assent of the Governor General under S. 107 (2) of the Government of India Act, 1935, and therefore the provision contained in S. 5 of the U. P. Act has to be taken into consideration in computing the period of limitation for suits under the Limitation Act in addition to the provisions of Ss. 4 to 25 mentioned in S. 3 of the Limitation Act. (Para 21)

Where a Provincial Act has been validly passed and it makes it obligatory on the

Courts to exclude a period when computing the period of limitation, the Courts have to exclude that period and if after excluding that period a suit or an application can be filed by a certain date, any acknowledgment or payment made in accordance with the provisions of Ss. 19 and 20, after the original period of limitation has expired but within the extended period, should be deemed to be an acknowledgment or payment made within the period prescribed for the filing of the suit or an application: ILR (1938) All 363: AIR 1938 All 217: 175 Ind Cas 556 (FB); ILR (1940) All 532: AIR 1947 All 199: 226 Ind Cas 440, Overruled; AIR 1929 Cal 68, Disting; AIR 1937 Oudh 26, Ref. (Para 22)

Anno: Limitation Act, S. 3 N. 3; S. 19 N. 12 Pts. 6 and 6a; S. 20 N. 10.

(c) Limitation Act (1908), Ss. 19 and 20— Acknowledgement within "prescribed period" — Meaning of.

"There has been some conflict of opinion as to the meaning of the words "prescribed period" in Ss. 19, 20 and other sections of the Act. It has been held in some cases that prescribed period means the period mentioned in the third column of the first Schedule. It has also been held that there is no reason to limit the words "period prescribed" to the period mentioned in the third column of the first schedule and that prescribed period must mean the period prescribed under the Limitation Act. In other words, the period mentioned in the third column of the first schedule is subject to the provisions of Ss. 4 to 25 of the Limitation Act. In our view the correct interpretation is that the acknowledgment or payment should have been made before the claim had become time barred and that is the prescribed period." (Para 26)

Anno: Lim. Act, S. 19 N. 12; S. 20 N. 10

CASES REFERRED: Paras

(A) (V25) AIR 1938 All 217: ILR (1938) All 363 (FB) 9, 10, 15, 18, 24, 25
(B) (V34) AIR 1947 All 199: ILR (1946) All 532 9, 15, 23
(C) (V22) AIR 1935 PC 85: 1935 All LJ 578 (PC) 9
(D) (V16) AIR 1929 Cal 68: 55 Cal 1210 9, 25
(E) (V15) AIR 1928 Bom 319: 52 Bom 521 9
(F) (V37) AIR 1950 Bom 94: ILR (1949) Bom 741 9
(G) (V24) AIR 1937 Oudh 26: 12 Luck 531 9, 15, 24
(H) (V25) AIR 1938 Mad 19: ILR (1938) Mad 439 9

R. C. Ghatak and S. N. Kakkar, for Appellant; Lakshmi Saran, for Respondents.

ORDER OF REFERENCE

MALIK C. J.: This is a Special Appeal against a judgment of a learned single Judge. The plaintiff filed a suit for recovery of Rs. 1200/-, on the allegation that the plaintiff-firm Kamta Prasad Jagannath Prasad was a registered firm and carried on business of commission agency for sale and purchase of potato, tobacco and 'khali', and the defendants had entered into several transactions of sale of potatoes, tobacco, etc., through the plaintiff-firm and they had also made certain purchases from the firm and the amount was due on a balance of account. It was said that the accounts between the parties were mutual, open and current as the plaintiff had to pay to the defendants the price realised from defendants' customers and the defendants had to pay to the plaintiff price of the goods purchased. The last item was entered in the accounts on 31-7-1943, from which date, it was claimed, limitation should be computed. The suit was filed on 24-2-1944. Among other defences, a defence was taken that the plaintiff's suit was barred by limitation. The trial Court dismissed the suit, holding that it was barred by limitation. The lower appellate Court decreed it. The learned single Judge has, however, dismissed the suit.

(2) It appears from the judgment of the learned single Judge, as also from the judgment of the lower appellate Court, that it was admitted that in the beginning the accounts were mutual, open and current. The lower appellate Court has said as follows :

"The account in the present case was admittedly mutual in the beginning. The plaintiff sold goods to the defendant creating an obligation on the defendant to pay him their price. It also sold the defendant's goods to third parties making itself liable to the defendant to pay their price. It bought goods under the directions of the defendant and sold them to other persons under the directions of the defendant; in these transactions the defendant was under an obligation to pay the price paid by the plaintiff and the plaintiff was under an obligation to pay to the defendant what it realised on sale. So there were mutual dealings between the parties creating independent obligations."

The learned single Judge has said :

"It is conceded before me that the dealings between the parties were in the nature of 'mutual, open and current account, where there had been reciprocal demands between the parties and the Article applicable to the case is Art. 85, Limitation Act."

(3) On this point, therefore, both parties were agreed that the dealings between the parties gave rise to reciprocal demands and the accounts were mutual, open and current.

(4) The learned single Judge, however, has said in his judgment that it was not disputed before him that the accounts were closed in November, 1937. This statement is challenged by learned counsel for the appellant and he points out that this was the main point for decision and the lower appellate Court had given a finding on the point in his favour that the accounts being admittedly mutual, open and current giving rise to reciprocal demands, it was for the defendants to show that the accounts ceased to be such, and the mere fact that there were no fresh dealings for some time did not necessarily lead to the conclusion that at any stage during that period the nature of the accounts was altered. The learned District Judge has rightly pointed out that at

any time it was open to the parties to enter into a fresh transaction which would have been entered in the accounts and become a part of the same old mutual, open and current account, and that the mere fact that there were no dealings for a period did not necessarily entitle the Court to hold in retrospect that the accounts had ceased to be mutual, open and current.

(5) Neither the learned District Judge nor the learned single Judge, however, appear to have given due weight to the finding recorded by the trial Court that after the end of the year the plaintiff struck a balance in his books on 3-11-1937, and thereafter started making demands for payment, and on 18-4-1938, he served the defendant 1 with a registered notice of demand. The learned Munsif had observed as follows :

> "After 3-11-1937 the account between the parties seems to have been formally closed, and the plaintiff began to demand the payment of the balance due to it from the defendant No. 1 and at last the plaintiff gave a registered notice of demand to the defendant No. 1 on 18-4-1938. The said notice dated 18-4-1938 is Ex. A1 on the record. In this notice the plaintiff referred to numerous previous demands in respect of the said balance and to the defendant's failure to pay the same, and formally demanded the payment of the said balance within a week, and further threatened the defendant No. 1 with institution of a suit for recovery of the said balance in case the defendant No. 1 would not pay it within a week, the term of the said notice."

In view of the oral demands followed by this registered notice and further from the circumstance that after 3-11-1937, there were no fresh dealings between the parties, the learned Munsif had rightly held that the old accounts which were mutual, open and current must be deemed to have been closed on 3-11-1937, and whatever payments were thereafter made by the defendant on 15-7-1939, 7-5-1942 and 31-7-1943 were merely payments in part satisfaction of their liability for the amount that had been found due on 3-11-1937.

(6) The learned single Judge has recorded the same finding, though for different reasons, and in the view we have taken of the notice we must agree with the learned single Judge that the mutual, open and current accounts must be deemed to have been closed on 3-11-1937.

(7) The question, however, remains whether the subsequent payments made by the defendant to the plaintiff, one of which at least, namely, the payment made on 31-7-1943, was in writing signed by the defendant (Ex. 4), can save limitation.

(8) If the period of limitation began to run from 3-11-1937, the suit could be brought by 3-11-1940, that is, within three years. In between, however, was enacted the Temporary Postponement of Execution of Decrees Act (10 of 1937), S. 5 of which provides that :

> "in computing the period of limitation prescribed by the Indian Limitation Act, 1908 .... for the institution of a suit in a civil court against an agriculturist for money .... the period during which this Act shall remain in force shall be excluded."

The Act remained in force from 1-1-1938, to 31-12-1940, that is, for a full period of three years. The plaintiff could, therefore, file the suit up to 3-11-1943. Before, however, this period expired, on 31-7-1943, the defendant made a payment which is evidenced in writing by Ex. 4. The question, therefore, arises whether this payment is a payment on account of a debt made before the expiration of the prescribed period so that a fresh period of limitation may begin to run.

(9) Reliance was placed on a decision of a Full Bench of this Court in — 'Shankar Lal v. Rana Lal Singh', AIR 1938 All 217 (A), where the learned Judges took the view that the period prescribed meant prescribed in the first Schedule. The same view was taken by a Division Bench which followed the Full Bench in the case of — 'Sheo Shankar v. Moti Lal', AIR 1947 All 199 (B). The Privy Council decision of — 'Maqbal Ahmad v. Onkar Pratap Narain Singh', AIR 1935 PC 85 (C), was distinguished in — 'Sheo Shankar Bhatt's case (B)', on the ground that their Lordships of the Judicial Committee were concerned with the exclusion of the period under S. 14, Limitation Act, and not with exclusion of a period under a Special and Local Act. In the Full Bench case ('ante') reliance was placed on a decision of Rankin C. J. in—'Debendra Nath v. Kartic Prasad', AIR 1929 Cal 68(D). That case may be distinguishable on the ground that S. 4, Limitation Act, did not exclude the period during which the court was closed, but it only enabled a person to file a suit on the reopening of the court if the period of limitation prescribed fell on a day when the court was closed. The learned Chief Justice relied on the language of S. 4 and observed as follows :

> "It is said that if one reads S. 4 togeher with S. 3, one finds that the prescribed period is extended; but that is not so. Section 4 is a provision to say that where the period of limitation prescribed expires on a day when the Court is closed the suit may be instituted on the day that the Court reopens, that is to say, it may be instituted notwithstanding that the period of limitation prescribed has expired."

If the suit is not instituted on the day the Court reopens, S. 4, Limitation Act, does not apply at all and the decision of the learned Chief Justice, therefore, may be distinguishable on that ground.

The Full Bench (Supra) also relied on a decision of the Bombay High Court in — 'Maganlal Harijibhai v. Amichand Gulabji', AIR 1928 Bom 319 (E) In that case the period excluded was under S. 6, Limitation Act, and it enabled a minor to institute a suit after his disability had ceased within the period prescribed under the first Schedule to the Limitation Act. An acknowledgment made during minority was held to be of no effect under S. 19, Limitation Act. The latest decision of the Bombay High Court brought to our notice is — 'Udhavji Anandji v. Bapudas Ramdas', AIR 1950 Bom 94(F) where it was held that an acknowledgment of liability passed not within the period

prescribed by the first Schedule but during the extended period allowed by S. 6 constitutes an acknowledgment within S. 19 and can start a fresh period of limitation.

A view contrary to the view taken by the Full Bench was taken by a Bench of the Oudh Chief Court in — 'Sukhnandan Prasad v. Raja Ahmad Ali Khan', AIR 1937 Oudh 26 (G) and also by the Madras High Court in — 'Sambayya v. P Subbayya', AIR 1938 Mad 19 (H).

(10) The question raised in this case is of general importance and in our view it is necessary that the Full Bench decision in AIR 1938 All 217 (A) may be reconsidered. We, therefore, direct that the following question may be referred to a larger Bench, preferably a Bench of five Judges :

"Whether a payment made by a debtor and acknowledged by him in a writing signed by him, after the original period of limitation had expired but within the extended period after exclusion of the period during which the Temporary Postponement of Execution of Decrees Act (10 of 1937) had remained in force, gave rise to a fresh period of limitation in accordance with the provision of S. 20, Limitation Act?"

The papers may be laid before the Hon'ble the Chief Justice for constitution of a Full Bench.

OPINION OF FULL BENCH

MALIK C. J.

(11) The facts of this case are fully set out in the referring order. The point referred to the Full Bench reads as follows:

"Whether a payment made by a debtor and acknowledged by him in a writing signed by him after the original period of limitation had expired but within the extended period after exclusion of the period during which the Temporary Postponement of Execution of Decrees Act (10 of 1937) had remained in force, gave rise to a fresh period of limitation in accordance with the provisions of S. 20, Limitation Act?"

(12) The dates and facts necessary to answer this question are as follows. There was a mutual, open and current account between the parties which, it has been found, was closed on the 3-11--1937. Certain payments were made by the defendants towards this account, the payment made on 31-7-1943, being in writing signed by the defendants. The suit was filed on 24-2-1944.

(13) An Act known as the Temporary Postponement of Execution of Decrees Act (10 of 1937), hereinafter called the Act, was passed in the year 1937. Section 5 of this Act provides that:

"(1) In computing the period of limitation prescribed by the Indian Limitation Act, 1908, or any other law for the time being in force, for (a) the institution of a suit in a civil court against an agriculturist for money or for foreclosure or sale in enforcement of a mortgage, and (b) the execution of such decree as is referred to in S. 3, and not covered by S. 6, the period during which this Act shall remain in force shall be excluded.

(2) In computing the period of twelve years prescribed by S. 48 of the Code of Civil Procedure, 1908, the period during which this Act shall remain in force shall be excluded."

The period, which under this Act had to be excluded, was from 1-1-1938 to 31-12-1940.

(14) If this Act had not intervened, the plaintiff could have filed his suit upto 3-11-1940, i.e. within three years from the date when the account was closed and the money became payable by the defendants to the plaintiff. The payment made on 31-7-1943, on which the plaintiff relied for saving limitation would then have been of no avail as it was not paid within the "prescribed period". The plaintiff alleged that the period between 1-1-1938 to 31-12-40 during which the Act remained in force, should be excluded and on excluding that period the payment made on 31-7-1943, was within the period of limitation prescribed and, therefore, the suit was within time in view of the provisions of S. 20, Limitation Act.

(15) A Full Bench of this Court had taken a contrary view in AIR 1938 All 217 (A) and that view had been followed by Division Bench in AIR 1947 All 199 (B). There was, however, a contrary view expressed by a Bench of the Oudh Chief Court in AIR 1937 Oudh, 26 (G). By reason of this difference of opinion between the Oudh Chief Court and this Court the Bench hearing the appeal considered it necessary to refere the question to a Full Bench for reconsideration.

(16) The point for decision is within a very narrow compass. S. 20 of the Limitation Act provides:

"Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, or by his duly authorised agent a fresh period of limitation shall be computed from the time when the payment was made.

Provided that, save in the case of a payment of interest made before the 1st day of January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

In the case before us, the acknowledgment was made in writing signed by the person making the payment and the plaintiff would be entitled to claim the benefit of S. 20, if the period of three years from 1-1-1938, to 31-12-1940, can be excluded, so that the payment made on 31-7-1943, can be said to have been made within the prescribed period.

(17) The argument of learned counsel for the respondent is that the payment made on 31-7-1943, was not made "before the expiration of the prescribed period", as in computing the period prescribed for the purposes of S. 20 the provisions of the Limitation Act are alone to be taken into consideration and not the provisions of any other Act.

(18) This argument seems to have found favour with the learned Judges in AIR 1938 All 217 (FB) (A). In that case a claim was made for the recovery of a certain debt due on a promissory note. The debtor, however, had become a ward of the court and the debt had been acknowledged by the Collector and the Board of Revenue. The

amount was not paid and the estate was released. Under S. 52, Court of Wards Act, when the Court of Wards after assuming the superintendence of the property of a ward releases the same without discharging the liability, the time from the publication of notice under S. 17 to the date of such release has to be excluded in computing the period of limitation applicable to the suit or application. The view that seems to have appealed to the learned Judges was that in considering whether the acknowledgment saved time under S. 19 the Court must confine itself to the four corners of the Limitation Act. Section 3 of the Limitation Act lays down:

"Subject to the provisions contained in sections 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

It was held that when a suit is filed and the Court has to consider whether it is within time, the provisions of Ss. 4 to 25 alone can be taken into consideration.

(19) The learned Judges relied on the provisions of S. 29 also. Section 29 provides:

"Where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application, by any special or local law

(a) the provisions contained in Section 4, Sections 9 to 18, and Section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply."

(20) We may point out that S. 29, Limitation Act, deals only with cases where a special or local law prescribes a period of limitation different from the one prescribed in the first Schedule. It has nothing to do with a case like the present in which a certain period has to be excluded from computation in determining the period of limitation prescribed under the Limitation Act, or a case like the one before the Full Bench where a certain period had to be excluded in computing the period of limitation by reason of the provisions of S. 52, Court of Wards Act.

(21) The Temporary Postponement of Execution of Decrees Act of 1937 was passed by the U. P. Legislature and received the assent of the Governor-General on 20-12-1937. List III of Sch. VII, Entry No. 4, of the Government of India Act of 1935 gives concurrent legislative powers to the Federal Legislature and the Provincial Legislature to enact laws relating to the law of limitation. Section 107, Sub-s. (2), Government of India Act, provides :

"Where a Provincial Law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless Federal Legislature may at any time enact further legislation with respect to the same matter :

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion".

The Provincial law having, therefore, received the assent of the Governor-General, the provisior contained in S. 5 of the Act has to be taken into consideration in computing the period of limitation for suits under the Limitation Act in addition to the provisions of Ss. 4 to 25 mentioned in S. 3 of the Limitation Act.

(22) Part III of the Limitation Act deals with computation of the period of limitation and provides what period is to be excluded for purposes of computation of that period. If a Provincial Act has been validly passed and it makes it obligatory on the Courts to exclude a period when computing the period of limitation, the courts have to exclude that period and if after excluding that period a suit or an application can be filed by a certain date any acknowledgment or payment made before that date, in accordance with the provisions of Ss. 19 and 20, should be deemed to be an acknowledgment or payment made within the period prescribed for the filing of the suit or application. The object of the legislature was that the acknowledgment or payment should have been made before the claim had become time-barred.

Where a claim had become time-barred a mere acknowledgment or payment, without a new promise to pay, could not revive the claim and make the period start running afresh. It could only happen if there was a fresh agreement giving rise to a fresh cause of action. In our view, there is no justification for giving these words the narrow interpretation that even if under the law then prevailing a claim was within time, taking into consideration the provisions of the Limitation Act and any other Act then in force, an acknowledgment or payment made within time would not save limitation. There is a clear difference between a case where the period was being extended of a claim still within time and a case of revival of a claim which has already become barred by limitation. In the latter class of cases the provisions of Ss. 19 and 20 would not help.

(23) The next case in favour of the respondent, — 'AIR 1947 All 199 (B)', is a Division Bench

case in which the previous Full Bench case was followed.

(24) A view contrary to the view in — 'Shanker Lal's case (A)', was taken by the Oudh Chief Courts (by Srivastava, Acting Chief Judge and Smith, J.) in the case of — 'AIR 1937 Oudh 26 (G)'. In that case also the debtor had become a ward of the court and the court of wards released the estate without paying the debts. The Collector had made certain acknowledgments and the plaintiff relied on those acknowledgments and claimed that the period during which the estate had been under the superintendence of the Court of Wards had to be excluded under S. 52. The learned Judges decided in plaintiff's favour but gave no reasons for their decision.

(25) In — 'Shanker Lal's case (A)', the decision of Rankin, C. J., in — 'AIR 1929 Cal 68 (D)', was relied on. As was pointed out in the referring order, this case was clearly distinguishable. The acknowledgment was made after the period of limitation had expired but during the period when the Court was closed. Reliance was placed on S. 4, Limitation Act, but it was pointed out that S. 4 could apply only to a case where a suit was filed on the date the Court reopened after the holidays. Section 4 is as follows :

> "Where the period of limitation prescribed for any suit, appeal or application, expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

The learned Chief Justice pointed out that the section did not extend the period of limitation but applied only to a case where the suit was filed on the day when the Court reopened after the holidays, that if the suit was not filed when the Court re-opened after the holidays Section 4 was not applicable and the plaintiff could not claim that the payment was made within the prescribed period. It is not necessary for us to express any opinion on the point but we may with respect point out that it is possible to take the view that when the suit could be filed on the day the Court reopened after the holidays acknowledgment made during the holidays could be deemed to be within the prescribed period, so that any acknowledgment made during that period would come under S. 19.

(26) There has been some conflict of opinion as to the meaning of the words "prescribed period" in Ss. 19, 20 and other sections of the Act. It has been held in some cases that prescribed period means the period mentioned in the third column of the first schedule. It has also been held that there is no reason to limit the words "period prescribed" to the period mentioned in the third column of the first schedule and that prescribed period must mean the period prescribed under the Limitation Act. In other words, the period mentioned in the third column of the first schedule is subject to the provisions of Ss. 4 to 25, Limitation Act. In our view the correct interpretation is that the acknowledgment or payment should have been made before the claim had become time-barred and that is the prescribed period.

(27) A question had sometimes arisen whether when a period has been prescribed under some other Act the provisions of Parts II & III of the Limitation Act were applicable. Section 29 of the Act as amended has now made that point clear and in any case the point does not arise and we need not express any opinion.

(28) In our view there is no good reason why the period of three years which had to be excluded under the Temporary Postponement of Execution of Decrees Act should not be taken into consideration in deciding the question whether the payment was made within the prescribed period.

(29) The suit, therefore, was clearly within time, the payment having been made before the period of limitation had expired. This is our answer to the question referred to the Full Bench.

V.S.B. Answer accordingly.

A.I.R. 1955 ALLAHABAD 46 (Vol. 42, C.N. 14)

ASTHANA J. (12-4-1954)

Ram Lal Singh, Applicant v. State through Anandi Chamar and others, Opposite Party.

Criminal Ref. No. 75 of 1952, made by Addl. S. J. of Jaunpur, D/- 28-2-1952.

Criminal P. C. (1898), S. 145 — Finding that there is no apprehension of breach of peace — Effect.

Where the Magistrate has found that there is no apprehension of a breach of the peace he has no jurisdiction to decide the further question as to which party was in possession of the disputed property, but if from the material on the record it appears that the property had been attached by the police from the possession of a particular party he can pass an incidental order that the attached property might be released in his favour in order to restore the status quo ante. If, however, the material on the record does not indicate from whose possession the property was attached or who was in possession of it on the date of the attachment, the Magistrate after finding that there is no apprehension of a breach of the peace cannot proceed further and take evidence in order to decide the question of possession. (Para 8)

Anno: Cr. P. C. S. 145 N. 2 and 12.

CASES REFERRED: Paras

(A) (V38) AIR 1951 Nag 201: 52 Cri LJ 1 3, 9
(B) (V35) AIR 1948 All 425: 49 Cri LJ 714 5
(C) (V39) AIR 1952 All 580: 1950 All WR (HC) 356 6
(D) (V40) AIR 1953 All 341: 1952 All WR (HC) 430: 1953 Cri LJ 740 7

Kirpa Shankar Sinha, for Applicant; Suraj Nath Singh for Opposite Party No. 1.

JUDGMENT: This is a reference by the learned Additional Sessions Judge of Jaunpur recommending that the order dated 29-10-1951 passed by the Sub-divisional Magistrate of Shahganj district Jaunpur for the release of the attached property in favour of the first party, i.e., Anandi Chamar and others, be quashed.

(2) The proceedings arose out of a case under S. 145, Cr. P. C. The learned Magistrate after considering the evidence produced before him came to the conclusion that there was no apprehension of a breach of the peace and he, therefore, dismissed the application under S. 145, Cr. P. C. He, however, proceeded to decide the question of possession and found that the first party was in possession of the property on the relevant date, i.e., within two months of the preliminary order and it was from his possession that the attachment was made. He passed an order that the attached property might be released in favour of the first party. Against this decision the second party filed a revision.

(3) The learned Sessions Judge has found that the learned Magistrate had no jurisdiction to pass the order after he had come to the conclusion that there was no apprehension of a breach of the peace and the proper order which should have been passed by him after coming to this finding was that he should have dismissed the application and quashed further proceedings. He has also found that the learned Magistrate had no jurisdiction to enter into the question of possession after he had found that there was no apprehension of a breach of the peace and in support of his view he has relied on several decisions mentioned in his judgment. The learned Magistrate in his explanation relied on a decision of the Nagpur High Court; but the reference of this case has been wrongly given by him. He has mentioned — 'State v. Sheoratan Singh', (AWR 1951 Nagpur, pages 56 to 59) instead of AIR 1951 Nag 201 (A)).

(4) I have heard the learned counsel for the parties. The only question for determination is whether the learned Magistrate had any jurisdiction to decide the question of possession after he had found from the evidence produced before him that there was no apprehension of a breach of the peace.

(5) In 'Rajdeo Singh v. Emperor', AIR 1948 All 425 (B), it was held by Agarwala, J. that when proceedings were dropped under S. 145 (5), Cr. P. C., on the ground that there never existed a dispute likely to cause a breach of the peace the Magistrate's jurisdiction to act under the provisions of S. 145, altogether came to an end, and as such he could only pass an incidental order relating to the attached property and if he entered into a minute examination as to the claims of the respective parties regarding the fact of actual possession on the date of the initial order he would be doing precisely what he was not empowered to do. It was further held by him that if from the record it appeared that the property had been attached from the possession of a certain party the Magistrate had the inherent jurisdiction to restore possession of the property to that party, as by doing so he would be restoring the status quo ante; but if there was nothing on the record to show from whose possession the property had been attached by the police, the only alternative for the Magistrate was to pass an order that the attachment of the property should be lifted without saying in whose favour the release was to be made.

(6) In 'Gangadhar v. State', AIR 1952 All 580 (C), it was held by a Division Bench of this Court consisting of Sapru and Seth, JJ. that where the Magistrate found that there was no likelihood of a breach of the peace but still entered into a minute examination of the evidence and ordered that the opposite party should remain in possession of the land until evicted in due course of law, without saying that the land had been attached from the possession of the opposite party it was held that the order of the Magistrate was not a mere order of release but was an order contemplated by S. 145, Cr. P. C., and as such was an order without jurisdiction.

(7) In 'Dulla v. State', AIR 1953 All 341 (D), it was held by Nasirullah Beg J. that once it was found that there was no danger of a breach of the peace the foundation for action under S. 145, Cr. P. C., did not exist and a Magistrate had no jurisdiction to proceed further in order to decide the question of possession, that the only course open to him in such a case was to quash all proceedings under S. 145, Cr. P. C., and that he could not direct the disputed property to be released in favour of one of the parties.

(8) It will appear from a consideration of the above authorities that the consistent view of this High Court has been that where the Magistrate has found that there is no apprehension of a breach of the peace he has no jurisdiction to decide the further question as to which party was in possession of the disputed property, but if from the material on the record it appeared that the property had been attached by the police from the possession of a particular party he could pass an incidental order that the attached property might be released in his favour in order to restore the status quo ante. If, however, the material on the record does not indicate from whose possession the property was attached or who was in possession of it on the date of the attachment the Magistrate after finding that there was no apprehension of a breach of the peace could not proceed further and take evidence in order to decide the question of possession.

(9) In 'AIR 1951 Nag 201 (A)', it was held that where the Magistrate acting under sub-s. (5) has cancelled the preliminary order passed under sub-s. (1) of S. 145 there would be nothing wrong if he passed an incidental order cancelling the order of attachment as well. It was further held that it was but right that when the jurisdiction to act under the section was found wanting the Magistrate should restore the status quo ante and when it was not possible to determine this status because of the difficulty in determining from whom the property was attached the appropriate order to pass was to retain the property in the custody of the court and direct the parties to have recourse to a civil court to obtain possession of the property. This decision also does not lay down that the Magistrate has got any jurisdiction to take evidence regarding the possession of the property after he has found that there is no apprehension of a breach of the peace. It is, however, doubtful if the property could be kept under attachment when the proceedings under S. 145, Cr. P. C., had been dropped

after finding that there was no apprehension of a breach of the peace.

(10) The learned Sessions Judge has observed that it does not appear from the police report or from any other document on the record from whose possession the property in dispute was attached. According to him the report of the police was silent as to which party was in possession at the time of the attachment though both of them were claiming possession to it.

(11) In the circumstances I accept the recommendation of the Sessions Judge and quash the order of the Magistrate directing the attached property to be released in favour of Anandi Chamar and others, opposite parties, and direct that the entire proceedings under S. 145, Cr. P. C., shall stand cancelled.

G.M.J. Reference accepted.

A.I.R. 1955 ALLAHABAD 48 (Vol. 42, C.N. 15)

FULL BENCH

MALIK C. J., V. BHARGAVA, MUKHERJI, M. L. CHATURVEDI AND ASTHANA JJ.

(12-10-1954)

Murari Lal Solan, Applicant v. State through Dist. Magistrate, Muzaffarngar and others, Opposite-Parties.

Misc. Appln. Nos. 141 and 181 of 1950.

Houses and Rents — U. P. (Temporary) Accommodation Requisition Act (25 of 1947), S. 1 (5) — Sub-section if ultra vires — (Constitution of India, Art. 245.)

Section 1 (5) in so far as it authorises the Provincial Government to direct the extension of the life of the Act for a further period of one year after the expiry of the one year fixed by the Act, is not 'ultra vires' the U. P. Legislature. AIR 1951 All 181 held no longer good law in view of AIR 1951 SC 332.

(Para 6)

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 181: 1951 All LJ 64: 52 Cri LJ 333 (FB) 1, 4

(B) (V38) AIR 1951 SC 332: 1951 SCR 747 (SC) 4

(C) (V41) AIR 1954 SC 569: 1954 SCJ 774 (SC) 4

(D) ('54) Ex. S. A. No. 1485 of 1951 D/- 16-9-1954 (All) 5

R. S. Pathak and Nathoo Singh Singhal, for Applicant; Standing Counsel, for Opposite-Parties.

MALIK C. J.:

On a difference of opinion between Mr. Justice Wali Ullah and Mr. Justice Agarwala a question of law was referred to a third Judge. The learned Judge to whom the question was referred in view of the decision of a Full Bench of this Court in the case of — 'Ram Kishan v. State', AIR 1951 All 181 (A), thought it necessary that the question should be decided by a Full Bench of five Judges, as in his opinion the decision in — 'State v. Ram Kishan', (A), needed reconsideration.

(2) The question referred for consideration is as follows:

"Whether S. 1 (5) U. P. (Temporary) Accommodation Requisition Act, 25 of 1947, in so far as it authorises the Provincial Government to direct the extension of the life of the Act beyond one year from 1-10-1947, is 'ultra vires' the U. P. Legislature?"

(3) The U. P. (Temporary) Accommodation Requisition Act, 25 of 1947 (hereinafter called the Act) was passed, as its preamble shows, because of shortage of accommodation, which had become very acute due to the large influx of refugees as a result of the partition of the country. The District Magistrate was empowered to requisition accommodation for the settlement of the refugees. How long it would take for the situation to come back to normal was not known. It was, however, anticipated that things might settle down in a year's time but the possibility of the provisions of the Act being needed even after the expiry of one year was also foreseen. The Legislature, therefore, provided in sub-s. (5) of S. 1 that:

"It (that is, the Act) shall cease to have effect on the expiration of one year from October, 1 1947, or if the Provincial Government so directs by notification in the Official Gazette, on the expiration of two years beginning with that date except as respects things done or omitted to be done before the expiration thereof, and S. 6 of the United Provinces General Clauses Act, 1904, shall apply upon the expiration thereof as if it had been repealed by an United Provinces Act."

The Act was, therefore, passed for a period of one year certain and it was left to the State Government, if in their opinion the exigencies of the situation so required it, to issue a notification, and then the Act was to continue to remain in force for a further period of one year.

(4) Learned counsel for the applicant has urged that the power of extending the life of the Act by a further period of one year was delegated legislation which was not permissible under the law. He has relied on a decision of a Full Bench of this Court in 'AIR 1951 All 181 (A)'. In view of the later decisions of the Supreme Court that case can no longer be said to lay down correct law. In the 'Delhi Laws' Case, In Re. Article 143 Constitution of India and Delhi laws Act (1912) etc., AIR 1951 SC 332 (B)', the question arose, before the Supreme Court, whether the Legislature could empower the Government to apply existing legislation to specified areas. This was challenged on the ground that it amounted to delegating legislative authority and was, therefore, invalid.

The President made a reference to the Supreme Court under Art. 143 of the Constitution. The opinion expressed in that case by the learned Judges has been summarised in a recent decision of the Supreme Court,—'Rajnarain Singh v. Chairman, Patna Administration Committee, Patna', AIR 1954 SC 569 (C). If it was possible for the Legislature to empower the Govt. to consider the circumstances and decide whether the existing laws should or should not be applied to a particular area, it cannot be seriously challenged that the U. P. Legislature could leave it to the discretion of the State Government that, if

things did not settle down and the problem of influx of refugees made it necessary, the Act should remain in operation for a further period of one year. The State Government could in that case issue a notification and thereby extend the life of the Act.

(5) The argument generally advanced against delegation of legislative authority is that the Legislature cannot abdicate its functions in favour of any other person or body. There could, in this case, be no question of the Legislature abdicating its powers. The Legislature enacted the law for a period of one year and foresaw the possibility that it might be necessary to extend the life of the Act for a further period of one year. The State Government had only to examine the situation at the end of the year and decide whether the need for requisition of houses still existed. This point recently came up for decision in — 'Mt. Bhagwati Devi v. Sardar Balwant Singh', E. S. A. No. 1485 of 1951, D/- 16 9-1954 (All) (D), and it was held by the Full Bench that S. 1 (5) of the Act was not 'ultra vires' the U. P. Legislature. In view of what has been said in that case it is not necessary for us to say anything more.

(6) Our answer, therefore, to the question referred is that S. 1 (5) of the U. P. (Temporary) Accommodation Requisition Act, 25 of 1947, in so far as it authorises the Provincial Government to direct the extension of the life of the Act for a further period of one year after the expiry of the one year fixed by the Act, is not 'ultra vires' the U. P. Legislature.

V.R.B. Answer accordingly.

(S) A.I.R. 1955 ALLAHABAD 49 (Vol. 42, C.N. 16)

FULL BENCH

MALIK C. J., AGARWALA, V. BHARGAVA, MUKHERJI AND M. L. CHATURVEDI JJ.

(11-10-1954)

Mst. Suraj Dei, Appellant v. Mst. Gulab Dei, Respondent.

Ex. First Appeal No. 331 of 1945; against order of Civil Judge, Gorakhpur, D/- 17-3-1945.

Limitation Act (1908), Art. 182 (5) — Application for step-in-aid — Application by decree-holder auction-purchaser for delivery of possession is not one — (Civil P. C. (1908), S. 47); 19 All 477 and 41 All 479: AIR 1919 All 390: 50 Ind Cas 143, Overruled.

The right of the decree-holder to have the property sold and possession delivered to him flows from his being the highest bidder and not from the decree. The position, therefore, of a decree-holder is exactly the same as that of any other person who bids at an auction sale. An application for delivery of possession cannot be made by the decree-holder as such, as the decree gives him no such right. It is an application by him as the auction-purchaser of the property. (Paras 6, 7)

The mere fact, that the executing Court is authorised, after it has confirmed the sale in favour of the auction-purchaser, to direct delivery of possession to him, does not necessarily make it a question relating to execution, discharge or satisfaction of the decree within S. 47, Civil P. C. (Para 8)

In any case, an auction-purchaser is not a representative of the decree-holder but of the judgment-debtor and any dispute arising between the auction-purchaser and the judgment-debtor would amount to a dispute between the judgment-debtor and his own representative and cannot come under S. 47 of the Code. (Para 9)

An application by the decree-holder auction-purchaser for delivery of possession is not, therefore, an application to take a step-in-aid of execution within Art. 182 (5), Limitation Act. 31 All 82 (FB) and AIR 1937 All 742 (FB), Rel. on. 19 All 477 and 41 All 479: AIR 1919 All 390: 50 Ind Cas 143, Overruled. Case law referred. (Para 12)

Anno: Lim Act, Art. 182, N. 123 Pt. 6; Civil P. C., S. 47, N. 19, 28.

CASES REFERRED: Paras

(A) (V24) AIR 1937 All 742: ILR (1937) All 921 (FB) 7, 8, 9, 10
(B) (V11) AIR 1924 Bom 429: 48 Bom 550 (FB) 10
(C) (V19) AIR 1932 Pat 80: 10 Pat 670 10
(D) (V15) AIR 1928 Oudh 199: 3 Luck 182 (FB) 10
(E) (V17) AIR 1930 Lah 363: 120 Ind Cas 593 10
(F) (V17) AIR 1930 Rang 61: 8 Rang 162 10
(G) (V13) AIR 1926 Cal 798: 53 Cal 781 (FB) 10
(H) (V7) AIR 1920 Mad 324: 43 Mad 107 (FB) 10
(I) ('09) 31 All 82: 1 Ind Cas 416 (FB) 10, 11
(J) ('97) 19 All 477: 1897 All WN 117 11
(K) (V6) AIR 1919 All 390: 41 All 479 11

Sripati Sahai Srivastava, for Appellant; Harnandan Prasad, for Respondent.

MALIK C. J.:

The short point referred to the Full Bench is as follows :

"Was the respondent's application for execution within time in respect of the earlier three years?"

The facts of the case are that Shrimati Gulab Dei, respondent, filed a suit in the year 1920 against Sadhu Saran for arrears of maintenance and for future maintenance. She claimed that she was the widow of a member of the joint Hindu family and after the death of her husband she was liable to be maintained from the funds of that family of which Sadhu Saran was in possession as Karta. On 13-12-1920, there was a compromise and a sum of money was paid towards the arrears and the future maintenance was fixed at Rs. 250/- per annum payable in four equal instalments falling due on the 31st of March, 30th of June, 30th of September and 31st of December in each year. A charge was also created on certain properties mentioned in the compromise. A decree was passed by the court in terms of the compromise.

(2) The judgment-debtor did not, however, pay the maintenance allowance regularly and a series

of applications had to be made for execution of the decree. It is not necessary to deal with the earlier applications. The seventh application was filed on 3-3-1938, and the arrears claimed were up to 31-12-1937. It was prayed that certain items of property mentioned in the execution application and over which a charge had been created should be sold by auction. On 4-4-1940, the property was sold. On 8-6-1940, the sale was confirmed. On 22-2-1943, the decree-holder auction-purchaser applied for possession of the property purchased by her at auction. On 30-3-1943, possession was delivered. That terminated those proceedings.

(3) On 18-2-1941, the eighth application for execution was filed in which arrears of maintenance were claimed for the years 1938, 1939 and 1940. This application was dismissed for want of prosecution on 23-4-1941.

(4) The ninth application, with which we are concerned, was filed on 2-11-1944, and the amount claimed was from 1-1-1938, to 30-9-1944. The judgment-debtor filed an objection that the application was barred by time, but the objection was dismissed by the execution Court. In this appeal by the judgment-debtor the learned counsel for the appellant has confined his objection only to the claim for the first three years, i.e., 1938, 1939 and 1940.

(5) An argument was advanced before the Bench hearing the appeal that the application dated 22-2-1943, was a step-in-aid of execution. The question that has, therefore, to be decided is whether the application dated 22-2-1943, could be considered as a step-in-aid of execution. Article 182, Limitation Act, provides a period of three years for execution of a decree from the date of the decree or order, or where the application for execution has been made previously, from the date of the final order or where some step-in-aid in execution of the decree or order had been taken, from that date. The answer to the question whether the application dated 22-2-1943, was a step-in-aid of execution would depend on whether the application filed by Shrimati Gulab Dei was in her capacity as a decree-holder and whether it was an application that related to execution, satisfaction or discharge of her decree.

(6) It cannot be disputed that Shrimati Gulab Dei had no right under the decree either to claim possession of the property or even to claim that the property be sold to her. The only right that the decree conferred on her was to put it into execution in the manner provided in the Code and one of the modes provided in the Code was to have the property of the judgment-debtor put to sale so that from the sale proceeds the decree might be satisfied. Under O. 21, R. 72 of the Code, before it was amended, a decree-holder did not even have a right to bid at auction and he could only do so with the express permission of the Court.

That rule has, however, been amended by this Court and the decree-holder has now been put in exactly the same position as any other person and is entitled to bid at the auction. If his bid happens to be the highest, he can claim that the sale be confirmed in his favour. If the sale is confirmed in his favour then he becomes entitled to get the sale certificate and possession of the property. The auction-purchaser can apply under O. 21, R. 95 to the Court granting the sale certificate that he be put in possession of the property and the Court can put him in possession, if need be, by removing any person who refuses to vacate the same, and the person made to vacate the property has a right to file a suit in the civil court for possession of the property within a period of one year under Art. 11A, Limitation Act. The right of the decree-holder to have the property sold and possession delivered to him flows from his being the highest bidder and not from the decree. The position, therefore, of a decree-holder is exactly the same as that of any other person who bids at an auction sale and whose bid being the highest is accepted by the Court and the sale is confirmed in his favour.

(7) Two points have been raised in support of the contention that the application dated 22-2-1943 was a step-in-aid of execution. It is urged that the decree-holder's position remains still that of a decree holder and any application that he may file would be deemed to be an application by a decree-holder against his judgment-debtor and it must, therefore, come under S. 47 of the Code. From what we have already said it is clear that the application for delivery of possession could not be made by the decree-holder as such, as the decree gave him no such right and it was an application by him as the auction-purchaser of the property.

It is also urged that so long as the decree-holder has not got possession of the property it cannot be said that his decree has been satisfied. This latter argument was met in a very apt illustration given by the learned Chief Justice, Sir Shah Mohammad Sulaiman, in — 'Kedar Nath v. Arun Chandra Sinha', AIR 1937 All 742 (FB) (A). He pointed out that, if after the sale certificate had been issued but before possession had been delivered the property was destroyed by an earthquake, the decree-holder could not claim that since he had not got possession of the property he could again claim the right to execute his decree.

(8) Learned counsel has also urged that, since there is a provision in O. 21 for delivery of possession of the property after confirmation of the sale, it must be deemed that the question of delivery of possession of the property to the auction-purchaser is a question relating to execution, discharge or satisfaction of the decree. As was pointed out by the learned Chief Justice in — 'Kedar Nath's case (A)', the mere fact, that the executing court is authorised after it has confirmed the sale in favour of the auction-purchaser to direct delivery of possession to him, does not necessarily make it a question relating to execution, discharge or satisfaction of the decree. If the auction-purchaser is a third party and he has deposited the money after the purchase, as he has to do within 15 days under O. 21, R. 85 of the Code, the money can be paid to the decree-

holder towards the satisfaction of his decree and the question of delivery of possession to the auction-purchaser under O. 21, R. 95 has nothing to do with the decree-holder and cannot be said to relate to execution, discharge or satisfaction of the decree, which has already been executed and discharged or satisfied. If the decree-holder is the auction purchaser and has recorded satisfaction under O. 21, R. 72 of the Code, the same result would follow and it cannot be said that anything further remains to be done towards the execution, discharge or satisfaction of the decree.

(9) In any case, as was pointed out by the learned Chief Justice, again in — 'Kedar Nath's case (A)', the auction-purchaser is not a representative of the decree-holder but of the judgment-debtor and any dispute arising between the auction-purchaser and the judgment-debtor would amount to a dispute between the judgment-debtor and his own representative and cannot come under S. 47 of the Code.

(10) The learned Chief Justice in — 'Kedar Nath's case (A)', in support of his decision referred to a Full Bench decision of the Bombay High Court in — 'Hargovind Fulchand v. Bhudar Raoji', AIR 1924 Bom 429 (B), a Full Bench of the Patna High Court in — 'Tribeni Prasad v. Ramasray Prasad', AIR 1932 Pat 80 (C), and a Full Bench of the Oudh Chief Court in — 'Gaya Bakhsh Singh v. Rajendra Bahadur', AIR 1928 Oudh 199 (FB) (D), as also the Division Benches of Lahore and Rangoon, in — 'Punjab National Bank v. Biri Mal', AIR 1930 Lah 363 (E), and — 'J. A. Martin v. S. M. Hashim', AIR 1930 Rang 61 (F).

The Full Benches of the Calcutta High Court and the Madras High Court in — 'Kailash Chandra v. Gopal Chandra', AIR 1926 Cal 798 (FB) (G), and — 'Veyindramuthu Pillai v. Maya Nadan', AIR 1920 Mad 324 (FB) (H), which had taken a contrary view, were also discussed and it is not necessary for us to repeat all that was said in — 'Kedar Nath's case (A)', or in the well considered judgment, if we may say so with respect, of Banerji, J., in — 'Bhagwati v. Banwari Lal', 31 All 82 (FB) (I). The consistent view of this Court has been that a decree-holder auction-purchase is in no different position from any one else who might have purchased the property at an auction sale in execution of a decree and the same considerations should apply to both.

(11) Before parting with this case, however, we may mention that the learned Judges referred this case for consideration by a larger Bench by reason of two Division Bench rulings of this Court — 'Moti Lal v. Makund Singh', 19 All 477 (J) and — 'Babu Ram v. Pearey Lal', AIR 1919 All 309 (K). 'Moti Lal v. Makund Lal (J)', was decided before the Full Bench and after the decision of the Full Bench it is no longer good law. In — 'Babu Ram's case (K)', the Full Bench in — 'Bhagwati v. Banwari Lal (I)', was cited but the learned Judges did not follow that decision on the ground that the question for decision in that case before them, was the same as in — 'Moti Lal's case (J)', which they purported to follow and which decision according to them had not been overruled by the Full Bench. We do not think that the learned Judges were right in that view, and in any case we have no hesitation in overruling the decision in — 'Babu Ram v. Pearey Lal (K)', on the ground that it does not lay down correct law.

(12) In our view the answer to the question must be in the negative. The case may now be put up before the Bench concerned.

D.R.R. Reference answered.

A.I.R. 1955 ALLAHABAD 51 (Vol. 42, C.N. 17)

H. S. CHATURVEDI J. (18-1-1954)

Jai Lal, Applicant v. State through Madhuri Saran and others, Opposite Parties.

Criminal Revn. Appln. No. 498 of 1952, against order of S. J., Mathura, D/- 14-1-1952.

Criminal P. C. (1898), S. 145(1) — Preliminary order — Essentials — Order omitting to direct parties to attend Court.

An order does not cease to be an order under S. 145(1) if it is defective in any small particulars. The main requirements are that the order should be in writing, that it should indicate that the Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land or water, etc., and also state the grounds of his being so satisfied. No doubt it is necessary that a Magistrate should properly word the preliminary order in a case under S. 145. But in every case the Court has to see whether the defect is or is not a material one.

An order cannot be regarded as illegal or invalid because of the mere omission on the part of the Magistrate to direct at the same time that the parties concerned in such dispute should attend his Court within a certain time, etc. The omission no doubt amounts to an irregularity, but the Courts have to consider whether the irregularity is such as would affect the validity of the order passed by the Magistrate. No order passed by a Court of competent jurisdiction can be reversed or altered because of any error or omission or irregularity in such order, unless such irregularity has in fact occasioned a failure of justice.

Held that the more important ingredients which should be included in such an order were contained in the order in question and that order should be deemed to be the order required by S. 145(1). (Para 4)

Anno: Cr. P. C., S. 145 N. 15.

K. C. Mittal, for Applicant; P. C. Gautam, for Opposite Party (No. 1).

ORDER: This application in revision arises out of proceedings under S. 145, Criminal P. C. An application under that section was made on behalf of the applicant Jai Lal against eight persons not including the opposite party Madhuri Saran. The Magistrate called for a police report and on a perusal of that report, on 21-9-1949, he passed the following order:

"Police report perused. I am satisfied that there is an apprehension of the breach of peace. S. O. will please attach the land and crop, if any, and entrust it to some reliable sapurdar. Applicant to show the specific number of plots to the S. O."

Thereafter the attachment was made and after a report had been received from the police indicating that the attachment had been made, the Magistrate after some delay, on 17-3-1950, passed the following order:

"I am satisfied from the police report that there exists an apprehension of breach of peace between the parties. Issue notice under S. 145, Cr. P. C., to the parties to file their written statements."

In the Hindi order of the 17th March, the date by which such written statements were to be filed was also indicated. It may be noted that Madhuri Saran had, in the meanwhile, put forward a claim that he was in actual possession of the land in dispute. Subsequently, the parties filed their respective written statements and after considering the evidence the learned Magistrate passed an order declaring Madhuri Saran to be in possession, and directed that he shall 'continue to be in such possession until evicted therefrom in due course of law'. He also forbade all interference with his possession. The attachment was directed to be withdrawn in his favour. The applicant went up in revision before the learned Sessions Judge and he dismissed his application.

(2) The point urged on behalf of the applicant is that inasmuch as the preliminary order was passed on 17-3-1950, the Magistrate had no power under S. 145 to determine the question as to which party was in possession before the property was attached by the police. Section 145 requires that the Magistrate shall, after considering the evidence, decide whether any and which of the parties was at the date of the order mentioned in sub-s. (1), in possession of the subject of dispute. It is said that inasmuch as neither party was in possession of the property on the date when the preliminary order was passed namely, 17-3-1950, the Magistrate should, acting under S. 146(1), have directed that the property was to remain attached until a competent court had determined the rights of the parties thereto, or the person entitled to possession thereof.

(3) On behalf of the opposite party Madhuri Saran, it is urged that the order passed by the learned Magistrate on 21-9-1949, was in fact the preliminary order and that he was quite right in determining which party was in possession of the property on that date before it was attached by the police under the orders of the Magistrate. On behalf of the applicant, it is said that the preliminary order of the Magistrate should satisfy all the conditions laid down in S. 145(1) which requires that the order should be in writing, should state the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof and require the parties concerned in such dispute to attend his court in person or by pleader within a time to be fixed by the Magistrate and to file written statements of their respective claims as respects the actual possession of the subject of dispute. On behalf of the opposite party it is said that although the order passed on the 21st September, 1949, does not call upon the parties concerned in the dispute to attend the Magistrate's Court within a certain time and to put in their written statements etc., it should still be deemed to be an order under sub-section (1) of 145.

(4) I do not think that an order ceases to be an order under S. 145(1) if it is defective in any small particulars. The main requirements are that the order should be in writing, that it should indicate that the Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land or water etc. and also state the grounds of his being so satisfied. In the present case, the Magistrate had asked the police to submit a report. When the report was received, the Magistrate on the back of that report wrote the order which has been reproduced above and the order clearly indicates that the Magistrate was satisfied for the reasons given in the police report that a dispute likely to cause a breach of the peace existed. No doubt it is necessary that a Magistrate should properly word the preliminary order in a case under S. 145. But in every case, we have to see whether the defect is or is not a material one.

It appears that the order of 21-9-1949, was defective inasmuch as the Magistrate did not at the same time pass an order requiring the parties concerned in the dispute to attend his court in person or by pleader within a certain time and to put in written statements of their respective claims, etc. The question is whether the omission on the part of the Magistrate to incorporate this in the order makes it invalid.

In my view, the order cannot be regarded as illegal or invalid because of the mere omission on the part of the Magistrate to direct at the same time that the parties concerned in such dispute were to attend his court within a certain time etc. The omission no doubt amounted to an irregularity, but we have to consider whether the irregularity is such as would affect the validity of the order passed by the Magistrate. No order passed by a court of competent jurisdiction can be reversed or altered because of any error or omission or irregularity in such order, unless such irregularity has in fact occasioned a failure of justice. It is not indicated how this irregularity has in fact occasioned a failure of justice.

The Magistrate had not the full particulars of the plots in dispute in his possession on the date on which the order was passed. After receiving the report of the station officer indicating that certain plots had been attached by him, necessary notices were directed to be issued by another order passed on 17-3-1950. No doubt the Magistrate thought that the latter order was in fact the order required by S. 145(1). But that is of no consequence. All the more important ingredients which should be included in such an order are contained in the order of 21-9-1949, and in my view that order should be deemed to be the order required by S. 145(1). The Magistrate on a consideration of the evidence found that the opposite party Madhuri Saran was in possession of the

property in dispute on the date when that order was passed and the finding of fact cannot be interfered with by this Court.

(5) I, therefore, see no reason to interfere and reject the application. The order staying the operation of the order passed by the Magistrate is discharged.

D.R.R. Revision application rejected.

(S) A.I.R. 1955 ALLAHABAD 53 (Vol. 42, C.N. 18)

FULL BENCH

MALIK C. J., BRIJ MOHAN LALL AND M. L. CHATURVEDI JJ. (22-9-1954)

Mst. Latif-un-Nissa and others, Applicants v. Mst. Khair-un-Nissa and another, Opposite Parties.

Civil Revn. No. 474 of 1946, against order of Civil Judge, Furrukhabad, D/- 1-5-1946.

†Civil P. C. (1908), O. 33, Rr. 1 and 7 — Applicant under — Death of, before decision under R. 7 — Heirs, if can continue proceeding in their own right — Pauperism of original applicant, consideration of.

The heirs of a person, who has made an application for leave to sue in 'forma pauperis' under O. 33, and dies before the application is allowed or refused under R. 7 of the Order, can continue the proceedings in their own right either upon showing that they are themselves paupers or by offering to pay court-fee on the plaint. In deciding the question whether the legal representatives should be allowed to continue the proceedings under O. 33, the Court is entitled to go into the question whether the original applicant was or was not a pauper. Case law Ref. (Para 19)

Anno: C. P. C., O. 33, R. 1 N. 11; R. 7 N. 8.

CASES REFERRED: Paras

(A) ('78-79) 2 All 241: 6 Ind App 126 (PC) 5
(B) ('49) Civil Revn. No. 452 of 1949 (All) (FB) 6
(C) (V12) AIR 1925 Mad 819: 88 Ind Cas 91 7
(D) (V15) AIR 1928 Mad 278: 51 Mad 697 7, 16
(E) (V32) AIR 1945 Oudh 219: 20 Luck 327 7
(F) (V21) AIR 1934 Mad 467: 58 Mad 169 7
(G) (V34) AIR 1947 Mad 405: ILR (1947) Mad 820 7, 18
(H) ('06) 33 Cal 1163: 4 Cal LJ 234 16
(I) ('22) 64 Ind Cas 63 (Cal) 16
(J) (V1) AIR 1914 Oudh 384: 18 Oudh Cas 64 16
(K) (V23) AIR 1936 Pat 591: 15 Pat 738 18
(L) (V39) AIR 1952 Cal 696: 56 Cal WN 207 18
(M) (V33) AIR 1946 Nag 320: ILR (1946) Nag 663 18
(N) (V40) AIR 1953 Mys 57: ILR (1953) Mys 238 18

S. Sadiq Ali and Gopal Behari, for Applicants; Ishaq Ahmad, for Opposite Parties.

MALIK C. J.:

Civil Revision No. 474 of 1946 filed by the legal representatives of Mohammad Baksh came up before a Bench of this Court on 14-9-1950, and, while my brother Agarwala, J. was of the opinion that the applicants could continue the proceedings if they were prepared to pay the court-fee, or if they could allege and establish that they were paupers and were not able to pay the court-fee, the other learned Judge, Pearey Lal Bhargava J. took a contrary view.

(2) By reason of the difference of opinion two questions of law were formulated and referred to a larger Bench for decision. The points are:

"1. Whether the heirs of a person, who has made an application for leave to sue in 'forma pauperis' under O. 33 of the Code of Civil Procedure and dies before the application is allowed or refused under R. 7 of the Order, can continue the proceedings in their own right either upon showing that they are themselves paupers or by offering to pay court-fee on the plaint? If the answer be in the affirmative, whether the heirs have to show that the original applicant was also a pauper?

2. Whether, in the circumstances of the present case, the objection that the right to sue did not survive is open to the applicants, in view of the order bringing the heirs on the record in the previous revision application and the final decision passed on that revision application?"

(3) The facts of the case so far as they are necessary for the decision of the points raised are that Mohammad Baksh and Haidar Baksh filed an application under O. 33 of the Code of Civil Procedure for permission to file a suit in 'forma pauperis'. They claimed that they were brothers and were the legal representatives and heirs of Haji Ahmad Baksh, who had died on 11-12-1928 and were entitled to his property which was in the wrongful possession of the opposite party. This application was rejected by the lower Court on a finding that Mohammad Baksh and Haider Baksh were not paupers. An application in revision was filed in this Court and during the pendency of the application Mohammad Baksh died. On the death of Mohammad Baksh his legal representatives Latif-un-Nissa & others applied that they be brought on the record and allowed to continue the civil revision. This application was granted without any objection and on 27-4-1944, the revision application came up for hearing.

The application was allowed and the following order was passed:

"We send the case back to the learned Civil Judge with the direction to consider the question of pauperism on the materials on the record. He should not take into consideration the value of the property covered by the gift and the wakf. If, independently of the property covered by these two transactions, the plaintiffs have sufficient means within the meaning of the law, to pay court-fee, they shall not be entitled to sue in 'forma pauperis'. If, on the other hand, they succeed in establishing that they have not sufficient means, they will be entitled to sue as paupers."

(4) When the case went back to the trial Court the heirs of Mohammad Baksh made an application on 10-11-1945, duly verified it and gave the list of properties belonging to them to show that they were paupers and were not in a position to pay the court-fee. On behalf of the opposite party objections were raised that Mohammad

Baksh having died his legal representatives could not continue the proceedings and the suit so far as Mohammad Baksh was concerned had abated.

The learned Civil Judge decided in favour of the objectors that the application could not be continued by the heirs of Mohammad Baksh as the application under O. 33 filed by Mohammad Baksh had abated. But the learned Judge granted the application of Haider Baksh. The learned Judge, however, held that the heirs of Mohammad Baksh were paupers and were not in a position to pay the court-fee.

(5) Order 33 of the Code of Civil Procedure (Act 5 of 1908) provides for suits by paupers and such a suit can be instituted by a pauper in accordance with the provisions of that Order. Under R. 2 of this Order the petition for leave to sue in 'forma pauperis' must contain the particulars required in regard to plaints and it must be signed and verified in the manner prescribed for the signing and verification of pleadings. The petition should also contain a schedule of any moveable or immoveable property belonging to the applicant with the estimated value thereof.

The rules under O. 33 do not require in this State two documents but one document which contains all the particulars required for a plaint with a prayer superadded that the applicant be granted the reliefs claimed without payment of the court-fee as he is not in a position to pay the same. Dealing with an application for leave to sue in 'forma pauperis' their Lordships of the Judicial Committee in — 'Stuart Skinner v. William Orde', 2 All 241 (A) observed:

> "Now a petition to sue in 'forma pauperis' contains all that a plaint is required to do. By S. 300 'the petition shall contain the particulars required by S. 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints'. Therefore it contains in itself all the particulars the statute requires in a plaint, and, plus these, a prayer that the plaintiff may be allowed to sue in 'forma pauperis'."

Since 1859 the Code was re-enacted three times in 1877, 1882 and 1908 but no material change has been made in these provisions of the Code and the observations of their Lordships of the Judicial Committee in — 'Skinner's case (A)' are, therefore, still good law. The document, therefore, contains, as their Lordships have pointed out, all the prayers that are contained in a plaint with a prayer super-imposed that the plaintiff be granted the reliefs claimed without payment of the court-fee. The other prayers contained in the document can only be entertained and granted if the prayer to be excused from payment of the court-fee is allowed. Where, therefore, that prayer is refused the document before the Court has been completely disposed of and it cannot be said that another order is necessary to dispose of the other prayers which were conditional on the Court allowing the applicant to sue in 'forma pauperis'. So long as the Court is seized of the application, in which the applicant prays that he be allowed to claim certain reliefs without payment of the court-fee due under the Court-fees Act, as he is not in a position to pay the same, the applicant can come forward and pay the court-fee and, if that is accepted, the plaint dates back to the date when it was originally filed and cannot be deemed to have been filed on the date when the court-fee was paid. If the prayer to be excused from payment of the court-fee is granted then also nothing more remains to be done and the Court has to proceed with the decision of the claim put forward before it. Order 33, R. 8, provides that the application to sue as a pauper shall be deemed to be the plaint in the suit if the application is granted. Even without that provision in R. 8, probably, the same result would have followed.

(6) If the Court is still seized of the application to sue as a pauper and it is of the opinion that the petitioner cannot be excused the payment of the court-fee, and the petitioner prays for an opportunity to pay the court-fee, there seems to be no good ground why the Court cannot grant time under S. 149 of the Code. It is not necessary to deal with this point at any length as it has arisen for decision before a recent Full Bench in — 'Devendra Kumar v. Raghuraj Bharti', Civil Revn. No. 452 of 1949 (All) (B), in which arguments have been concluded but the judgment has been reserved.

(7) Learned counsel for the opposite party has conceded that if a petitioner, who has applied under O. 33, R. 1 of the Code, dies before the application is disposed of, the legal representatives of the deceased can pay the court-fee and continue the proceedings and the suit would be deemed to have been instituted on the date when the application under O. 33 was filed by the predecessor-in-interest of the plaintiff. This view was taken by Jackson J. — 'In re, A. S. Radhakrishna Iyer', AIR 1925 Mad 819 (C). In — 'Kaveri Subbiah v. Bala Tripura Sundara', AIR 1928 Mad 278 (D), Srinivasa Ayyangar J. held that a petition for leave to sue in 'forma pauperis' was a personal application on a personal ground and if the applicant died the application could not be continued.

The learned Judge pointed out that unlike the case that was before Jackson J. the legal representatives had not appeared before him to pay the court-fee but, if they had, he would have been prepared to consider such an offer and willing to afford an opportunity by giving time to continue the proceedings as a suit. In several cases an offer was made to pay the court-fee by the legal representatives of the deceased who had applied under O. 33 of the Code and had died before the application was disposed of and the offer was accepted. See — 'Mt. Tarif Begam v. Raziuddin', AIR 1945 Oudh 219 (E); — 'Duraipandiyan v. Solaimalai', AIR 1934 Mad 467 (F) and — 'Brahamaramba v. Seetharammayya', AIR 1947 Mad 405 (G).

The ground on which the learned Judges allowed the court-fee to be paid was that though the prayer to file the suit in 'forma pauperis' made

by the deceased could no longer be granted by reason of his death, the other prayers in the application still remained undisposed of and the legal representatives could by paying the court-fee convert the document into a plaint and continue it as such.

(8) The application, however, had been verified by the deceased and, if it, therefore, became a plaint on payment of the court-fee, it became a plaint which had been filed by the deceased. The legal representatives are not required to verify the plaint again and the payment of the court-fee dates back to the date when the original application to file the suit in 'forma pauperis' was filed.

(9) As we have already said, the other reliefs claimed in the petition are subject to the prayer being granted that the petitioner being a pauper he should be allowed to sue in 'forma pauperis'. If that prayer is rejected under O. 33, R. 7(3) of the Code, in our view, the petition is completely disposed of and it is not necessary to pass another order rejecting the other prayers.

(10) It must also be remembered that the question of pauperism is not decided once for all. If a suit has been filed in the ordinary way on payment of court-fee and, after the suit has been registered, it is discovered that there is a deficiency but the plaintiff is not able to make good the same and applies that he be allowed to continue the suit in 'forma pauperis' that prayer can be granted. If the petitioner is allowed to sue in 'forma pauperis' he, or after his death his legal representatives, can be dispaupered if it is found that they are in a position to pay the court-fee.

(11) There is before the Court, in our view, a document in which the main prayer is that the petitioner may be allowed to claim certain reliefs mentioned in the document without payment of court-fees. The other prayers cannot be considered so long as the main prayer that the petitioner be excused from paying the court-fee is not granted or the court-fee is not paid.

The question whether a person is or is not in a position to pay the court-fee is a personal matter and on his death, therefore, his legal representatives cannot claim that the application filed by their predecessor-in-interest to sue in 'forma pauperis' must be granted on the ground that the deceased was a pauper. If they are in a position to pay the court-fee, they will have to pay the same, just as the deceased would have had to pay the court-fees if his circumstances had so altered that he was in a position to pay the same.

(12) If they can continue the proceedings on payment of court-fees, why should they not be able to say that since they are also paupers they may not be required to pay the court-fees. Just as on payment of court-fee the original petition is registered as a suit, even if the court-fee was paid by the heirs of the deceased petitioner, on the Court holding that the legal representatives were also paupers, it is the original application that shall be registered as a plaint and it should date back to the date when the original application was filed. In effect it would mean that the legal representatives are allowed to claim the reliefs claimed by their predecessor-in-interest without payment of the court-fee.

(13) Where a petitioner was not a pauper and had wrongly made an application to be allowed to sue in 'forma pauperis' but, before that application could be disposed of, he had died and his legal representatives who were paupers pray that they should be allowed to continue the application, the question may arise whether permission should be granted.

If the petitioner had been alive the Court could have dismissed his application if he was not a pauper, unless the Court had given him time under S. 149 of the Code of Civil Procedure to pay the court-fees. His legal representatives who are continuing the original petition should not be in a better position and, while they can be granted exemption from payment of the court-fee if they are paupers, if the Court finds that the original petition was not bona fide and the Court would not have granted the petitioner time under S. 149 to pay the court-fee, the petition should fail, unless the legal representatives are themselves paupers and the court decides to treat their application as a fresh application under O. 33 of the Code.

(14) What we have held above may be summarised as follows:

(i) When a person makes an application for leave to file a suit in 'forma pauperis' his prayer that he be executed from paying the court-fees is personal to himself and cannot survive after his death;

(ii) the other reliefs mentioned in the application are subject to permission being granted to sue in 'forma pauperis'. If that relief is refused, the application is completely disposed of and it is not necessary to pass a separate order rejecting the other reliefs as they could only be claimed if the court-fees were paid or were excused;

(iii) the petitioner can so long as the application is pending pay the court-fees and if the court-fees are accepted the plaint will date back to the date of the original application;

(iv) if, before the application has been disposed of, the petitioner dies and his legal representatives are allowed to pay the court-fees the case will be registered as a suit filed on the date when the original petition was filed; and

(v) if they are not able to pay the court-fees, they will have to allege and prove that they were paupers and may be allowed to sue in 'forma pauperis.' If they are held to be paupers the proceedings would date back to the date when the original application was filed, unless the court comes to the conclusion that the original application was not a bona fide application and the deceased was not a pauper.

(15) A question might arise whether the legal representatives can file a fresh application in 'forma pauperis' in their own right if their claim is still within time if the application filed by the deceased had been rejected on the ground that

he was not a pauper. The answer to that question will depend on the interpretation of O. 33, R. 15 of the Code.

If the prayer to file a suit in 'forma pauperis' is personal to the deceased, as has been held by us, then there is no reason why O. 33, R. 15 of the Code should bar the legal representatives from making a fresh application that they were paupers if their claim was still within time. A question might arise whether in such a case the legal representatives can be allowed to file a suit without payment of costs due from the deceased. In case they are claiming the property in their own right no such question can arise. If, however, they are claiming through the deceased, it may be urged that their right to claim the property should be subject to the same disability.

The other view might be that the provisions of O. 33, R. 15 impose personal disabilities and do not affect the rights of his legal representatives. As the point has not arisen in this case, we need not express any opinion.

(16) Learned counsel has referred us to some cases in which the application for leave to file a suit in 'forma pauperis' was held to be a proceeding in which on the death of the applicant his legal representatives could not be substituted as his legal representatives. They are, — 'Lalit Mohan Mandal v. Satish Chandra Das', 33 Cal 1163 (H); — 'Jatindra Nath Ghose v. Sourindra Nath Mitra', 64 Ind Cas 63 (Cal) (I); — 'Farzand Ali Khan v. Mir Amir Haider', AIR 1914 Oudh 384 (J) and — 'AIR 1928 Mad 278 (D).

In those cases the learned Judges took the view that on the death of the petitioner, it was no longer necessary to decide whether he was or was not in a position to pay the court-fee and the proceedings started by deceased finally terminated. If the petition is considered to be a document for certain reliefs, which the plaintiff claimed he was entitled to get with a prayer super-imposed that he may be allowed to claim them without payment of the requisite court-fee then it is possible to take the view that the legal representatives may pay the court-fees & continue the proceedings or claim that as they were also paupers they, in their turn, may be allowed to sue without payment of court-fees. It may not be of much significance, but it may be noted that O. 33, R. 7(3) does not say that the application for leave to sue in 'forma pauperis' shall be dismissed but it says that the Court shall then either allow or refuse to allow the application to sue as a pauper.

(17) As we have already said once the Court has refused to grant the permission to be allowed to sue in 'forma pauperis' and has rejected the application the Court has ceased to have seisin of the case and can no longer exercise the powers under S. 149 of the Code. But while still seized of the case the Court can refuse the prayer for permission to sue in 'forma pauperis' and grant time under S. 149 of the Code to pay the court-fees. On the death of the petitioner, his legal representatives can also be allowed to continue the proceedings on payment of the court-fees or be allowed to allege and prove that they were paupers and they should, therefore, be excused from payment of the court-fee and if their prayer is granted they would have the right to continue the suit.

(18) There are decisions of the other High Courts where the legal representatives were allowed to continue the proceedings in 'forma pauperis' after the death of the original petitioner. In — 'Mt. Bibi Marim v. Surajmal', AIR 1936 Pat 591 (K), Agarwala and Madan JJ. held that where one of the applicants applying for permission to sue as pauper dies during the pendency of the application his legal representative is entitled to be brought on the record in his place and to continue the proceedings as a suit on payment of court-fee or on proof of the fact that they were paupers and were not able to pay the court-fee.

In — 'Satish Chandra v. Phani Bhusan De', AIR 1952 Cal 696 (L), the legal representatives were allowed to pay the court-fee within the extended time allowed by the Court and the suit was, therefore, registered as a regular suit dating back to the date when the original application to sue as a pauper was filed.

In — 'AIR 1947 Mad 405 (G)', a Bench of the Madras High Court allowed the legal representatives to continue the proceedings initiated under O. 33 of the Code on payment of court-fee. The plaint was deemed to have been instituted on the day when the application under O. 33 was filed.

In—'Mt. Annapurna Bai v. Balaji Maroti', AIR 1946 Nag 320 (M), Niyogi J. held that the legal representatives could continue the proceedings on proof of the fact that they were also paupers where the original applicant had died before the application had been granted. To the same effect is the decision of the Mysore High Court in — 'Devaraju Naidu v. T. M. Prabhuviah', AIR 1953 Mys 57 (N).

(19) Our answer to the first question, therefore, is as follows:

> "That the heirs of Mohammad Baksh could continue the proceedings either upon showing that they were themselves paupers or by offering to pay the requisite court-fee In deciding the question whether the legal representatives should be allowed to continue the proceedings under O. 33 the Court is entitled to go into the question whether the original applicant was or was not a pauper."

In view of the answer that we have given to the first question the second question does not arise and need not, therefore, be answered and we express no opinion on the point.

R.G.D. Answer accordingly.

A.I.R. 1955 ALLAHABAD 56 (Vol. 42, C.N. 19)

ROY J. (25-2-1954)

Sri Chand, Applicant v. Dhundi Ram Mathuri, Opposite Party.

Criminal Revn. Appln. No. 1221 of 1952, against judgment of Dist. Magistrate, Agra, D/- 24-3-1952.

(a) Criminal P. C. (1898), S. 146 — Evidence as to possession.

There was a clear admission by one party in his petition of complaint that the other party was in possession over that portion of

the land which was in dispute. The first party never produced any evidence in support of his alleged possession. But on the contrary there was the evidence in the sworn testimony of three witnesses produced on behalf of the other party to the effect that for the last three years he had been in actual physical possession over the land. Furthermore, there was no evidence on behalf of the first party that there was an apprehension of breach of peace. On the contrary there was the evidence of three witnesses on the other side who stated that there was no apprehension of breach of peace.

Held that under these circumstances it could not be said that the evidence of neither party was such as would lead to a positive conclusion about the fact of possession of either party. (Para 6)

Anno: Criminal P. C., S. 146, N. 5.

(b) Criminal P. C. (1898), S. 146 — "Unable to satisfy himself".

Section 145 requires that there must be a present dispute and a likelihood of breach of peace; that is, there must be a present fear that it is probable that there will be a breach of the peace owing to the dispute unless proceedings are taken under the section. This does not mean that orders under the section are to be made when somebody comes and says that he fears that breach of the peace will occur a considerable time ahead. It should be held as a very important principle in cases under S. 145, that a Magistrate should be extremely reluctant to attach the property in dispute, unless there are clearest indications to show that without the attachment the evil consequences which the section is intended to remove will immediately flow.

It is quite intelligible that the Magistrate might be in a position to say with confidence that he was unable to satisfy himself as to the possession of the parties in cases where the land is jungle or waste land. But where the land was admittedly in possession of one party and there was no proof at all to show that there was likely to be a breach of peace the Magistrate was only admitting his own weakness if he stated that he could not come to a decision on the question of possession when he had before him two parties, one of whom was quite ready with information and the other kept himself aloof from the proceedings except that he filed the deed of lease existing in his favour. The information that was given to the Magistrate by the first party might have been true or false; but it was his duty to collect information and sift it. (Para 7)

Anno: Criminal P. C., S. 146, N. 5.

(c) Criminal P. C. (1898), S. 145 — Non-compliance with provisions of the section.

A Magistrate before taking action under S. 145 must find that he is satisfied that a dispute likely to cause a breach of the peace within his jurisdiction exists. In the absence of a statement to that effect in his order it may be said that he has no jurisdiction to act under S. 145. It is desirable for a Magistrate to record in his preliminary order the reasons why he is satisfied that a dispute likely to cause a breach of the peace exists. This is what S. 145 requires. The omission to do so may not divest the Magistrate of jurisdiction but would only be an irregularity curable by S. 537. But if that is cured at the earlier stage, the order passed by the Magistrate at the later stage must shew that the Magistrate without reference to the merits of the claim of any of such parties to the rights to possess the subject of dispute and after hearing the evidence which the parties chose to produce has come to a decision whether any and which of the parties was at the date of the order in possession over the property. (Para 7)

Anno: Criminal P. C., S. 145, N. 15.

B. S. Darbari and B. N. Mehratra, for Applicant; B. L. Dikshit, for Opposite Party.

ORDER: This is an application in revision by Sri Chand against an order dated 24-3-1952, passed by the learned District Magistrate of Agra by which he refused to interfere with an order dated 29-10-1951, passed by the learned City Magistrate of Agra in a case under S. 145, Criminal P. C. The case furnishes an instance which illustrates that the provisions of Ss. 145 and 146, Criminal P. C., are so easily attracted by Magistrates with utter disregard of what those sections really contemplate before an action under those sections can be warranted.

(2) On 18-9-1950, a complaint was lodged by Dhundi Ram opposite party against Sri Chand, applicant in the Court of the City Magistrate which runs as follows:

"The applicant has a plot of land in the Naya Nagla within police circle Chatta in Agra. There exists a temple over this land. The opposite party who plies his cart on hire used to stable his bullocks by the side of the road. The road was under repairs by the Municipality. The opposite party then temporarily tethered his cattle over the land of the applicant by his leave or license. Later on the opposite party started entertaining evil designs and was prepared to pick up fight with the applicant. The opposite party now intends to make construction over this land very soon. If he is not prevented it might lead to serious breach of the peace. Action may, therefore, be taken."

On the application the learned City Magistrate directed the station officer of police station Chatta to inquire and report by 28-9-1950. The report was not forthcoming and time was enlarged and ultimately the S. O. made the following report on 2-1-1951.

"Dhundi Ram and others have taken lease of 6 bighas of land from the Nazool Department. From out of that land he had left vacant a portion with the intention of constructing a temple, and the rest of the land was built upon and converted into 'abadi'. Since the disputed piece of land was lying vacant, Sri Chand Jatav used to tether his cattle on it. Dhundi Ram and

others now desire to construct a temple over this land, but Sri Chand has been opposing and resisting it. Under these circumstances there is apprehension of breach of peace. Orders are solicited for attaching the property."

(3) Upon that report the learned City Magistrate passed the following order on 3-1-1951:

"Attach property. Issue notice to opposite party. Fix date for evidence."

Sri Chand filed a written statement before the City Magistrate contending that he has been in exclusive possession over this land for nearly three years; that there was no apprehension of a breach of the peace and that Dhundi Ram was not in possession over the property within the last three years. The City Magistrate required the parties to produce such evidence as they liked in support of their respective claims. Dhundi Ram relied upon a lease purported to have been executed in his favour and in favour of others by the Nazool Department on 22-8-1922. He did not, however, produce any oral evidence in support of his contention that he was in actual physical possession over this land or that there was really an apprehension of breach of peace.

There was further no evidence strictly to connect the identity of the disputed piece of land with any part of the land covered by the lease aforesaid. On the other side there was the evidence of Sri Chand supported by two other witnesses Daulatia and Parbhati, all of whom swore that Sri Chand has been in actual physical possession over this land for nearly the last three years and there was really no apprehension of breach of peace with regard to this plot of land. It may be noticed that the police Sub Inspector who had made the report dated 2-1-1951, was not produced on behalf of Dhundi Ram, nor was he examined by the City Magistrate in order to refute the contention of Sri Chand and his witnesses that Sri Chand was really in possession for the last three years and there was no likelihood of breach of peace.

In spite of these circumstances the learned City Magistrate by his order dated 29-10-1951, observed as follows:

"For the applicant in this case no witnesses have been examined to prove that he was in actual physical possession of the land in dispute. He has however produced one document which is a lease of the Municipality, this land being given by the Municipality to him in the year 1922. From this document it is clear that at one time or the other the applicant was in possession of the land but it does not necessarily lead to the conclusion that he was in possession of the land when proceedings under S. 145, Criminal P. C., were started. This document goes to prove the proprietary rights or rather the rights of a lessee as given to the applicant by the Municipal Board.

On the other hand two witnesses have been examined by the opposite party and from this evidence it appears that an attempt has been made to bring about that the land was in possession of the opposite party and as such he was in actual physical possession of it, but the evidence produced by the applicant and the opposite party is insufficient and it is not possible to come to a definite conclusion as to which party was in actual physical possession. In view of this I order that the land remains attached and the dispute be referred to a competent court by which the rights of the party can be determined."

(4) From what has been stated above, it is obvious that neither in the order dated 3-1-1951, nor in the order dated 29-10-1951, did the learned City Magistrate come to a finding that there was really an apprehension of breach of the peace. The learned City Magistrate completely brushed aside the statement of Dhundi Ram the complainant in his complaint dated 18-9-1950, in which there was a clear admission that Sri Chand has been in possession over the land although he contended in the same complaint that that possession was permissive. When the order of the learned City Magistrate was brought into question in revision before the learned District Magistrate of Agra, the District Magistrate's attention was drawn to the statement contained in the complaint of 18-9-1950 by Dhundi Ram regarding possession; and it was urged before him that since the possession of Sri Chand over this land was admitted by Dhundi Ram himself on the material dates, Sri Chand's possession could not be disturbed by an order under S. 146, Criminal P. C.

On that aspect of the matter the learned District Magistrate observed as follows:

"It has been stressed before me that the application of Dhundi Ram dated 18-9-50 shows that he was not in possession. I do not agree with this view although this application shows that Sri Chand was using this land also partly. I agree with the City Magistrate that the evidence of neither party is such as would lead to a positive conclusion about the fact of possession by either party.

It has also been urged before me that action should be taken by me under S. 146 (1), Criminal P. C. There was a clear report by the police that there was a dispute about this land and an apprehension of breach of peace. It also appears that Sri Chand was adopting the usual tactics of putting up a temple these days whenever someone wants to encroach on somebody else's land. This practice has to be condemned and discouraged. As such I do not see any justification of releasing the land in exercise of my authority. I do not find any force in the revision which is dismissed."

(5) The learned District Magistrate completely overlooked the provisions of Ss. 145 and 146, Criminal P. C. when he passed that order. In the first place, there was a clear admission by Dhundi Ram in his petition of compliant dated 18-9-1950 that Sri Chand was in possession over that portion of the land which was in dispute. In the second place, Dhundi Ram never produced any evidence in support of his alleged possession. But on the contrary there was the evidence in the sworn testimony of three witnesses produced on

behalf of Sri Chand to the effect that for the last three years Sri Chand has been in actual physical possession over the land. Furthermore, there was no evidence on behalf of Dhundi Ram that there was an apprehension of breach of peace. On the contrary there was the evidence of three witnesses on the other side who stated that there was no apprehension of breach of peace.

(6) I am unable to understand how under these circumstances the courts below came to the conclusion that the evidence of neither party was such as would lead to a positive conclusion about the fact of possession of either party. There was also a factual error in the order of the learned District Magistrate when he observed that it was Sri Chand who was

"adopting the usual tactics of putting up a temple these days whenever someone wants to encroach on somebody else's land."

Sri Chand never wanted to construct a temple over this land. In fact, the whole of the controversy regarding the temple has been misunderstood by the two courts. In the complaint dated 18-9-1950 no reference was made that Sri Chand was desirous of constructing a temple over this land. In the police report dated 2-1-1951, it was stated that Dhundi Ram and others now desire to construct a temple over this land, but Sri Chand has been opposing and resisting it. The learned District Magistrate was, therefore, entirely wrong in coming to the conclusion that Sri Chand was "adopting the usual tactics of putting up a temple by encroaching upon somebody else's land."

(7) Section 145, Criminal P. C., requires that there must be a present dispute and a likelihood of breach of peace; that is, there must be a present fear that it is probable that there will be breach of the peace owing to the dispute unless proceedings are taken under the section. This does not mean that orders under the section are to be made when somebody comes and says that he fears that breach of the peace will occur a considerable time ahead. The procedure under the section is intended to deal with conditions in which the parties responsible for law and order have an existing fear that unless steps are taken under the section, a breach of the peace will occur before they can prevent it. A Magistrate before taking action under S. 145 must find that he is satisfied that a dispute likely to cause a breach of the peace within his jurisdiction exists. In the absence of a statement to that effect in his order it may be said that he has no jurisdiction to act under S. 145. It is desirable for a Magistrate to record in his preliminary order the reasons why he is satisfied that a dispute likely to cause a beach of the peace exists.

This is what S. 145, Criminal P. C., requires. The omission to do so may not divest the Magistrate of jurisdiction but would only be an irregularity curable by S. 537 of the Code. But if that is cured at the earlier stage, the order passed by the Magistrate at the later stage must shew that the Magistrate without reference to the merits of the claims of any of such parties to the rights to possess the subject of dispute and after hearing the evidence which the parties chose to produce has come to a decision whether any and which of the parties was at the date of the order in possession over the property. In the present case there was clear proof of possession of Sri Chand on the material dates. It should be held as a very important principle in cases under S. 145, Criminal P. C., that a Magistrate should be extremely reluctant to attach the property in dispute, unless there are clearest indications to show that without the attachment the evil consequences which the section is intended to remove will immediately flow.

It is quite intelligible that the Magistrate might be in a position to say with confidence that he was unable to satisfy himself as to the possession of the parties in cases where the land is jungle or waste land. But whereas in the present case the land was admittedly in possession of Sri Chand, and there was no proof at all to show that there was likely to be a breach of peace the Magistrate was only admitting his own weakness if he stated that he could not come to a decision on the question of possession. He had before him two parties, one of whom, namely, Sri Chand was quite ready with information and the other, namely, Dhundi Ram kept himself aloof from the proceedings except that he filed the deed of lease existing in his favour. The information that was given to the Magistrate by Sri Chand might have been true or false; but it was his duty to collect information and sift it.

After all, the order under S. 146 is almost the same as an act of confiscation and therefore a Magistrate should naturally be reluctant to make use of that section. Apart from the fact that the whole of the proceedings in this case under Ss. 145 and 146 are replete with irregularities, the material that was produced before the trial court could lead one to the only decision that Sri Chand has been in possession over the land for about the last three years, and that there was no apprehension of breach of peace.

(8) In this view of the matter the order of the two courts cannot be supported. I, therefore, set aside those orders and direct that the property which has been attached should be released in favour of Sri Chand.

D.H.Z. Revision allowed.

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FULL BENCH

MALIK C. J., AGARWALA, V. BHARGAVA, MUKERJI AND M. L. CHATURVEDI JJ.

(12-10-1954)

Ram Kishore Jaiswal, Defendant-Appellant **v.** B. Kavindra Narain and others, Plaintiffs-Respondents.

Second Appeals Nos. 1144, 1150 and 1170 of 1946, from decision of Civil Judge, Banaras, D/- 14-1-1946.

(a) Evidence Act (1872), S. 42 — Custom — Judgments regarding.

On a question of custom a decision in a case as regards the existence or non-existence of a

custom is good evidence in other cases. (Para 14)

Anno: Evi. Act, S. 42, N. 3.

(b) U. P. Abolition of Zar-e-Chaharum Act (30 of 1951) — Act is not retrospective. (Para 18)

(c) Words and Phrases — Zamindar, meaning of — (Wazib-ul-arz — Construction — Meaning of words.)

The word 'Zamindar' used in a 'wajib-ul-arz' prepared by revenue officers during the course of the settlement must be given the ordinary meaning given to it in revenue proceedings. The word 'zamindari' has a well established connotation. It means "a person who is the owner or a co-sharer of a mohal and as such has an interest in the common land of the mohal and the management of the mohal, has the right to realise rent from tenants and in the absence of a contract to the contrary is liable to pay land revenue to Government. (Para 19)

(d) Custom (U. P.) — Zar-i-Chaharum — Plot proprietor if can claim — Applicability of custom to involuntary sales.

Held that the plaintiffs as plot proprietors were not entitled to claim 'zar-i-chaharum' on sale of the houses situate on the land belonging to them in Patti Shamlat of village Jaitpura pargana Dihat Amanat, district Banaras. L. P. A. No. 13 of 1932, D/- 10-4-1934 (All) and S. A. Nos. 567 & 568 of 1932, D/- 4-10-1934 (All) Approved. AIR 1949 All 739 distinguished. (Para 23)

There is no custom entitling plot proprietors to claim 'zar-i-chaharum' on voluntary sales and even if there was such a custom it will not apply to compulsory sales and no custom applicable to such sales has been established. (Para 25)

CASES REFERRED: Paras

(A) ('83) 6 All 47: 1883 All WN 198 (FB) 12, 25

(B) (V36) AIR 1949 All 739: 1949 All WR (HC) 483 13, 22

(C) ('34) L. P. A. No. 13 of 1932, D/- 10-4-1934, decided by Sulaiman, C. J., and King, J. (All) 15, 19

(D) ('34) S. A. Nos. 567 & 568 of 1932, D/- 4-10-1934, decided by Kisch, J., (All) 16, 19

(E) ('50) L. P. A. Nos. 6, 7, 8 & 30 of 1946, D/- 3-11-1950, decided by Wali Ullah and Agarwala, JJ. (All) 20

(F) (V22) AIR 1935 PC 169: 157 Ind Cas 423 (PC) 21

(G) (V28) AIR 1941 All 173: 1941 All LJ 43 24

(H) (V28) AIR 1941 All 396: 1941 All LJ 592 24

Krishna Shanker and N. P. Asthana, for Appellant; Shanker Sahai Verma and A. P. Dubey, for Respondents.

MALIK C. J.:

These three appeals arise out of three suits filed in the court of the Additional Munsif of Banaras for realisation of 'zar-i-chaharum', that is, one-fourth of the sale price.

(2) On 16-7-1947, in execution of a simple money decree against Babu Nandan a portion of plot No. 586 was sold at auction and was purchased by the appellant, Ram Kishore Jaiswal. On 25-8-1938, another portion of the same plot was sold by Babu Nandan to the appellant. On 19-9-1938, the rest of plot No. 586 was sold by Babu Nandan to the appellant.

(3) Plot No. 586 was situate in Patti Shamlat, Mauza Jaitpura, Banaras. The plaintiffs were the plot proprietors while the defendant Babu Nandan was a parjotdar. The plaintiffs filed three suits and in the plaint they alleged that they were zamindars and under an ancient custom the zamindars were entitled to get one-fourth of the sale price, whether the property was sold by voluntary sale or by auction sale.

(4) Suit No. 291 of 1943 was filed to claim 'zar-i-chaharum' as a result of the auction sale and the other two suits, Nos. 625 of 1943 and No. 587 of 1943, were filed to claim 'zar-i-chaharum' on account of the sales effected on 25-8-1938, and 19-9-1938, respectively.

(5) The defendant denied that the plaintiffs were zamindars of Patti Shamlat or that there was any custom for payment of 'zar-i-chaharum' or that the plaintiffs had any right to claim the same.

(6) The plaintiffs had filed an incorrect copy of the khewat and the learned Munsif relying on that khewat held that the plaintiffs were zamindars and not plot proprietors and under a custom recorded in the 'wajib-ul-arz' they were entitled to the amount claimed and decreed the plaintiffs' suits.

(7) The defendant appellant filed appeals in the court of the learned Civil Judge of Banaras and in that court he filed a correct copy of the khewat. The learned Judge thereupon remitted the following issue to the trial court:

> Whether the plaintiffs are mere plot proprietors and not entitled as such to claim benefit of the custom of recovery of 'zar-i-chaharum'?"

(8) On 12-10-1945, the trial court held that it had been entirely misled by the incorrect copy of the khewat filed by the plaintiffs, that the correct copy of it showed that they were mere plot proprietors and that, as a matter of fact, learned counsel for the plaintiffs had admitted that the plaintiffs were plot proprietors. The learned Munsif further pointed out that the plaintiffs had no concern whatsoever with the Government, that they were not liable to pay land revenue and that they had no right to claim 'zar-i-chaharum'.

(9) On return of the finding the lower appellate court held that the plaintiffs were not zamindars but plot proprietors but observed that

> "even as plot proprietors they were entitled to receive 'zar-i-chaharum' in all instances in which a zamindar would have been able to claim benefit of the recorded custom."

The learned Judge also held that the said custom applied also to auction sales. All the three appeals were therefore dismissed.

(10) The defendant has filed the Second Appeal No. 1150 of 1946 against the decree in Original Suit No. 291 of 1943, while Second Appeals Nos. 1144 of 1946 and 1170 of 1946 are against the decrees in Original Suits Nos. 625 of 1943 and 587 of 1943 respectively.

(11) The cases came up before a Bench and the learned Judges referred two questions of law for decision by a Full Bench of five Judges. The questions are:

"1. Having regard to the terms of the 'Wajib-ul-arz' of 1853 relating to village Jaitpura, paragana Dihat Amanat, district Banaras, on the record of Suit No. 291 of 1943 of the Court of City Munsif of Banaras, are the plaintiffs as plot proprietors not entitled to 'zar-i-chaharum', on the sale of houses situated on the land belonging to them?

2. If the plaintiffs as plot proprietors are entitled to 'zar-i-chaharum', does the right accrue only on voluntary or also on compulsory sales?"

(12) On the second point there was a Full Bench decision of four learned Judges in — 'Kalian Das v. Bhagiratti', 6 All 47 (FB) (A) and it was, therefore, that the learned Judges recommended that a Bench should be constituted of five Judges.

(13) As regards the first question, the decisions of this Court relating to Patti Shamlat of Mauza Jaitpura in the city of Banaras have all been one way but by reason of a decision relating to another Mohal of Banaras known as Bhadaini in the case of — 'Shukrullah v. Sir Vijaya Ananda', AIR 1949 All 739 (B) where a plot proprietor was given the right to claim 'zar-i-chaharum' the learned Judges referred the question to a Full Bench for decision.

(14) On a question of custom a decision in a case as regards the existence or non-existence of a custom is good evidence in other cases and as this case is before a Bench of five Judges we felt reluctant to answer the question as many facts have been assumed in this case, probably for lack of material, which were disputed in other cases and findings were recorded on them. The judgments of this Court in those cases have been cited in the referring order as authority.

(15) To illustrate our meaning we may refer to two decisions mentioned in the referring order which also related to village Jaitpura. The first case is — 'Gajadhar Shukul v. Bhikhu Nonia', L. P. No. 13 of 1932, D/- 10-4-1934 (All) (C). This Letters Patent Appeal had arisen out of suit No. 269 of 1927 for 'zar-i-chaharum' filed in the court of the Munsif of Banaras by Gajadhar Shukul who was a plot proprietor in Mohal Shamlat village Jaitpura just like the plaintiffs in the present case. In that case the history of the village was carefully gone into and it was found that Jaitpura had previously two Pattis, Patti Mauza Jaitpura, also known as Patti Arhai, & Patti Deo Narain. A large number of plots had been sold and many houses had been constructed on these plots.

In the Settlement of 1866 these plots were put in a separate Patti known as Patti Shamlat and two 'Wajib-ul-arzes' were prepared, one of Mauza Jaitpura also known as Patti Arhai and the other of Patti Deo Narain. It was held in that case that the 'Wajib-ul-arz' of mauza Jaitpura also known as Patti Arhai did not apply to Patti Shamlat. It was also held that the plaintiff who was a mere plot proprietor had no right to claim 'zar-i-chaharum'. A learned single Judge, Dr. S. N. Sen, dismissed the appeal holding that there was no custom in Patti Shamlat as the 'wajib-ul-arz' did not relate to it. He also observed that assuming that a custom did exist the plaintiff as plot proprietor could not claim 'zar-i-chaharum'. The Letters Patent Bench dismissed the appeal on a short point that the plaintiff being merely a plot proprietor he could not rely on the 'wajib-ul-arz' and could not, therefore, claim 'zar-i-chaharum'.

(16) The other case is the — 'Collector of Ghazipur v. Krishna Deo', S. A. Nos. 567 & 568 of 1932, D/- 4-10-1934 (All) (D). In that case also the plaintiff was a plot proprietor in Patti Shamlat, village Jaitpura. There also the custom in Patti Shamlat was denied and it appears from the judgment of the Munsif in Suit No. 97 of 1930, out of which the appeal had arisen, that originally there were two Pattis, Patti Mauza Jaitpura also known as Patti Arhai and Patti Deo Narain. Certain plots which had been sold and had been purchased by others were put in a separate Patti which was known as Patti Shamlat. The proprietors of Patti Shamlat did not pay any land revenue nor was any 'wajib-ul-arz' prepared for that Patti. The 'wajib-ul-arzes' of the other two Pattis were filed in the case and it was held that the 'wajib-ul-arz' of Patti Mauza Jaitpura also known as Patti Arhai did not apply to Patti Shamlat and what is still more important the learned Munsif in his judgment dealing with the contents of the 'wajib-ul-arz' said:

"It has been clearly recorded in the 'wajib-ul-arzes' that the plot proprietors shall not be entitled to claim any profits arising out of the Malkana rights of the zamindars."

Mr. Justice Kisch in his judgment said:

"Village Jaitpura originally consisted of two Pattis; Patti Arhai and Patti Deo Narain. A 'wajib-ul-arz' was drawn up in respect of each of these Pattis in the settlements of 1853 and 1866. In those documents the custom of the zamindars having a right to one-fourth of the sale-proceeds of houses sold by parjotdars is recorded. It is also recorded that plot proprietors shall not have such right. The house in suit is situated in Patti Shamlat."

In the case before us, however, only a mutilated copy of the 'wajib-ul-arz' of Mohal Mauza Jaitpura also known as Patti Arhai was filed, and the portion mentioned in the judgments of the learned Munsif and Mr. Justice Kisch are not to be found in it as it is said that that portion of the paper has been destroyed.

(17) The learned Judges referring the case assumed that the 'wajib-ul-arz' of Patti Arhai, Mauza Jaitpura related to Patti Shamlat and on that assumption they referred the first question.

(18) Before we deal with this question, we must point out that in our view the custom relied on is a most unreasonable custom under which the zamindar can claim not only a one-fourth share of the price of the prajauti land but also a one-fourth share of the price of the building that may have been put up on the land by the parjotdar

and this he is entitled to get every time the house is sold. What was the origin of this custom we do not know. It may have something to do with the levy of 'chauth' by the Mahrattas on the fall of Moghul Empire. Though this custom was claimed to prevail in two Mohals, Bhadaini and Jaitpura, which are now parts of Banaras city, persons owing land had started giving land on parjaut and parjautdars had started creating darpajauts reserving to themselves the right to claim a one-fourth share of the sale price on the sale of houses on such land. An attempt was made at one time to reduce the rigour of this unjust demand by selling the land separately from the building but that too did not succeed as it was held that it was a ruse to defeat the claim. Ultimately the Legislature had to step in in the year 1951 and pass an Act, the U. P. Abolition of Zar-e-Chaharum Act, 1951 (U. P. Act 30 of 1951), that such demands are illegal, whether based on custom or contract. This Act is not retrospective and does not, therefore, apply to this case.

(19) Coming now to the question formulated by the Bench, the portion of the 'wajib-ul-arz' of Patti Arhai, mauza Jaitpura, on which reliance is placed is as follows:

> "Jis wact koi makan malik apna makan zamin parjawat farokht kare tab chaharum qimat mubaiyya ka ham zamindar ko milta hai so badastur lete rahenge (i.e., whenever the owner of a house situate on parjot land sells it then one-fourth of the sale price is payable to us, the zamindars, and we shall continue to receive the same as before)."

The question for decision is whether the plaintiffs, who are mere plot proprietors, can claim to be 'zamindars'. Learned counsel for the plaintiffs-respondents has urged that the word 'zamindar' has not been defined in the 'wajib-ul-arz' and it must mean 'owner of land' and that the plaintiffs being owners of a plot of land they can, therefore, claim to be zamindars. The 'wajib-ul-arz' was prepared by revenue officers during the course of the settlement and the words, therefore, used in the 'wajib-ul-arz' must be given the ordinary meaning given to them in revenue proceedings. The word 'zamindar' has a well established connotation. It means

> "a person who is the owner or a co-sharer of a mohal and as such has an interest in the common land of the mohal and the management of the mohal, has the right to realise rent from tenants and in the absence of a contract to the contrary is liable to pay land revenue to Government".

The plaintiffs cannot claim to come in that category at all. No attempt has been made on behalf of the plaintiffs to prove how they came to acquire the plot No. 586. It is admitted that they are not co-sharers in the two main mohals, mohal mauza Jaitpura also known as Patti Arhai & Patti Deo Narain. It is also admitted that they have no liability to pay land revenue to Government by reason of their ownership of the plot. In these circumstances we see no reason to differ from the conclusion that was arrived at by Sulaiman, C. J., and King, J., in 'Gajadhar Shukul's case (C)' and Kisch, J. in the 'Collector of Ghazipur's case (D)'.

(20) Reference has also been made to a third decision by a Bench of this Court in — 'Bishwanath Barai v. Ram Nandan', L. P. A. Nos. 6, 7, 8 and 30 of 1946, D/- 3-11-1950 (All) (E). The question that arose in that case was whether a person who by adverse possession acquired title to a plot of land could rely on the custom of 'zar-i-chaharum'. The learned Judges held:

> "It is true that the plaintiff has acquired proprietary title over the plots by adverse possession against the zamindar. That, however, does not mean that the plaintiff by adverse possession becomes zamindar. No doubt he becomes proprietor of the plots but that makes him a plot proprietor only. In order to become a zamindar or a 'co-sharer' in the Mohal the plaintiff has to show that he partakes in the management of the Mohal or exercises other rights that usually appertain to a 'co-sharer' in a Mohal. The word 'zamindari' is used in this sense as denoting a co-sharer in a Mohal. It is not used with reference to a proprietor or the owner of a 'Haqiat mutfarqa' unless such person partakes in the management of the Mohal."

(21) In the case of — 'Ramjimal v. Riaz-ud-din', AIR 1935 PC 169 (F) it was held that if a person was proprietor of a specific plot of land and as such was not entitled to any interest in the joint lands of the Mohal nor was he entitled to take part in the administration of its affairs he was only a petty proprietor and not a co-sharer. That case no doubt depended on the language of the Agra Pre-emption Act but that Act merely reproduced what was well recognised as the meaning of a plot proprietor as against a zamindar or a co-sharer.

(22) The decision of Harish Chandra and P. L. Bhargava, JJ. in 'Shukrullah v. Sir Vijaya Ananda (B)' cited above is not relevant as it related to mauza Bhadaini and the learned Judges have pointed out at page 740 of the report that the plaintiff in that case was not a plot proprietor but was a pattidar or a co-sharer and was liable to pay land revenue to the Lambardar.

(23) Our answer to the first question, therefore, is that the plaintiffs as plot proprietors were not entitled to claim 'zar-i-chaharum' on sale of the houses situate on the land belonging to them in Patti Shamlat.

(24) As regards the second question, it was seventy years back in the year 1884 that the learned Judges pointed out that a custom of 'Zar-i-chaharum' applicable to private sales would not necessarily apply to auction sale and that the plaintiff would have to prove that there was a custom applicable to auction sales also. This case has been followed for the last seventy years. No doubt Collister, J. in the case of — 'Radhey Shiam v. Nazir Husain', AIR 1941 All 173 (G) said that no distinction existed between an auction sale and a private sale but within a few months sitting with Iqbal Ahmad, Chief Justice, the learned Judge

overruled himself in — 'Basdeo Singh v. Sheo Shankar', AIR 1941 All 396 (H).

The language of the 'wajib-ul-arz' does not support such a custom. The words have already been quoted and they are to the effect that 'whenever the owner of a house sells the same'. This cannot apply to an involuntary sale by a Court.

(25) Three documents, Exhibits 6, 7 and 5 of 1870, 1871 and 1901 were filed. They are three judgments of the court of the Munsif in which 'chaharum' was claimed and was allowed. In none of these cases was the question of custom when property was sold by auction raised or decided. In our view, the 'wajib-ul-arz' does not support the plaintiffs and these three judgments are wholly insufficient to prove a custom in favour of the plaintiffs. Learned counsel has conceded that he cannot ask us to overrule the decision in '6 All 47 (FB) (A)'. What he contends is that a custom has grown up since. That decision is of 1884 and there is no sufficient material on the record to justify a finding that a well established custom has grown up for payment of 'zar-i-chaharum' on compulsory sales of houses on parjauti land. Our answer to the second question, therefore, is that there is no custom entitling plot proprietors to claim 'zar-i-chaharum' on voluntary sales and even if there was such a custom it will not apply to compulsory sales and no custom applicable to such sales has been established on behalf of the plaintiffs.

K.S.B. Answer accordingly.

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ASTHANA J. (5-3-1954)

Smt. Dhanwanti and others, Applicants, v. State through Khan Bahadur Shafi Ali Khan, Opposite Party.

Criminal Revn. No. 836 of 1952, against Order of Temporary S. J. Aligarh, D/- 6-2-1952.

Criminal P. C. (1898), Ss. 517 and 523 (2) — Applicability.

Death of accused during pendency of enquiry against him by a Magistrate into an offence under S. 457, Penal Code — S. 517 cannot apply to case because no question of restoring possession to the person from whom property has been recovered can arise since that person is dead. 29 Mad 375 and AIR 1951 Madh-B 154 followed.

Inquiry regarding ownership of the property not concluded because of accused's death — Since the opposing claimants, namely, the persons claiming as legal heirs of the accused and person claiming return on ground that they were properties stolen from him had no objection, Court ordered enquiry under S. 523 (2). (Paras 4, 5)

Anno: Cr. P. C. S. 517 N 4; S. 523 N 10.

CASES REFERRED: Paras

(A) ('06) 29 Mad 375: 4 Cri LJ 233 2

(B) (V38) AIR 1951 Madh B 154: 52 Cri LJ 1476 2

P. C. Gautam, for Applicants; Syed Sadiq Ali Khan for Opposite Party; Dr. M. H. Faruqi Govt. Advocate, for the State.

ORDER: Chhitariya along with three other persons was sent up for trial under Section 457, I.P.C., in respect of certain property. Chhitariya died during the pendency of the inquiry before the Magistrate and so far as he was concerned the case abated against him. The other three accused were discharged under Section 253 (1), Cr. P. C. After their discharge the property which was alleged to have been recovered from the possession of Chhitariya deceased along with some other property was ordered to be returned to the complainant. Bhupali and Thakuri, sons of Chhitariya, and Srimati Dhanwanti his widow, filed a revision against this order before the Sessions Judge, Aligarh.

Their contention was that as the case against Chhitariya had abated the property which had been recovered from his possession should have been restored to them as they were his legal heirs. The learned Sessions Judge confirmed the order of the Magistrate in respect of the property mentioned in Ex. P4. He, however, set aside the order of the learned Magistrate with regard to the property in Ex. P6 which was alleged to have been recovered from the possession of Chhitariya and directed that this property would remain in possession of the court till its ownership was decided by a competent civil court and the rightful person was forthcoming to claim it. It is against this order that the present revision has been filed in this Court.

(2) It was contended on behalf of the applicants that the case having abated against Chhitariya and there being no finding that the property mentioned in Ex. P6 which had been recovered by the police from his possession was stolen property or was the property in respect of which the offence had been committed it should have been returned to his legal heirs who were entitled to it. It was also contended that the learned Magistrate had no power to act under Section 517, Cr. P. C., as that section empowered the Magistrate to act only in those cases where the inquiry pending before him had concluded and as in this case Chhitariya died during the pendency of the case it cannot be said that the inquiry had concluded as contemplated in this section. It was argued that the word "concluded" did not cover those cases where the inquiry had come to an end on account of the death of the accused.

In support of this contention reliance was placed on — 'In the matter of Kuppammall', 29 Mad 375 (A). In this case the accused was charged with criminal breach of trust in respect of certain jewels which were recovered by the police from the pledgees and sent to the Magistrate along with the charge-sheet. The accused died during the inquiry and the alleged owner of the jewels made an application to the Magistrate to be put in possession of them under Section 517 and 523, Criminal P. C. It was held that S. 517 did not apply to the case and as there was no evidence or finding about the ownership, Section 523, Cr. P. C.,

also did not apply and that the Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels.

Another case relied on is — 'Tarachand v. The State', AIR 1951 Madh-B 154 (B). It was held in this case that the word "concluded" in Section 517 means concluded after a full hearing with a final judgment or determination of the case against the accused and when, therefore, on account of the death of the accused the trial or inquiry could not be concluded and the Magistrate for that reason did not retain the jurisdiction to give a finding or to make a final judgment on the material before him, the power of the police to make a report to the Magistrate under Section 523 for the disposal of the property was not taken away. It was, further, held that in such a case the Magistrate had no jurisdiction to pass any orders as regards the return of the property to either party and that the property must be returned to the police for disposal according to law.

(3) It has been contended that the learned Magistrate could have acted under the provisions of Section 523 (2), Cr. P. C., or in his inherent jurisdiction regarding the disposal of the property recovered from the possession of Chhitariya deceased.

(4) In view of the above two decisions Section 517 is inapplicable to the case. Chhitariya the person from whom the property mentioned in Ex. P6 was recovered is dead and, therefore, no question of restoring possession to the person from whom the property was recovered arises in this case. The applicants allege themselves to be legal heirs of Chhitariya deceased and it is on this basis that they claim the property. On the other hand, the claim of the complainant was based on the fact that the property was stolen from his possession by Chhitariya deceased. In view of the fact that Chhitariya died before the inquiry could be concluded against him the question regarding the ownership of the property remained undetermined. Sub-section (2) of S. 523 lays down the procedure where the owner of the property seized is unknown. It has been argued on behalf of the applicants that the learned Magistrate may be directed to act in accordance with this provision in disposing of the property. There does not appear any objection to this proposal.

(5) I, therefore, allow this application to this extent that the property mentioned in Ex. P6 shall remain in the custody of the Magistrate till such time as either of the parties shall establish its claim to it before him as provided under Section 523 (2), Criminal P. C.

M.K.S. Order accordingly.

(S) **A.I.R. 1955 ALLAHABAD 64 (Vol. 42, C.N. 22)**

BRIJ MOHAN LALL J. (28-4-1954)

Parma Nand and others, Plaintiffs-Appellants v. Sm. Chhimmawati and another, Defendants-Respondents.

Second Appeal No. 2331 of 1953, against decree of 2nd Civil J., Saharanpur, D/- 24-9-1953.

Specific Relief Act (1877), Ss. 53, 56 and 9 — Injunction against execution of decree — (Civil P. C. (1908), O. 39, R. 1).

A suit by the person against whom a decree has been passed under S. 9, for restraining the decree-holder from executing the decree does not lie. If such an injunction is granted the very object and purpose of the suit under S. 9 (which is that if a person takes the law in his own hands and forcibly dispossesses another otherwise than in accordance with law he must surrender possession irrespective of any title that may vest in him) will be defeated. The judgment-debtor must first surrender possession to the decree-holder in execution of the decree passed under S. 9, Specific Relief Act, and then may assert any right on the basis of title which he may possess. The plea of title which cannot be set up in the suit itself cannot also be set up as a bar to execution proceedings. (Paras 2, 3)

Anno: Sp. Rel. Act, S. 53, N. 1; S. 56, N. 9; S. 9, N. 1; C. P. C., O. 39, R. 1, N. 7.

M. A. Kazmi, for Applicants.

JUDGMENT: This is a second appeal by the plaintiffs. A suit for possession under S. 9, Specific Relief Act, was instituted by the respondent against one Sm. Savitri and her husband Banarasi Das. During the pendency of that suit the present appellants purchased the property from Smt. Savitri. They were impleaded as parties to the litigation and a decree for possession was passed against them also.

(2) They have now filed the suit which has given rise to this second appeal to obtain an injunction restraining the respondent from executing the decree. Both the courts below have dismissed the suit. In my opinion also such a suit does not lie. The appellants must first surrender possession and thereafter they can set up any right they like on the basis of title. If they are granted an injunction restraining the respondent from executing her decree the very object and purpose of the suit under S. 9, Specific Relief Act, will be defeated. The object and purpose of that suit are that if a person takes the law in his own hands and forcibly dispossesses another otherwise than in accordance with law he must surrender possession irrespective of any title that may vest in him. If a plea of title cannot be set up in the suit itself, it can also not be set up as a bar to execution proceedings.

(3) I am, therefore, of the opinion that the appellants must first surrender possession to the respondent in execution of the decree passed under S. 9, Specific Relief Act, and then they may assert any right which they may possess.

(4) The result, therefore, is that they cannot be granted an injunction to restrain the respondent from executing the decree.

(5) The appeal fails and is dismissed under O. 41, Rule 11, C. P. C.

M.K.S. Appeal dismissed.

(S) A.I.R. 1955 ALLAHABAD 65 (Vol. 42, C.N. 23)

FULL BENCH

MALIK C. J., AGARWALLA AND V. BHARGAVA JJ. (2-11-1954)

Soham Singh Jangpangi and others, Plaintiffs-Appellants v. Kunwar Tikendra Bahadur, Defendant-Respondent.

Second Appeal No. 2034 of 1947, against decision of Dist. J., Kumaun, D/- 11-8-1947.

Landlord and Tenant — Land tenures in Garhwal and Kumaon — Pakka and Kachcha Khaikari rights in villages — Suit for declaration claiming Pakka Khaikari rights in village — Words and Phrases — "Pakka Khaikar" — "Hissedar".

Pakka Khaikari is a term used in Kumaon and Garhwal in a special sense. A Kachcha Khaikar seems to mean a tenant, while a Pakka Khaikar is in a sense a proprietor. According to Stowell's Manual of Land Tenures of the Kumaon Division, 1954 Edition, a Pakka Khaikar is a sort of ex-proprietor and his right is in reality an under-proprietary right. A 'Hissedar' means in Kumaon and Garhwal 'a cosharer in the zamindari rights'. A Pakka Khaikari village may, in course of time, become a kachcha khaikari village by reason of the pakka khaikars losing their pakka khaikari rights. But a kachcha khaikar can, in no case, become a pakka Khaikar nor can a kachcha Khaikari village be converted into a pakka khaikari village.

(Paras 8, 9, 10, 12, 15)

On 7-4-1865, the Rajwarhs of Askot (hissedars) executed a Tasallinama in favour of one Dhanu, the ancestor of the plaintiffs, to cultivate the irrigated land in Bangpani. Under that Tasallinama the rights given to Dhanu were tenancy rights. In Muntakhib of the 1867, Thok Bangpani was recorded as Wiran and in the Khasra of that year it was entered as Muddati Wiran. Dhanu was in possession of the entire cultivated area in 'Thok Bangpani; and the hissedars had no khudkashi land in that Thok; and the hissedars did not spend any money to cut down the forest and reclaim the land and all that was done by plaintiffs' predecessor-in-interest. There was no evidence to prove that the plaintiffs were in possession of anything more than the irrigated area and that there was any common land or unmeasured land in Thok Bangpani, and if so, to whom it belonged. A suit for a declaration was brought by the plaintiffs praying that Mauza Bangpani, Patti Malla Askot, was a Pakka Khaikari village of the plaintiffs and that they had been wrongly recorded as Kachcha Khaikars in the revenue papers during the settlement of 1940-41 by the mistake of the Settlement Officers.

Held (1) that from the mere fact, that the whole of the cultivated area in Thok Bangpani was in the possession of the plaintiffs, it could not be assumed that they were the original cultivating proprietors of the land who were deprived of their proprietary rights by reason of the grant of the zamindari to the Rajwarhs of Askot. (Para 14)

(2) that no rights were conferred on Dhanu to the uncultivated land in the village and it could not be said that he was given any under-proprietary rights under the Tasallinama of 1865; and (Para 14)

(3) that the plaintiffs had failed to prove that they were pakka khaikars and that Thok Bangpani was a Pakka Khaikari village. (Para 17)

CASE REFERRED: Para

(A) ('50) 1950 RD (BR) 76 11

R. C. Ghatak, for Appellants; L. M. Pant, for Respondent.

MALIK C. J.:

This is a plaintiffs' appeal against a decree passed by the learned Additional Civil Judge of Almora dismissing the plaintiffs' suit for a declaration that "Mauza Bangpani, Patti Malla Askot, is a Pakka Khaikari village of the plaintiffs and that they have been wrongly recorded as Kachcha Khaikars in the revenue papers during the settlement of 1940-41 by the mistake of the Settlement Officer."

(2) The facts, so far as they could be ascertained from the papers on the record, are that there was a village Juma which was the Asal Mauza. Jalajibli was the Lagga of this village and there were in it three Thoks, Bangpani, Bans Bagar and Mori Bagar. All this property had been given by the British Government to the Rajwarhs of Askot as their zamindari.

(3) On 7-4-1865, the Rajwarhs of Askot executed a Tasallinama in favour of one Dhanu, the ancestor of the plaintiffs, to cultivate the irrigated land in Bangpani on the following terms:

"As you reside within our 'ilaqa', and as regards bringing under cultivation the waste land along the bank of Gori Ganga, you should first bring under cultivation the 'sera (irrigated land) of Bangpani ..... You should pay the revenue and 'malikana' dues according to the rates prescribed in the recent settlement, and remain there in the capacity of a Khaikar. Without raising any objection, you should supply us, the Zamindars of Taluqa Askot, whether good or bad or rich, coolie, godam, etc. You should bring tenants from other 'ilaqas and cultivate that land, i. e., Bangpani, Bans Bagar and Mori Bagar. You should not instigate the cultivators of our 'ilaqa'. Besides this, you should extend the cultivation from the upper side to the lower side. You shall cultivate the land as mentioned by us. You shall abide by the conditions laid down above. If you go in any way against the above mentioned conditions and behave dishonestly in any way towards us, it shall be dispossessed without raising any objection from the above mentioned land lying within Askot."

(4) In the Muntakhib of the 1867, during Beckett's Settlement, Thok Bangpani was recorded as 'Wiran' but there are some indications in it that at one time it was divided into plots. In

the Khasra of that year it was entered as 'Muddati Wiran'.

(5) On 12-8-1871, Dhanu applied for the reduction of the rent assessed which he claimed was excessive. There is another Tasallinama of 1873 with respect to some other land by which Dhanu was given permission to cultivate it. It is not disputed that the present plaintiffs are in possession of the entire cultivated area in village Bangpani and after Dhanu's death no claim to that area was laid by the Rajwarhs of Askot. The entire cultivated land, therefore, continued to be in possession of Dhanu and after his death his legal heirs. What exactly is the area of the land, whether this Thok Bangpani has got any uncultivated or unmeasured land, on these points we have no information. It is also admitted that the Rajwarhs of Askot have no khudkasht land in this Thok.

(6) To summarise, therefore, the facts in favour of the plaintiffs are that:

(1) they are in possession of the entire cultivated area in Thok Bangpani and the hissedars have no khudkasht land in that Thok; and

(2) the hissedars did not spend any money to cut down the forest and reclaim the land and all that was done by plaintiffs' predecessor-in-interest.

As against it, however, we have the facts:

(1) that Thok Bangpani belonged to the Rajwarhs of Askot who were the Hissedars and had once been brought under cultivation and divided into plots;

(2) that it had become Wiran or Muddati Wiran;

(3) that the hissedars had allowed plaintiffs' predecessor-in-interest to bring the irrigated land into cultivation;

(4) that there is no evidence to prove that the plaintiffs are in possession of anything more than the irrigated area which was given to them under the Tasallinama of 1865.

(5) that under the Tasallinama of 1865 the rights given to Dhanu were tenancy rights and not proprietary rights; and

(6) that there is no evidence on the record to prove whether there is any common land or unmeasured land in Thok Bangpani, and if so, to whom it belongs.

(7) The rights that the plaintiffs can, therefore, claim are traceable to the document of 1865 and as that document creates merely tenancy rights the plaintiffs cannot claim that they have got anything more than the right to cultivate the irrigated land which was given to them in 1865.

(8) Learned counsel for the appellants, Sri Ghatak, has urged that if a 'Hissedar', which word means in Kumaun and Garhwal 'a co-sharer in the zamindari rights' has no Khudkasht land in the village and the entire cultivated area is in the possession of the Khaikars, they must be held to be Pakka Khaikars.

(9) On the other side it is urged by Sri Pant that Pakka Khaikari cannot be created by a grant or by a Hissedar giving to the grantee the right to merely cultivate the irrigated land in a village. Learned counsel has urged that a Pakka Khaikari is a term used in Kumaun and Garhwal in a special sense and means the body of persons who brought waste land under cultivation by cutting down the forest and reclaiming the land for their own benefit and thus became in a sense the proprietors of the land which was more or less unclaimed property and were later deprived of their proprietary rights by the Indian Rulers or by the British Government ignoring their claims and settling the land with others who thus became the overlords and the actual occupiers of the village were reduced to the position of a sort of under-proprietors. For all intents and purposes, they were the owners of the village including the common land and the waste land, their only liability being to pay the land revenue and a certain percentage as Malikana dues to the Hissedar. The liability of the entire body was joint and several and, on the death of one without any legal heir, his land reverted to the other Pakka Khaikars of the village and did not revert to the Hissedar. The main difference, therefore, it is claimed is that while a Kachcha Khaikar is a tenant, a Pakka Khaikar is in a sense a proprietor.

(10) Learned counsel for the appellants has relied on the observations in Stowell's Manual of Land Tenures of the Kumaun Division, 1954 Edition, page 62, where dealing with the main classes of Khaikars the learned author has said—

"..... first class of Khaikars, therefore, consists of the old occupant cultivators in villages where the hissedars hold no khudkasht land; all villages held entirely by khaikars belong to this class since no instance is on record of an entire village of Khaikars having any other origin".

It is urged by learned counsel that Stowell's book, in the absence of anything to the contrary, is considered to be authoritative and, if the village is held entirely by khaikars, it must be deemed to be a Pakka Khaikari village. Stress is laid on the observations of Mr. Stowell that no instance is on record of an entire village of Khaikars having any other origin."

(11) On the other hand, learned counsel for the respondent has referred us to a decision of the Board of Revenue in — 'Mahendra Singh v. Dhundu', 1950 RD (BR) 76 (A) where, though the entire cultivated area was in possession of the Khaikars, it was held that it did not follow therefrom that it was a Pakka Khaikari village and the decision of the Commissioner in the Settlement proceedings of 1941 was set aside.

(12) Dealing with the main class of Khaikars, Stowell has divided them into two main groups, Pakka Khaikars and other Khaikars. About Pakka Khaikars he says that they are

"those Khaikars who present the original cultivating proprietors of the land, and who were deprived of their independent right by grants or assignments of the proprietary right under native rule, or were by fraud or force reduced

to the status of Khaikars by usurping thokdars, muafidars or padhans in the early days of British rule".

At page 95 of his book dealing with the unmeasured land the learned author has said:

"They (Pakka Khaikars) have right over unmeasured land and gaon sanjait in their village to the same extent as the hissedars have in khudkasht villages. The hissedar has no right to cultivate unmeasured land in the village."

According to Stowell, therefore, a Pakka Khaikar is a sort of ex-proprietor and his right is in reality an under-proprietary right.

(13) The law in the Kumaun and Garhwal was for a long number of years administered through executive officers and wherever in a Pakka Khaikari village a Hissedar had managed to get a foothold by acquiring some khudkasht land they held that the village had lost its Pakka Khaikari status and had become a Kachcha Khaikari. Dealing with this Stowell has said:

"But of this class of Khaikars (i. e. Pakka Khaikars) the only ones that have succeeded in preserving a distinct existence with recognised status and rights superior to those of the inferior classes of Khaikars are those whose villages remained in the cultivating possession of the Khaikars alone, the hissedars not having succeeded in obtaining khudkasht cultivating possession in them."

Subsequently it was recognised that it was unjust to the rest of the body of Pakka Khaikars that, if by some means a hissedar had managed to secure a footing in the village, through one of the Pakka Khaikars, the rights of the other Khaikars should thus be affected. In later years, therefore, it was held that

"If a hissedar had in any way effected an entry and got khudkasht possession, his having done so should not on principle affect the right of the remaining Khaikars."

In such cases, it was suggested, a further question as to when and under what circumstances a hissedar got possession of the khudkasht land should be considered and the hissedar so obtaining land should be placed on precisely the same footing as regards his rights and privileges as any other Khaikar and that the land so cultivated should not be considered to be his khudkasht nor should it affect the under-proprietary right of the other Khaikars. (See the decision of Mr. J. R. Reid, Commissioner, dated 9-1-1889, in — 'Dehi Dutt v. Prem Singh'). It has also been held and is now well settled that in a Pakka Khaikari village

"the Khaikars alone have a right to arrange for the cultivation, pasturage, etc., including the succession to land lapsing owing to the death, heirless, of Khaikars, the breaking up of waste, etc., while the hissedars have no right beyond the collection of revenue, cesses and padhanchari."

(14) From the mere fact, therefore, that the whole of the cultivated area in Thok Bangpani is in the possession of the plaintiffs, it cannot be assumed that they were the original cultivating proprietors of the land who were deprived of their proprietary rights by reason of the grant of the zamindari to the Rajwarhs of Askot. The origin of the possession of the plaintiffs and their predecessor is known. It was in the year 1865 that Dhanu was given the right to cultivate the irrigated land in the village which was a 'muddati wiran'. No rights were conferred on Dhanu to the uncultivated land in the village and it cannot be said that he was given any under-proprietary rights under the Tasallinama of 1865.

(15) Learned counsel for the appellants has placed great reliance on a decision of Mr. Stiffe, Commissioner, in — 'Chait Ram v. Banuwa', (Selected Revenue Decisions of Kumaun by Gairola, page 103). Mr. Stiffe in his judgment has dealt with the origin of Pakka Khaikars and says:

"there are only two ways in which these Pakka Khaikari villages have originated one in the case of grant made over the heads of the original cultivators, in which case the Pukka Khaikar corresponds almost exactly to the under-proprietor of Oudh ..... The second case seems to me to be illustrated in the village now in suit. I take it that in the old days the position was much like the position in the Tarai and Bhabar Estates at the present moment. Government looked for the most solvent and influential man in the neighbourhood, settled certain villages with him and encouraged him to acquire tenants. The hissedar, thus created, probably had several villages and already had his home in a settled village. He found tenants for the other villages and arranged with them, or it was arranged for him by Government that they should pay him certain dues and cultivate and manage the village. It was not, therefore, the hissedar who risked his money or expended his labour on reclaiming waste land but it was the body of tenants."

There is, however, nothing to support the view of Mr. Stiffe. According to Mr. Stiffe, if there was an absentee landlord who had no cultivatory land in the village and he had spent no money or labour in reclaiming the land, clearing the forest and habilitating the village and had left it all to be done by tenants then such tenants would become Pakka khaikars, but, as we have already said, there does not seem to be any authority for the proposition that such persons who were brought on to the land as tenants became ex-proprietors, if that is what constitutes a Pakka khaikari. In the glossary of terms used in the hills, at page 8 of the Manual, Khaikars are divided into two classes:

"(1) An under-proprietor whose rights as the original occupant cultivator have been usurped by or granted to some other person at some former period. This is the "pakka khaikar."

(2) An occupancy tenant (who or whose predecessor never had any higher right). This is the "kachcha khaikar."

Though a pakka khaikari village, may, in course of time, become a kachcha khaikari village by reason of the pakka khaikars losing their pakka khairkari rights, a kachcha khaikar can, in no

case become a pakka khaikar, nor can a kachcha khaikari village be converted into a pakka khaikari village. How other khaikari rights, i.e., other than pakka khaikari rights, can be acquired is dealt with at page 63 of Stowell's book, the fourth clause of which is as follows:

"At settlement a tenant-at-will or other person may be recorded as a khaikar at the request of the hissedar, usually under some previous agreement between the parties, it is common, in fact, for instruments purporting to confer khaikari rights to defer the entry of such rights till the date of the next settlement."

This definition exactly meets the case of Dhanu in whose favour the tasallinama of 1865 was executed. Sal Assi Settlement, or Traill's Settlement, was in the year 1823 in which the boundaries of different villages were fixed but no measurements were made. The proceedings of the Beckett's settlement concluded in the year 1872 and during those proceedings the khasra of 1867 and the 'muntakhib' of 1867 were prepared to which reference has already been made. The entries in the settlement papers about the khaikari rights conferred on Dhanu were under a "previous agreement between the parties."

(16) Two other papers have been relied upon. One is an entry of 1872 in which Dhanu was recorded as Ghar Padhan but this entry was scored out and, therefore, no inference can be drawn from it that Dhanu had correctly been recorded as such. The other paper is of 1883 in which a list was prepared of villages in which the entire cultivated land was held by khaikars and in which hissedars had no khudkasht land. Bangpani was included in it. According to the decisions of the Commissioners, then prevailing, if there was a hissedar in a village it could not be a pakka khaikari village but, where the history of the village was known and it was known how Dhanu and his descendants came to have possession of the cultivated area in the village, it is not possible to hold that the mere inclusion in the list was any proof in favour of the plaintiffs that they were pakka khaikars. The list gives only the facts as found on the spot and it does not say whether the villages given in the list were pakka khaikari villages or kachcha khaikari villages.

(17) Having considered this matter carefully, from such material as is on the record, we must hold that the plaintiffs have failed to prove that they were pakka khaikars and that Thok Bangpani is a pakka khaikari village. The suit was rightly dismissed by the lower Court and this appeal must fail and is dismissed with costs.

V.S.B. Appeal dismissed.

(S) A.I.R. 1955 ALLAHABAD 68 (Vol. 42, C.N. 24)

SPECIAL BENCH

LUCKNOW BENCH — MALIK C. J., V. BHARGAVA AND H. S. CHATURVEDI JJ.

(30-9-1954)

Mohd. Wasi and another, Appellants v. Bachchan Sahib and others, Respondents.

Second Appeal No. 186 of 1945, from Order of Civil J., Kheri, D/- 13-2-1945.

(a) Muhammadan Law — Mosque — Prayer in — Right of, belongs to men of all sects — Cause of action — (Civil P. C. (1908), S. 9).

It is now well settled that—

(1) a mosque is dedicated for the purpose that any Muslim belonging to any sect can go and say prayers therein;

(2) it cannot be reserved for Muslims of any particular denomination or sect;

(3) no one can claim to have the form of congregational prayer usually said in a mosque altered to suit him;

(4) even though the congregational prayers are said in a mosque in a particular form any Muslim belonging to any other sect can go into a mosque and say his prayers at the back of the congregation in the manner followed by him so long as he does not do anything mala fide to disturb the others;

(5) the object of the dedication can neither be altered nor the beneficiaries limited or changed; and

(6) a Muslim will have a cause of action if he is deprived of his right to say prayers in a mosque or is prevented from doing so. AIR 1934 All 732, Foll; Case law Ref. (Para 32)

In a suit brought in a representative capacity by certain Sunnis claiming to be in possession of a Mosque, against the Shias of the locality, a permanent injunction was prayed to be issued to the effect that the Shia Muslims of that locality should not decorate Tabut or Gahwara in the said mosque and take out their procession from the said mosque nor should they do Matam therein.

Held that the suit must fail on the ground that though the plaintiffs were objecting to certain functions and ceremonies held in the mosque at the instance of the defendants, they themselves had been performing other ceremonies which might be equally objectionable to others, and from the evidence it was clear that the mosque had been used for taziadari etc., from its very inception; and that Gahwara ceremonies had been performed therein for the last forty years or more and that Shias as also some Sunnis had been taking part in it. (Para 33)

Anno: C. P. C., S. 9 N. 23.

(b) Specific Relief Act (1877), Ss. 54 and 56 — Permanent injunction — Discretion of Court.

From the absence of the words "the Court may in its discretion" in Ss. 54 and 56, it cannot be argued that an injunction can be granted or refused in accordance with the provisions of these two sections and that it is not a discretionary relief like a declaration under S. 42 of the Act. No doubt the words "the Court may in its discretion" are not in Ss. 54 and 56 of the Act but S. 52 of the Act makes it clear that a relief for injunction, temporary or perpetual, is to be granted at the discretion of the Court. (Para 24)

Anno: Sp. R. Act, S. 54 N. 14; S. 56 N. 1.

CASES REFERRED : Paras

(A) (V27) AIR 1940 PC 116: ILR (1940) Lah 493 (PC) 15
(B) (V19) AIR 1932 Bom 356: 57 Bom 551 17
(C) ('54) 1954 All WR (HC) 525 19
(D) (V3) AIR 1916 Pat 87: 37 Ind Cas 302 20
(E) ('85) 7 All 461: 1885 All WN 117 (FB) 26
(F) ('90) 12 All 494: 1890 All WN 179 (FB) 27
(G) ('91) 13 All 419 (FB) 28
(H) (V20) AIR 1933 All 284: 144 Ind Cas 298 29
(I) (V21) AIR 1934 All 732: 153 Ind Cas 1095 30
(J) ('12) 17 Ind Cas 386: 1912 Mad WN 1059 31

Niamtullah, Mohd. Husain, Masood Hasan, Azizuddin Haider and Fareeq Hasan, for Appellants; Ghulam Imam and E. M. Tahir (for Nos. 4 to 10 and 12 to 18) and S. C. Das (for Nos. 5 to 9, 12 to 15 and 18), for Respondents.

MALIK C. J. :

This appeal was cognizable by a single Judge but on an application made on behalf ot the plaintiffs-appellants that the case involves a general question of importance affecting the Shias and Sunnis, two sects of the Muslim community, it was ordered to be heard by a Bench of three Judges.

(2) The two plaintiffs belong to the Sunni sect and are residents of Qasba Mahmudabad, District Sitapur. They brought a suit in their representative capacity under O. 1, R. 8, Civil P. C. on behalf of the Sunnis of Qasba Mahmudabad against the first five defendants in their representative capacity as representing the Shia Muslims of the same Qasba. In paragraph 6 of the plaint it was said

"that as all the Sunni Muslims of Mahmudabad have the right to get a permanent injunction issued the plaintiffs under O. 1, R. 8, Civil P. C. seek permission to file the suit on behalf of all the Sunnis of Qasba Mahmudabad, and as all the Shias of Mahmudabad are prepared to contest the suit, permission is sought to file the suit against the defendants on behalf of all the Shia Muslims of Qasba Mahmudabad."

(3) When notice of the suit was issued, defendants 6 to 19 who are Sunni Muslims applied that they did not wish to be associated with the plaintiffs, nor did they want the plaintiffs to represent them and they were, therefore, impleaded as defendants to the action.

(4) There is a mosque situate near the railway station in Qasba Mahmudabad. The plaintiffs' contention was that it was constructed by a Sunni Musalman, that the Azan and the prayers had all along been said in the Sunni form and that the Shia Musalmans had nothing to do with this mosque, nor did they say their prayers in it, but with the aid of the police the Shia Musalmans had started forcibly decorating Tabut and Gahwara inside the mosque after doing Matam etc., that according to the belief of the Sunni Musalmans the said action was "against Shariyat and it insults, debases and injures their feelings". It was said that the Shia Musalmans had no right to have the Tabut or the Gahwara decorated inside the mosque or take it out in a procession from thereafter doing Matam etc. It was, therefore, prayed that a permanent injunction be issued against them. In paragraph 4 the immediate cause for the suit was given as follows :

"That this year the Shia Musalmans of Mahmudabad after getting warrants of arrest issued under S. 107, Criminal P. C. against the plaintiffs and other Sunni Muslims of Mahmudabad in order to injure their feelings, desire to do the aforesaid acts in the said mosque on 26-3-1942, about which the plaintiffs came to know on 21-3-1942. The Shias desire that the Sunni Muslims should vacate the said mosque after saying their mid-day prayer on 26-3-1942, for this reason a general order was enforced on 24-3-1942, that the Sunni Muslims should completely vacate the said mosque after saying their prayers."

The relief claimed in the plaint was as follows :

"That a permanent injunction be issued to the effect that the Shia Muslims of Qasba Mahmudabad should not decorate Tabut or Gahwara in the said mosque and take out their procession from the said mosque nor should they do Matam therein."

(5) Defendants 1, 3 and 5 filed one written statement while defendants 2 and 4 filed another, and defendants 6 to 19 filed a separate written statement on 22-7-1942, after they had been impleaded. The Sunni defendants 6 to 19 supported the Shia defendants and pleaded that they consider Tazias and Taziadari as part of Islamic religion, that they join and participate in the Gahwara procession and they have no objection to the said acts being done as before. According to them the plaintiffs were a troublesome group who believed in creating disputes between different communities and they realise subscription for the purpose of litigation and misappropriate a part of it. It was pointed out that besides this mosque there were other mosques in Mahmudabad from which Tazias were taken out and Gahwara processions etc., were formed and decorated.

(6) The Shia defendants denied that the mosque had been constructed by a Sunni. They claimed that they had been saying their prayers in the said mosque and that the decoration of Gahwara and Matam etc., had been performed in the mosque from a long time and the procession was taken out from there and it was recently that the plaintiffs had started creating trouble. It was also pleaded that a large number of Sunnis believed in Taziadari and they took part in the functions. That the mosque was originally constructed by one Ramzani Halwai who had built an Imambara and Kachcha Idgah and he used to do Taziadari in honour of Hazrat Imam Husain. The Rajas of Mahmudabad (who admittedly belong to the Shia sect) had, it was said rebuilt the mosque when it had fallen down and had been responsible for its upkeep and maintenance.

(7) As a result of these pleadings, the learned Munsif framed the following issues :

"(1) (a) Whether the mosque in question was built by a Sunni, was it reserved for the Sunnis and has it been used by them only?

(b) If so, its effect?

(2) Whether the defendants can be prevented from conducting the ceremonies in question in the mosque in suit?

(3) Whether the suit is maintainable as framed?

(4)(a) Have the defendants and the Shias been using the mosque in suit as alleged by them?

(b) If so, its effect?

(5) To what relief, if any, are the plaintiffs entitled?"

(8) The case was fought out at some length and a large number of witnesses were produced by either side. After having carefully considered the matter the learned Munsif dismissed the suit on 13-5-1944.

(9) The plaintiffs filed an appeal which was again argued at great length and the learned Judge after devoting considerable time in writing out an elaborate judgment dismissed the appeal on 13-2-1945.

(10) This being a Second Appeal the findings of fact recorded by the lower appellate court have not been challenged by counsel. It may be useful to briefly set out those findings.

(11) The learned Civil Judge found

(1) that there was no satisfactory evidence to prove that Ramzani was a Sunni or a Shia. But as Sunnis predominated in this country there was a presumption that he was a Sunni;

(2) that Ramzani used to do 'taziadari' and had built an 'Imambara';

(3) that the plaintiffs had failed to prove that Idgah mosque was reserved by Ramzani for the use of Sunnis alone;

(4) that it was conceded by counsel for the plaintiffs by a statement made on 21-12-1944, that Shias had been saying their prayers in the mosque in suit from the time that it assumed the shape of a mosque;

(5) that the building had the shape of a mosque at the time of the First Settlement and it was made 'pakka' some time before 1903;

(6) that additions and alterations were made in the building after 1927 by the subscription raised from the public, both Shias and Sunnis. That it was used formerly only for Indian prayers but after 1927 people started going in very large numbers to say their regular prayers and the 'chabutra' was then extended. Shias had contributed to the rebuilding and the repair of the mosque. The Mahmudabad Estate had been white washing the mosque and sending Iftari and providing Badhnis;

(7) that there were no Sunni 'mutwallis' for the mosque. There was no permanent Moazin appointed to call Azans five times a day;

(8) that the plaintiffs had failed to prove that there was a Sunni Imam or permanent Moazin to lead the Panchgana prayers and to call out the Azan for the Panchgana prayers in the mosque;

(9) that during the month of Ramzan Taravi prayer is said in the mosque but does not clash with the time when Shias offer their prayers;

(10) that although Shias had been saying individual prayers in the mosque from the time it was used as such there was no fixed Imam for leading the congregational prayers of Shias;

(11) that Gahwara was being decorated in the mosque and taken out in a procession for more than forty years before the date of suit;

(12) that Gahwara is decorated between 3 and 4 p.m. on the 8th of Rabi-ul-awwal during a period of 15 or 20 minutes;

(13) that Sunnis also used the mosque for holding Maulud, Majlises, Taqrirs by Maulanas, meetings of the Anna Fund (which is carried on against 'taziadari'), for taking out Jalus-e-Mohammadi, for the stay of Maulanas and for performing Seyums;

(14) that 'tazias', 'alams' and Gahwaras are taken out from this mosque and other mosques by both Shias and Sunnis; and

(15) that the decoration and taking out of Gahwara causes no disturbance to Sunnis who go to say Zohar prayers in the mosque in suit.

(12) The learned Judge has devoted considerable time in considering whether the taking out of Gahwara and similar processions, 'taziadari' and 'azadari', are or are not against the Shariat. It is not necessary for us to go into this question nor can we consider ourselves competent to do so. The fact remains that while a section of the Muslims abhor and condemn such practices another section, though numerically less but probably equally well established, consider them meritorious. It is also a fact that even a fair number of Sunnis take part in 'tazias' and 'taziadari' and in the Gahwara procession.

As always happens, with the passing of time the scriptures are differently interpreted by learned men and, if they can influence a sufficient number to form a nucleus, a new sect grows up and often there is bitter ill-feeling between the members of one sect and another each condemning the other for what it considers to be a heretical or wrong interpretation of the sacred scriptures. This happened among Christians and in the middle ages there were wide spread persecutions of Catholics by the Protestants and also of the Protestants by the Catholics. Protestants and Catholics have, however, separate churches of their own and the problem that has, therefore, arisen in some parts of India, as regards the use of mosques by different sects of Muslims, did not arise among Christians about the use of churches.

(13) Chaudhri Niamat Ullah has put forward before us a very short and simple argument. His contention is that a mosque is the property of God primarily dedicated for saying of prayers. No Muslim can be excluded from saying his prayers in a mosque and no objection can be taken to his saying prayers therein so long as he says

his prayers according to the well recognised ecclesiastical rules of Muslim faith. He has contended that, that being the primary object, besides the five prayers prescribed —the first (Fajir) before dawn, the second (Zohar) after mid-day, the third (Asad) in the afternoon, the fourth (Maghrib) after sunset and the fifth (Isha) before midnight— a Muslim can say prayers at any time during the day and night and the mosque must, therefore, be available to him whenever he wants it for the purpose of saying his prayers, that anything else done in the mosque is by leave and licence, and that a mosque cannot be put to any other user if a Muslim objects to it on the ground that it interferes with his right to say his prayers.

(14) Learned counsel for the respondents has urged that this being an important point dealing with ecclesiastical law he could have produced expert witnesses if it had been raised in the lower court and has urged that, in case we feel inclined to accept this new approach to the case, we should remit an issue to the lower appellate court.

(15) Learned counsel for the appellant has, however, relied on the decision of the Privy Council in — 'Masjid Shahid Ganj v. Shiromani Gurdwara Parbandhak Committee, Amritsar', AIR 1940 PC 116 at p. 120 (A), in support of his objection that oral evidence in such matters will not be admissible and the point raised being a pure question of law it should be decided by us. He has urged in the alternative that the point was raised in the lower court and was decided. He has drawn our attention to page 180 of the paper book where the learned Judge says:

> "Let us now consider for what purposes a mosque has been and can be used under Mohammedan Ecclesiastical Law."

The discussion under that head, however, shows that the point was not put in the way it has been urged by Chaudhri Niamat Ullah on behalf of the appellants. The lower court was called upon to consider whether the uses to which the building was brought were against the Shariat and for what purposes the building may legitimately be brought.

(16) We do not, however, consider it necessary to examine the contention whether a mosque must be deemed to have been dedicated only for the purpose of saying prayers and any other user must be by leave and licence. We shall assume that the primary object of dedication of a mosque is the saying of prayers to God and the entire Muslim public are the beneficiaries for that purpose. The fact that the building can be used and has been used from the earliest times for other purposes not repugnant to the Muslim faith can, however, admit of no doubt. The learned Judge has referred us to several authorities to establish that fact, e. g., Mohammad Ali in his Quran, old Edition, footnote No. 445 has mentioned that

> "a deputation consisting of 60 Quraish came from Najran in 10 A. H. and they were lodged by the Prophet in the mosque."

In the Hidaya it is mentioned that a Qazi should preferably sit in a mosque to hold his court. Fatwe-Kazi Khan, Vol. 1, page 31 says that travellers can stay in a mosque and it can be used as a school. Other passages from other books have also been quoted to show that in the days of the Prophet feats of arms were displayed by Abysinians & poems were read inside the mosque. Authorities have been cited that relics of the Prophet and his immediate relations can also be preserved in a mosque.

(17) Learned counsel for the appellant has cited a number of authorities to establish his contention that a mosque is dedicated for the purpose of prayer alone, that other user is by leave and licence and that no one can claim a right to use it for any other purpose except for saying of prayers. He has relied on Tyabji's Muhammaden Law, sections 514 to 516. These sections, however, deal with the completion of a dedication. According to them the first public prayer said on the land or within the building completes a dedication for a mosque. It is also made clear that there can be no power of revocation once a mosque is dedicated and there can be no reservation of rights by the 'waqif' nor can a mosque be dedicated with an effective reservation for a particular sect or class of people.

In — 'Akbarally A. Adamji v. Mohomedally', AIR 1932 Bom 356 (B), Tyabji J. observed at page 362

> "it has been laid down as a principle in a decision of great authority that a mosque must be a mosque for all, that it must be a building dedicated to God and not a building dedicated to God with a reservation that it should be used only by persons holding particular views of the ritual; that it is a place where all Mohomedans are entitled to go and perform their devotions as of right according to their conscience:"

The learned Judge, made certain observations which we consider significant. He said:

> "However I feel great difficulty in seeing how it can be given effect to in British India, where each community is free to govern itself by its own customs and usages, and its own interpretation of the Quran and of the fundamental rules of Islam; and the Court does not lay down what shall be considered the true interpretation where rival interpretations have been adopted."

(18) If the argument of learned counsel is given its full effect it can lead to a tyranny of the majority by a few. The Muslims of a locality may have a mosque built for prayers and make elaborate arrangement for 'taziadari' or similar rituals in which they may have great faith. Any Muslim can then come forward and claim that nothing but prayers shall be said in the mosque and it shall not be used for any other purpose as he wants to say his prayers at any time he likes within twenty-four hours and the rituals would disturb his prayers.

(19) In a country like India, where people are free to follow their own faith, according to their own belief, the policy of live and let live must govern the relationship between followers of various religions or sects, so long as it does not conflict against the rules of public morality or decency. It is not open to a member of a particular sect to claim that the others should not follow their faith according to their belief because it offends against his susceptibilities. We had recently a case from Amathi in which the Muslims had objected to the blowing of conch-shells on the ground that

it was intimately connected with idol worship which was repugnant to Muslim sentiment. (See — 'Sh. Ahmad Ali v. Babu Ram', 1954 All W. R. (HC) 525 (C)). It appears to us, therefore, that the only way of ensuring peace and religious freedom to all would be by laying down that the practices followed peacefully and without objection for years at a place of worship should not be disturbed on the ground that it was being objected to by some people because they claimed that it was repugnant to the true tenets of their faith.

(20) A Muslim has no doubt a right to say his prayers in a mosque and he cannot be kept out of it. There are certain prayers which are said in a gathering and in that sense they may be called congregational prayers. In every mosque these prayers are said at particular hours and Chaudhri Niamat Ullah has urged, and probably rightly, that any of the five prayers said in a congregation cannot be repeated on the same day for the benefit of those who come late or who want to say the prayers in a different way. He has relied on a decision of the Patna High Court in — 'Khalil Ahmad v. Malik Israfil', AIR 1916 Pat 87 (D). In that case in an old mosque built by the Sunnis the Qadianis had been saying their prayers for a number of years. The learned Judges held that the plaintiffs who were Qadianis could not get a decree that they were entitled to abstain from joining in the ordinary devotion at the mosque and to appoint an Imam of their own to lead the prayers after the usual daily prayers had been concluded.

(21) It may be that nothing can be done in a mosque at a time when the five daily prayers are said so as to disturb the saying of those prayers. Besides the five daily prayers a Muslim can say other prayers at any time of the day and night. These can be said at any place which is clean. The right that a Muslim has is merely to say his prayers and if he is excluded or if he is disturbed or not allowed to say his prayers at the time he has been usually saying them in the mosque he may have a just grievance. No allegation has been made in the plaint that any time when the plaintiffs used to say their prayers the Gahwar and other ceremonies were so performed that the plaintiffs were disturbed or that the plaintiffs' right had been interfered with.

The main ground in the plaint was that it was a Sunni mosque and the Gahwara and other ceremonies were repugnant to the Sunni Muslims. Paragraph 4 of the plaint has been relied upon but that merely sets out the fact that an order was passed by the police that the Sunni Muslims should vacate the mosque after saying prayers. The order did not say that they must vacate the mosque before saying their prayers and the lower appellate court has pointed out that there was no allegation in the plaint and no evidence led to prove that the decoration of the Guhwara and the taking out of the procession from the mosque in suit caused any disturbance to Sunnis in saying their prayers. In the absence of proof that the plaintiffs' rights were affected they cannot be said to have any cause of action for the suit.

(22) There is another ground on which the suit must fail. It is clear from the judgment of the learned Civil Judge that the Sunni Muslims are bringing this mosque to various uses which are summarised at page 180 of the paper book as (1) holding of Sayums, (2) for holding discourses by Moulanas, (3) for taking out Jaloos Mahamadi procession, (4) holding of Milads, (5) holding of Jalsa Anna Fund, and (6) for the staying of the Maulanas who want to deliver lectures at Mahmudabad. Since they are bringing the mosque to all these uses they cannot claim that Shias and other Sunnis who believe in 'taziadari' cannot bring the building to such use on the ground that the mosque is dedicated only for the purpose of saying of prayers.

(23) There is yet another ground why the suit must fail. The plaintiffs have confined the relief in the plaint to an injunction against Shias while a large section of Sunnis also believe in 'taziadari' and if the suit is decreed they would be free to do taziadari while Shias will be forbidden from doing it.

(24) Learned counsel for the appellants has, however, pointed out that though the relief may have been claimed only against Shias it is open to the Court under O. 41 R. 33, Civil P. C. to grant any appropriate relief and that the relief may be granted not only against Shias but also against Sunnis who believe in taziadari. Learned counsel has also relied on the provisions of Ss. 54 and 56, Specific Relief Act (1877) and has urged that an injunction can be granted or refused in accordance with the provisions of these two sections and that it is not a discretionary relief like a declaration under S. 42 of the Act. Our attention has been drawn to the words "the Court may in its discretion" in S. 42 and the absence of those words in Ss. 54 and 56 of the Act. We do not, however, think that there is any substance in this argument. No doubt the words "the Court may in its discretion" are not in Ss. 54 and 56 of the Act but S. 52 of the Act makes it clear that a relief for injunction, temporary or perpetual, is to be granted at the discretion of the Court.

(25) We have the findings of the lower appellate court that for more than forty years the ceremonies objected to have been performed in the mosque; that Shias and some Sunnis have been taking part in it; that the original founder himself believed in 'taziadari' and that the mosque was never reserved for Sunnis alone. In these circumstances if by reason of the bitterness of feeling that has recently developed due to Maddhe Sahaba and Tebarra controversy in Lucknow a section of Sunnis have become more sensitive and went to exclude a considerable section of Muslims of the locality from doing what they have been doing peacefully and without objection for the last forty years or more, the Court would be well justified in not using its discretion in favour of the plaintiffs. These observations would be enough to dispose of this appeal but as a number of cases have been cited we may briefly deal with them.

(26) A Hanifi Muslim says the word "amen" at the end of his prayer silently or under his breath while Wahabis say it loudly. A Wahabi Muslim for saying "amen" in a loud voice was prosecuted under Ss. 79 and 296, Penal Code (1860). He was convicted by the lower court. There was an appeal

to the High Court. The case was referred to a Full Bench and the Chief Justice and three other learned Judges sent the case back for a retrial to find out whether the accused had caused any disturbance at the time of saying of the prayers. See — 'Queen-Empress v. Ramzan', 7 All 461 (E). Mahmood J. wrote a dissentient judgment in which he said:

> "As to the merits of the present case itself upon this particular point, I have to observe that a Muhammedan mosque is in many respects different, so far as I know, from an ordinary Christian church; because it is not only a place for divine worship, but also intended for religious and moral teaching and discussion, and it is not unusual that in places where the Muhammadan community is still flourishing, a library and a school form part of the mosque. I cannot, therefore, hold that to carry on religious discussion in a mosque, even though the majority of the people present at the time do not approve of such discussion constitutes a criminal offence."

Mr. Das for the respondents has relied on this passage in support of his contention that a mosque may be used for other purposes than of saying prayers. We, however, do not want to go into that question as we consider it unnecessary.

(27) Learned counsel for the appellants has relied on — 'Ata-Ullah v. Azim-Ullah', 12 All 494 (FB) (F). As a result of the prosecution of Wahabis for saying "amen" in a loud voice, some Wahabis filed a suit for a declaration that they were entitled to pray and perform their religious devotion according to their own beliefs. The case was again referred to a Full Bench in which the learned Chief Justice made it clear that a mosque which is dedicated to God cannot be limited in its dedication to any particular sect or sects of Muslims and that every Muslim has got a right to say his prayers according to the well recognised rules of Mohammedan Ecclesiastical Law.

(28) The next case was — 'Jangu v. Ahmad Ullah' 13 All. 419 (FB) (G). In this case also the dispute related to the saying of the word "amen" in a loud voice at the end of the prayers by the Wahabis and they asked for a declaration from a civil court. The right was recognised but it was made clear that they could not say "amen" 'mala fide' in such a loud voice as to disturb others.

(29) The other case relied upon is — 'Sifat Ali Khan v. Ali Mian', AIR 1933 All 284 (H). This was a case in which the plaintiffs sued for a declaration that they were the 'mutwallis' and 'Imams' of a certain mosque and that they had for more than 25 years been saying namas as members of the Ahmadi or qadiani sect and that the defendants who were non-qadianis had on no account any right to offer their prayers in congregation led by some other Imam. The case came up to this court in second appeal and it was held that the plaintiffs had failed to prove that they were the 'mutwallis' and Imams of the mosque or they had any right to lead the prayers.

(30) The next case relied on is — 'Syed Ahmad v. Hafiz Zahid Hussain', AIR 1934 All 732 (I). In that case a school or 'maktab' was held within the compound of an ancient mosque built nearly 300 years before. Those in charge of the management of the school wanted to have a 'pakka' building for that purpose and a suit was filed on behalf of the mosque and it was held that the mosque was dedicated for a specific purpose and every Muslim of whatever locality and belonging to whichever sect of Muslims had a right to say his prayers therein and that the local Muslim population could not claim any special beneficial interest in themselves and could not, therefore, utilize the mosque property for building a school on a part of its ground. If we may say so, with respect, we accept both the propositions laid down in this judgment that a mosque is dedicated for worship and is open to all Muslims, local and others, and that the local Muslims cannot have a right to use it for any other purpose however meritorious or beneficial it may be to them.

(31) In — 'Muthala Kandi v. Pulli Veetil Abu Baker', 17 Ind Cas 386 (Mad) (J), it was held by a Bench of the Madras High Court that every Muhammadan worshipper has the right both to offer prayers and to recite the Koran as a part of his right of worship in a mosque but he cannot claim the right to use the mosque for the purpose of collecting subscriptions or distributing sweetmeats.

(32) From all the authorities cited above it would appear that it is now well-settled that

(1) a Mosque is dedicated for the purpose that any Muslim belonging to any sect can go and say prayers therein;

(2) it cannot be reserved for Muslims of any particular denomination or sect;

(3) no one can claim to have the form of congregational prayer usually said in a mosque altered to suit him;

(4) even though the congregational prayers are said in a mosque in a particular form any Muslim belonging to any other sect can go into a mosque and say his prayers at the back of the congregation in the manner followed by him so long as he does not do anything 'mala fide' to disturb the others;

(5) the object of the dedication can neither be altered nor the beneficiaries limited or changed; and

(6) a Muslim will have a cause of action if he is deprived of his right to say prayers in a mosque or is prevented from doing so."

(33) Accepting all these propositions the plaintiffs' suit must fail by reason of the fact that they are not able to prove that their right to say prayers has in any way been affected by reason of the action of Shia defendants. Secondly, it must fail because the nature of the relief claimed by them is defective. Thirdly, it must fail on the ground that though the plaintiffs are objecting to certain functions and ceremonies held in the mosque at the instance of the defendants, they themselves have been performing other ceremonies which may be equally objectionable to others. And, lastly, it must fail because from the evidence it is clear that the mosque has been used for 'taziadari' etc. from its very inception; that Gahwara ceremonies have been performed therein for the last forty years or more and that Shias as also some Sunnis have

been taking part in it. In these circumstances if the defendants were not doing anything against public morality or decency the plaintiffs cannot be allowed to claim the grant of a discretionary relief that the Shias and others be not allowed to follow the tenets of their faith in their own way without let or hindrance by others.

(34) The result, therefore, is that this appeal fails and is dismissed with costs.

V.S.B. Appeal dismissed.

(S) A.I.R. 1955 ALLAHABAD 74 (Vol. 42, C.N. 25)

(LUCKNOW BENCH) MALIK C. J. AND V. BHARGAVA J. (27-9-1954)

Harish Chandra Bajpai and another, Applicants v. Triloki Singh and others, Opposite Parties.

C. M. An. (O. J.) No. 100 of 1953.

(a) Constitution of India, Art. 226 — Scope of jurisdiction — Certiorari against election Tribunal — Order allowing amendment of election petition — (Representation of the People Act (1951), S. 83 (3)).

The jurisdiction of the High Court under Art. 226 of the Constitution is discretionary and the High Court would not issue a writ of certiorari unless the Tribunal has acted without jurisdiction or the decision is palpably erroneous. The High Courts cannot constitute themselves Courts of appeal either on questions of fact or, on question of law. A mere wrong decision cannot be corrected by a writ of certiorari. It must be a patent error before the High Court can interfere. AIR 1954 SC 440, Rel. on. (Para 7)

Where an application for amendment of an election petition is made under S. 83(3), Representation of the People Act, the Election Tribunal has the right to decide whether it comes within S. 83(3). If the majority of the members of the tribunal holds that the petition should be allowed on the ground that it does not change the nature of the original petition but merely gives further particulars; the order even if wrong cannot be said to be without jurisdiction nor can it be said that it is such a patent error or the decision is so palpably erroneous as to justify interference under Art. 226 of the Constitution. (Para 8)

Anno: Const. of India, Arts. 32 and 226 N. 7, 39.

(b) Constitution of India, Art. 132 — Scope.

Leave can be granted under Art. 132 only in a case involving a substantial question of interpretation of the Constitution. (Para 10)

Anno: Const. of India, Art. 132 N. 2, 8.

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 245: 1954 All LJ 15 5

(B) (V41) AIR 1954 SC 440: ILR (1954) Mys 235 7

Hyder Husain, Manohar Lal and J. S. Trivedi, for Applicants; Iqbal Ahmad, H. K. Ghose, H. N. Misra, Khushwast Rai, Bishun Singh, Onkar Singh and K. S. Varma, (for No. 1); M. L. Tilhari (for Nos. 4 and 7); Sri Ram Asrey Misra (for Nos. 12 and 14), for Opposite Party.

MALIK C. J.:

This is a very simple matter.

(2) An election petition was filed on 10-6-1952 and in that petition certain allegations were made in paragraph 7C the first portion of which alone need be quoted:

"That the respondents Nos. 1 and 2 could in furtherance of their election enlist the support of certain government servants."

The rest of the paragraph deals with two incidents of 16th December and 27th December, 1951, with which we are not concerned.

(3) On 27-2-1953, the petitioners filed an application for amendment in which the relevant prayer was as follows:

"Therefore the petitioners pray that under S. 83 (3) he be allowed to amend the details of para. 7C by adding the words 'village headman' with their names and the fact that they worked and issued appeal and subsequently they became polling agents of respondents Nos. 1 and 2 and for this the petitioners shall ever feel grateful."

This application was granted by an order dated 28-11-1953, by the majority, the advocate member and the Chairman agreeing to the amendment, while the third member was of the opinion that the amendment application should be rejected. The advocate member held that the amendment sought amounted to furnishing further particulars and such an amendment could be allowed under S. 83(3), Representation of the People Act, 1951. In the alternative he held that even if the amendment went beyond furnishing other and further particulars, the application could be granted under O. 6, R. 17, Civil P. C. The Chairman did not express any definite opinion but held that the petition could be granted as it came either under one provision or the other. The third member, however, held that the petition could not be granted either under S. 83(3) of the Act, as by it certain new grounds were being introduced, or under O. 6, R. 17, Civil P. C.

(4) Certain previous proceedings were referred to at the Bar, though we do not see much relevancy or bearing of those proceedings. The election petition was filed on 10-6-1952 and one of the opposite parties to the petition was Balbhadra Singh who had stood for election but had lost. He filed a written statement in which he mentioned certain new facts for invalidating the election. They were that certain Government Officers had helped in the election of the returned candidate. When the petitioner came to file his replication on 16-1-1953, he borrowed the allegations from Balbhadra Singh's written statement and put them in the replication.

On 31-10-1953, the replication came up for consideration before the Tribunal and all the members were unanimously of the opinion that the replication must be confined to the allegations made in the written statement and new matter could not be introduced in it. An alternative argument that it amounted to furnishing better and further particulars was also rejected. On 13-11-1953, by a majority it was held that the opposite party No. 10 could not in his written statement raise new grounds for unseating the returned candidate. It is not urged that either of the two

orders debarred the Tribunal from considering the application dated 27-2-1953, and passing the order dated 28-11-1953.

(5) What, however, is urged is that the Election Tribunal has no power to allow new grounds to be introduced in the election petition by way of an amendment under O. 6, R. 17, Civil P. C. and under S. 83(3), of the Act the petitioner can only be allowed to amend the particulars or give such further and better particulars in regard to any matter referred to in the petition, as may be necessary in the opinion of the Tribunal for ensuring a fair and effectual trial of the petition.

Reference has also been made to a decision of this Court in — 'Audesh Pratap Singh v. Brij Narain', AIR 1954 All 245 (A), where an argument was advanced by the learned Counsel for the petitioner that the Tribunal had allowed new allegations to be made after the period of limitation had expired so as to make it a new petition. It was held that the amendments permitted by the Tribunal could not be said to have so radically changed the petition as to make it a new one. While dismissing the application, however, the learned Judges expressed an opinion that "no amendment of the petition was sought and the Tribunal would have had no power to allow it if it had been asked for."

(6) In the case before us, the petition for amendment purported to be under S. 83(3) of the Act and the advocate member of the Tribunal held that it did come under S. 83(3) though he expressed an alternative opinion also. The Chairman placed it in the alternative without expressing any preference for either of the two grounds. It is, therefore, urged that the decision of the majority is based on the finding that the amendment sought amounts merely to furnishing further particulars, as the allegations in paragraph 7C of the original petition were vague and indefinite and no details were furnished about the Government servants whose support had been enlisted by the returned candidate. Learned counsel's argument that a village headman is not a Government servant is met by the provisions of S. 123(8), Cl. (b) of the Act under which a village headman is included in the category of persons serving under the State Government.

(7) It has been held by their Lordships of the Supreme Court as also by this Court that the jurisdiction of this Court under Art. 226 of the Constitution is discretionary and that this Court would not issue a writ of certiorari unless the Tribunal has acted without jurisdiction or the decision is palpably erroneous. The law has been discussed at some length in the latest decision of the Supreme Court in — 'T. C. Basappa v. T. Nagappa', AIR 1954 SC 440 (B). Their Lordships have made it clear that the High Courts cannot constitute themselves Courts of appeal either on questions of fact or on questions of law. A mere wrong decision cannot be corrected by a writ of certiorari. It must be a patent error before we can interfere.

(8) The application was made under S. 83(3), Representation of the People Act, 1951. The claim made was that by that application no fresh grounds were being introduced in the election petition but only further particulars regarding points already raised were being given. The tribunal had the right to decide whether the petition did or did not come under S. 83(3). It took the view that it did and that there was no material change in the election petition and the amendments sought were merely in the list of particulars. The tribunal may have been right or the Tribunal may have been wrong, but this writ application neither raises a question of jurisdiction nor can it be said that it is such a patent error or the decision is so palpably erroneous that we can interfere under Art. 226 of the Constitution.

(9) In the circumstances we do not consider that this is a fit case in which we should interfere. The application is, therefore, dismissed but we make no order as to costs. The stay order is discharged.

(10) Learned counsel has asked for leave to appeal to the Supreme Court under Art. 132 of the Constitution. Leave can be granted under Art. 132 only in a case involving a substantial question of interpretation of the Constitution. No such question arises. Leave is, therefore, refused.

K.S.B. Application dismissed.

(S) A.I.R. 1955 ALLAHABAD 75 (Vol. 42, C.N. 26)

(LUCKNOW BENCH) RANDHIR SINGH J.

(2-9-1954)

Rahas Behari Panday, Appellant v. State.

Criminal Appeal No. 356 of 1953, against order of Special Magistrate, Lucknow, D/- 15-6-1953.

Penal Code (1860), S. 161 — Use of Magistrates for police trap — Practice condemned — Effect on their evidence — (Criminal Trial — Witnesses).

There can be no doubt that it is highly improper to make use of Magistrates as witnesses in laying police traps for the detection of the offences of taking illegal gratification. AIR 1954 SC 322 and AIR 1951 Cal 524, Referred. (Para 9)

But, however profound their disapprobation be with regard to this practice, it is difficult for the Courts to shut their eyes to the materials which might appear before them in particular cases. Courts cannot decide cases except on the basis of a careful weighing of such evidence as is placed before them. AIR 1954 Madh B 101, Rel. on. (Para 10)

Where, therefore, the police or the Magistrate did not induce a party to pay the bribe but they only witnessed the transaction which was to happen in the normal course of events and the trap lay only in the watching of the transaction:

Held that, howsoever improper it might have been to take advantage of the services of a First Class Magistrate, the fact remained that he did witness the payment of the bribe to the accused and as the evidence satisfactorily established that the accused accepted money much in excess of the railway freight and demanded it as 'bility Karai', he had been rightly convicted under S. 161, I. P. C. (Para 11)

Anno: I.P.C., S. 161 N. 12.

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 322: 1954 Cri LJ 910 (SC) 9

(B) (V38) AIR 1951 Cal 524: 52 Cri LJ 1116 9

(C) (V41) AIR 1954 Punj 89: 1954 Cri LJ 545 10

(D) (V41) AIR 1954 Madh B 101: 1954 Cri LJ 966 10

G. G. Chatterji, for Appellant; B. L. Kaul, for Addl. Govt. Advocate, for the State.

JUDGMENT: The appellant in this case has been convicted under S. 161, I. P. C. and has been sentenced to rigorous imprisonment for a period of one year and six months and a fine of Rs. 200/-, in default to undergo further rigorous imprisonment for a period of three months by the Special Judge, Lucknow, appointed under the Criminal Law Amendment Act, 1952 (Act 46 of 1952).

(2) It appears that the appellant was a booking clerk posted at railway station Colonelganj in March, 1952. Baskets of eggs are despatched from Colonelganj to Lucknow and, it was alleged on behalf of the prosecution that there was a general complaint that the booking staff at Colonelganj used to demand illegal gratification both in cash and kind at the time of the booking of such parcels. One Bahau also dealt in eggs and had to meet this difficulty. A few days before the occurrence Bahau is said to have met one Sri D. D. Kapur, R. S. O., S. P. E., Lucknow at the Lucknow City Station and he brought this complaint about illegal gratification demanded from the despatchers of eggs at Colonelganj to his notice. Sri Kapur told Bahau that he should meet him at Colonelganj when he next booked a consignment for Lucknow. On 10-3-1952 Sri Kapur came to Colonelganj accompanied by Sri Balbhaddar Singh, Inspector, Special Police Establishment and Bahau was called. Bahau was to book some baskets of eggs on that date and his statement was recorded by the Inspector, Sri Balbhaddar Singh.

Both these officers, namely, Sri Kapur and Sri Balbhaddar Singh, then went to the District Magistrate's residence at Gonda in order to ask him to arrange for a trap. The District Magistrate was, however, not available and his stenographer is said to have advised to go to the Railway Magistrate. They then went to the Railway Magistrate who told them that he would arrange for the trap after instructions from the District Magistrate. As the District Magistrate was not available, he thought it fit to arrange for the trap. The Railway Magistrate, Sri K. L. Trivedi, then went to Colonelganj and the statement of Bahau was recorded by him. Bahau had in his possession currency notes of the value of Rs. 20/- and they were signed by the Magistrate and their numbers were noted. Bahau was then asked to go to the railway station and book his baskets. He was told that the two officers as also the Magistrate would also go to the station and watch the payment of the illegal gratification demanded. One Hasan Ali was also called and Hasan Ali and Bahau went together. The two officers Sri D. D. Kapur and Sri Balbhaddar Singh as also the Railway Magistrate followed them. The two officers walked towards the western window of the room where the booking was to be done while the Magistrate walked into the verandah and near the eastern window.

Bahau told the appellant, who was on duty at the time of the occurrence, to book his parcels. He was asked to pay Rs. 16-3-0 and on being asked as to why so much money was demanded, the appellant is said to have told him that Rs. 2-7-0 was due on account of railway freight & the rest was bility-Karai. Another Babu, who was lying on a board in the same room, then asked Bahau as to whether he had brought eggs also and Bahau told him that he had brought 20 eggs only. The Babu then told him that he should have brought 50 eggs. Bahau then offered to pay price of the balance and he was asked that he should supply the remaining number of eggs when he would next come to the railway station to get his baskets booked.

Bahau delivered currency notes of the value of Rs. 17/- to the appellant who returned extra coins of the value of 0-13-0 to Bahau and then prepared the Railway Receipt. Some labels were given to be attached to the baskets. After the Railway Receipt had been made out, the Magistrate and the two officers, who were watching the transaction, entered the room and the appellant is then said to have been asked to give a search. Thereupon the appellant took out the money from his pocket and gave it to the Magistrate. He then begged for pardon. The twenty eggs were recovered wrapped up on a 'Jhandi' used for signalling on a rack in the same room. The statement of the appellant was then recorded by the Magistrate and after the statement of Bahau had also been recorded, a telegram was sent to the D. T. S. at Gonda to suspend the appellant. Permission for investigation was granted by the Magistrate to Sri Balbhaddar Singh and after the investigation was completed, a complaint was filed by the Deputy Superintendent of Police. S. P. E. against the appellant.

(3) The defence of the appellant was that he received no money as illegal gratification from Bahau and that no sum of Rs. 17/- had been recovered from his person. The prosecution examined a number of witnesses and some witnesses were examined also on behalf of the defence. The learned Special Judge who tried the case, found the appellant guilty under Sec. 161, I. P. C. and sentenced him to imprisonment and fine as mentioned above. He has now come up in appeal.

(4) The prosecution had examined in this case Sri K. L. Trivedi, Magistrate First Class, who was the Railway Magistrate at Gonda. He narrated the manner in which he was approached by the two officers and the trap laid. He stated that he saw from the eastern window of the booking office the passing of the currency notes to the appellant.

(5) He also states that thereafter he entered the room and asked the appellant to search him and his companions as he was a Magistrate who wanted to search the person of the appellant. The appellant refused to search the persons of the witness and his companions and they themselves showed him that they had nothing with them. The Magistrate then told the appellant to give his search as he had accepted a bribe from Bahau. Thereupon the appellant took out the money which he had in his coat pocket. The notes recovered tallied with the numbers of the notes already noted by the Magistrate. Bahau

was found to have with him the remaining three notes of Re. 1/- each as also the coins of the value of 0-13-0. The Magistrate also recovered the eggs wrapped up in a piece of cloth on a rack in the same room. Bahau, Hasan Ali, Sri D. D. Kapur and Sri Balbhaddar Singh also supported Sri K. L. Trivedi about the payment of the money in their view and the recovery of the money from the person of the appellant.

(6) The learned counsel for the appellant has pointed out a number of discrepancies in the statements of these witnesses and it has been argued that the statement of Sri K. L. Trivedi or of the other witnesses should not be accepted. It has been pointed out that while the other witnesses for the prosecution in this case state that it was the other Babu in the room who had demanded the eggs, the Magistrate stated that the demand for the eggs was also made by the appellant. It has to be borne in mind that Sri K. L. Trivedi was walking outside in front of the eastern window. He was not acquainted with any of the two members of the railway staff who were inside the room and it is possible that he might have mistaken the words uttered by the other Babu in the room as words spoken by the appellant. I am unable to attach any great importance to this discrepancy.

Another discrepancy, which has been pointed out, is that Bahau has stated that the appellant was also searched while Sri K. L. Trivedi states that his pockets were felt. It is possible that Bahau may have taken this to be a search of the appellant. Lastly, it has been urged that there is a discrepancy in the statement of Bahau and of the other witnesses, particularly of Sri K. L. Trivedi about the place where the statement of Bahau was recorded after the recovery of the notes from the person of the appellant. It appears from a perusal of the statement of Sri K. L. Trivedi that he had refreshed his memory, while in the course of the deposition, from the report which he had ultimately submitted regarding the proceedings taken by him that night. This circumstance shows that his memory was not very green with respect to all the details of the occurrence. The occurrence took place in March, 1952 and the statement of the Magistrate was recorded sometime in November, 1952. After a lapse of so many months it is not surprising if he did not remember all the minute details about what happened on the date of the occurrence. The contradictions do not affect any material part of the evidence and these discrepancies would not be enough to throw a doubt on the veracity of the witnesses or the correctness of the story for the prosecution in the main.

(7) It has further been argued on behalf of the appellant that the defence of the appellant that no money was recovered from his persons and that it was only after a search of the room that the eggs as also the currency notes of the value of Rs. 17/- were recovered from a corner of the room placed on a rack, finds support in some of the statements of the witnesses for the prosecution. One of the witnesses has stated that the tubes where tickets sold were also inspected after the search and it has been argued that it was not necessary to search the tubes or any other person if in fact the money had already been recovered from the person of the appellant. I am unable to attach any great importance to this circumstance in view of the clear statements of all the witnesses for the prosecution that the money was recovered from the person of the appellant.

(8) The defence had examined three witnesses including the station master who was said to have been called to the booking office after the notes had been recovered from the person of the appellant. The Station Master states that the Magistrate had told him that no money had been recovered from the person of the appellant and that some currency notes and eggs were found wrapped up in a corner of the room. I am unable to give credence to the statement given by the station master in view of the fact that it was incredible that the Magistrate, who had reported about the incident the same day, should have made a statement quite in conflict with his report, in the presence of all persons. The evidence of the station master and the other two witnesses on this point has, therefore, been rightly rejected by the lower Court.

(9) Reliance has been placed on a ruling of the Supreme Court in — 'Shiv Bahadur Singh v. State of Vindhya Pradesh', AIR 1954 SC 322 (A), in which some observations made by their Lordships of the Supreme Court with regard to the impropriety of employing Magistrates to act as witnesses in traps have been made. Some such observations had also been made earlier in several other cases and in one case particularly by Mukherji, J. in a case — 'M. C. Mitra v. The State', AIR 1951 Cal 524 (B). There can be no doubt that it was highly improper to make use of Magistrates as witnesses in laying police traps for the detection of such offences. In the reported case first mentioned however, it appears a sum of Rs. 25,000/- was provided by the police to a certain person to be paid as illegal gratification and a Magistrate's services were availed of for witnessing the transaction. Their Lordships of the Supreme Court have observed as follows:

> "The police authorities in this step which they took showed greater enthusiasm than Nagindas himself in the matter of trapping the appellant No. 1. It may be that the detection of corruption may some times call for the laying of traps, but there is no justification for the police authorities to bring about the taking of a bribe by supplying the bribe money to the giver where he has neither got it nor has the capacity to find it for himself. It is the duty of the police authorities to prevent crimes being committed. It is no part of their business to provide the instruments of the offence.
>
> We cannot too strongly disapprove of the step which the police authorities took in this case in the matter of providing the sum of Rs. 25.000/- to Nagindas who but for the police authorities thus coming to his aid would never have been able to bring the whole affair to its culmination."

(10) In this reported case, therefore, it was the police who provided the instruments of the offence and in fact brought about the payment of the bribe by providing the means for it. Under

these peculiar circumstances the Supreme Court did not even rely on the evidence of the Magistrate who accompanied the police to the place where the bribe was paid. In another case cited on behalf of the appellant — 'Nitya Nand Prem Lal v. The State', AIR 1954 Punj 89 (C), a Division Bench of the Punjab High Court disapproved of the practice of employing Magistrates for the purpose of providing evidence of payment of bribe. In this reported case also, the police themselves induced one Chaman Lal to pay some money as bribe to the accused in that case. The practice, therefore, of employing Magistrates in such transactions calls for a strong disapprobation but the facts in the cases relied upon were slightly different.

In the present case the police or the Magistrate did not induce Bahau to pay the bribe. They only witnessed the transaction which was to happen in the normal course of events. Bahau used to book baskets of eggs to Lucknow and on the date of the occurrence he had brought ten baskets to be booked in the normal course. The trap lay only in the watching of the transaction. The observations made by Nevaskar J. in a case reported in — 'K. N. N. Ayyangar v. State', AIR 1954 Madh B 101 (D) are as follows:

> "But however profound our disapprobation be with regard to this practice it is difficult to shut our eyes to the materials which might appear before us in particular cases. We cannot decide cases except on the basis of a careful weighing of such evidence as is placed before us."

(11) I respectfully agree, if I may say so, with the observations made above. In the present case, howsoever improper it might have been to take advantage of the services of a First Class Magistrate, the fact remains that he did witness the payment of the bribe to the appellant. The evidence satisfactorily established that the appellant accepted money much in excess of the railway freight and demanded it as 'bility Karai'. This sum was paid in the view of the witnesses including the Magistrate. I am, therefore satisfied that the conclusions arrived at by the learned Special Judge were correct and the appellant has been rightly convicted under S. 161, I.P.C.

(12) It remains now to be seen if the sentence awarded to the appellant is excessive. It has been urged on behalf of the appellant that he is a young man and as a result of his conviction he will lose his employment in the railway and that in case his conviction stands, a sentence of imprisonment may not be inflicted. The offence was committed more than two years ago and there is no doubt that the appellant will not only lose his employment but will also not be employed by the Government in future. Taking this circumstance into consideration I do not think it fit to order the appellant to go back to jail. I, however, think it fair to enhance the sentence of fine to Rs. 300/-.

(13) As a result, the appeal is allowed only to this extent that the conviction of the appellant under Section 161, I. P. C. is maintained but his sentence of imprisonment is set aside. The sentence of fine is maintained and this fine is enhanced to Rs. 300/-. The appellant shall pay the fine within one month. If the fine is not paid the appellant shall undergo rigorous imprisonment for a period of three months.

D.R.R. Order accordingly.

(S) **A.I.R. 1955 ALLAHABAD 78 (Vol. 42, C.N. 27)**

BEG AND ROY JJ. (1-9-1954)

State v. Bhugawan and another, Opposite Party.

Criminal Ref. No. 93 of 1953.

(a) Criminal P. C. (1898), S. 307 (1) — Disagreement by Judge with view of jury, if enough to justify reference.

Where two possible views can reasonably be taken of the evidence, the mere fact that the Court itself prefers to take a view which does not happen to be in consonance with the view of the jury would not provide a sufficient ground for a reference under S. 307. A mere disagreement by the Judge with the view of the jury is not enough in law to justify a reference. The Judge must further be clearly of opinion that imperative requirements of justice constrain him to take a contrary view and must record the grounds in support of the course taken by him to enable the High Court to judge the correctness of such grounds. The ground stated by the Judge should be such as to persuade the High Court reviewing the evidence and faced with the choice between the two, to consider that "no reasonable body of men could have reached the conclusion arrived at by the jury". AIR 1946 PC 151, Followed. (Para 10)

Anno: Cr. P. C., S. 307 N. 11 Pt. 16a.

(b) Penal Code (1860), S. 361 — "Keeping" — Guardian struck with infirmity or disease.

The word 'keeping' is a word of the wide import and would cover a case where a minor is merely within the protection or care of the said guardian or depends upon him for his or her maintenance, support or substance whenever necessity arises. The tie cannot, therefore, be dissolved suddenly on the guardian having been struck with some infirmity or disease. (Para 11)

Anno: Penal Code, S. 361 N. 2.

(c) Penal Code (1860), S. 361 — Intention.

It is difficult to adduce direct evidence of intention in most cases under S. 361. Intention can only be inferred from circumstances. (Para 12)

Anno: Penal Code, S. 361 N. 10.

CASE REFERRED: Para

(A) (V33) AIR 1946 PC 151: 47 Cri LJ 905 (PC) 10

Sri Ram, Dy. Govt. Advocate, and J. R. Bhatt, Asst. Govt. Advocate, for the State; Suraj Nath Singh, for Opposite Party.

BEG J.:

This is a reference by the learned Assistant Sessions Judge of Fyzabad under S. 307, Criminal

P. C. Two young boys, namely, Bujhawan and Bhaggal were prosecuted under S. 366, Penal Code. They were sent up for trial. The trial was conducted with the aid of a jury. At the end of the trial the jury returned a unanimous verdict of guilty. The trial Judge, however, disagreed with the said verdict and has made this reference to the High Court under the aforesaid section Bujhawan and Bhaggal are alleged to have kidnapped a minor girl named Sushila on the night of 12-6-1951.

(2) The prosecution case in respect of the occurrence is that Sushila daughter of Rajman Das, was living with her father on the date of the incident. The father used to maintain her and look after her. Bujhawan and Bhaggal lived at a distance of about 100 paces from her house. Bujhawan is a Bari by caste, and Bhaggal is a Bhar. The girl was a Brahman by caste. The two boys used to come to the house of the girl. Five or six days prior to the date of occurrence Bujhawan asked her to accompany him to Delhi. He came to her house on the night of the incident and she accompanied him at 9 p.m. Bhaggal was also with Bujhawan at that time.

They went to Akbarpur on a tonga. They entrained at Akbarpur for Delhi. At Delhi they stayed at Kashmirigate. Bhaggal and Bujhawan were with her there. On 27-7-1951, Roshan Lal, Sub-Inspector of Police Station Kashmirigate, Delhi, came to know that Bujhawan had brought a girl with him and was staying within his circle. He went to Bujhawan and made inquiries from him about it. Bujhawan represented to him that they were brother and sister. On their statements having been taken separately, it turned out that the girl was a Brahman and the accused was a servant of her house and had brought her. He accordingly arrested both of them. Having come to know that the case appertained to police station Bhaskari in Fyzabad, he sent information of it to the said police station.

(3) A first information report of the incident had already been made on 15-6-1951, at 9-30 a.m. at police station Bhaskari by Rajdeo, the uncle of the girl. In this report Rajdeo had stated that his brother Rajman Das was a Mahant of Lakhanpur Kuti and his daughter Sushila aged fifteen years had been living with him at Lakhanpur. She disappeared with a number of ornaments which were in her possession. Since the time of her disappearance Bujhawan and Bhaggal, who were residents of the same village, had not been seen in the village. For that reason he had suspected both of them of having kidnapped Sushila. He also stated in this report that his brother Rajman Das was unsound in mind, and the mother of the girl was dead.

(4) The girl was subsequently examined by the Medical Officer of Sadar Hospital, Fyzabad, who was of opinion that she was about fifteen years of age. The memo prepared by the doctor at the time of his examination is Ex. P-5. It gives the grounds which enabled the doctor to come to the aforesaid conclusion.

(5) Both Bujhawan and Bhaggal pleaded not guilty. Bhaggal stated that he had been implicated in the case as he was working at Rajman's place. Bujhawan admitted having been arrested by the police on 27-7-1951, along with Sushila. He, however, alleged that the case was brought against him due to enmity.

(6) In support of the prosecution case a number of witnesses were examined. The actual eye-witnesses, however, are only two, namely, Smt. Sushila P. W. 8 and Smt. Rajdei P. W. 2. Smt. Sushila P. W. 8 narrated the prosecution story mentioned above in detail. She further admitted in cross-examination that she had gone to Delhi of her own will. She also stated that her father used to beat her and hence she was fed up with the life at home and she left for Delhi. The main facts of the incident as narrated by Sushila, the victim of the offence, were corroborated by Smt. Rajdei P. W. 2, who stated that her house was about 2 or 3 bighas away from the house of Sushila. On the night in question Sushila had come to her house in the evening and had asked her to sleep with her at her house. She accompanied Sushila and slept in her house. While she was sleeping at the house a knock at the door was heard at about midnight and both of them were awakened, Sushila opened the door. She saw two persons Bhaggal and Bujhawan there. Sushila went away with them. When she tried to intervene Bujhawan threatened her.

(7) So far as Bujhawan is concerned, the evidence of the two witnesses mentioned above finds corroboration from the fact that he was actually arrested along with the girl subsequently at Delhi. This fact is admitted by Bujhawan himself.

(8) The evidence of the above-mentioned eye-witnesses finds further corroboration from the circumstantial evidence provided by two witnesses, namely, Har Prasad P. W. 3 and Shyam Deo Singh P. W. 4. Har Prasad stated that he knew the accused Bujhawan and Bhaggal and he also knew Sushila the daughter of Rajman Das. Sushila used to live with her father. About fifteen days before the occurrence he had seen Sushila, Bhaggal and Bujhawan having a talk in the jungle. He rebuked the boys for that and made a complaint of it to the father of Bujhawan and the father of Bhaggal. Shyam Deo Singh P. W. 4 stated that Har Prasad had mentioned this incident to him. Thereafter he had called both the accused and reprimanded them.

(9) On the question of age also there is ample prosecution evidence. Rajdeo (P. W. 1), the uncle of the girl, stated that she was about fifteen years of age. His statement was corroborated by an entry from the Birth Register kept in the Collectorate. This entry is Ex. P-4. The expert evidence of the doctor points to the same conclusion, namely, that the girl was about fifteen years of age.

(10) The entire evidence mentioned above was placed before the jury and the jury having believed it gave a unanimous verdict of guilty. The trial Judge, however, differed from the jury in the appraisal of evidence. We find ourselves unable to endorse the opinion of the trial Court in this regard. If in view of the above evidence, the jury gave a verdict of guilty, the conclusion arrived at by it cannot, in our opinion, be characterised

as unreasonable or improper. Before the trial Court makes a reference under S. 307, Criminal P. C., the law requires that it must be clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court.

Where two possible views can reasonably be taken of the evidence, the mere fact that the Court itself prefers to take a view which does not happen to be in consonance with the view of the jury would not provide a sufficient ground for a reference under S. 307, Criminal P. C. A mere disagreement by the Judge with the view of the jury is not enough in law to justify a reference. The Judge must further be clearly of opinion that imperative requirements of justice constrain him to take a contrary view and must record the grounds in support of the course taken by him to enable the High Court to judge the correctness of such grounds. The ground stated by the Judge should be such as to persuade the High Court reviewing the evidence and faced with the choice between the two, to consider that "no reasonable body of men could have reached the conclusion arrived at by the jury." This is the test that was laid down by their Lordships of the Privy Council in — 'Ramanugrah Singh v. Emperor', AIR 1946 PC 151 (A). Applying the above test, we are of opinion that the reference by the trial Judge so far as the questions of fact are concerned is misconceived and must be rejected.

(11) The learned Judge has also stated a legal ground in support of the reference. In this case the evidence is that the father of the minor had become insane. In the opinion of the learned Judge once a Hindu father becomes insane he forfeits his right to be the guardian of the minor. In such a case according to his view, the minor having been left without a guardian, it will be no offence for anyone to kidnap the minor from the custody of the erstwhile guardian. This proposition of law on the face of it appears startling; and if accepted, would lead to dangerous consequences. We would be loathe to subscribe to a view capable of producing such mischievous results unless supported by high authority. No such authority is cited in support of it.

By virtue of his position, the father in a Hindu family acts as a 'patria potestas' and is the natural guardian of his children. This right of guardianship is his inherent right as father, and he cannot be divested of it except for reasons that are strong and weighty. In Gour's Hindu Code (Fourth edition) paragraph 772 it is observed that the mere fact that the father is indigent, diseased or immoral would not suffice to vacate his authority. Further it is to be observed that in order to sustain the tie of guardianship between the lawful guardian and ward, it is enough under S. 361, Penal Code, if the minor is in the 'keeping' of the guardian. The word 'keeping' is a word of wide import and would cover a case where a minor is merely within the protection or care of the said guardian or depends upon him for his or her maintenance, support or sustenance whenever necessity arises. The tie cannot, therefore, be dissolved suddenly on the guardian having been struck with some infirmity or disease.

In the present case the girl has herself stated that her father used to look after her. Her father was the Mahant of a temple and also owned some cultivatory plots in the management of which Sushila helped him. Under the above circumstances, we are of opinion that her father continued to be her guardian and she was in his keeping at the time when she was kidnapped. We, accordingly, hold that the view of law taken by the learned trial Judge is incorrect. The reference cannot, therefore, be sustained on this ground.

(12) The trial court has also observed that there is no evidence of guilty intention. It is difficult to adduce direct evidence of intention in most of such cases. Intention can only be inferred from circumstances. The circumstances here are that the girl was a minor; she had no will of her own. She was enticed away by the two young boys to a far away place. One of them used to be a servant at her house. They did not give any information of it to the father or to any of the relations of the girl. One of the boys who was arrested with the girl gave a false explanation.

The accused were also seen with the girl a few days prior to the incident in a lonely jungle and their conduct was objected to by some respectable persons who saw them in this situation. The father of the girl happened to be an insane person, and obviously the accused took advantage of the unsound condition of mind of the insane protector and guardian of the girl. Their conduct cannot be considered to be that of an innocent person. Even after the case came to Court they expressed no remorse. On the other hand, they pleaded not guilty and took refuge under the technicalities of law. We have no doubt that the guilt of both Bujhawan and Bhaggal has been established and they should be convicted under S. 366, Penal Code.

(13) The learned counsel for the accused has, however, invited our attention to some extenuating circumstances in this case. He has stated that Bujhawan and Bhaggal are young in age. It is stated that they are near about 17 years of age. It is further stated that the girl was a willing party; that she was dissatisfied and disgusted with the beating administered to her by father; and that she did not make any grievance against the conduct of either of the accused when she was arrested. He has further invited our attention to the fact that both those persons have remained as undertrials for a period of about eighteen months.

(14) Bearing in mind the above-mentioned circumstances we are of opinion that a sentence of six months' rigorous imprisonment on each of them would meet the ends of justice. We accordingly reject the reference, convict Bujhawan and Bhaggal under S. 366, Penal Code, and sentence each of them to six months' rigorous imprisonment under the aforesaid section.

V.R.B. Reference rejected.

(S) A.I.R. 1955 ALLAHABAD 81 (Vol. 42, C.N. 28)

RAGHUBAR DAYAL J. (12-5-1954)

Shyama Charan, Applicant v. State.

Reference No. 352 of 1953, against order of S. J., Basti, D/- 1-8-1953.

Criminal P. C. (1898), Ss. 523, 435, 438 and 439 — "Property" does not include human beings — Order passed by Magistrate for custody of abandoned child of about 2 1/2 months — Order is one passed in executive capacity and is not subject to revision — (U. P. Manual of Government Orders, Paras 62 and 63).

The property contemplated by Section 523 Criminal P. C., consists of material objects and not human beings. (Para 5)

Magistrate cannot pass orders under this section for custody of children. 1 Weir 348 referred in AIR Commentary on Cr. P. C. 4th Ed.; (1949) Vol. III, P. 2867 Note 18, Ruling No. 5 Ref. (Para 5)

Therefore an order passed by a Magistrate for the custody of a child 2½ months' old, found abandoned, cannot be under S. 523.

It is true that for the validity of any executive order the authority passing the order must derive authority from some law but it does not necessarily follow that if an order is passed which is not justified by any law authorising the Magistrate to pass an executive order, such an order must be an order passed by the Magistrate in a judicial proceeding and, therefore, as a Court. (Para 5)

As persons in charge of law and order, it should be presumed that the Magistrate and the Police will have to take upon themselves the care of abandoned children. It would, therefore, appear that the Magistrate's order with respect to the custody of the child would not be absolutely without any jurisdiction or power vested in him. As a Magistrate he has to make suitable orders for the custody of the child. Such an order will undoubtedly be an order made by him in his executive capacity and not as a Court or Magistrate. Such an order would not be subject to the revisional jurisdiction of the High Court. Paras 62 and 63 of Manual of Govt. Orders Ref. (Paras 5, 8)

There is no good reason to restrict the application of paragraphs 62 and 63 of the Manual of Government Orders to the foundlings found by police alone and not to apply to the foundlings found by other persons. Of course, when a foundling is found by any other person and that person is prepared to take charge of that child, the Magistrate will ordinarily in the absence of any compelling reason, place the child in that person's custody. (Para 6)

Anno: Cr. P. C., S. 523, N. 18, S. 439, N. 1, S 438, N. 7a S. 435 N. 7, 10.

CASE REFERRED: Para

(A) ('85) 1 Weir 348 5

Moti Lall, for Applicant; Vishwamitra, for the State.

ORDER: A child about 2½ months old was found abandoned in the compound of the seed stores at Basti on the 19-5-1953. Shyama Charan getting information about the presence of the child there from one Shrimati Dhanpatia took charge of the child and took it to the police station where he reported the matter. The police then made over the child to Shyama Charan's custody.

(2) On 20-5-1953, Jagannath applied to the Magistrate praying that the child be given to his custody, he having no child of his own. After getting a report from the police, the Magistrate ordered on 1-6-1953, that the child be given to Jagannath and the child was actually made over to Jagannath on 9-6-1953.

(3) Thereafter Shyama Charan applied to the City Magistrate praying for the recall of the order expressing his failure to understand the law under which the order for the delivery of the child to Jagannath was passed and also the fact that a minor's custody is governed by the provisions of the Guardians and Wards Act.

On this application the Magistrate ordered that as the child was given to the applicant i.e., Shyama Charan by the police for a temporary period and in view of his order dated 1-6-1953, Shyama Charan had no claim. He accordingly rejected the application.

(4) Shyama Charan then filed a revision before the Sessions Judge of Basti on 10-6-1953. The learned Sessions Judge has made this reference to this Court recommending that the order of the Magistrate for the delivery of the child to Jagannath be set aside and the child be ordered to be restored to the custody of Shayama Charan.

(5) The City Magistrate in his explanation to the Sessions Judge stated that he had passed the order complained of in his executive capacity and not as a Court. The learned Sessions Judge was of the opinion that the order of the Magistrate was passed under S. 523, Criminal P. C.

I do not agree with the view of the learned Sessions Judge. Section 523, Criminal P. C. deals with property seized by a police under S. 51, Criminal P. C., or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence. The property contemplated by this section seems to consist of material objects and not human being. It is very fairly conceded for the applicant Shyama Charan, that nobody would refer to a human being as property.

It is, however, contended for him that some sort of control is exercised over certain kinds of human beings, e. g., lunatics or children who are unable to take care of themselves. To have the power of control over another is not equivalent to possessing a right of ownership over others and to treat the other persons less favourably situated as their property. I have not been able to lay hands on the case quoted in Chitaley's Criminal Procedure Code under Section 517. The reference is — 'In re Howka Ramalakshmi, 1 Weir 348 (A)' The reference says:

"But children are not property and the Court cannot, under this section, pass orders regarding the custody of children."

It is, therefore, clear that the order passed by the Magistrate is not an order passed in the exercise of his powers under Section 523, Criminal P. C.

It is contended for the applicant that the order though not strictly coming under S. 523, Criminal P. C., purports to be an order under that section. There is nothing in the various orders of the Magistrate to indicate that he purported to exercise his powers under Section 523, Criminal P. C.

It was also contended that an executive order of a Magistrate would be only such an order which is justified under any other law and as there is no law which authorises a Magistrate to pass an order like the one complained of, the order could not be an executive order and it being an order passed by a Magistrate in his capacity as a Magistrate it must be deemed to be an order passed by a criminal Court and, therefore, subject to the revisional powers of this Court.

It is true that for the validity of any executive order the authority passing the order must derive authority from some law but it does not necessarily follow that if an order is passed which is not justified by any law authorising the Magistrate to pass an executive order, such an order must be an order passed by the Magistrate in a judicial proceeding and, therefore, as a Court. I have not found any particular reference which would lay down as a duty of the police or of the Magistrate to deal with cases of children found abandoned.

As persons in charge of law and order, I should presume that they will have to take upon themselves the care of such persons. It must be, in view of such an implied right, a duty of these public servants that the Government passed orders which are contained in paragraphs 62 and 63 of the Manual of Orders of Government. These paragraphs are:

P. 62 "Foundlings and the friendless children of female prisoners should be made over to some orphanage when they attain the age of two years ....."

P. 63 "In the case of foundlings of less than two years of age District Magistrate should make the best possible arrangements for their care, and meet the expenditure, should any be necessary, from their contract grants. Any child whose maintenance has been so arranged for can, if necessary, after it attains the age of two years, be brought under the rule in the foregoing paragraph."

It is clear from these orders that foundlings are to be cared for by the District Magistrate and in respect of foundlings of less than two years, District Magistrates are required to make the best possible arrangement for their care and can meet the expenditure, if necessary, from the contract grant.

It would, therefore, appear that the Magistrate's order with respect to the custody of the child was not absolutely without any jurisdiction or power vested in him. As a Magistrate he had to make suitable orders for the custody of the child. Such an order will undoubtedly be an order made by him in his executive capacity and not as a Court or Magistrate.

(6) Learned counsel for Shyama Charan has urged that these paragraphs of the Manual of Government Orders deal with foundlings found by the police and not those found by other persons. I see no good reason to restrict the application of these paragraphs to the foundlings found by police alone and not to apply to the foundlings found by other persons. Of course, when a foundling is found by any other person and that person is prepared to take charge of that child, the Magistrate will ordinarily, in the absence of any compelling reason, place the child in that person's custody. It was so done by the police in this case as well.

(7) It has also been urged that Shyama Charan heard of the child and taking the first step of informing the police got some right over the child as a 'de facto' guardian and that in the exercise of that right he could get custody of the child till such time that the child's parent's are found and are prepared to take charge of the child. I need not express any opinion on this point. If there are any such rights in Shyama Charan he can have recourse to proper remedy.

(8) The fact that the City Magistrate passed orders as an executive officer makes the order not subject to the revisional jurisdiction of this Court and that should mean the end of this reference Further, when Shyama Charan himself took charge of the child from the police with an undertaking to produce it when required, it is not open to him, in my opinion, to object to the order of the Magistrate at this stage. He has to comply with that undertaking.

(9) In view of the above, I reject the reference.

R.G.D. Reference rejected.

(S) **A.I.R. 1955 ALLAHABAD 82 (Vol. 42, C.N. 29)**

M. L. CHATURVEDI J. (20-10-1954)

Bharat Bhushan, Applicant v. P. C. Saxena and another, Opposite Party.

Misc. Writ No. 1020 of 1953.

(a) Cinematograph Act (1918), S. 5 (3) — Scope — Power of State Government to issue directions for grant of license to particular person.

The power of the licensing authority to issue licenses under S. 5 (3), Cinematograph Act being subject to the control of the State Government the latter has the power to direct the licensing authority to grant a licence to a particular individual. There are no limitations placed on the controlling power of the State Government as regards the grant of a license under the Act and the State Government may set aside their orders and issue any directions in this respect which it may consider to be fit and proper. (Para 4)

(b) Cinematograph Act (1918), S. 5 — License granted under instructions of State Government — Signature.

In cases where a license is granted under the instructions of the State Government it matters very little as to who signed the order or the actual license. The authority granting the license in such a case is really the State Government as it is the Government which issues directions to the licensing authority, namely, the District Magistrate to grant the license to a particular individual. The function of the licensing authority under the circumstances becomes merely a ministerial function. The licensing authority has not to apply its mind any more to the question to whom the license should be granted and it has just to carry out the instructions issued by the State Government. (Para 5)

(c) Constitution of India, Art. 226 — Scope.

In the exercise of the jurisdiction conferred by Art. 226 of the Constitution the High Court is not to be guided by extreme technicalities or even irregularities which do not affect the merits or justice of the case. (Para 5)

Anno: Const. of India, Arts. 32 and 226, N. 7.

(d) Cinematograph Act (1952), Ss. 1 (2), 18 — Extent and operation — Effect of repeal of Cinematograph Act, 1918 — Grant of licenses to exhibit cinema shows in Part A and B States — Old Act still applies.

Section 1 (2), Cinematograph Act, 1952 extends the operation of the provisions of parts I, II and IV to the whole of India except the State of Jammu and Kashmir but part III has been applied to only Part C States. This would show that as far as the granting of licenses is concerned this Act does not apply to the State of U. P. which is one of the States mentioned in Part A. The scheme of the Act of 1952 shows that as far as the subject of the grant of the licenses to exhibit cinema shows is concerned the provisions of the old Act of 1918 are still in force in Part A and Part B States. The other provisions concerning the censorship of the films have been altered by the Act of 1952 and this alteration applies to the whole of India. (Para 6)

The wording of S. 18 of the Act of 1952 shows that the repeal of the Act of 1918 in Part A and Part B States was confined to the sanctioning of the cinematograph films for exhibition. What it amounts to is that the repeal is confined to that portion of the older Act which is covered by Part II of the new Act. Section 6 of the old Act is one of the sections which has been repealed by the new Act. But the issuing of the licenses and the procedure provided therefor cannot be said to come within the wording of the repealing section because what it repeals is the sanctioning of cinematograph films and not the issuing of licenses for running cinema houses. (Para 7)

(e) Constitution of India, Art. 226 — Procedure of executive bodies — Cinematograph Act (1918), S. 5 (3) — Order of State Government granting license is executive — No opportunity to hear given to parties — Effect — (Cinematograph Act (1918), S. 5 (3)).

There is no provision anywhere in the Cinematograph Act making it incumbent on the State Government to hear persons who want licenses for running cinema houses. Where the State Government grants a license under S. 5 (3) to one of the applicants it is not necessary for the State Government to issue notices to the parties and to give them an opportunity of placing their cases before it. The order is in the nature of an executive order and it is neither a judicial nor a quasi-judicial order.

Hence, the order cannot be challenged by the petitioners on the ground that no opportunity was given to them to place their case before the State Government. (Para 8)

Held on facts that both the parties had had full opportunity of placing their cases before the Cinema Magistrate and it was not necessary that subsequent opportunities also should have been given to the parties at every stage of the proceedings. (Para 8)

Anno: Const. of India, Arts. 32 and 226 N. 183.

S. C. Khare, for Applicant; N. P. Asthana and Standing Counsel for Opposite Party.

ORDER: This is a petition under Article 226 of the Constitution. The petitioner is one out of the four proprietors of a building known as Minarwa Cinema situate near Motor Stand in the Town of Jhansi. This house appears to have been constructed in the year 1942 and a lease was executed in favour of one Sri R. M. Modi of Bombay in the same year for a period of five years at a monthly rental of Rs. 450/- with an option that the lessee could renew the lease for another period of three years, but he would have to pay rent for the subsequent period at the rate of Rs. 550/- a month.

Sri R. M. Modi died in the year 1946 and the four proprietors of the cinema building executed another lease in favour of Sri K. M. Modi, the brother of the deceased, and in this lease it was made clear that the lease would continue for eight years. The period of eight years expired on 31-5-1950. But it appears that Sri K. M. Modi continued to exhibit the cinema shows in this building till 30-4-1952. It has been stated in the counter affidavit that the rent for the period after 31-5-1950 was paid at the rate of Rs. 1000/- per month till 30-4-1952, and this assertion has not been controverted in the re-joinder affidavit filed by the petitioner.

There is considerable dispute between the parties as to what happened after 30-4-1950 and the attempt of the petitioner is to show that the respondent No. 2 (Sri K. M. Modi) had no right to continue in possession of the cinema building whereas in the counter affidavit facts have been asserted to make out the right of the said respondent to continue in its possession.

I shall not enter into the controversy with respect to these facts, as I do not propose to decide in these proceedings whether the respondent No. 2 is entitled to continue in possession of the

building or not. The question is the subject matter of a civil suit pending in the court of the District Judge at Jhansi, and any observation that I may make in this respect may prejudice one or the other of the parties in the proceedings before that court. If the position were clear that the respondent No. 2 had no right to remain in possession that fact would have been taken into consideration in deciding this petition; but that is, on the facts disclosed, not the position.

It appears that there was a compromise between the parties in proceedings under Section 145, Criminal P. C. The proceedings under S. 145, Criminal P. C., were started on the application made by one Sri B. M. Shah on behalf of the respondent No. 2 on 13-5-1952. The building was ordered to be attached on the 23rd of May. On 26-5-1952 an application was made on behalf of the four proprietors of the cinema building for dropping the proceedings under Section 145, Criminal P. C., in view of the pendency of the civil suit, and also for making all the proprietors of the cinema building parties to the proceedings under Section 145, Criminal P. C. This application was rejected by the learned Magistrate.

On 4-7-1952 a compromise was filed in these proceedings which was signed by Sri B. M. Shah on behalf of the respondent No. 2 and two out of the four proprietors of the cinema building, namely Sri Mannu Lal and Sri Dip Chand; and, according to the terms of the compromise, possession of the cinema building was to be delivered to Sri B. M. Shah as the representative of the respondent No. 2. On the strength of the said compromise, possession of the cinema building was delivered to Sri B. M. Shah on 9-7-1952.

Coming to the civil suit, what appears to have happened was that an application was made there for dismissing the suit on the ground of the compromise dated 4-7-1952, but Sri Bharat Bhushan and Smt. Monga Devi, the two proprietors who had not signed the compromise opposed this application. Sri Mannu Lal and Sri Dip Chand also subsequently wanted to back out of it. The District Judge then seized of the case passed an order on 22-8-1953 holding that Mannu Lal and Dip Chand must be held to have compromised the matter but Bharat Bhushan, (the petitioner) and Smt. Monga Devi could continue the suit. Bharat Bhushan, the petitioner and Dip Chand are the sons of Mannu Lal and Monga Devi is their mother. The position, therefore, is that the father and one son have been held to have compromised the matter but the other son and the mother are proceeding with the civil suit.

(2) It appears that there were no cinema shows exhibited in this building between the period 1st of May and 21-11-1953. The licence to the respondent No. 2 to run the cinema was granted by an order dated 23-10-1953 but the cinema shows could not be exhibited till 21-11-1953 because of the continuance of the injunction order issued by the learned District Judge of Jhansi restraining the said respondent from doing so. This injunction was discharged on 21-11-1953.

(3) The proceedings for the grant of a licence started on an application made on behalf of the respondent No. 2 for granting to him a licence to run the cinema house, and it appears that Dip Chand also filed an application for a licence for the same. The learned District Magistrate issued notice to the opposite parties to appear before the Cinema Magistrate on 11-12-1952 who heard the parties and submitted his report to the District Magistrate. On 25-2-1953 the District Magistrate passed an order saying that the dispute concerning the alleged lease was 'sub judice' in a civil court, and, under the circumstances, he could not make any order allowing or disallowing either of the applications made by the parties. The applications were ordered to be filed without any orders with a direction that it would be open to the applicants to revive them after the civil suit was over.

It appears from the facts stated in the counter affidavit that a representation was made to the Government on behalf of respondent No. 2 praying that a licence to exhibit the cinema shows be granted to the said respondent. The Government issued instructions to the District Magistrate directing him to grant the licence to the respondent No. 2 because the said respondent had been restored to the possession of the cinema house. In obedience to the instructions received from the Government a licence was ordered to be issued in favour of respondent No. 2. This order was passed on 31-10-1953, but there is a considerable dispute as to whether it was signed at that time by the District Magistrate or he appended his signatures to it on some subsequent date. I do not propose to enter into this controversy either, because of the view that I have taken on another point in this case which I shall presently state. To continue the story a licence was subsequently issued in favour of the respondent No. 2 and it is signed by the Cinema Magistrate for the District Magistrate.

(4) On the facts stated above, the learned counsel for the petitioner has urged three points in support of his petition. His first submission is that the licence could have been granted only by the licencing authority which in this case was the District Magistrate of Jhansi and the State Government had no authority to issue any directions for the grant of a licence to a particular individual. The learned counsel has referred me to Section 4 which shows that the authority having power to grant licence under this Act shall be the District Magistrate provided that the State Government may by notification in the official gazette constitute such other authority as it may specify in the notification to be the licencing authority for the purposes of this act.

It is nobody's case that any other person has been appointed by the State Government as the licencing authority. I have, therefore, no hesitation in holding that the licencing authority in the present case was the District Magistrate of Jhansi. The learned counsel for respondent No. 2 relies on Section 5 sub-s. (3) of the

same Act (Cinematograph Act (2 of 1918)). This Sub-section reads as follows:

"Subject to the foregoing provisions of this section, and to the control of the State Government, the licensing authority may grant licenses under this Act to such persons as it thinks fit, and on such terms and conditions and subject to such restrictions as it may determine."

The power to the licensing authority to issue license has been conferred by the sub-section, but the same has been expressly made subject to the control of the State Government. The power of the licensing authority being subject to the control it appears to me to be apparent that the State Government has the power to direct the licensing authority to grant a licence to a particular individual. There are no limitations placed on the controlling power to the State Government as regards the grant of a license under the Act and a plain reading of the sub-section shows that the grant of licenses by the licensing authorities are subject to the control of the State Government which obviously means that the State Government may set aside their orders and issue any directions in this respect which it may consider to be fit and proper. In this case it has been proved from the facts stated in the counter affidavit which have not been controverted in the rejoinder that the State Government had issued directions to the licensing authority to issue the license in favour of the respondent No. 2.

(5) The next argument of the learned counsel was that assuming this to be the position, the order directing the issue of the license must have been signed by the District Magistrate himself. But I do not think that in cases where a license is granted under the instructions of the State Government it matters very much as to who signed the order or the actual license. The authority granting the license in such a case is really the State Government as it is the Government which issues directions to the licensing authority, namely, the District Magistrate to grant the license to a particular individual. The function of the licensing authority under the circumstances becomes merely a ministerial function. The licensing authority has not to apply its mind any more to the question to whom the license should be granted and it has just to carry out the instructions issued by the State Government. The authority directing the present license to be issued to the respondent No. 2 being the State Government the actual order and the license could very well have been signed by the Cinema Magistrate. In any case, the objection even if technically correct, is not such which should be given effect to in the proceedings under Article 226 of the Constitution. In the exercise of the jurisdiction conferred by Article 226 of the Constitution this Court is not to be guided by extreme technicalities or even irregularities which do not affect the merits or justice of the case.

(6) Another point argued in this connection by the learned counsel for the petitioner is that Section 5 (3), Cinematograph Act of 1918 has been repealed by the subsequent Cinematograph Act, 1952, No. 37 of 1952 and he has referred me in this connection to Section 18 of the latter Act. Section 18 is in the following words:

"The Cinematograph Act, 1918 (2 of 1918), is hereby repealed:

Provided that in relation to Part A States and Part B States the repeal shall have effect only in so far as the said Act relates to the sanctioning of cinematograph films for exhibition."

Part one of this latter Act contains only Sections 1 and 2, Section 2 being the section which defines certain terms. Part two contains provisions for the constitution of a Board of Film Censors and the Certification of Films. It also provides for appeal and powers of Central Government to modify orders passed under Section 4 or Section 5 and then certain penalties are provided for contraventions of this part and power is also given to the Central Government to make rules.

Part three is the part which relates to regulation of exhibitions by means of cinematographs, and it is this part which relates to the granting of licenses for exhibition of cinema shows. Part four only consists of Section 18 which is the repealing section and which I have already quoted in full. Now Sub-section (2) of Section 1 extends the operation of the provisions of Parts I, II and IV to the whole of India except the State of Jammu and Kashmir but part III has been applied to only Part C States. This would show that as far as the granting of licenses is concerned this Act does not apply to the State of U. P. which is one of the States mentioned in Part A. If the contention of the learned counsel for the petitioner is taken to be correct the position would be that there would be no provision left at all in any of the two enactments which would govern the grant of licenses. The scheme of the Act of 1952 shows that as far as this particular subject is concerned, namely, the subject of the grant of the licenses to exhibit cinema shows, the provisions of the old Act 2 of 1918 are still in force in Part A and Part B States. The other provisions concerning the censorship of the films have been altered by this latter Act and this alteration applies to the whole of India.

(7) It further appears from the wording of Section 18 of the Act of 1952, that the repeal of the Act of 1918 in Part A and B States was confined to the sanctioning of the cinematograph films for exhibition. What it amounts to is that the repeal is confined to that portion of the older Act which is covered by part II of the new Act. Section 6 of the old Act is one of the sections which has been repealed by this latter Act. But the issuing of the licenses and the procedure provided therefor cannot be said to come within the wording of the repealing section because what it repeals is the sanctioning of cinematograph films and not the issuing of licenses for running cinema houses.

(8) The last point urged by the learned counsel for the petitioner was that his clients were not given any opportunity by the State Government to place their case before it. There is no provi-

sion anywhere in the Act of 1918 making it incumbent on the State Government to hear persons who want licenses for running cinema houses. The Cinema Magistrate had heard the parties and he had submitted the report to the District Magistrate. The District Magistrate came to the conclusion on these facts that none of the parties should be granted a license till the civil suit was decided. A representation was then made on behalf of the respondent No. 2 to the State Government and the State Government had all the facts before it and it then came to the conclusion that the possession of the building having been delivered to the respondent No. 2 it is this respondent who should have been given license for running the cinema shows also. I do not think that it was necessary for the State Government to have issued notices to the parties and to have given them an opportunity of placing their cases before it. The order is in the nature of an executive order and in my opinion it is neither a judicial nor a quasi-judicial order. In any case, both the parties had had full opportunity of placing their cases before the Cinema Magistrate and it was not necessary that subsequent opportunities also should have been given to the parties at every stage of the proceedings.

(9) These are all the points that were argued before me and I have come to the conclusion that this petition should fail. I accordingly, dismiss it with costs. Both the respondents will be separately entitled to one set of costs each.

K.S.B. Petition dismissed.

A.I.R. 1955 ALLAHABAD 86 (Vol. 42, C.N. 30)

M. L. CHATURVEDI J. (1-10-1954)

Banarsi Das, Applicant v. Cane Commr., U. P., Lucknow and another, Opposite Parties.

Writ No. 7838 of 1951.

(a) U. P. Sugar Factories Control Act (1 of 1938), Ss. 18 and 19 — U. P. Sugar Factories Control Rules (1938), Rule 23(1) — Occupier of factory not signing agreement with grower — Cane Commissioner still gets jurisdiction under R. 23 (6).

According to the scheme of the Sugar Factories Control Act and the Rules, an offer for the sale of cane is to be made by the grower or the Co-operative Society in the reserved area in Form No. 13 and an agreement in Form No. 12 is to be executed between the Society or the grower and the factory. This agreement in Form No. 12 contains ten paragraphs and the last paragraph provides that any dispute between the parties regarding the matter pertaining to the agreement shall be referred to arbitration in the manner provided in the rules. Section 18(2) of the Act makes it obligatory on the occupier or manager of a factory to enter into this agreement and to purchase the cane offered by the Society or the grower. According to R. 23(1) of the Sugar Factories Control Rules, any dispute touching this agreement or the one mentioned in S. 19(2) must be referred to the Cane Commissioner for decision or, if he so directs, to arbitration, but no suit shall lie in a civil or revenue Court in respect of any such dispute. (Para 6)

The object of S. 18(2) is to compel the occupier or manager to sign the agreement made for him by the officers of the Department and the only thing that is left for him is to sign the agreement. But this does not mean that S. 18(2) does not refer to the unsigned agreement. As a matter of fact, it very clearly refers to the agreement, the form, the terms and the conditions of which have been prescribed, and it then directs the occupier or manager to sign such a document. On a plain reading of the wording of S. 18 (2), the proper interpretation is that it does refer to the agreement both before and after the signatures, and if it refers to an unsigned agreement also, the provisions of R. 23(1) are attracted and any dispute touching the signed or unsigned agreement must be referred to the Cane Commissioner for decision, who may send it to arbitration, if he so considers proper. It cannot therefore be said that if no such agreement as is provided in S. 18(2) or S. 19(2) is executed the provisions of R. 23(1) do not come into play at all and that the Cane Commissioner acquires no jurisdiction under this rule to decide the matter himself or to refer it to arbitration. (Para 8)

(Held that all along, the conduct of the occupier of the factory had shown that he had accepted the agreement though it was not signed by him). (Para 9)

(b) U. P. Sugar Factories Control Act (1 of 1938), S. 30 — U. P. Sugar Factories Control Rules (1938), Rr. 23(1) and 30 — Cane Commissioner is not the final authority to decide the question of interpretation of the Rules — He is not the final judge to decide whether he has jurisdiction or not to deal with matter. (Para 10)

(c) U. P. Sugar Factories Control Act (1 of 1938), S. 18(2) — U. P. Sugar Factories Control Rules (1938), R. 23(1) — Agreement not in form No. 12 — Rule 23(1) would not apply.

If there is some agreement which is not in Form No. 12 as prescribed by the Rules, the provisions of R. 23(1) would not apply to it. A specific agreement having been referred to in R. 23 it is that agreement and that agreement alone which would attract the provisions of the Rule. Every agreement to purchase cane whether oral or in writing which is not in the form prescribed by the Rules (Form No. 12) would not be an agreement referred to in S. 18(2). (Para 11)

(d) U. P. Sugar Factories Control Act (1 of 1938), S. 18(2) — Provisions are mandatory — (Civil P. C. (1908), Preamble) — (Interpretation of statutes — Provisions when mandatory).

Generally speaking, the language of each statute along with other circumstances has to be seen in order to find out whether the statutory direction is mandatory or directory. In cases, however, where the disobedience of a provision is made penal it can safely be said that the provision is mandatory. AIR 1954 SC 210, Relied on. (Para 12)

The provision in S. 18(2) concerning the form of agreement is mandatory. The word

used here is 'shall' and a penalty for intentionally failing to enter into an agreement is also provided for by S. 27(3) of the Act. (Para 12)

Anno: Civil P. C., Preamble N. 7.

(e) U. P. Sugar Factories Control Act (1 of 1938), S. 30(2)(u) — U. P. Sugar Factories Control Rules (1938), R. 23 — "A decision" of Cane Commissioner and 'award' of arbitrator are not the same — Appeal against award provided but no appeal against decision of Cane Commissioner — There is no discrimination — No infringement of Art. 14 — (Constitution of India, Art. 14).

A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. (Para 17)

The expressions "decision by the Cane Commissioner" and "the award by the arbitrators" in S. 30(2)(u) have been used in a manner so as to clearly indicate that the decision is something different from an award and it would be doing violence to the language used in R. 23, if it were held that the decision by the Cane Commissioner is also called an award by the aritrator. (Para 17)

Rule 23 of the Sugar Factories Control Rules permits the Cane Commissioner to decide the dispute himself or to refer it for arbitration and also that an appeal lies against the decision of the arbitrator or the Board of arbitration but no appeal lies against the decision of the Cane Commissioner. (Para 17)

It is true that the right of appeal is a valuable right and giving one person a right of appeal and denying the same to another similarly situated will generally be taken to be an act of improper discrimination, but the other test is whether in the circumstances of a particular case this denial of right of appeal has substantially prejudiced the party. (Para 18)

No substantial prejudice is caused to a person by deprivation of this right of appeal when the dispute is determined by the Cane Commissioner himself. The Cane Commissioner is a very responsible officer of the Government and his position is very different from that of an ordinary arbitrator or arbitrators. His position is such that he is probably a good substitute for the appellate authority, namely, the Divisional Commissioner. If a person's case has been tried by a higher officer he may not be given a right of appeal whereas if it has been heard by an officer having lesser powers the right of appeal may be provided. These provisions will not be held to deny to any person equality before the law or equal protection of the laws as the basis for the classification is discernible, the basis being the experience and the status of the officer trying the case. In view of the position of the Cane Commissioner, a denial of right of appeal against his decision cannot be said to be an act of improper discrimination. No right of second appeal or revision is provided at all even to a person whose case has been referred to arbitration and there is only one right of appeal to the Divisional Commissioner. In cases decided by the Cane Commissioner there is no right of appeal but no substantial prejudice is caused to any person by the deprivation of this right of appeal to the Divisional Commissioner. The provision of this law is not discriminatory and it does not deny equality of law or equal protection of the laws and is thus not inconsistent with Art. 14. (Para 19)

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 210: 1954 SCR 892 12
(B) (1877) 2 PD 203: 42 JP 6 12
(C) (V41) AIR 1954 Nag 44: ILR (1953) Nag 997 12
(D) (V34) AIR 1947 All 27: ILR (1946) All 883 (FB) 17
(E) (1884) 9 AC 448: 53 LJ Ch 842 17
(F) (V41) AIR 1954 SC 545: 1954 SCA 743 19

V. D. Bhargava, for Applicants; Standing Counsel, for Opposite Party.

ORDER: This is a petition under Art. 226 of the Constitution.

(2) The petitioner Seth Banarsi Das was the lessee of Shiva Prasad Banarsi Das Sugar Mills, Bijnor, for five years. The period of his lease was to expire on 30-6-1951. The dispute in the present case is with respect to the commission payable by the petitioner to the respondent No. 2, namely, the Cane Marketting Society Limited, Bijnor, (hereinafter called the society) for the years 1949-50 and 1950-51.

Under the U. P. Sugar Factories Control Act of 1938 and the Rules made thereunder, it was for the respondent No. 2 to first make an offer to the petitioner in Form No. 10 mentioned in the Rules of the quantity of sugarcane which the Society offered for sale to the Mills of which the petitioner was the lessee. After the offer an agreement was to be entered into between the two parties in the form of the agreement as given in Form No. 12.

For the years 1949-50 and 1950-51 the Society made offers in Form No. 10 but the petitioner thought that the offer was not for the entire quantity of cane which he was entitled to purchase from the Society and he wanted the Society to make offers for larger quantities. For the year 1949-1950, the Society offered to sell 36.25 lakh maunds of cane and for the year 1950-51 it offered 32 lakh maunds whereas according to the petitioner the Society should have offered 39 lakh maunds of cane for the year 1949-50 and 46.92 lakhs in 1950-51.

It is the petitioner's case that in these two years the price of Gur and Khandsari sugar had gone up considerably and the members of the Society therefore wanted to offer to the petitioner less quantity of cane than he was entitled to under the Rules.

On 14-6-1950, the petitioner wrote to the Society that there was a snortage in the supply of sugarcane during the year 1949-50 amounting to nearly 13 lakh maunds. A reply to this letter was sent by the Society on 4-10-1950, repudiating the petitioners claim to the purchase of the quantity mentioned by him and further asserting that the So-

ciety was only bound to supply the quantity mentioned in the agreement. As a result of the dispute with respect to this quantity the petitioner says that he never entered into the agreement mentioned in Form No. 12 for the purchase of cane either for the year 1949-50 or 1950-51. The petitioner appears to have preferred a claim before the Cane Commissioner by means of his letter dated 31-10-1950 claiming compensation for the Society's omission to sell the entire quantity of cane to the petitioner. This claim, however, was not adjudicated upon and nothing has been heard about it at all.

In the accounts sent by the petitioner to the Society he allowed to the Society the amount of commission to which the Society was entitled for the cane already supplied by the Society to the petitioner but debited the loss suffered by the petitioner on account of short supply of cane to him.

The Society's case was that the petitioner was not entitled to any compensation from the Society for short supply of cane as the supply really was not short, on the other hand, it was the Society which was entitled to receive the amount of commission from the petitioner for the cane that it had supplied to him. It consequently filed a claim against the petitioner before the Cane Commissioner for the recovery of the commission amounting to Rs. 2,63,624/2/6 which claim included the amount due for the year 1948-49 also. The Society also claimed interest on the amount of this compensation.

The Cane Commissioner decided to deal with the matter himself and fixed 18-8-1951 for hearing and informed the parties of the claim and the date fixed for hearing. The matter was taken up on 18th of August and the statement of Shri R. S. Mathur, Special Attorney of the Society was recorded but an objection was raised on behalf of the Society to the effect that the petitioner was not duly represented in the proceedings before the Cane Commissioner.

The General Manager of the petitioner then requested the Cane Commissioner to fix another date to enable the petitioner to be present at the hearing and the proceedings were then adjourned to 4-9-1951. The present petition was filed on 3-9-1951, and the contentions of the petitioner in this petition are that no agreement for the purchase and sale of cane having been entered into between the parties in Form No. 12 as required by the rules, the Cane Commissioner did not get a jurisdiction to decide the dispute between the parties and also that R. 23 (1) of the Sugar Factories Control Rules was void because it was inconsistent with Art. 14 of the Constitution.

The main prayers contained in the petition are that a writ of Certiorari or other suitable direction or order be issued calling for the record of the case from the Cane Commissioner (Respondent No. 1) and quashing the proceedings that are pending before him and that a writ of prohibition be issued forbidding the Cane Commissioner from continuing the proceedings.

(3) The position taken up by the Society in the counter-affidavit filed on its behalf is that the petitioner has suppressed some material facts and the petition should therefore be dismissed on this ground alone. The facts suppressed are five in number detailed in paragraph 2 of the counter-affidavit.

It is then said that the Cane Commissioner has jurisdiction to deal with the dispute between the parties, that the Society sold to the petitioner the entire quantity of cane in both the years which the petitioner was entitled to purchase and the petitioner is not entitled to recover any compensation for the alleged short supply of sugarcane by the Society; that the petitioner designedly did not return the agreement in Form No. 12 to the Society though he had been acting as if the agreement was in full force. It is said that the Society sent several reminders to the petitioner to return the agreement in Form No. 12 but the petitioner failed to send the signed agreements to the Society.

In the rejoinder affidavit the petitioner reiterated the position taken up by him in his first affidavit and denied that there was concealment of any material facts in his first affidavit.

(4) Learned counsel for the petitioner has urged two points before me. His first contention is that no agreement in writing between the parties having been entered into, the provisions of R. 23 (1) do not come into play and the Cane Commissioner has neither the jurisdiction to decide the case himself nor to refer it for adjudication to an arbitrator.

The second contention is that R. 23 (1) of the Sugar Factories Control Rules is void as it authorises the Cane Commissioner at his sweet will either to decide the dispute himself with respect to the agreement referred to in the Rules or to send it for adjudication to an arbitrator. No guiding principles have been laid down as to which cases should be referred to an arbitrator and which should be decided by the Cane Commissioner himself. He can refer the same case to an arbitrator or arbitrators or keep it for decision by himself and that this law is inconsistent with Art. 14 of the Constitution.

The respondents have challenged the correctness of both the petitioner's contentions mentioned above and have further alleged that the petition should be dismissed as it conceals some material facts of the case.

(5) Before proceeding to consider these questions I may refer to the relevant provisions of the Sugar Factories Control Act and the Rules made thereunder. Before the above Act was passed the sugar factories used to deal directly with the cane-growers and the Government thought that in the interest of both of them the purchase and supply of cane should be controlled. The officer put in charge of this control for the entire State of U. P. was called the Cane Commissioner and provisions were made in the Act for marking out reserved areas for the different factories and the cane grown in this area could be purchased only by the sugar factory for which the area was reserved. No other manufacturer of sugar was entitled to purchase the cane grown in this area and the factories were expected to purchase the whole cane grown therein minus such deductions for seed and other matters which might be prescribed.

The Sugar Factories were required to obtain licences and, as far as purchase of cane was concerned, provision was made under S. 18(1) for the cane growers or the Cane Grower's Co-operative Society to make offers for the sale of cane. The Manager or occupier of the factory was then directed to enter into an agreement, in such Form as may be prescribed, to purchase the cane offered to the factory by the grower or the Co-operative Society. Besides this reserved area there could be also an assigned area but I am not concerned with it in this case.

(6) Section 18(2) of the Act is important and may be quoted in full:

"(2) The occupier or manager of a factory for which an area is reserved shall enter into an agreement, in such form, by such date and on such terms and conditions as may be prescribed, to purchase the cane offered in accordance with sub-s. (1):

Provided that he shall not purchase or enter into an agreement to purchase cane grown by a member of a Cane-Growers' Co-operative Society from any person except from such Co-operative Society:

Provided further that he shall not be required to purchase or enter into an agreement to purchase ratoom cane or cane of any variety if the same has been declared by notification under S. 17-A to be unsuitable for use in such factory".

Section 30 is the section which gives power to the State Government to make rules and cl. (u) of sub-s. (2) of the Section authorises the Government to make rules for

"the reference to the Cane Commissioner of disputes relating to the supply of cane for decision or, if he so directs to arbitration, the mode of appointing an arbitrator, or arbitrators, the procedure to be followed in proceedings before the Cane Commissioner or such arbitrator or arbitrators and the enforcement of the decision of the Cane Commissioner or the awards of arbitrators;"

As far as the Rules are concerned, it is necessary to quote only R. 23 (1):

"Any dispute touching an agreement referred to in S. 18(2) or S. 19(2) of the Act shall be referred to the Cane Commissioner for decision or, if he so directs, to arbitration. No suit shall lie in a civil or revenue Court in respect of any such dispute."

The above provisions of law would show that according to the scheme of the Act and the Rules an offer for the sale of cane was to be made by the grower or the Co-operative Society in the reserved area in Form No. 13 and an agreement in Form No. 12 was to be executed between the Society or the grower and the factory. This agreement in Form No. 12 contains ten paragraphs and the last paragraph provides that any dispute between the parties regarding the matter pertaining to the agreement shall be referred to arbitration in the manner provided in the rules. Section 18(2) of the Act makes it obligatory on the occupier or manager of a factory to enter into this agreement and to purchase the cane offered by the Society or the grower. According to R. 23 (1) any dispute touching this agreement or the one mentioned in S. 19(2) must be referred to the Cane Commissioner for decision or, if he so directs, to arbitration, but no suit shall lie in a civil or revenue Court in respect of any such dispute.

(7) The learned counsel for the Society urged that his client had signed the agreement and sent it on to the petitioner and the petitioner also may have signed it. But the evidence produced in the case does not prove that the agreement was signed either by the petitioner or by the Society. In paragraph 5 of the affidavit filed with the petition it has been stated that no agreement at all was entered into between the parties as required by S. 18(2) of the Act. Again in paragraph 13 it has been stated that the agreement referred to in Form No. 12 of Appendix No. III attached to the Sugar Factories Control Act was never executed by the parties for the years 1949-50 and 1950-51.

As against these clear assertions of fact mentioned in the affidavit filed with the petition, the counter-affidavit only mentions in clause No. 5 of paragraph No. 2 that the petitioner evaded return of one copy of the prescribed agreement in Form No. 12 in spite of several reminders. It has nowhere been stated in the counter-affidavit that the agreement was signed on behalf of the Society and sent to the petitioner, but the use of the word "return" might suggest that it was at least sent to the petitioner and as far as the signatures by the petitioner are concerned the counter-affidavit is completely silent. As regards the signatures on behalf of the Society also there is no assertion that the agreement was so signed by it.

There is thus no evidence that the petitioner signed the agreement and the petitioner says that he did not sign it. Under the circumstances it may be taken to be proved that he did not sign it. As far as the Society is concerned it is possible that the agreement may have been signed on behalf of the Society or it may not have been signed. There is neither an assertion that it was signed on behalf of the Society nor that it was not signed. On this state of evidence I think that this petition must be decided on the assumption that no agreement in Form No. 12 had actually been signed by the parties.

(8) Coming now to the first point, the argument of the learned Counsel for the petitioner is that no such agreement as is provided in S. 18(2) or 19(2) having been executed the provisions of R. 23 (1) do not come into play at all and the Cane Commissioner acquired no jurisdiction under this rule to decide the matter himself or to refer it to arbitration. His argument is that it is not possible to say that there was any dispute touching the agreement when no agreement was in existence at all.

I think that the contention of the learned counsel for the petitioner on this point should not be accepted. Rule 23(1) says that any dispute touching an agreement referred to in S. 18(2) shall be referred to the Cane Commissioner for decision or, to arbitration. The question here is which is the agreement which is referred to under S. 18(2) of the Act? If the sub-section refers also to the unsigned agreement then it is clear that a dispute

concerning an unsigned agreement is also to be referred to the Cane Commissioner; whereas, if that sub-section refers only to the signed agreement the dispute with respect to the unsigned agreement cannot be referred to the Cane Commissioner for decision.

Section 18(2) of the Act says that the occupier or manager of a factory for which an area is reserved (as is the case here) shall enter into an agreement, in such form, by such date and on such terms and conditions as may be prescribed, to purchase the cane offered in accordance with subs. (1). What the sub-section contemplates is the existence of an agreement in the form and containing the terms and conditions prescribed by an officer of the Government and it lays an injunction on the manager or occupier of a factory to enter into it.

I agree with the learned counsel for the petitioner so far that the expression "enter into" means nothing else than signing the agreement. The form, the terms and conditions have to be laid down by somebody other than the parties to the agreement and then it has to be an agreement for the purchase of the quantity of cane offered by a Cane-Growers' Co-operative Society under sub-s. (1) of S. 18. It would thus appear that everything else that the agreement is to contain is settled by the officers of the Government and the occupier or manager of the factory has been directed to enter into such an agreement which can only mean that he should sign it.

The object of S. 18(2) is to compel the occupier or manager to sign the agreement made for him by the officers of the Department and the only thing that is left for him is to sign the agreement. But this does not mean that S. 18(2) does not refer to the unsigned agreement. As a matter of fact, it very clearly refers to the agreement, the form, the terms and the conditions of which have been prescribed, and it then directs the occupier or manager to sign such a document. In my opinion, on a plain reading of the wording of S. 18(2), the proper interpretation is that it does refer to the agreement both before and after the signatures, and if it refers to an unsigned agreement also, the provisions of R. 23(1) are attracted and any dispute touching the signed or unsigned agreement must be referred to the Cane Commissioner for decision, who may send it to arbitration, if he so considers proper.

This is likely to be the intention of the rule-making authority also, otherwise it would lead to the result that the occupier or manager of a factory can by his own illegal omission oust the jurisdiction of the Cane Commissioner to deal with the matter in dispute. An intentional failure to enter into an agreement, as required by sub-s. (2) of S. 18, is made punishable under S. 27(3)(b) of the Act. There might have been some force in the argument of the learned counsel for the petitioner, if the petitioner had any right to settle the terms and conditions of the agreement or the form in which it should be executed. But that is not the position here. He has got to accept the agreement in the terms and conditions prescribed and the offer for the quantity of the cane to be crushed by the factory is also there having been made under S. 18(1). The occupier or manager has been directed to sign the agreement and by his omission to do so he cannot confer an advantage on himeslf. I consequently hold that R. 23(1) applies to unsigned agreements also.

(9) In the present case the facts proved are that without signing the agreement the petitioner intended (indented?) for & purchased the cane in the manner provided for in the rules & he throughout acted in the manner in which he would have acted if he had signed the agreement. He actually went to the length of making a reference to the Cane Commissioner against the Society for the recovery of damages for the alleged short supply of cane. It does not appear what happened to this claim; presumably it was rejected by the Cane Commissioner. The making of such a claim to the Cane Commissioner may not amount to an estoppel but it does show that, till the date of making the claim, the petitioner thought that the agreement was in existence and the dispute between him and the Society could be decided by the Cane Commissioner.

The learned counsel for the petitioner has laid great stress on the fact that his client had been protesting all along, that more cane should have been offered by the society and, therefore, it cannot be said that his client had accepted the terms of the agreement. It is true that the petitioner did ask for a larger quantity of cane, but it also appears that he did agree to accept and crush the cane that had already been offered according to the terms of S. 18(1) of the Act. His conduct shows that he had accepted the terms of the agreement though there is no proof that he had signed it also. The general question whether the agreement of preference can be accepted orally or by conduct also, or that it must bear the signatures of the parties, does not arise for decision in this case, because in my opinion even, in the absence of signatures of the parties, the matter in dispute, concerning the agreement referred to in section 18(2), attracts the provisions of R. 23(1). It is clearly proved in this case that the Society had sent the agreement to the petitioner for his signature and the existence of the written agreement is not in doubt.

(10) It was urged by the learned counsel for the Society that R. 30 of the Sugar Factories Control Rules provides that all matters connected with the interpretation of these rules shall be referred to the Cane Commissioner whose decision shall be final, and his argument was that it was for the Cane Commissioner to interpret R. 23(1) and it was for him to decide whether a dispute concerning an unsigned agreement could be decided by him or not. I am unable to accept this argument because this would be making the Cane Commissioner the final judge of the question whether he has jurisdiction or not to deal with a particular matter.

(11) The next contention of the learned counsel for the Society is that the provision in S. 18(2) of the Act concerning the agreement being in such form and on such terms and conditions as may be prescribed is merely directory and not manda-

tory so that S. 18(2) would cover any agreement for the purchase of cane whether made orally or in writing and whether continuing all the terms given in Form No. 12 or not. I do not think it would make any real difference whether this provision is mandatory or directory because R. 23(1) specifically mentions the agreement referred to in S. 18(2) and the agreement referred to in that section is the one in Form No. 12 as prescribed by the rules. Rule 23(1) refers to a particular agreement and to no other, that being the agreement which has been prescribed by the rules in Form No. 12. If there is some agreement which is not in Form No. 12 as prescribed by the Rules, I do not think that the provisions of R. 23(1) would apply to it. A specific agreement having been referred to in R. 23 it is that agreement and that agreement alone which would attract the provisions of the rule. Every agreement to purchase cane whether oral or in writing which is not in the form prescribed by the Rules would not be an agreement referred to in S. 18(2).

(12) It is further difficult to say that the provision in S. 18(2) concerning the form of agreement is not mandatory. The word used here is 'shall' and a penalty for intentionally failing to enter into an agreement is also provided for by S. 27(3) of the Act. In the case of — 'Jagan Nath v. Jaswant Singh', AIR 1954 SC 210 (A), it has been observed:

"A provision of a statute is not mandatory unless the non-compliance with it is made penal."

This observation certainly shows that if the non-compliance with the provision is made penal then the provision is mandatory. Generally speaking the position is that the language of each statute along with other circumstances has to be seen in order to find out whether the statutory direction is mandatory or directory.

I may here quote the words of Lord Penzance in the case of — 'Howard v. Bodington', (1877), 2 P. D. 203, at p. 211 (B):

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory".

In cases, however, where the disobedience of a provision is made penal it can safely be said that the provision is mandatory. Learned counsel for the petitioner referred to the case of — 'Patiram v. Baliram', AIR 1954 Nag 44 (C), where a provision was held to be directory and not mandatory with the result that the contract was not held to be void. The facts of that case were different and the case is not of any real help in the determination of the point under consideration before me.

(13) I now come to the question whether R. 23 (1) of the Sugar Factory Control Rules 1938 is void as being inconsistent with the provisions of Art. 14 of the Constitution.

The argument of the learned counsel for the petitioner is that this rule authorises the Cane Commissioner to either decide the dispute himself or refer it for arbitration. No guiding principles have been laid down as to which class of cases shall be decided by the Cane Commissioner and which class referred to arbitration. It is left to the sweet will of the Cane Commissioner to decide any case he likes himself or to refer the same for arbitration. Out of persons similarly situated the case of one can be tried by the Cane Commissioner whereas the case of another may be referred to arbitration.

In cases referred to arbitration an appeal lies from the decision of the arbitrator or arbitrators to the Commissioner of the Division but no such appeal lies if the case is decided by the Cane Commissioner himself. It is said that the persons similarly situated do not have the equal protection of law because in one case an appeal is provided whereas in the other no right of appeal has been given. Right of appeal is a very valuable right and depriving a person whose case has been decided by the Cane Commissioner of this right is said to be discriminatory.

(14) It has been argued in reply by the learned counsel for the Society that on a correct interpretation of R. 23 it should be held that the Cane Commissioner should also be treated as an arbitrator and that an appeal lies against his decision also to the Commissioner of the Division and there is thus no prejudice caused to the party whose case the Cane Commissioner decides himself, and the procedure which is to be followed by the arbitrator and the Cane Commissioner is practically the same.

(15) In my opinion the contention of the learned counsel for the Society on this point is not correct. Section 30, U. P. Sugar Factories Control Act, is the section which confers powers on the State Government to make rules to carry out the provisions of the Act and in cl. (u) of sub-s. (2) it is provided that rules may be framed to provide for reference to Cane Commissioner of disputes relating to the supply of cane for decision or if he so directs to arbitration. They may also be framed for the purpose of appointing an arbitrator or arbitrators and the procedure to be followed in proceednigs before the Cane Commissioner or such arbitrator or arbitrators and also for the enforcement of the decisions of the Cane Commissioner or the awards of arbitrators.

From a reading of this clause it appears to be clear that the judgment by the Cane Commissioner is called a 'decision' whereas the judgment by the arbitrator or arbitrators is called an 'award'. Rules are to be framed for procedure to be followed in proceedings before the Cane Commissioner or before the arbitrator or arbitrators, and also for the enforcement of the 'decision' of the Cane Commissioner and the 'awards' of the arbitrators. The 'award' by the arbitrator and the 'decision' by the Cane Commissioner have thus been treated as separate matters.

Rule 23, sub-r. (1) again says that the disputes shall be referred to the Cane Commissioner for 'decision' or if he so directs to 'arbitration'. Sub-rule (2) provides for reference to a sole arbitrator but if a sole arbitrator is not acceptable to both

the parties then the dispute is to be referred to a board of arbitration consisting of one representative of each party and an umpire acceptable to both the representatives. If the representatives are unable to elect such an umpire the Cane Commissioner may himself act as an 'umpire' or nominate one. Sub-rule (3) says that the sole arbitrator or the president of the board of arbitration shall have the power of a Court in respect of summoning the parties, witnesses and records. According to sub-r. (4) the award of the arbitrator or board of arbitration is to be binding on the parties and is not to be called in question in any civil or revenue Court.

Sub-rule (5) says that the above authorties shall give an award within the time fixed by the Cane Commissioner failing which the Cane Commissioner may decide the dispute himself or appoint another arbitrator or arbitrators. This rule goes to show that the Cane Commissioner himself is not called as an arbitrator as he is the person who fixes the time for giving an award and if the award is not given within that time he may withdraw the dispute for decision by himself. Sub-rule (6) says that any party considering himself aggrieved by an award may appeal to the Commissioner of the Division in which the factory is situated and the Commissioner's order in appeal according to sub-r. (7) is to be final.

Sub-rule (8) is again important and what it says is that on application being made to the civil Court the decision of the Cane Commissioner or the 'award' of the arbitrator or arbitrators or the Commissioner's order in appeal shall be enforced by the Court as if such decision, award, or order in appeal were the decree of that Court. It would appear from what has been stated above that 'decision' of the Commissioner is something quite different from the 'award' and is not included in the latter.

The wordings of this rule go against the contention of the learned counsel for the Society. It is true that no separate procedure has been provided for the hearing of the case by the Cane Commissioner. But this may be due to the fact that the Cane Commissioner having been given the power to decide the case he is to be deemed to be a Court and the provisions of the Code of Civil Procedure are made applicable to him by S. 141 of the Code, the proceedings before him being clearly of a civil nature. Sub-section (2) of S. 23 speaks of the reference of a 'suit' to arbitration by the Cane Commissioner. This shows that the proceedings before the Cane Commissioner are treated as a 'suit' which he can refer to arbitration.

According to the definition of the word 'court' as given in S. 3, Evidence Act, all persons except arbitrators authorised to take evidence are included in the word. According to rules the Cane Commissioner has been authorised to decide the dispute and the dispute before him has been called a 'suit' and I am inclined to think that these provisions point to the conclusion that the Cane Commissioner is to act as a 'Court' though it has not been said in so many words that he is entitled to take evidence.

In cl. 10 of form No. 12 mentioned in appendix 3 of the Sugar Factories Control Rules it is provided that any dispute between the parties regarding the matters mentioned in the clause shall be referred to arbitration in the manner provided for in rules and no suit shall lie in the civil or revenue Court in respect of any such dispute. Here it is not said that the matter shall be referred to the Cane Commissioner for decision, but the Cane Commissioner having been given the authority to decide the dispute by R. 23(1) it did not require the consent of parties to confer power upon him to decide the matter. It is necessary to have an arbitration clause in such agreements but not a provision for decision by a person who is constituted a Court by Statute. The omission to include the Cane Commissioner in cl. 10 of the agreement does not in my opinion help the learned counsel for the Society.

(16) It is true that an appeal is provided against the award given by an umpire and the Cane Commissioner himself may be an umpire in some cases though no appeal is provided against the decision of a Cane Commissioner but this may be due to the fact that where the Cane Commissioner acts as an umpire he can give his vote only in cases of disagreement between the representatives of the parties. His vote thus would decide only that matter concerning which there is a disagreement and in all other matters the decision of the two representatives would be the award of the board of arbitration. His powers here are very much limited and that may be the reason that an appeal lies against the decision of the board of arbitration but no appeal lies against the decision of the Cane Commissioner.

Supposing that the Code of Civil Procedure does not apply to proceedings before the Cane Commissioner, the rules of natural justice would govern the procedure before him and the omission to provide for procedure in the rules does not lead to the conclusion that the Cane Commissioner is also called an arbitrator. The fact that no appeal is provided against his decision may be due to the responsible position that he holds being a person put in charge of working of all the Sugar Factories in the State.

(17) The learned counsel for the Society strongly contended that the rules may not be happily worded but an interpretation should be given to them which would lead to justice and fair play between the parties. He argued that there have been cases where the wordings of the statute have not been given their natural meaning and reference was made to Maxwell on the Interpretation of Statutes, 10th edn. page 235, where cases of "obvious oversights" by the legislature have been discussed and courts have given meanings to the words of statutes which were different from their literal or grammatical meaning. These interpretations were held to be justified by the great inconvenience which would have resulted from a rigid adherence to such meaning, or because it would have led to unjust results which the legislature presumably had never intended.

He also cited the Full Bench case of — 'Bharat Singh v. Mt. Chadi', AIR 1947 All 27 (FB) (D),

where it has been held that the words of a statute may be construed differently from their literal meaning when a literal construction would result in an absurdity, or inconsistency and the words are capable of another construction which will carry out the manifest intention. It was accordingly held that the word 'transferee' was used by the Legislature in U. P. Act No. 10 of 1937 in the restricted sense denoting a purchaser or transferee out and out and not in the wider sense so as to include a mortgagee or lessee also.

He also referred to the decision of the House of Lords in the case of — 'Arthurhill v. The East & West India Dock Co.', (1884) 9 AC 448: 53 LJ Ch 842 (E). Earl Cairns observed,

"It appears to me that both of these instances to which I have been referred, the construction contended for by the appellants and the construction placed upon the section by Lord James J. are possible constructions; and where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the Statute was passed, it is the bounden duty of a court to adopt the second one and not to adopt the first of those constructions."

I respectfully agree with the decision mentioned above but in my opinion the construction placed on the wordings of R. 23 by the learned counsel for the Society is not a possible construction. In Maxwell on the Interpretation of Statutes 10th Edn., p. 201 the rule of interpretation has been stated as follows,

"A sense of the possible injustice of an interpretation ought not to induce Judges to do violence to well settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations."

In my opinion the expressions "decision by the Cane Commissioner" and "the award by the arbitrators" have been used in a manner so as to clearly indicate that the decision is something different from an award and it would be doing violence to the language used in the rule if I were to hold that the decision by the Cane Commissioner is also called an award by the arbitrator.

This is not the only statute where the officer-in-charge of the department has been given a right either to decide or to refer the matter to arbitration and his decision is treated as quite different from the award by the arbitrator. In the Co-operative Societies Act, No. 2 of 1912, cl. (1) of sub-s. (2) of S. 43 which is the rule-making section (is?) worded in language similar to cl. (u) of sub-s. (2) of S. 30 of the U. P. Sugar Factories Control Act. In cl. (1) of S. 43 (2) also the Registrar of the Co-operative Societies is authorised to decide himself certain disputes or to refer them to arbitration. Rules 115 and 116 are the rules framed under this clause. Rule 115 says that the disputes mentioned therein may be decided either by the Registrar or by arbitration and R. 116 says that the Registrar shall either decide the dispute himself or refer it for decision to an arbitrator or arbitrators.

In view of what I have stated above I agree with the contention of the learned counsel for the petitioner that R. 23 of the Sugar Factories Control Rules permits the Cane Commissioner to decide the dispute himself or to refer it for arbitration and also that an appeal lies against the decision of the arbitrator or the board of arbitration but no appeal lies against the decision of the Cane Commissioner.

(18) The next question for consideration is whether the omission of the right of appeal in one case and its presence in the other is so discriminatory in character as to be said to deny to the petitioner equality before the law or the equal protection of the laws and make the law contained in R. 23 void as being inconsistent with Art. 14 of the Constitution. It is true that the right of appeal is a valuable right and giving one person a right of appeal and denying the same to another similarly situated will generally be taken to be an act of improper discrimination, but the other test is whether in the circumstances of a particular case this denial of right of appeal has substantially prejudiced the party.

(19) It appears from the notice issued by the Cane Commissioner that he has decided to determine the dispute himself and in a case like this no appeal by the unsuccessful party would lie but I think that no substantial prejudice is caused to a person by deprivation of this right of appeal when the dispute is determined by the Cane Commissioner himself. The Cane Commissioner is a very responsible officer of the Government and his position is very different from that of an ordinary arbitrator or arbitrators. His position is such that he is probably a good substitute for the appellate authority, namely, the Divisional Commissioner.

Instances are not wanting where a person has been given a right of appeal if his case has been tried by a lower Court but the same is denied to another similarly situated whose case has been determined by a more experienced officer. Section 413, Criminal P. C., denies a person the right of appeal in which a Court of Session passes a sentence of imprisonment not exceeding one month or in which the Court of Session or District Magistrate or other Magistrate of the First Class passes a sentence of fine not exceeding Rs. 50/-. Persons convicted of the commission of minor offences may be tried by any Magistrate but if he is tried and sentenced by a second or a third class Magistrate to any amount of fine he has a right of appeal against the decision but if he is convicted of the commission of the same offence by a Court of Session or a District Magistrate or a Magistrate of the First Class and is sentenced to a fine not exceeding Rs. 50/- a right of appeal is denied to him.

Similarly a person convicted by any Magistrate and sentenced to any term of imprisonment has a right of appeal but if he is sentenced for the commission of the same offence under the same section of the Penal Code to imprisonment upto one month by a Court of Session he cannot go up in appeal against the sentence. Power has also been given to the Magistrate to try certain cases summarily though offences under the same sections may also be tried like ordinary summons and warrant cases but if the trial has been sum-

mary then a sentence of fine not exceeding Rs. 200/- by a Magistrate empowered to try the case summarily is not appealable.

Then there is the fact that an appeal against the decision of a second and third class Magistrate lies to the District Magistrate who may transfer it to a first class Magistrate empowered in this behalf whereas an appeal from an order of a first class Magistrate lies to the Court of Session. The conviction may be under the same section of the Penal Code and for the commission of a similar offence but the forum of appeal in the two cases is different, and it is well known that a Court of Session is a Court of greater experience than the Court of a Magistrate.

Similarly, in civil cases the honorary munsifs are authorised to hear and try cases of small cause court nature and a decree passed in such a case by an honorary munsif would be appealable whereas if the same case were heard by the Small Cause Court Judge no appeal would lie from his decree.

The above instances show that if a person's case has been tried by a higher officer he may not be given a right of appeal whereas if it has been heard by an officer having lesser powers the right of appeal may be provided. In my opinion these provisions will not be held to deny to any person equality before the law or equal protection of the laws as the basis for the classification is discernible, the basis being the experience and the status of the officer trying the case. Applying the same analogy to the case before me and in view of the position of the Cane Commissioner, a denial of right of appeal against his decision cannot be said to be an act of improper discrimination.

No case has been cited before me by the learned counsel for the petitioner where the mere existence of a right of appeal in one case and the denial of it in another has by itself been held to be such a circumstance as to make the statute void as being inconsistent with Art. 14 of the Constitution.

In the case of — 'Suraj Mall Mehta and Co. v. Vishwanatha Sastri', AIR 1954 SC 545 (F), there were a number of circumstances which induced their Lordships of the Supreme Court to hold that S. 5(4), Taxation on Income (Investigation Commission) Act, 1947, was void and the absence of right of appeal was one of the circumstances. Under the Income-tax Act an appeal is provided, then a second appeal and also a revision against the order of an Income-tax Officer passed under S. 34 of the Act whereas no appeal, second appeal, or revision was provided against a similar order passed by the Income-tax Investigation Commission. Their Lordships held in that case that there was a material and substantial difference in the procedure provided in the two Acts including the right of appeal, second appeal, or revision. They then considered the other circumstances creating discrimination and came to the conclusion that S. 5(4), Income-tax (Investigation Commission) Act, was a piece of discriminatory legislation offending against the provision of Art. 14 of the Constitution.

In the instant case no right of second appeal or revision is provided at all even to a person whose case has been referred to arbitration and there is only one right of appeal to the Divisional Commissioner. In cases decided by the Cane Commissioner there is no right of appeal but I think no substantial prejudice is caused to any person by the deprivation of this right of appeal to the Divisional Commissioner. The provision of this law, in my opinion, is not discriminatory and it does not deny equality of law or equal protection of laws and is thus not inconsistent with Art. 14.

(20) I have now to see whether there was such concealment of material facts in the application and affidavit filed by the petitioner as to deprive him of the right to press this petition.

In the counter affidavit filed on behalf of the society five cases of such suppression are mentioned in paragraph No. 2.

The first suppression mentioned there is said to be the omission of the petitioner to mention in his petition that he himself had sent a letter on 31-10-1950 invoking the jurisdiction of the Cane Commissioner to decide a dispute under R. 23(1) of the Sugar Factories Control Rules. It is said that the Cane Commissioner entertained the claims of both the parties. This latter part of the allegation does not appear to be correct.

It appears from the affidavit filed in rejoinder that on 14-6-1950 the petitioner wrote to the society claiming a sum of over a lac of rupees as damages for short supply of cane. The society sent a reply on 4-10-1950 to the above letter and one of the pleas that it took up was the denial of its liability. On 31-10-1950 the petitioner then preferred his claim to the Cane Commissioner but the Cane Commissioner took no notice of the claim and no proceedings were started by the Cane Commissioner on this claim.

Sending of a claim to the Cane Commissioner which was taken no notice of is not such a circumstance the omission to mention which should result in the dismissal of the petition.

The sending of the claim may have a bearing on the point but the omission to mention this fact does not appear to have been deliberate and it might well have been considered by the petitioner to be an unimportant circumstance.

The second act of suppression is said to be the omission of the petitioner to mention the fact that his General Manager had attended the proceedings of the case before the Cane Commissioner on 18-8-1951. At this hearing an objection was raised on behalf of the Society that the petitioner was not properly represented at the proceedings and the proceedings were adjourned to the 4th of September. The present petition was, however, filed one day before the date fixed by the Cane Commissioner. The petitioner having been considered not to be properly represented by his General Manager and the proceedings having been adjourned on this ground the omission to mention these facts cannot be said to be improper.

It further appears from the affidavit filed in the rejoinder that the petitioners' legal adviser

was also sent to represent the petitioner and he wanted to file a written statement which inter alia challenged the jurisdiction of the Cane Commissioner to decide the dispute but the Cane Commissioner refused to accept the written statement from the legal adviser, and wanted personal presence of the petitioner and adjourned the case for 4-9-1951. The petitioner thus cannot be said to have submitted to the jurisdiction of the Cane Commissioner as in the statement proposed to be filed the jurisdiction of the Cane Commissioner was challenged. The omission to mention this fact cannot be said to be a material concealment of any fact.

It is then said that in his letters dated 14-8-1950 and 4-11-1950 the petitioner admitted his liability to pay commission to the society but now he was disputing his liability to pay the same. It is said that the petitioner should have mentioned the sending of the above two letters. I do not think that the contention of the Society is correct on this point either. The petitioner even now is not denying his liability for the payment of the commission due to the Society but what he is denying is the fact that the Commissioner has jurisdiction to decide this dispute.

The fourth fact concealed is said to be that the petitioner had purchased cane from the reserved area on requisition slips and identification cards issued by the Society and by making these purchases the petitioner became liable to pay commission to the Society but the petitioner did not mention this fact in his petition or affidavit. As to this point it may again be said that the petitioner is not denying his entire liability to pay commission but only the jurisdiction of the Cane Commissioner and in the petition and affidavit filed by him there was no concealment of the fact that the petitioner had purchased some sugarcane from the reserved area worked by the Society.

It is lastly urged that the petitioner did not return the agreement in form No. 12 to the Society in spite of several reminders though he had purchased sugar-cane by sending requisitions and his other conduct was also such as to have caused the Society to believe in the existence of agreement in Form No. 12. This is a matter of evidence and the petitioner's case is that there has been no conduct of his which justifies the inference that he accepted or signed the agreement in form No. 12. He says that he wrote back to the Society to say that their offer was not for the entire quantity of sugar cane that they ought to have supplied to the petitioner. The petitioner's case in the petition is that the agreement in form No. 12 was not signed and the provisions of R. 23(1) therefore did not come into operation and the Cane Commissioner had no jurisdiction to decide the dispute.

I do not think that there has been a concealment of any such material fact as to lead to the dismissal of this petition on the ground of improper concealment of facts alone, and I do not agree with the contention of the learned counsel for the Society on this point.

(21) As a result of my decision on points Nos. 1 and 2 this petition should fail and I dismiss it with costs which I assess at Rs. 300/- payable to respondent No. 2.

R.G.D. Petition dismissed.

A.I.R. 1955 ALLAHABAD 95 (Vol. 42, C.N. 31)

(LUCKNOW BENCH) RANDHIR SINGH J.

(4-5-1954)

Murru, Applicant v. The State.

Criminal Reference No. 35 of 1952, from order of S. J., Rae Bareli, D/- 21-2-1952.

Criminal P. C. (1898), S. 145 — There must be preliminary order under S. 145(1) — No preliminary order — Attachment — Proceeding cancelled — Order in the matter of attachment.

A Magistrate acquires jurisdiction in a case under S. 145 only after he is satisfied that there was prima facie an apprehension of a breach of the peace. If a Magistrate is not satisfied of a likely apprehension of a breach of the peace, he cannot proceed further with the case. (Para 2)

Where the Sub-Divisional Magistrate proceeded with the case and ordered attachment without first coming to a conclusion that there was a likelihood of a breach of the peace and subsequently another Magistrate to whom the case was transferred tried to rectify the omission and proceeded to inquire if there was a likelihood of a breach of the peace and he came to the conclusion that there was no such apprehension, he could be perfectly within his rights to reject the application. (Para 2)

The jurisdiction of the Magistrate comes to an end with the proceedings under S. 145. All that he can do thereafter is to order delivery of possession of the attached property if there is already something on the record to indicate as to who was in possession of the property when it was attached by the police. The Magistrate cannot enter into an inquiry and decide as to who was in possession after having cancelled the proceedings under S. 145. He should simply withdraw the attachment, or if there was some moveable property in the custody of the Court or of the Police, he should allow it to remain under attachment till the parties established their claim to it. (Para 2)

(High Court passed suitable orders under S. 561-A).

Anno: Criminal P. C., S. 145 N. 12, 16, 48, 54.

Kalbe Mustafa, for Applicant; B. P. Misra, for Opposite Party No. 3 to 6 and 8.

ORDER: This is a criminal reference by the Sessions Judge of Rae Bareli.

It appears that an application was made under S. 145, Criminal P. C. by one Murru against Sheo Dulari, Sheo Kumar and others on the allegation that there was an apprehension of a breach of the peace between the parties in respect of certain lands.

The Sub-Divisional Magistrate, Dalmau, before whom the application was presented, directed the

Station Officer, Jagatpur, to inquire and report. He also directed the Station Officer to attach the property if he found any apprehension of a breach of the peace.

The Station Officer submitted his report on 14-11-1950, in which he mentioned that there was an apprehension of a breach of the peace and that he had made the attachment of the property as directed by the Sub-Divisional Magistrate.

On the report of the Station Officer the Sub-Divisional Magistrate ordered that notice should go to the parties.

The case was thereafter transferred to Sri Samarjit Singh, Special Magistrate for disposal. Written statements were filed by both the parties. At that stage it appears that Sri Samarjit Singh found out that the Sub-Divisional Magistrate had not recorded the preliminary order about his satisfaction about an apprehension of a breach of the peace which he should have done under S. 145 (1), Criminal P. C. He, therefore, proceeded to inquire if there was an apprehension of a breach of the peace and ultimately came to the conclusion that there was no apprehension of a breach of the peace and accordingly rejected the application filed under S. 145, Criminal P. C.

In the same order, however, he directed the attached property to be made over to Sheo Kumar. The parties went in revision to the Sessions Judge. The Sessions Judge has now recommended that the order passed by the Magistrate with regard to the delivery of possession to Sheo Kumar should be set aside as he had no jurisdiction to pass such an order.

(2) It has been held in a number of cases from time to time that a Magistrate acquires jurisdiction in a case under S. 145, Criminal P. C., only after he is satisfied that there was prima facie an apprehension of a breach of the peace. If a Magistrate is not satisfied of a likely apprehension of a breach of the peace, he cannot proceed further with the case. In the present case it appears that the Sub-Divisional Magistrate proceeded with the case and ordered attachment without first coming to a conclusion that there was a likelihood of a breach of the peace. Sri Samarjit Singh to whom the case was subsequently transferred tried to rectify the omission and proceeded to inquire if there was a likelihood of a breach of the peace and he came to the conclusion that there was no such apprehension. He was, therefore, perfectly within his rights to reject the application.

The question arises whether he had a right thereafter to order delivery of possession to any particular party. This point has also arisen in some cases and it has been held that the jurisdiction of the Magistrate comes to an end with the proceedings under S. 145, Criminal P. C. All that he can do thereafter is to order delivery of possession of the attached property if there is already something on the record to indicate as to who was in possession of the property when it was attached by the police. The Magistrate cannot enter into an inquiry and decide as to who was in possession after having cancelled the proceedings under S. 145, Criminal P. C. The learned Magistrate, was also therefore, not entitled to decide as to who was in possession and then direct delivery of possession to him. He should have simply withdrawn the attachment, or if there was some moveable property in the custody of the Court or of the Police, he should allow it to remain under attachment till the parties established their claim to it.

This Court, however, has power to pass suitable orders in such cases also under S. 561A, Criminal P. C. The reference is therefore accepted and the order of the learned Special Magistrate directing delivery of the attached property to Sheo Kumar is set aside. If there is any moveable property in the custody of the police it may be allowed to remain under attachment till such time as the parties or any of them establish their claim to it by a Civil action. The attachment of the immoveable property shall cease.

R.G.D. Order accordingly.

(S) **A.I.R. 1955 ALLAHABAD 96 (Vol. 42, C.N. 32)**

(LUCKNOW BENCH) MALIK C. J. (12-3-1954)

Kunj Behari and another, Plaintiffs-Appellants v. Shia College, Lucknow and another, Defendants-Respondents.

Second Appeal No. 828 of 1947, against decree of Addl. Dist. J., Lucknow, D/- 29-7-1947.

(a) Civil P. C. (1908), O. 41, R. 5 — Effect of uncommunicated order staying execution.

Where the order for stay of execution proceedings before the Sale Officer was passed by the transferor Court but before the order was communicated to the sale officer the sale had taken place.

Held that the sale was valid. AIR 1927 All 401 (FB), Followed. (Para 2)

Anno: Civil P. C. O. 41 R. 5 N. 17.

(b) Civil P. C. (1908), S. 39 (1) (d) — Failure to give reasons — Effect.

Clause (d) of S. 39 (1) lays down that the Court which had passed the decree if it considers for any other reason that the decree should be executed by another Court, can send the decree to that Court but it has to give reasons in writing. The discretion is left to the Court which passed the decree. If the reasons are not given in writing, it may not be possible for the Court of appeal to know the reasons and to correct the order in case it is of the opinion that the order under transfer should not have been passed. But it does not mean that mere failure to give reasons in writing when there is no objection by either party would take away the jurisdiction of the Court to which the decree has been transferred. (Para 3)

Anno: Civil P. C. S. 39 N. 2, 9, 17

CASE REFERRED: Para

(A) (V14) AIR 1927 All 401: 50 All 41 (FB) 2

D. P. Khare, for Appellants; Ghulam Imam (for No. 1) and Mohd. Nazimuddin and Rameshwar Dayal Khare (for No. 2) for Respondents.

JUDGMENT: This case raises a very short point. There was a compromise decree obtained

by the Shia College against one Maiku Lal with respect to arrears of rent. This decree was obtained from the Court of the Revenue Officer, Lucknow. The decree was put in execution. On 29-9-1944, the Revenue Officer evidently acting under S. 39, C. P. C., transferred the execution case to the sale officer, Lucknow, for sale of the property which was agricultural land.

On 22-10-1945, the Sale Officer sold this land to the respondent No. 2. On 15-3-1946, the sale was confirmed. On 28-9-1945, the judgment-debtor had made an application to the Revenue Officer that the decree had been obtained by fraud. Out of the sum claimed he said he had paid Rs. 130 to the plaintiff before the date of the decree.

The judgment-debtor, therefore, prayed that inquiry should be held and in the meantime the proceedings before the Sale Officer should remain stayed. The Revenue Officer issued notice of this application and directed stay of the sale proceedings. This order, however, was not communicated to the Sale Officer till 22-10-1945, that is, two days after the sale, with an addition that if the sale had already taken place, proceeds may not be paid over to the decree-holder till further orders. After the death of Maiku Lal, Maiku Lal's sons filed the suit out of which this appeal has arisen and they challenge the entire sale proceedings on the ground that the sale officer had no jurisdiction to sell the property and the sale was, therefore, void. The auction purchaser who was a third party was also impleaded as defendant No. 2 and he is respondent No. 2 in this appeal.

(2) Two grounds have been taken by learned counsel in support of his plea that the sale officer had no jurisdiction. Firstly, that the Revenue Officer, should have in the order of transfer given reasons as required by S. 39 (1) (d), C. P. C., and secondly that the sale having taken place on 20-10-1945, after the stay order had been passed on 28-9-1945, the Sale Officer had no jurisdiction to sell the property. The second point has absolutely no force as it is covered by Full Bench decisions of various High Courts. I need, however, mention only one case — 'Parsotam Saran v. Barhma Nand', AIR 1927 All 401 (FB) (A).

(3) As regards the first point, it is true that the Revenue Officer when transferring the execution file to the Sale Officer for sale of the property (probably because it was agricultural land which could only be sold by the Collector) should have given reasons in writing. Section 39 (1) provides for cases where a decree may, on the application of the decree-holder, be sent to another Court for execution. If conditions (a), (b) and (c) of sub-s. (1) exist the decree can be transferred and no reason need be assigned. If, however, the transfer is made for any other reason, then Cl. (d) requires that the reason should be recorded in writing. The question arises whether failure to record reasons in writing would vitiate the order and the sale officer could be said to have had no jurisdiction to sell the property. The order of transfer was made on 29-9-1944 after notice to the parties and Maiku Lal was a party to this order. If he had any objection to the transfer, he should have made it to the Revenue Officer.

Moreover Cl. (d) lays down that the Court which had passed the decree if it considers for any other reason that the decree should be executed by another Court, it can send the decree to that Court but it has to give reasons in writing. The discretion is left to the Court which passed the decree. If the reasons are not given in writing, it may not be possible for the Court of appeal to know the reasons and to correct the order in case it is of the opinion that the order under transfer should not have been passed but it does not mean that mere failure to give reasons in writing when there is no objection by either party would take away the jurisdiction of the Court to which the decree has been transferred. No authority has been cited in support of the view and on a reading of the section it does not appear to me that there is any reason to hold that the absence of giving reasons for the transfer takes away the jurisdiction of the transferee Court.

(4) The result, therefore, is that this appeal fails and is dismissed with costs.

H.G.P. Appeal dismissed.

A.I.R. 1955 ALLAHABAD 97 (Vol. 42, C.N. 33)

(LUCKNOW BENCH): MALIK C. J. AND H. S. CHATURVEDI J. (22-7-1954)

Smt. Haseen Fatima, Applicant v. Asst. Custodian Evacuee Property, Opposite Party.

Civil Misc. Appln. No. 34 of 1953.

Constitution of India, Art. 226 — Scope of — Declaring certain property as evacuee property — (Administration of Evacuee Property Act (1950), S. 7).

Where the Tribunals mentioned in a particular Act fail to exercise their jurisdiction, or exceed their jurisdiction, or act in any other manner which may be said to be on the face of it illegal or grossly improper, a writ petition may lie under Art. 226 of the Constitution for issue of proper directions to the Tribunals concerned or even to correct their errors. (Para 2)

But where the reliefs claimed are that the High Court should declare that certain items of property belong to the applicant evacuee and restrain the Assistant Custodian of Evacuee Property from taking possession of certain items of property and from selling the fruits of certain groves, they are beyond the scope of Art. 226, as the Administration of Evacuee Property Act makes an elaborate provisions for enquiry into the question and the decision has to be made under that Act only by Tribunals named therein. (Paras 1, 2)

Anno: Const. India, Art. 226, N. 17(f), 30(c), 174(b).

Qazi Farooq Hasan, for Applicant; G. T. Wadhwani and S. S. Dhawan, for Opposite Party.

MALIK C. J.:

This is a writ petition under Art. 226 of the Constitution which, to our minds, is entirely misconceived. The question in dispute is whether certain items of property belonged to the applicant

or to her son who, we understand, is an evacuee. The Administration of Evacuee Property Act makes elaborate provisions for enquiry into the question and the decision has to be made under that Act by Tribunals named therein. Even ordinary civil Courts have been deprived of their jurisdiction to decide the question of title, whether the property in dispute belonged or did not belong to an evacuee.

(2) In case Tribunals mentioned under the Act fail to exercise their jurisdiction, or exceed their jurisdiction, or act in any other manner which may be said to be on the face of it illegal or grossly improper, a writ petition may lie under Art. 226 of the Constitution for issue of proper directions to the Tribunals concerned or even to correct their errors. The reliefs claimed here are, however, in effect that we should declare that certain items of property belong to the applicant and then restrain the Assistant Custodian from taking possession of certain items of property and from selling the fruits of certain groves. All this is beyond the scope of Article 226 of the Constitution.

(3) The application, therefore, fails and is dismissed with costs, which we assess at Rs. 300/-.

D.R.R. Application dismissed.

(S) **A.I.R. 1955 ALLAHABAD 98 (Vol. 42, C.N. 34)**

RAGHUBAR DAYAL J. (28-4-1954)

State of Uttar Pradesh v. Kailash, (Accused), Opposite Party.

Misc. Case No. 432 of 1954.

Criminal P. C. (1898), Ss. 496, 497 and 498 — "Appear" — Accused must appear physically before Court, before bail is granted. AIR 1949 Lah 77 (FB) and AIR 1953 Hyd 219 (FB), Dissented from.

The conception of bail is that a person praying for bail is in custody and desires freedom, which he can obtain only under an order of the Court having jurisdiction over him. The liability of a person to arrest is no restraint. When a person appears in Court, his very physical presence results in his placing himself in the custody of the Court. Appearing through counsel cannot naturally result in even notional custody of the Court over the person concerned. It may be that the applicant might give his address in the application, but there cannot be any undertaking that he would not move away from that place. The word 'appear' in Ss. 496 and 497 does not contemplate appearance through counsel. AIR 1949 Lah 77 (FB) — AIR 1953 Hyd 219 (FB), Dissented from. AIR 1950 EP 53 (FB), Relied on. (Paras 1, 2)

The unfettered powers of the Court under S. 498 relate to the granting of bail in cases relating to offences punishable with death or transportation for life. Section 497, sub-s. (1) does not give any discretion to any Court other than the Court concerned to grant bail to a person against whom there appear reasonable grounds for believing that he had been guilty of an offence punishable with death or transportation for life. This unfettered power of the Court to grant bail does not contemplate the power to grant bail to a person who is not in custody. In fact a person not in custody stands in no need of any order of bail. If he is not in custody he is free to go wherever he likes. In the case of such a person an order of bail can be rightly considered to be an unjustified restraint on his movements instead of any gain to him. (Para 3)

Sessions Judge cannot therefore grant bail to accused who had neither been arrested nor detained by the police nor had appeared personally in Court. (Para 1)

Anno: Criminal P. C., S. 496 N. 1; S. 497 N. 2, 3; S. 498 N. 1.

CASES REFERRED: Paras

(A) (V37) AIR 1950 EP 53: 51 Cri LJ 480 (FB) 1

(B) (V36) AIR 1949 Lah 77: Pak Cas (1949) Lah 57 (FB) 2

(C) (V39) AIR 1952 Madh B 161: 1952 Cri LJ 1425 2

(D) (V40) AIR 1953 Hyd 219: 1953 Cri LJ 1320 (FB) 2

(E) (V18) AIR 1931 All 504: 33 Cri LJ 94 (FB) 3

D. P. Uniyal D. G. A., for the State; S. N. Misra, for Opposite Party.

ORDER: This is an application by the State of Uttar Pradesh for the cancellation of the bail granted to Kailash by the Sessions Judge on 3-12-1953 when a case under Ss. 366 and 368, Penal Code, was under investigation with the police of Farrukhabad.

By 3-12-1953 the police had not been able to arrest Kailash. Kailash himself did not appear before the Magistrate having jurisdiction over the case, or before the Sessions Judge of Farrukhabad. An application was filed on his behalf before the Sessions Judge praying for bail and stating the reason why he could not appear in Court and why he should be given bail.

The learned Additional Sessions Judge was of opinion that the circumstances were such that the accused could not surrender. He allowed him bail to the satisfaction of any first class Magistrate having jurisdiction.

It is contended for the State that the learned Sessions Judge had no jurisdiction to pass this order granting bail and that, therefore, this order should be cancelled.

The question to decide then is whether the learned Sessions Judge could grant bail to Kailash, who had neither been arrested nor detained by the police nor had appeared in Court. Apparently bail could not be granted in such circumstances. Sections 496 and 497, Criminal P. C., lay down when a person can be released on bail. The conception of bail is that a person praying for bail is in custody and desires freedom, which he can obtain only under an order of the Court having jurisdiction over him.

The case reported in — 'Amarchand v. The Crown', AIR 1950 EP 53 (FB) (A), fully deals with the various provisions of the Criminal Procedure Code and the conception and meaning of the word 'bail'. With respect, I fully agree with the view expressed there, and need not dilate on the matter.

(2) Opposite view is expressed in—'Hidayat Ullah Khan v. The Crown', AIR 1949 Lah 77 (B); — 'State v. Mangilal Shankarlal', AIR 1952 Madh B 161 (C) and — 'Muzaffaruddin Mohammad v. State of Hyderabad', AIR 1953 Hyd 219 (FB) (D).

The basis of the decision of the Hyderabad High Court is that a person who is liable to be arrested can be said to be restrained and, therefore, the Courts could grant him bail, as bail can be granted to a person who is in some form of custody or restraint.

The basis of decision in AIR 1952 Madh B 161 (C) is that bail can be given to a person who appears before the Court, and that the person may appear before the Court through counsel and, therefore, the Court can give him bail irrespective of the fact whether the person concerned was under any sort of restraint or not.

With respect I do not agree with these views. The liability of a person to arrest is no restraint. Notionally every person is liable to arrest for anything which the persons having authority to arrest consider him to have committed. When a person appears in Court, his very physical presence results in his placing himself in the custody of the Court. Whether the Court actually orders his being taken in custody or allows him bail at once, notionally it must be held that the person was in the custody of the Court and got his release on bail. Ordinarily when an accused appears before a Magistrate—in whose Court the accused appear who do not desire to be arrested by the police—the immediate order that such Court passes is that the applicant be taken in custody.

Usually, I imagine, even the application that such a person presents contains some such expression that he was surrendering himself.

Appearing through counsel cannot naturally result in even notional custody of the Court over the person concerned. It may be that the applicant might give his address in the application, but there cannot be any undertaking that he would not move away from that place. I do not, therefore, consider that the word 'appear' in Ss. 496 and 497 contemplates appearance through counsel.

(3) It has also been submitted for the opposite party Kailash that S. 498 gives unfettered powers to this Court to admit any person to bail, and in that connection reliance is placed on a Full Bench case reported in — 'K. N. Joglekar v. Emperor', AIR 1931 All 504 (E). The unfettered powers of the Court under S. 498 relate to the granting of bail in cases relating to offences punishable with death or transportation for life. Section 497, sub-s. (1) does not give any discretion to any Court other than the Court concerned to grant bail to a person against whom there appear reasonable grounds for believing that he had been guilty of an offence punishable with death or transportation for life. This unfettered power of the Court to grant bail does not contemplate, to my mind, the power to grant bail to a person who is not in custody. In fact a person not in custody stands in no need of any order of bail. If he is not in custody he is free to go wherever he likes. In the case of such a person an order of bail can be rightly considered to be an unjustified restraint on his movements instead of any gain to him.

(4) I am, therefore, of opinion that the order of the learned Additional Sessions Judge dated 3-12-1953 was passed without jurisdiction and should be set aside.

(5) The learned Deputy Government Advocate was not in a position to lay before the Court the considerations bearing on the question whether Kailash should be allowed bail or not. In the circumstances this question is left open for the decision of the Sessions Judge, Farrukhabad, to whose Court the case against the opposite party has been committed.

In order to avoid any possible harassment to the accused, opposite party, and to have him in custody without any appreciable lapse of time, I consider it desirable to order that the opposite party should appear in person before the Sessions Judge, Farrukhabad on Monday the 3rd May, 1954, surrender himself to the Court, and apply for bail, if so advised. The learned Sessions Judge will deal with the application for bail, if presented, on merits. I must make it clear that these directions have not even remote connection with the question whether he deserves bail or not in this case.

(6) I, therefore, cancel the bail granted to Kailash, and direct him as noted above. The bail bonds are cancelled.

R.G.D. Order accordingly.

(S) A.I.R. 1955 ALLAHABAD 99 (Vol. 42, C.N. 35)

V. BHARGAVA J. (26-8-1954)

Kanpur Oil Mills Harriesganj, Applicant v. Judge (Appeals) Sales Tax, Kanpur Range, Kanpur and others, Opposite Parties.

Civil Misc. (Writ) Case No. 481 of 1952.

(a) Constitution of India, Art. 286 (1) and (2) — Scope and applicability.

Clauses (1) and (2) of Art. 286 are prohibitory clauses, laying down restrictions on the power of a State law to impose, or authorise the imposition of a tax on sales or purchases of goods. Clause (1) inter alia restricts the power of a State law to impose a tax to such sales or purchases as do not take place outside the State. What are sales outside a State is laid down in the Explanation which forms part of cl. (1) of Art. 286 of the Constitution. This explanation introduces a fiction of law and lays down, that in cases where goods have actually been delivered in a particular state as a direct result of a sale or purchase for the purpose of consumption in that State, that sale shall be deemed to have taken place in that State, notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has, by reason of such sale or purchase, passed in another State. In cases, therefore, where delivery of goods in pursuance of a sale or purchase takes place in a particular State for consumption in that State, the sale, by this fiction of law, has to be deemed to take place

in that State and, consequently, in no other State. The result is that such a sale or purchase cannot be taxed by another State except the State in which the sale is deemed to have taken place because of the actual delivery of goods for consumption in that State. Clause (2) of Art. 286 deals with another aspect; under that clause, all sales in the course of inter-State trade or commerce are exempt from sales tax except to the extent that Parliament may by law otherwise provide. This limitation on the power of a State law to impose tax on sales or purchases taking place in the course of inter-State trade or commerce is a separate and distinct ban on imposition of tax apart from the ban imposed by cl. (1) (a) of that Article. If either of the two limitations placed by cl. (1) or cl. (2) of Art. 286 comes into play, the State law cannot tax such a sale or purchase. (Para 3)

If the imposition of tax is banned under cl. (1)(a), it is immaterial whether the imposition of that tax is or is not banned under cl. (2) of Art. 286. Even cl. (1)(a) of Art. 286 deals with cases of inter-State trade and commerce and places a ban on taxation by State law of sales or purchases by all States other than the State in which, in such cases, the goods are actually delivered for consumption in that State. If this ban of cl. (1) comes into operation, the non-applicability of the ban under cl. (2) of Art. 286 becomes immaterial and the taxation of the sale by the State law must be held to be void. AIR 1953 SC 252, Discussed and Rel. on. (Para 4)

(b) Constitution of India, Art. 286(1)(a), Expl. — Sale between parties belonging to different States — Place of sale — Determination of, for purposes of sales tax.

Whenever any sale takes place in which the parties belong to two different States, it will have to be determined where the sale has taken place for purposes of imposing sales tax. The determination of the place of sale for purposes of Contract Act, or for determining the rights inter partes to the sale may depend on the provisions of the Sale of Goods Act, but when the liability of the sale or purchase to sales tax has to be considered, the place where the sale takes place must be determined in accordance with Art. 286 for purposes of complying with the provisions of cl. (1) (a) of Art. 286, and the place of sale must be determined after taking into account the Explanation appended to that clause. (Para 3)

(c) Constitution of India, Art. 286(2), Proviso — Scope — Extent of power of President.

The only power, which the President has been granted under the proviso to Art. 286 (2), is to pass an order, doing away with, for a temporary period ending on the 31st day of March, 1951, the ban imposed by clause (2) of Art. 286. No power has been granted to the President to dispense with the ban imposed by clause (1)(a) of Art. 286.

(Para 6)

Held that the order made by the President on 26-1-1950, by which the President directed that the tax on sale or purchase of goods under the U. P. Sales Tax Act shall, notwithstanding that such imposition of tax was contrary to the provisions of clause (2) of Art. 286, continue to be levied until the 31st day of March, 1951, could in no way authorise the Government of U. P. to impose sales tax in contravention of the ban imposed by Art. 286(1)(a). (Para 6)

(d) Constitution of India, Art. 286 — Article applies to laws made subsequent to, as well as to laws existing prior to, commencement of Constitution.

The language of Art. 286 makes it clear that the ban is imposed on every "law of a State" without making a distinction whether that law existed at the commencement of the Constitution or has been passed since the Constitution came into force. Wherever, in the Constitution, it was intended that the ban should be only on future laws, the language used has specifically dealt with the making of a law by a State and the use of the word "made" in that connection for one form or the other has been brought in to make it clear that such provisions of the Constitution would govern only future laws. Where the words used are 'law of a State' these words are comprehensive enough to cover existing laws as well as laws made after the commencement of the Constitution.

(Para 7)

(e) Constitution of India, Art. 372 — Scope and effect of.

The effect of Art. 372 is that, if any law happens to be contrary to any provision of the Constitution, to that extent that law would cease to continue in force. What this really means is that, if any existing law contains any provision which is in conflict with any provision in the Constitution, that provision of the existing law would be void. Of course, it does not mean that a law, which was made by a competent legislature before the Constitution and which the legislature may not be competent to make after the Constitution, will also be void. All that is required is that the law should have been made by a competent legislature at the time when it was made and, after the passing of the Constitution, it should not be contrary to any provision of the Constitution, and should not violate any fundamental right or other ban imposed by the Constitution against such a law. (Para 7)

(f) Sales Tax — U. P. Sales Tax Act (15 of 1948) — Validity — (Constitution of India, Arts. 286(1)(a) and 372).

The U. P. Sales Tax Act continues to be in force in the State of Uttar Pradesh after the commencement of the Constitution only to the extent to which it did not contravene any of the provisions of the Constitution. The provision, which permits the State of Uttar Pradesh to tax sales which under clause (1)(a) of Art. 286 must be deemed to take place outside the State of Uttar Pradesh, has become void as a consequence. (Para 7)

(g) Constitution of India, Arts. 226 and 286(1)(a) — Order imposing sales tax in contravention of Art. 286(1)(a) — Order quashed under Art. 226. (Paras 1, 7 and 8)

CASE REFERRED: Para

(A) (V40) AIR 1953 SC 252: 1953 SCR 1069 5

R. S. Pathak and G. S. Pathak, for Applicant; Standing Counsel, for Opposite Parties.

ORDER: The petitioner, Messrs. Kanpur Oil Mills, Harrisganj, Kanpur, is a firm carrying on the business of manufacturing oils and dealing in them. During the assessment year 1949-50, the firm filed returns for assessment of sales tax under the U. P. Sales Tax Act and an order of assessment was passed by the Sales Tax Officer, Kanpur, on 28th February, 1951. Amongst sales effected by the petitioner were certain transactions in which the purchasers belong to places outside the State of Uttar Pradesh and delivery of goods was also effected to them outside the State of Uttar Pradesh. In a number of cases, the goods, which were sent by rail, were booked by the petitioner, showing itself as the consignee of the goods. Thereafter, in some cases, the railway receipts were sent to the purchasers through the banks and, in some cases, direct to the purchasers.

The Sales Tax Officer, when making the assessment, exempted from tax the turn-over in respect of all sales in which the railway receipts were sent to the purchasers through the banks, holding that, in those cases, delivery had taken place outside the State of Uttar Pradesh and the amount of turnover was not liable to sales tax. He, however, held that in respect of sales amounting to Rs. 1,55,073/-, in which the railway receipts were sent direct to the purchasers, the property in the goods passed to the purchasers within U. P. even though actual delivery took place outside Uttar Pradesh. He was of the view that these sales must be held to have taken place inside U. P. and, consequently, were subject to the U. P. Sales Tax. The petitioner filed an appeal before the Judge (Appeals), Sales Tax, Kanpur Range. The learned Judge (Appeals) upheld the decision of the Sales Tax Officer and dismissed the appeal. In deciding the appeal, the learned Judge held:

"The admitted facts are that goods worth Rs. 1,55,073/- were actually delivered outside the Province but the transaction of sale was complete within U. P. The contract was entered into in U. P. The goods were delivered in U. P. on payment of the price. The question of actual delivery, as contemplated by Art. 286 of the Indian Constitution, shall only arise in the case of sales outside the State. The place of sale has got to be determined in accordance with the Sale of Goods Act. In this case, the contract was entered into within this Province. The price was paid within this Province. The delivery of goods was made within this Province and as such, under the provisions of the Sale of Goods Act, the sale shall be deemed to have taken place within this Province. The sales within this Province are outside the scope of Art. 286(1) of the Indian Constitution. Such sales, as were dismissed (?) in this case, shall be considered to be in the nature of inter-State trade and commerce and they shall continue to be taxed upto 31-3-51 in accordance with G. O. No. 7 (Continuance Order)."

This petition has been filed under Art. 226 of the Constitution by the petitioner, challenging this order of the Judge (Appeals), Sales Tax, on the ground that the sales under Art. 286(1) of the Constitution must be deemed to have taken place outside the State of Uttar Pradesh in respect of this amount of Rs. 1,55,073/- and the learned Judge's judgment is based on an error apparent on the face of the record and is liable to be quashed in this respect by issue of a writ of certiorari.

(2) It does appear that the learned Judge, in applying Art. 286 of the Constitution, did not fully comprehend the scope of its various clauses. Clause (1) of Art. 286 of the Constitution lays down:

"286(1): No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) Outside the State; or

(b) ....."

Clause (2) of that section is as follows:

"286(2): Except in so far as Parliament may by law otherwise provide no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce."

(3) Both these clauses of Art. 286 of the Constitution are prohibitory clauses, laying down restrictions on the power of a State Law to impose or authorise the imposition of a tax on sale or purchases of goods. Clause (1) 'inter alia' restricts the power of a State law to impose a tax to such sales or purchases as do not take place outside the State. What are sales outside a State is laid down in the Explanation which forms part of clause (1) of Art. 286 of the Constitution. This Explanation introduces a fiction of law and lays down that, in cases where goods have actually been delivered in a particular State as a direct result of a sale or purchase for the purpose of consumption in that State, that sale shall be deemed to have taken place in that State, notwithstanding the fact that, under the general law relating to sale of goods, the property in the goods has, by reason of such sale or purchase, passed in another State. In cases, therefore, where delivery of goods in pursuance of a sale or purchase takes place in a particular State for consumption in that State, the sale, by this fiction of law, has to be deemed to take place in that State and, consequently, in no other State. The result is that such a sale or purchase cannot be taxed by another State except the State in which the sale is deemed to have taken place because of the actual delivery of goods for consumption in that State. Clause (2) of Art. 286 deals with another aspect. Under that clause, all sales in the course of inter-State trade or commerce are exempt from sales tax except to the extent that Parliament may by law otherwise provide. This limitation on the power of a State

law to impose tax on sales or purchases taking place in the course of inter-State trade or commerce is a separate and distinct ban on imposition of tax apart from the ban imposed by cl. (1)(a) of that Article. This means that a particular sale or purchase may not be liable to tax because of cl. (1)(a) of Art. 286 of the Constitution and this ban would operate even though there may be no such ban on taxing that sale or purchase under clause (2) of that Article. Similarly, there may be no ban on taxing a sale or purchase under clause (1)(a) of Art. 286 but the ban may occur under clause (2) of that Article. If either of the two limitations placed by clause (1) or clause (2) of Art. 286 of the Constitution comes into play, the State law cannot tax such a sale or purchase. In the present case, the petitioner has relied on the ban placed by clause (1)(a) of Art. 286 and not on clause (2) of that Article. The learned Judge (Appeals), Sales Tax, himself clearly found that all the goods in respect of the sales in dispute were actually delivered outside the State of Uttar Pradesh and the actual delivery was not made within the State of Uttar Pradesh. On behalf of the petitioner, it had been contended before the Sales Tax authorities that the goods were delivered to the purchasers in States other than the State of Uttar Pradesh for consumption in those very States in which they were actually delivered. There is no specific finding either by the Sales Tax Officer or by the Judge (Appeals), Sales Tax, whether this contention was correct but a reading of the two orders makes it clear that the contention of the petitioner was not repelled and the authorities proceeded to decide the case assuming that this contention was correct. Once the case of the petitioner was accepted that the delivery of the goods actually took place in a State other than the State of Uttar Pradesh for consumption in that very State, it is clear that cl. (1)(a) of Art. 286 of the Constitution read with the explanation attached to that Clause would prevent the State of Uttar Pradesh from imposing sales tax on that transaction of sale. The learned Judge (Appeals), Sales Tax, when dealing with this question, held that

> "the question of actual delivery, as contemplated by Art. 286 of the Indian Constitution, shall only arise in the case of sales outside the State. The place of sale has got to be determined in accordance with the Sale of Goods Act."

This view, expressed by the learned Judge, is obviously based on misinterpretation of Art. 286 of the Constitution. Whenever any sale takes place in which the parties belong to two different States, it will have to be determined where the sale has taken place for purposes of imposing sales tax. The determination of the place of sale for purposes of the Indian Contract Act, or, for determining the rights inter partes to the sale may depend on the provisions of the Sale of Goods Act, but when the liability of the sale or purchase to sales tax has to be considered, the place, where the sale takes place, must be determined in accordance with Art. 286 of the Constitution for purposes of complying with the provisions of cl. (1)(a) of Art. 286 of the Constitution, and the place of sale must be determined after taking into account the Explanation appended to that clause. On applying the Explanation to the transaction now in question, it is perfectly clear that all the sales, which are sought to be taxed, took place outside the State of Uttar Pradesh because actual delivery of the goods took place in States other than the State of Uttar Pradesh for consumption in those States. The result is that such sales cannot be taxed under any State law and any such taxation under a State law would be void as contravening the ban imposed by cl. (1)(a) of Art. 286 of the Constitution.

(4) The learned Judge (Appeals), Sales Tax, may be right in his view that, for purposes of applying cl. (2) of Art. 286 of the Constitution, the actual place of sale need not be determined in accordance with the Explanation which forms part of clause (1) of Art. 286. For purposes of clause (2) of Art. 286, it may, therefore, be possible to hold that these sales, in accordance with the provisions of the Sale of Goods Act, must be deemed to have taken place within the State of Uttar Pradesh and, as a result of this view, the ban imposed by cl. (2) of Art. 286 of the Constitution may not stand in the way of the State of Uttar Pradesh imposing a tax on the sale under its State law. However this would be quite immaterial because, as I have said earlier, if the imposition of tax is banned under cl. (1)(a), it is immaterial whether the imposition of that tax is or is not banned under cl. (2) of Art. 286. The learned Judge seems to have been under the impression that, if a sale takes place in the course of inter-State trade and commerce, the only ban on the right of the State law to impose tax is under cl. (2) of that Article and that there is no ban at all under cl. (1)(a) of Art. 286 of the Constitution. This impression is not correct. Even cl. (1)(a) of Art. 286 deals with cases of inter-State trade and commerce and places a ban on taxation by State law of sales or purchases by all States other than the State in which, in such cases, the goods are actually delivered for consumption in that State. If this ban of cl. (1) comes into operation, the non-applicability of the ban under cl. (2) of Art. 286 becomes immaterial and the taxation of the sale by the State law must be held to be void.

(5) Reference may be made, in this connection, to a decision of their Lordships of the Supreme Court in — 'State of Bombay v. United Motors (India) Ltd.', AIR 1953 SC 252 (A). Their Lordships, in that case, clearly expressed this proposition in the following words:

> "We are, therefore, of opinion that Art. 286(1)(a) read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein in the wider sense explained above. The latter State is left free to tax such sales or purchases, which power it derives not by virtue of the Explanation but under Art. 246(3) read with Entry 54 of List II."

After having thus clearly interpreted the effect of Art. 286(1)(a) of the Constitution, their Lordships then proceeded to examine the extent of the power of the State, in which the goods are

actually delivered for consumption therein, to tax such sales and, for that purpose, they proceeded to consider whether that State was barred from taxing such sales under cl. (2) of Art. 286. Learned counsel for the State relied on this later part of the judgment of their Lordships of the Supreme Court for his contention that a State, from which the goods are sent, can tax a sale though the goods may be delivered in another State for consumption therein in pursuance of that sale. Obviously, no such inference can follow from the decision of their Lordships. The judgment of the Supreme Court makes it plain that sales or purchases involving inter-State elements are of various types and ban on such sales or purchases is placed under cl. (1)(a) as well as cl. (2) of Art. 286 of the Constitution. The ban under cl. (1)(a) operates against taxation by the State selling the goods whereas the ban under cl. (2) has to be considered when dealing with the question of the power of the delivery State to tax that sale.

When considering the latter aspect, their Lordships held that, if the goods are actually delivered in a State for consumption therein, such a sale is not liable to be taxed even by that State on the ground that, 'qua' that State, the transaction loses its character of being a transaction in the course of inter-State trade and commerce. They then cited an example, saying that cl. (2) of Art. 286 would be applicable to a case where the goods are delivered in a State other than the selling State but not for the purpose of consumption therein but for the purpose of re-exporting to other States. They also mentioned that there may possibly be other categories of sales or purchases which may not satisfy all the requirements of the Explanation, and it was immaterial whether such transactions may or may not be sufficiently numerous for the Constitution to take notice of them. In such cases, according to their Lordships, the ban placed by cl. (2) of Art. 286 would come into operation. It is, therefore, clear that the mere circumstance that the ban placed by cl. (2) of Art. 286 of the Constitution does not operate against imposition of tax by the State of Uttar Pradesh on the sales in question does not lead to the inference that the ban placed by cl. (1)(a) of Art. 286 can also not operate. That ban being clearly in the way of the State of Uttar Pradesh, prohibiting it from taxing the sales, the taxation of those sales would be against the provisions of Art. 286(1) of the Constitution and the order imposing such a tax must, therefore, be quashed.

(6) Learned counsel for the State raised another new point based on the language of the proviso to cl. (2) of Art. 286 of the Constitution which is as follows:

"Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951."

It was contended by learned counsel that an order was made by the President on 26th January, 1950, by which the President directed that the tax on sale or purchase of goods under the U. P. Sales Tax Act shall, notwithstanding that such imposition of tax was contrary to the provisions of cl. (2) of Art. 286 of the Constitution, continue to be levied until 31-3-1951. Learned counsel's argument was that once the President had passed an order, continuing the levy of tax upto 31-3-1951, in exercise of the powers conferred on him under this proviso, the levy of the tax would be valid even though the tax may be banned by cl. (1)(a) of Art. 286 of the Constitution. Obviously, this argument is based on an incomplete reading of the language of the proviso. The proviso includes in it the clause "notwithstanding that the imposition of such tax is contrary to the provisions of this clause" and this makes it perfectly clear that the only power, which the President has been granted under the proviso, is to pass an order, doing away with, for a temporary period ending on the 31-3-1951, the ban imposed by cl. (2) of Art. 286 of the Constitution. No power has been granted to the President to dispense with the ban imposed by cl. (1)(a) of Art. 286 of the Constitution. If the President had purported to pass an order, in exercise of his powers under this proviso, that the tax would continue to be levied until 31-3-1951, even though such tax might be contrary to the ban placed by cl. (1)(a) of that Article, such an order of the President could not be given effect to and would not validate that law as the order would be in excess of the powers granted to the President by the Constitution. The actual order passed by the President nowhere makes such a provision. The order really continues the levy of tax notwithstanding that the imposition of such tax was contrary to the provisions of cl. (2) of Art. 286 of the Constitution. The result is that, if the petitioner had contended that those sales were exempt from tax by the State of Uttar Pradesh under cl. (2) of Art. 286, that contention would have been repelled provided the sales had taken place on or before 31-3-1951. The petitioner has sought protection not under cl. (2) but under cl. (1)(a) of Art. 286 of the Constitution and the order of the President, therefore, in no way, authorises the imposition of this tax.

(7) Learned counsel also contended that Art. 286 of the Constitution can govern State laws made by the State Legislatures after the 26-1-1950, when the Constitution came into force and should not be applied to laws which were made prior to the 26-1-1950. This contention also has no force. The language of Art. 286 makes it clear that the ban is imposed on every "law of a State" without making a distinction whether that law existed at the commencement of the Constitution or has been passed since the Constitution came into force. Wherever, in the Constitution, it was intended that the ban should be only on future laws, the language used has specifically dealt with the making of a law by a State and the use of the word "made" in that connection for one form or the other has been brought in to make it clear that such provisions of the Constitution would govern only future laws. Clause (2) of Art. 13 thus places a ban on the State making any law which takes away or abridges the rights conferred

by Part III of the Constitution. In cls. (1) and (2) of Art. 31 of the Constitution, there is no mention of any law being 'made' and the language indicates that those provisions were meant to govern the existing laws as well as future laws. This is clarified by cl. (5) of Art. 31 of the Constitution in which the laws mentioned in cl. (2) have been divided into two classes, viz., existing laws and any laws which the State may hereafter 'make'. These examples clearly show that where the words used are "law of a State", these words are comprehensive enough to cover existing laws as well as laws made after the commencement of the Constitution. Existing laws were continued in force by Art. 372 of the Constitution but that Article, in continuing the existing laws, clearly provided that the existing laws were to continue in force 'subject to the other provision in the Constitution'. The effect of this provision in Art. 372 is that, if any law happens to be contrary to any provision of the Constitution, to that extent that law would cease to continue in force. What this really means is that, if any existing law contains any provision which is in conflict with any provision in the Constitution, that provision of the existing law would be void. Of course, it does not mean that a law, which was made by a competent legislature before the Constitution and which the legislature may not be competent to make after the Constitution, will also be void. All that is required is that the law should have been made by a competent legislature at the time when it was made and, after the passing of the Constitution, it should not be contrary to any provision of the Constitution, and should not violate any fundamental right or other ban imposed by the Constitution against such a law. The U. P. Sales Tax Act could, therefore, continue in force in the State of Uttar Pradesh after the commencement of the Constitution only to the extent to which it did not contravene any of the provisions of the Constitution and, as I have said above, the provision, which permits the State of Uttar Pradesh to tax sales which, under cl. (1) (a) of Art. 286 of the Constitution, must be deemed to take place outside the State of Uttar Pradesh, has become void as a consequence. This petition must, therefore, be allowed and the orders of the Sales Tax Officer and the Judge (Appeals), Sales Tax, must be quashed in so far as they levy tax on sales in contravention of cl. (1)(a) of Art. 286 of the Constitution, viz., in respect of sales to the extent of Rs. 1,55,073/-.

(8) The petition is accordingly allowed and the orders of the Sales Tax Officer and the Judge (Appeals) Sales Tax, imposing sales tax on those sales amounting to Rs. 1,55,073/- are quashed. The petitioner shall be entitled to its costs from the opposite parties which I assess at Rs. 400/-.

(9) It does not appear to be necessary to make any further direction to the opposite parties to refund the amount of tax which has been realised from the petitioner by virtue of orders of assessment which have been quashed today as the petitioner would, no doubt, be entitled to a refund by applying to the appropriate authorities.

K.S.B. Petition allowed.

(S) A.I.R. 1955 ALLAHABAD 104 (Vol. 42, C.N. 36)

MUKERJI J. (15-6-1954)

Phudki, Applicant v. State, Opposite Party.

Criminal Revn. No. 1972 of 1951, against order, 1st Addl. Ss. J., Meerut, D/- 23-11-1951.

Penal Code (1860), S. 186 — "Obstruction" meaning of — (Words and phrases — "Obstruction").

The word 'obstruction' in S. 186 connotes some overt act in the nature of violence or show of violence. It cannot be said that a man obstructed another if that man runs away from arrest or if he does not actually submit to the arrest. Case law reviewed. (Para 7)

Anno: Penal Code, S. 186 N. 1.

CASES REFERRED: Paras

(A) ('65) 2 Bom HCR 128 8

(B) (V14) AIR 1927 Lah 708: 28 Cri LJ 753 8

(C) (V3) AIR 1916 All 53: 38 All 506: 17 Cri LJ 413 9

(D) (V20) AIR 1933 All 759: 1933 All LJ 952: 34 Cri LJ 1211 10

Vishva Mitra and R. K. Kakkar, for Applicant; J. R. Bhatt, A. G. C., for Opposite Party.

ORDER: This is an application by Phudki who has been convicted by one of the learned Additional Sessions Judges of Meerut under S. 186, Penal Code and sentenced to undergo rigorous imprisonment for a period of three months.

(2) The facts giving rise to this criminal revision briefly stated were these: On the 7th of April, 1949, Sub-Inspector Himmat Singh of police station Garhmukteshwar started an investigation in regard to a dacoity case. He decided to arrest the applicant that night, and in order to give effect to that decisions of his, he asked his second officer Richpal Singh to go down with two constables to the house of Phudki and to arrest him. When S. O. Richpal Singh and the constables reached the house of Phudki, Phudki, somehow, got scent of their arrival and actually opened a back door and ran for liberty. The police officer and the two constables chased him and while so chasing him, the police constable fired a pistol shot at Phudki. Phudki shouted for help saying that he was being killed. Thereupon several villagers turned up and they assaulted the police officer and the two constables. In the meanwhile, Himmat Singh, the Sub-Inspector, also arrived on the scene and there was some sort of a fight between the police and the villagers and some villagers were injured while the two constables sustained some minor injuries.

(3) Fifteen persons were put up for trial under S. 332, I. P. C., including the applicant. They were all convicted by the Magistrate under S. 332 and awarded a sentence of two years' R. I. and a fine of Rs. 100/- each, or in default of payment of fine to undergo a further period of six months' R. I.

(4) On appeal, the learned Judge came to the conclusion that the evidence against the fourteen out of the fifteen accused was thoroughly insufficient to warrant their conviction under S. 332, I. P. C. The view that the learned Judge took was that it could not be said with certainty, on the evidence, that these men took part in the assault

on the police that particular night. The learned Judge actually found that on the evidence it could not be said in regard to Phudki also that he took any part in assaulting anybody or in any manner showing force in making his escape as at that stage there was no question of any escape for Phudki, inasmuch as, Phudki was not in the custody of the police for the police had not caught Phudki before the fight started with the villagers. On the aforementioned findings, the learned Judge acquitted fourteen of the appellants before him but chose to convict Phudki under S. 186, I. P. C.

(5) Section 186, I. P. C. is in these words:

"Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

(6) Before this section can be made applicable, the prosecution has to prove that there has been voluntary obstruction of a public servant in the discharge of his public functions. In this case, on the findings it cannot be said that there was any voluntary 'obstruction' by Phudki, indeed the learned Judge found that Phudki had not been guilty of any violence or even any show of violence against the police party. All that has been found against him was that he ran away from arrest, or that he did not actually submit to being arrested.

(7) The question that arises is whether such conduct can amount to voluntarily obstructing a public servant who wanted to arrest Phudki in the discharge of his public functions. In my judgment it cannot be so said for the word 'obstruction' connotes some overt act in the nature of violence or show of violence. It cannot be said that a man obstructed another if that man runs away from the other.

(8) In a very old Full Bench decision of the Bombay High Court of the year 1865, a Bench of three Judges held that escaping from lawful custody is not obstructing a public servant in the discharge of his public functions within the meaning of S. 186, I. P. C. This proposition was laid down in the case of — 'Reg v. Poshu ', 2 Bom HCR 128 (A). A similar view was taken by Tek Chand J. of the Lahore High Court in the case of — 'Jamna Das v. Emperor', AIR 1927 Lah 708 (B). Tek Chand J. observed that running away and shutting himself up in a room and refusing to come out is not voluntary obstruction. According to this learned Judge such conduct was no more than a mere "passive resistance" or at best an attempt to evade the process of the Court and that such acts could not be described as obstruction.

(9) In the case of — 'Emperor v. Aijaz Husain', AIR 1916 All 53 (C), Mr. Justice Sundar Lal held that:

"In order to constitute an offence under S. 225B, I. P. C., something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest."

(10) In the case of — 'Emperor v. Tohfa', AIR 1933 All 759 (D), a Bench of this Court approved of the dictum of Mr. Justice Sundar Lal in the aforementioned case. In — 'Tohfa's case (D)', it was pointed out that the question whether an offence under S. 186, Penal Code, has or has not been committed must depend upon the peculiar facts and circumstances of each case. It was pointed out in that case that threats to violence made in such a way as to prevent a public servant from carrying out his duty might amount to an obstruction of the public servant, particularly if such threats are coupled with an "aggressive or menacing attitude" on the part of the person uttering the threats.

Merely running away from arrest cannot, in my judgment, amount to obstruction in any sense of that word. Obstruction connotes some positive act, which would deter the man obstructed from carrying out his intentions; the act of running away does not do any such thing. It may, however, have the effect of baulking a man or cheating him of his intentions but that would not amount to obstruction.

(11) For the reasons given above, I must hold that the conviction of the applicant under S. 186, I. P. C., was unjust. I, accordingly, allow this application in revision and set aside the conviction & the sentence passed on the applicant. The applicant is on bail. He need not surrender to his bail.

H.G.P. Revision allowed.

A.I.R. 1955 ALLAHABAD 105 (Vol. 42, C.N. 37)

MUKERJI J. (4-6-1954)

Chhanga, Applicant v. State.

Cri. Revn. No. 1080 of 1953, against the order of Civil and S. J., Bulandshahr, D/- 8-6-1953.

Criminal P. C. (1898), S. 476 — Complaint in respect of perjury — Preliminary enquiry though not obligatory is desirable — Accused should be given opportunity to meet evidence in enquiry.

It is no doubt true that it is not obligatory for any Court, under the law, to have a preliminary enquiry in a case before it decides to make a complaint, but it is desirable that there should be such an enquiry, before a Court decides to make a complaint, unless the perjury was absolutely clear on the face of the record. In a case where a Court decides to take further evidence in order to determine whether or not the allegations contained in the affidavit are false, it is but fair to give the accused an opportunity of either meeting that evidence when it is being taken, or if such an opportunity has not been given, then to give him an opportunity, as envisaged by S. 476. (Para 4)

That the applicant will have full opportunity of meeting all that evidence when it is produced against him at the trial is not sufficient reason for denying him the opportunity of meeting that evidence at the preliminary stage. It is a serious matter for anyone to face a criminal trial and if the law contemplated giving an opportunity to the accused of meeting the case at an earlier stage than the

trial itself, then such an opportunity should not be denied. (Para 4)

Anno: Criminal P. C., S. 476 N. 7, 11.

Prayag Das and S. N. Kacker, for Applicant; Shri Ram, Dy. Govt. Advocate, for the State.

ORDER: This is an application in revision by Chhanga against whom the Additional District Magistrate (Judicial), Mr. S. P. Jindal, has made a complaint under Ss. 193/199, Penal Code.

(2) Chhanga made applications for transfer of two cross-cases pending in the Court of a certain Magistrate before the District Magistrate. These applications were heard by the Additional District Magistrate, Mr. Jindal. In these applications certain allegations were made against one Mr. Jatan Swarup to the effect that the opposite parties to the application were friendly with Mr. Jatan Swarup and that they had given a thousand rupees to Mr. Jatan Swarup in order that he may influence the trying Magistrate who was an intimate friend of Mr. Jatan Swarup, and that by that means the opposite parties had assured their success in the case.

(3) The Additional District Magistrate, when he had the transfer application before him, and when he saw the aforementioned allegations in the affidavit, resorted to a rather out of the common procedure, of summoning the oath commissioner who had verified the affidavit, the person who had identified the deponent before the oath commissioner and examining them as also of summoning and examining Mr. Jatan Swarup. Mr. Jatan Swarup denied having had anything to do with this matter, much less, having taken money and having tried to influence the trying Magistrate. After the Additional District Magistrate had recorded all this evidence, he dismissed the transfer application and immediately thereafter made a complaint against the applicant about which I have already referred.

(4) An appeal was preferred by the applicant to the learned District Judge under S. 476B of the Code of Criminal Procedure. Before the learned Judge it was contended that since the Magistrate had proceeded in an irregular fashion in regard to this matter, the appellate Court should direct the withdrawal of the complaint. It was further argued before the Judge that when the Additional District Magistrate decided to take evidence in regard to the allegations that had been made in the affidavit, and to controvert those allegations, then it was incumbent on the Additional District Magistrate to give the applicant an opportunity to meet that evidence or, at any rate, the applicant should have been given an opportunity to cross-examine the witnesses that were called so that the applicant could show that their evidence was not necessarily reliable. The learned Judge repelled both these contentions.

It is not necessary for me to go into the arguments which the learned Judge has employed in order to repel the applicant's contention, for, in my view, it is sufficient for me to say that most of the reasoning that had been employed by the Judge for repelling the applicant's contention was not sound. It is no doubt true that it is not obligatory for any Court, under the law, to have a preliminary enquiry in a case before it decides to make a complaint, but it has been consistently held in this Court and in other High Courts that it is desirable that there should be such an enquiry, before a Court decides to make a complaint, unless the perjury was absolutely clear on the face of the record. In a case where a Court decides to take further evidence in order to determine whether or not the allegations contained in the affidavit are false, then, in my view, it is but fair to give the accused an opportunity of either meeting that evidence when it is being taken, or if such an opportunity has not been given, then to give him an opportunity, as envisaged by S. 476, Criminal P. C.

In this particular case the Additional District Magistrate did neither of these two things and, therefore, it cannot be said that the applicant has had a fair deal in the Court below in regard to this matter. He has been prejudiced by the Additional District Magistrate receiving evidence against the applicant without giving him any opportunity of meeting it. The argument that the applicant will have full opportunity of meeting all that evidence when it is produced against him at the trial is not sufficient reason for denying him the opportunity of meeting that evidence at the preliminary stage. It is a serious matter for anyone to have to face a criminal trial and if the law contemplated giving an opportunity to the accused of meeting the case at an earlier stage than the trial itself, then such an opportunity should not be denied.

(5) The applicant has been charged with a serious offence, and it is also clear on the circumstances of this case that it would be in the interests of justice that if 'prima facie' the allegations made by the applicant were false, then he should be prosecuted for perjury. But, even then, I am of the opinion that he should be given an opportunity to show cause before a complaint is actually made against him in a Court, for it may be that, if given an opportunity, the applicant may be able to substantiate his allegations or may be able to show that the allegations were not necessarily false.

(6) In the result, I direct that the Additional District Magistrate do withdraw the complaint dated 24-12-1952, that he made against the applicant under Ss. 193/199, Penal Code, and that he should thereafter issue a notice to the applicant to show cause why he should not be so prosecuted. The Additional District Magistrate shall, after the necessary enquiry, either make a complaint if he is satisfied, 'prima facie', that there has been perjury, or discharge the notice if he is satisfied, 'prima facie', that there has been no perjury. The record of the case shall be sent down to the Court below forthwith so that the learned Additional District Magistrate may give effect to my order.

H.G.P. Order accordingly.

A.I.R. 1955 ALLAHABAD 106 (Vol. 42, C.N. 38)

V. BHARGAVA J. (26-8-1954)

Purushottam Chandra, Petitioner v. State of Uttar Pradesh and others, Respondents.

Civil Misc. Writ No. 487 of 1954.

(a) Constitution of India, Art. 226 — Against whom writ can issue.

No writ or direction can be issued under Art. 226 to persons who are not impleaded as opposite parties to the petition. (Para 3)

Anno: Const. of India, Arts. 226 and 227 N. 26, 43.

(b) Constitution of India, Art. 226 — Writ of prohibition — When can issue.

A writ of prohibition issues only when a judicial or quasi-judicial tribunal exceeds its jurisdiction or tries to exercise jurisdiction not vested in it. (Para 5)

Anno: Const. of India, Art. 226 N. 140, 151.

(c) Constitution of India, Art. 226 — Writ of prohibition against State Government — Government proposing to take action against a municipal member under S. 40(3), U. P. Municipalities Act, and giving him show cause notice under S. 40(4) — Writ if can be issued — (U. P. Municipalities Act (2 of 1916), S. 40 (3), (4) and (5)).

Whenever action has to be taken under sub-s. (3) of S. 40, U. P. Municipalities Act, 1916, the proceedings are initiated by a proposal of the State Government to take action under that sub-section. On that proposal, an opportunity of explanation has to be given to the member under S. 40(4). Under sub-s. (3) of S. 40 of the Act, action can be taken if the Government is of the opinion that the member has flagrantly abused his position in the manner mentioned in that sub-section. The basis for taking action is the opinion of the Government and not the actual existence of the fact that the position has been flagrantly abused. If the power of the State Government to take action had depended of the existence of the fact that the member had flagrantly abused his position, it might have been possible for the Courts to examine whether there was material for coming to such a view. When the law requires that the State Government has to form its opinion and empowers the State Government to take action on that opinion, the Courts cannot examine whether the opinion formed by the Government is correct or incorrect. It is only necessary to make sure that the Government has formed the opinion as required by law. (Para 5)

Hence, where the Government has not yet proceeded to pass orders under sub-s. (3) of S. 40 but is still at the intermediate stage of giving an opportunity to the petitioner of giving his explanation and of holding the enquiry contemplated by sub-s. (5) of S. 40, no irregularity of procedure as prescribed by the Act can be said to have been committed. The proceedings at that stage are clearly valid proceedings and any order passed under S. 40(3) in pursuance of those proceedings will be an order passed after following the correct procedure. In these circumstances, it cannot be said that the State Government had no jurisdiction to pass an order under sub-s. (3) of S. 40, U. P. Municipalities Act, 1916, and, consequently, no writ of prohibition, as prayed for by the petitioner, can issue. (Para 5)

(d) Constitution of India, Art. 226 — Nature of direction or order that can passed under the Article.

In an application under Art. 226, challenging the order of the State Government directing the institution of an enquiry under S. 40, U. P. Municipalities Act, the High Court has no power to give a direction to the State Government to hold an enquiry into the allegations against the petitioner through a judicial officer. The State Government has to hold an enquiry in accordance with the provisions of the U. P. Municipalities Act, 1916, and as long as it does so, the High Court cannot, in exercise of its writ jurisdiction give any order or direction as to the manner in which the enquiry should be held. (Para 7)

N. C. Vaish, for Petitioner; Standing Counsel, for the State.

ORDER: This petition under Art. 226 of the Constitution has been presented by Purushottam Chandra who was elected as a member of the Municipal Board of Ghaziabad on 1-11-1953.

(2) It appears that some land within the limits of the Municipal Board of Ghaziabad was acquired under the Land Acquisition Act for the development schemes of the municipal board by a notification issued in the U. P. Gazette on 10-7-1947. On part of this land, the petitioner started constructions which he called a 'Dharamshala'. These constructions were started without complying with the provisions of S. 178, U. P. Municipalities Act, 1916. A statement about compensation payable to the owners of the land was prepared and sent with a report by the Land Acquisition Officer to the Collector. That report is dated 14-10-1952. The report mentions that, on this land, a building known as Dharamshala, constructed by the petitioner, was standing. The officer, sending the report, was of the opinion that since the constructions were made after the notification relating to acquisition of land, the petitioner was not entitled to any compensation in respect of this building. It was, however, suggested that it may not be necessary to have the building removed and the building may be taken over without payment of any compensation whatsoever.

It was stated by learned counsel for the petitioner that this recommendation in the report was accepted by the Collector and was made a part of the award. Even subsequently, the petitioner obtained a permit for 200 bags of cement from the Planning Officer on 2-1-1953. There were thereafter some reports to the authorities and to the Government, as a result of which, on 27-12-1953, this site was inspected by Shri D. N. Tandon, Deputy Collector posted at Ghaziabad, who gave a report that the work on this 'Dharamshala' had been started again from 23-11-1953. At the time when he went for inspection, he found that the building had already been constructed and the labourers were plastering the floor and roof of the building.

Thereafter, on 27-4-1954, a charge, which was communicated to the District Magistrate of Meerut by the Assistant Secretary to Government, U. P. Municipal Department, was served on the peti-

tioner by the District Magistrate. The charge was that

"the petitioner had contravened the provisions of S. 178, U. P. Municipalities Act, 1916, and the building bye-laws made thereunder when soon after his election as a member of the Ghaziabad Municipal Board he re-started on 28-11-1953, the unauthorised construction of a building on plot No. 827 of land outside Sihani Gate, which land had been acquired by Government for the Ghaziabad Municipal Board for their development schemes. Being in full knowledge of these facts, he had, by his said action, so flagrantly abused his position as member of the Board as to render his continuance as member detrimental to public interest."

The Government also passed an order on 8-5-1954, suspending the petitioner from membership of the Ghaziabad Municipal Board pending enquiry into the charge mentioned above.

The petitioner on these facts moved this petition in this Court on 17-5-1954. In this petition, as originally moved and subsequently amended, the following four prayers have been made:

"(1) That the respondent No. 1 be ordered by a writ of 'prohibition' (to refrain from passing any orders pursuant) to S. 40(3), U. P. Municipalities Act of 1916.

Note — The part within the brackets does not occur in the original petition presented in this Court but learned counsel for the petitioner read out this part from his copy in order to explain what this prayer in the original petition was really to be as the prayer actually put in the petition appeared to be meaningless.

(2) That the order of suspension under S.40(5) of the said Act be kept in abeyance pending the determination of this petition and the order of suspension be quashed.

(3) That the respondent No. 1 be further ordered to hold an enquiry into the allegations against the petitioner through a Judicial Officer.

(4) That the elections of Vice-President of the Municipal Board, Ghaziabad, held on 25-5-1954, and of the committees held on 25th and 26th May, 1954, be declared null and void and the persons so elected be restrained by an order from functioning as such Vice-President and Chairman and Members of the Committees."

The opposite parties in this petition are only three in number, viz., the State of Uttar Pradesh, the District Magistrate, Meerut District, Meerut, and Shri Ramanuj Dayal, President, Ghaziabad Municipal Board, Ghaziabad.

(3) The first point, that has to be noticed, is that prayer No. 4 in the petition cannot be granted to the petitioner as the persons sought to be restrained from functioning as Vice-President, Chairman and Members of the committees, have not been impleaded as opposite parties in the petition. Obviously, no writ or direction can issue to them without impleading them as opposite parties to this petition. Therefore, so far as this prayer is concerned it need not be considered on merits at all.

(4) Learned counsel for the petitioner has mainly argued that the first prayer should be accepted by this Court. It may be mentioned in this connection that, in this case, lengthy and numerous affidavits have been filed by the various parties and they contain a lot of material which appears to be entirely unnecessary for the purpose of this petition. In giving the above facts, I have only included those facts on which learned counsel for the petitioner based his argument in order to claim the relief sought by the petitioner and all other unnecessary facts have been completely omitted. Actually, in this judgment, I have only dealt with those facts which were necessary for dealing with the few arguments advanced by learned counsel for the petitioner in support of the petition and have not gone into other facts to see whether any other arguments could be advanced on the basis of those facts.

(5) The main writ sought by the petitioner is the writ of prohibition, directing the State of Uttar Pradesh not to proceed with action under S. 40(3), U. P. Municipalities Act, 1916. A writ of prohibition issues only when a judicial or quasi-judicial tribunal exceeds its jurisdiction or tries to exercise jurisdiction not vested in it. The facts given above as well as the contentions of learned counsel nowhere make out that the State of Uttar Pradesh has no jurisdiction to pass orders under sub-s. (3) of S. 40, U. P. Municipalities Act, 1916. In fact, the provisions of sub-s. (3) of S. 40 clearly show that the power to pass orders under that provision of law is vested in the State Government only and no other authority, except the State Government, can pass those orders. The provisions of this section indicate that the passing of the orders under sub-s. (3) of S. 40 is permissible only under certain circumstances.

Firstly, under sub-s. (4) of S. 40, whenever the State Government proposes to take action under sub-s. (3) of that section, an opportunity of explanation shall be given to the member concerned. Thereafter the State Government is to form its opinion whether the member has so flagrantly abused, in any manner, his position as a member of the Board as to render his continuance as a member detrimental to the public interest. If the Government does form such an opinion, the Government can pass order, laying down what action has to be taken and, at the time of passing the orders, the reasons for taking the action have to be placed on record. It is, therefore, clear that whenever action has to be taken under sub-s. (3) of S. 40, U. P. Municipalities Act, 1916, the proceedings are initiated by a proposal of the State Government to take action under that sub-section. On that proposal, an opportunity of explanation has to be given to the member. In the present case, the annexures filed by the petitioner himself show that the Government did propose to take action and, in pursuance of that proposal, served a charge on the petitioner in order to give him an opportunity of giving his explanation. The procedure, which has been adopted by the State Government, is, therefore, the correct procedure prescribed by law.

The real grievance of the petitioner is that the acts, imputed to him, do not constitute a flagrant abuse of his position as a member of the board so

as to render his continuance as a member detrimental to the public interest and it is urged that, on account of this, the State Government has no jurisdiction to take proceedings against the petitioner. Firstly, it must be noticed that, under sub-s. (3) of S. 40 of the Act, action can be taken if the Government is of the opinion that the member has flagrantly abused his position in the manner mentioned in that sub-section. The basis for taking action is the opinion of the Government and not the actual existence of the fact that the position has been flagrantly abused. If the power of the State Government to take action had depended on the existence of the fact that the member had flagrantly abused his position, it might have been possible for the Courts to examine whether there was material for coming to such a view. When the law requires that the State Government has to form its opinion and empowers the State Government to take action on that opinion, the Courts cannot examine whether the opinion formed by the Government is correct or incorrect. It is only necessary to make sure that the Government has formed the opinion as required by law.

There may be cases where it may be possible for the Courts to interfere even if the opinion has been formed by the Government, when that opinion is based on reasons placed on record under sub-s. (4) of S. 40 of the Act which bear no reasonable relation to the formation of that opinion. That is, however, a point which need not be decided at this stage. At the present stage, the Government has not yet proceeded to pass orders under sub-s. (3) of S. 40. The Government is still at the intermediate stage of giving an opportunity to the petitioner of giving his explanation and of holding the enquiry contemplated by sub-s. (5) of S. 40 added to this section by the U. P. Municipalities (Amendment) Act, 1952 (U. P. Act VII of 1953). An enquiry by the State Government is instituted whenever the State Government proposes to take action under sub-s. (4) of S. 40. At this stage, the Government has only some 'prima facie' material before it on the basis of which it considers that the enquiry should be held.

It is not made out in the petition that there was no such material, on which the Government could come to the conclusion that an enquiry should be held and propose to hold the enquiry and take action. While the enquiry is being held and the State Government is giving an opportunity to the petitioner to submit his explanation, no irregularity of procedure is being committed. Whether the State Government will ultimately pass an order against the petitioner under sub-s. (3) of S. 40, or, will cancel the proceedings cannot be anticipated. The proceedings at the present stage are clearly valid proceedings and any order passed under S. 40(3) in pursuance of those proceedings will be an order passed after following the correct procedure. In these circumstances, it cannot be said that the State Government had no jurisdiction to pass an order under sub-s. (3) of S. 40, U. P. Municipalities Act, 1916, and, consequently, no writ of prohibition, as prayed for by the petitioner, can issue.

(6) The second prayer is that the order of suspension under sub-s. (5) of S. 40 of the Act be kept in abeyance pending the determination of the petition and that order be quashed. The power of suspension is vested in the State Government at the stage when the State Government institutes an enquiry for the purpose of taking action under sub-s. (3) of S. 40 and the petition and the affidavits nowhere make out that, when the order of suspension was passed by the State Government, it was not within its powers to do so. The order of suspension has now been in force for more than three and a half months and its prolongation is obviously the result of acts on the part of the petitioner himself. The petitioner moved this writ petition and it was, probably, as a consequence of the pendency of this petition that the Government stayed its hands and did not proceed further with the enquiry. The petitioner approached this Court at the wrong stage because the proceedings at the stage, at which they were when this petition was filed, were clearly in accordance with the law and within the jurisdiction of the State Government.

(7) The only other prayer by the petitioner is that the State Government be ordered to hold an enquiry into the allegations against the petitioner through a Judicial Officer. No power vests in this Court to give such a direction to the State Government. The State Government has to hold an enquiry in accordance with the provisions of the U. P. Municipalities Act, 1916, and as long as it does so, this Court cannot, in exercise of its writ jurisdiction give any order or direction as to the manner in which the enquiry should be held.

(8) On behalf of the petitioner, allegations have been made that these proceedings against him are the result of 'mala fide' action on the part of opposite party No. 3. That point is irrelevant so far as prayers in this petition are concerned. The writs are sought to restrain the State Government from taking action against the petitioner and the petitioner nowhere alleges any mala fides on the part of the State Government itself. May be that the enquiry by the State Government started because opposite party No. 3 moved the State Government for that purpose but that point is to be considered by the State Government itself when it forms its opinion and decides to pass or refrain from passing orders of removal of the petitioner under sub-s. (3) of S. 40 of the Act.

(9) The petition fails and is dismissed with costs which shall be Rs. 100/- for opposite parties Nos. 1 and 2 and Rs. 100/- for opposite party No. 3.

(10) As prayed by clearned counsel for the petitioner, documents, which have been filed in original in this petition, may be returned to the petitioner in accordance with the rules.

K.S.B. Petition dismissed.

A.I.R. 1955 ALLAHABAD 109 (Vol. 42, C.N. 39)

LUCKNOW BENCH — BEG J. (8-4-1954)

Municipal Board, Hardoi, Appellant v. State through Gauri Shankar, Complainant-Respondent.

Cri. Revn. No. 320 of 1953, against order of Sessions J., Hardoi, D/- 7-8-1953.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), Ss. 158(1)(a) and 128(8) and (13) — Liability to pay octroi duty.

If biris are imported within the municipal lmits, a liability to pay the octroi duty would be created. Once it is established that a liability to pay an amount is created that liability can only be discharged either by payment of the said amount or by some other method provided by law. The fact that the amount is not recoverable by a resort to law Courts does not mean that the liability itself has been wiped off. The liability exists even after the introduction of the goods within the municipal limits. (Paras 7 and 11)

Where, therefore, the accused is suspected of having imported biris within the municipal limits without payment of the octroi duties and a notice is issued against him under S. 158, it cannot be said that the notice is bad. (Para 17)

(b) Municipalities — U. P. Municipalities Act (2 of 1916), S. 158 — Notice under, if against principle of criminal law.

Under S. 158 the evidence is called for merely for the purpose of investigating the matter and the person against whom notice is issued is not an accused at that stage. The issue of notice cannot therefore be said to be against the principle of criminal law that an accused should not be compelled to provide incriminating evidence against him. (Para 12)

(c) Municipalities — U. P. Municipalities Act (2 of 1916), S. 158(1)(b) — Notice under — Compliance with.

In order to demand compliance with notice under S. 158(1)(b) the question of liability to pay would not arise at all. It is enough if the duty is required to be assessed. It would be open to the Municipal Board, and in fact necessary, to assess his amount for the purpose of enabling the Court to determine the amount of fine for which he would be liable under S. 155 of the Act. (Para 15)

CASE REFERRED: Para

(A) (V21) AIR 1934 All 795: 57 All 219 6

Kalbe Mustafa, for Appellant; Hyder Husain, for Respondent.

ORDER: This is a revision against an order of acquittal filed by the Municipal Board, Hardoi.

(2) It would appear that one Gauri Shanker, son of Kalika Prasad, had been carrying on a grocer's shop in the town of Hardoi. As a grocer, he had also been dealing in biris. The Municipal Board, Hardoi, suspected that he had been importing goods especially biris within the Municipal limits without payment of the octroi dues. In order, however, to ascertain the truth, they issued a notice against Gauri Shankar under S. 158, U. P. Municipalities Act, 1916 (Act 2 of 1916). This notice is dated 2-7-1952, and is to the following effect:

"Notice under S. 158 of the Municipalities Act is hereby given to furnish accounts within three days to ascertain whether full tax has been paid on the import of goods, especially on biris or not."

Gauri Shankar refused to accept this notice and did not furnish the accounts demanded from him. Under the circumstances the Municipality had no other alternative but to prosecute him under S. 158, Municipalities Act.

(3) The accused pleaded not guilty and denied that he had received any notice or information to furnish accounts. In view of the defence set up by the accused, evidence was led on behalf of the prosecution to prove that the accused was served with the above mentioned notice. The trial Court believed the evidence that notice was served on the accused. Accordingly it found the accused guilty of having committed an offence under S. 158, Municipalities Act, and sentenced him to pay a fine of Rs. 250/- or in default to undergo six months' simple imprisonment. An appeal having been filed by the accused, the learned Sessions Judge, Hardoi, allowed the appeal, set aside the conviction and acquitted him of the offence with which he was charged.

(4) Dissatisfied with this judgment, the Municipal Board, Hardoi, have filed this revision against the acquittal of Gauri Shankar.

(5) The sole point argued by the learned counsel for the applicant was that the lower appellate Court's interpretation of S. 158, U. P. Municipalities Act, was not correct. The view taken by the lower appellate Court was that S. 158 was not applicable to the present case, as the accused could not be said to be liable to pay a tax under the U. P. Municipalities Act. In order to appreciate the legal position, S. 158, U. P. Municipalities Act, may be cited. It runs as follows:

"158(1) The Board may by written communication call upon an inhabitant of the municipality to furnish such information as may be necessary in order to ascertain—

(a) whether such inhabitant is liable to pay a tax imposed under this Act;

(b) at what amount he should be assessed;

(c) the annual value of the building or land which he occupies and the name and address of the owner.

(2) If an inhabitant so called upon to furnish information omits to furnish it or furnishes information which is untrue, he shall be liable upon conviction to a fine which may extend to five hundred rupees."

(6) On behalf of Gauri Shankar the opposite party it is argued in this Court that a person is not liable to pay octroi duty, except at the barrier, and that once the goods have entered the municipal limits, he cannot be said to be liable to pay any octroi duty or tax. In this connection reliance is placed by the learned counsel on a ruling of the Allahabad High Court in — 'Municipal Board, Bareilly v. Abdul Aziz Khan', AIR 1934 All 795 (A). In that case, it was held that where a person does not pay the octroi duty imposed upon him under the Act, it is not possible for the Municipal Board to recover this amount by a civil suit. I am of opinion that this ruling has no bearing on the question that confronts the Court in the present case.

The question arising in the present case is whether the accused was liable to pay a tax imposed under this Act. It might be that the tax was not recoverable from him by a civil suit. It might further be that the Municipal Board have no mode available to them for the recovery of it from the accused, but the question is whether he was liable to pay it under the Act. I have no doubt that he was liable to pay the said tax under the Act. Reference in this connection may be made to S. 128, U. P. Municipalities Act, which specifies the taxes which the Board may impose within the municipal limits. Under S. 128, Municipalities Act, the Board is authorized to levy various kinds of taxes. Sub-clause (viii) authorizes a Municipal Board to levy

"an octroi on goods or animal brought within the municipality for consumption or use therein."

Sub-clause (xiii) authorizes a Municipality to levy

"a tax on goods imported into or exported from any municipality in which an octroi was in force on 6-7-1917, or with the previous sanction of the Central Government, any other municipality."

(7) Under the above circumstances it is rightly conceded that the Municipal Board could levy a tax on biris. It has also been conceded that a tax on biris was actually levied by the Municipal Board. The power to levy such a tax or octroi duty has not been challenged Rr. 142, 144, 154 and 155 lay down the method for the collection of such duty at the barrier. Rules 150 and 165 lay down the method for the collection of such duty after the goods have crossed the barrier and have been intercepted by the Inspector.

In view of these provisions, there can be no manner of doubt that if biris were imported within the municipal limits, a liability to pay the octroi duty would be created. Once it is established that a liability to pay an amount is created that liability can only be discharged either by payment of the said amount or by some other method provided by law. The fact that the amount is not recoverable by a resort to law Courts does not mean that the liability itself has been wiped off. It is possible for a liability to exist without any such liability being enforceable in a Court of law. An instance of it may be provided by a case where a claim for a certain amount might be barred by the law of limitation.

(8) The argument that the accused was not liable to pay any octroi duty, because its amount could not be recovered in a Court of law overlooks the fact that no such limitation is contemplated by S. 158(a), Municipalities Act. In order to empower the Municipality to issue a notice under S. 150(a) of the said Act, all that is necessary is that "such inhabitant is liable to pay a tax imposed under this Act". If the accused was liable to pay the tax and did not pay it, the liability would subsist until the amount was paid off, even though it could not be recovered or enforced by means of a civil action.

(9) It is significant that S. 158 does not define the purpose for which the information is required. Such information might be required by the Municipal Board for the purpose of prosecuting the accused under S. 155, Municipalities Act. Under S. 155, Municipalities Act, a person evading payment of octroi is liable to be punished and convicted in respect of it. A perusal of S. 155 would also indicate that under that section a person, who had failed to pay the octroi duty, is deemed to be "liable to the payment of octroi". Thus under S. 155 also, the liability is treated as a subsisting liability. Further, the penalty provided for such an offence under S. 155 is a fine extending

"either to ten times the value of such octroi or to fifty rupees, whichever is greater and which shall not be less than four times the value of such octroi."

It is clear, therefore, that an assessment of the actual amount of octroi duty would also be necessary not only for the launching of prosecution against the opposite party, but also for the purpose of determining the penalty to be levied by way of fine on the person contravening the provisions of the Act.

(10) Thus the scheme of the Act itself clearly shows that even though the liability might not be enforceable in a civil Court, it is recognized as a subsisting and a continuing liability under the Act. Unless the liability was deemed to be a subsisting or a continuing one, no conviction under S. 155, U. P. Municipalities Act would be possible. The argument advanced on behalf of the opposite party seems to make a confusion between the liability to pay the tax and its recoverability in a Court of law. In my opinion these two facts must be kept quite distinct and separate. One has nothing to do with the other.

In this view of the matter it is quite clear to me that the liability created did continue to exist and the opposite party was liable to pay the tax for which the Act had made provision. The utmost that can be said is that the liability which was at the initial stage actual became at a subsequent stage merely a potential or hypothetical one owing to its irrecoverability, but the liability continued to exist all the same. The argument advanced on behalf of the opposite party seems to me to be a curious one. It comes to asserting that a liability to pay a certain amount is wiped out, if a person manages to evade payment of it either at the time when it became due or adopts a device so as to make it unenforceable by a subsequent civil action. This interpretation of the section, to my mind, would be quite unreasonable. It would obviously lead to results that are unfair and inequitable and should for that reason be avoided.

(11) The further argument advanced on behalf of the opposite party, that no liability existed after the introduction of the goods within the municipal limits also does not appeal to me. The rules made under the Municipalities Act provide for the collection of octroi duty not only at the barrier, but even after the goods have been introduced within the municipal limits. If the clerk at the barrier has failed to collect the duty, under Rr. 150 and 165 it is still open to the Inspector to intercept the goods on the route and collect the duty. It will be impossible for the Inspector to demand payment and to make collection at

that stage, if it is held that after the entry of the goods within the municipal limits the liability to pay the octroi duty was wiped out.

(12) There is another reason why I think that the argument on behalf of the opposite party should not be accepted. Evidence of the contravention of the law in such cases will only be in the hands of the accused and unless it is possible to summon such records from him, it will be difficult for the Municipal Board to take action in such cases. In this connection the learned counsel for the opposite party has argued that it is against the principle of criminal law to compel an accused to provide incriminating evidence against him.

In my opinion this argument is fallacious and overlooks the fact that the evidence is called for merely for the purpose of investigating the matter and the person against whom notice is issued is not an accused at that stage. The Criminal P. C. itself provides powerful methods of securing evidence and of taking possession of it during the course of investigation. If it is possible for the investigating officer to force an entry into the house of the accused and to make a search of his house for the purpose of collecting incriminating material against him, I cannot see any reason why it should not be possible for the Municipal Board to adopt a more polite method of effectuating the same purpose by requiring the accused to furnish such evidence as is in his possession relating to a matter under inquiry.

(13) The conduct of the accused in the present case also appears to me to be thoroughly dishonest. When his prosecution was launched, the defence that he took was that he never got any information and could not, therefore, comply with the notice for that reason. The Municipal Board having succeeded in establishing to the hilt in the trial Court that such a notice was actually served on him, he altogether changed the line of his defence at the appellate stage by taking refuge in the technicalities of law.

At the appellate stage he shifted his position and on his behalf his counsel stated that it was not disputed that a notice under S. 158, Municipalities Act was served on his client. He further conceded that the accused did not comply with the requirements of this notice. A defence conducted in this fashion naturally deprives the accused of all sympathy at the hands of the Court. His own defence was not that he interpreted the law in the fashion in which it is sought to be interpreted on his behalf by his learned counsel. The defence that he took was obviously false and baseless.

(14) If the interpretation sought to be placed on his behalf is accepted, it will be difficult, if not impossible, to detect evasion of octroi duty by persons stealthily importing dutiable goods. They would not be liable to refund the money in civil Court. Further, they would refuse to provide any information and would thereby escape all punishment in the criminal Court as well. The result will be that a premium would be placed on dishonesty and fraud. This should not be allowed.

(15) I may also mention that the learned counsel for the applicant has further argued that the notice in question also fell under sub-cl. (b) of S 158. Under this sub-clause, the Municipal Board would be entitled to call for information with a view to ascertain the amount at which the octroi duty should be assessed. In order to demand compliance with notice under sub-cl. (b) of S. 158, the question of liability to pay would not arise at all. It is enough if the duty is required to he assessed. It would be open to the Municipal Board, and in fact necessary, to assess his amount for the purpose of enabling the court to determine the amount of fine for which he would be liable under S. 155 of the Act.

(16) On behalf of the opposite party, it has been argued that such assessment can only be done at the barrier and not afterwards. This argument is not warranted by the terms of S. 158 as well as by rules reference to which has been made above. Moreover, at the barrier an assessment can only be made by the clerk, who is posted there. On the other hand S. 158 entitles or authorizes the Municipal Board to make the assessment. The Municipal Board can only make the assessment subsequent to it.

(17) Whichever view of the matter is taken I am of opinion that it would not be correct to hold that the notice issued by the Municipality was not covered by S. 158 of the Act. If this interpretation of S. 158 is accepted, then the acquittal of the opposite party will have to be set aside.

(18) I accordingly allow this revision application and set aside the acquittal of the opposite party. The next question to be determined is as to what consequential order should be passed. It is open to me either to order a retrial of the opposite party or to remand the case to the lower appellate Court for passing a fresh order.

(19) The learned counsel for the opposite party says that he would prefer to have a retrial by a Magistrate. I accordingly remand the case for a retrial of the opposite party. The file of the case should be sent to the District Magistrate concerned to be forwarded to some Magistrate competent to try and dispose of the case according to law.

V.R.B. Retrial ordered.

A.I.R. 1955 ALLAHABAD 112 (Vol. 42, C.N. 40)

FULL BENCH

MALIK C. J., AGARWALA AND V. BHARGAVA JJ. (16-9-1954)

Ambika Upadhaya, Defendant-Applicant v. Nakched Upadhaya, Plaintiff, Opposite Party.

Civil Revn. No. 225 of 1950, against order of Civil J., Azamgarh, D/- 19-9-1949.

Debt Laws — U. P. Agriculturists Relief Act (17 of 1934), Ss. 10 and 12 — Application for redemption under S. 12 in respect of several mortgages — Jurisdiction of Civil Court — (Civil P. C. (1908), O. 2, R. 3).

An application for redemption under S. 12 in respect of several mortgages executed by the same mortgagor in favour of the same

mortgagee is cognizable by a Civil Court when the principal amount of one of the mortgages only is above Rs. 500 while the principal amount of each of the rest of the mortgages is below Rs. 500. By virtue of Order 2, Rule 3, Civil Procedure Code, the mortgagor could combine the several mortgages in one suit even though the application in respect of the other mortgages had to be filed before the Collector under S. 10. AIR 1949 All 536, Distinguished; AIR 1948 Oudh 214 (FB), Ref. to. (Para 2)

Anno: Civil P. C., O. 2, R. 3 N. 1.

CASES REFERRED: Paras

(A) (V36) AIR 1949 All 536: ILR (1950) All 232 2

(B) (V35) AIR 1948 Oudh 214: 23 Luck 261 (FB) 3

R. B. Misra, for Applicant; Ambika Prasad, for Opposite Party.

MALIK C. J.:

This is a civil revision under S. 115 of the Code. The defendant appellant was a mortgagee, and five mortgage deeds were executed in his favour, four of which were for a sum of Rs. 25/- each, while the fifth was for a sum of Rs. 1700/-. The mortgagor filed an application under S. 12, U. P. Agriculturists Relief Act (17 of 1934) for redemption of the five mortgages. The application was granted, and an appeal against the order was dismissed on 19-9-1949. This civil revision was filed against that order on the ground that the civil Court had no jurisdiction with respect to four of the mortgage deeds.

(2) Section 10, U. P. Agriculturists Relief Act, provides that—

"Applications under this Chapter shall, if the principal money secured does not exceed Rs. 500/- be brought before the Collector, and the word "court" in this Chapter shall in such cases include the "Collector"."

At the time of the admission of the appeal learned counsel referred to a Division Bench ruling of this Ccurt in — 'Sukhdeo Ahir v. Baldeo Ahir', AIR 1949 All 536 (A) and urged that each mortgage deed must be taken separately to determine the jurisdiction of the Court. Learned counsel has urged that with respect to four of the mortgage deeds the civil Court had no jurisdiction and only with reference to the fifth mortgage deed for Rs. 1700/- the suit could be filed in the civil Court. The facts, however, of — 'Sukhdeo Ahir's case (A)' in which the opposite party was not represented, were entirely different. In that case each of the five mortgage-deeds was of less than Rs. 500/- and it was only the aggregate amount that was in excess. In the case before us it has been admitted that with reference to the fifth mortgage deed the application for redemption under S. 12 had to be filed in the civil Court. The creditor and the debtor being common, there was no bar to the creditor combining the claim for money due under the other four mortgages with the claim under the fifth mortgage. Order 2, R. 3, Civil P. C., provides that—

"A plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendant jointly."

The suit was, therefore, clearly cognizable by the civil Court.

(3) Learned counsel for the opposite party has drawn our attention to a Full Bench decision of the Oudh Chief Court in — 'Ram Lakhan v. Bisheshar Misir', AIR 1948 Oudh 214 (B). It is not necessary for us to consider that decision as in any view of the matter, the suit was filed in the right Court.

(4) There is no force in this civil revision which is dismissed with costs.

K.S.B. Revision dismissed.

(S) AIR 1955 ALLAHABAD 113 (Vol. 42, C.N. 41)

FULL BENCH

MALIK C. J., DESAI AND MUKERJI JJ.

(12-10-1954)

Bhagirathi and others, Applicants v. The State through Smt. Raziya, Opposite Parties.

Criminal Misc. Case No. 1974 of 1951.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 49 (2) — Scope of — Does not provide for case where both complainant and accused are from same area.

Per Malik C. J. and Mukerji J., (Desai J. Contra): S. 49 (2) clearly provides for a case where the complainant is a resident within the area of one Gaon Sabha and the accused is a resident within the area of another Gaon Sabha. The legislature does not seem to have made any provision for a case where both the complainant as also the accused come from the same area of the Gaon Sabha. (Para 4)

Per Desai J.: It follows from the provisions of S. 49 (2) that if both the parties reside in the area of one Gaon Sabha, the Bench must include two panches residing in that Gaon Sabha. If it includes only one, the remaining four would come from the areas of Gaon Sabhas in which neither party resides and that would be against the provisions of S. 49 (2) and as such, without jurisdiction to try the case. (Para 16)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 49 (2) — U. P. Panchayat Raj Rules (1947), R. 84 (d) — Defective constitution of Bench — Objection does not go to root of jurisdiction — Point not open in writ petition — (Constitution of India, Arts. 226, 227)).

Per Malik C. J. and Mukerji J., Desai J. dissenting: The provisions of S. 49 (2) of the U. P. Panchayat Raj Act do not go to the root of the jurisdiction of the bench and if no objection has been taken to the constitution of such a Bench by either party in accordance with the provisions of R. 84 (b), it is not open to them to raise that point in a writ petition under Art. 226 or 227 of the Constitution . AIR 1954 All 81 Ref. (Para 10)

Per Desai J. Non-compliance with the provisions of S. 49 (2) causes a jurisdictional defect in the constitution of the Bench and the panches have no jurisdiction to try the case assigned to them. If a Bench must in-

clude a panch belonging to a particular Gaon Sabha but does not include him or includes more panches belonging to a Gaon Sabha than are required under S. 49 (2), the constitution of the whole Bench becomes defective and the panches are devoid of any jurisdiction. Case law referred. (Para 18)

There is no provision in the Act or in the Rules giving a right to a party to object to the constitution of a Bench only on the ground that it is against the provisions of S. 49 (2). Therefore, if a party fails to object to the constitution seasonably, it cannot be said to have failed to have recourse to a remedy prescribed by the law and thereby to have been estopped from objecting to it in a subsequent proceeding. (Para 23)

(c) Constitution of India, Arts. 226, 227 — Scope of articles — Powers under Art. 227 — When exercised.

Per Malik C. J.: Articles 226 and 227 are supplementary to each other. The emphasis under Art. 227 is on administrative control and the limited judicial powers contemplated by it are intented for and merely ancillary to such administrative control. Arts. 226 and 227 are not intended for identical situations. Though Art. 227 can be said to be not merely administrative superintendence, the power of superintendence conferred by Art. 227 must be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. AIR 1954 SC 215 and AIR 1952 All 963 Rel. on. (Para 11)

Per Desai J.: The existence of a remedy through an appropriate writ bars an aggrieved party's invoking powers of superintendence of the High Court under Art. 227; this necessarily follows from the propositions which are beyond controversy now, that the superintending jurisdiction exists to correct only such errors as can be corrected through a writ of certiorari etc., and that the superintending jurisdiction is exercised through the issue of one of such writs.

If a party is aggrieved by an order of a subordinate court or tribunal, against which he has no statutory remedy, he must apply for an appropriate writ or he would have no remedy from a High Court. If under the superintending jurisdiction a High Court can issue an order or direction, it can only be in co-operation with, or ancillary to, a writ of certiorari, mandamus or prohibition. Only to this extent can a High Court in exercise of its superintending jurisdiction issue an order or direction which is not of the nature of a writ or certiorari etc. (Para 26)

Anno: Const. Ind. Art. 226 N. 12, Art. 227, N. 7, 8.

(d) Criminal P. C. (1898), S. 367 (2) — Applicability to proceedings before Panchayati Adalat — Sentence without specifying offences — Legality — (U. P. Panchayat Raj Act (26 of 1947), S. 83).

The provisions of Criminal P. C. do not govern proceedings before a Panchayati Adalat. A Panchayati Adalat is not at all bound by its provisions & its orders cannot be held to be illegal on the ground of any conflict with them. The powers conferred upon a Panchayati Adalat are so wide that nothing that it does is illegal if it does not contravene any specific provision of the Panchayat Raj Act. Therefore it is not illegal for the Panchayati Adalat to pass one sentence upon the accused without specifying the offences. AIR 1948 All 136 distinguished. (Para 15)

Anno: Cr. P. C., S. 367 N. 9.

(e) U. P. Panchayat Raj Act (26 of 1947), Ss. 49 and 77A — Distinction between.

Per Desai J.: S. 49 deals with the constitution of a Bench and S. 77A with presence of its members during the trial of a case. What the two provisions considered together mean is that a Bench must consist of five panches, that it is not essential for all of them to be present on every date of hearing and that if at least three panches, including the chairman, are present, they can try the case. The fact that three panches are allowed to try the case does not mean that there is no jurisdictional defect if a Bench is constituted with only four or even three panches, or with five panches, one or more of whom possess no residential qualification to be members of it. (Para 18)

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 81: 1953 All LJ 265: 1954 Cri LJ 120 10, 17, 23
(B) (V41) AIR 1954 SC 215: 1954 SCR 565 (SC) 11, 26
(C) (V39) AIR 1952 All 963: 1952 Cri LJ 1695 11, 23
(D) (V35) AIR 1948 All 136: 1947 All LJ 593: 49 Cri LJ 103 14, 15
(E) (V40) AIR 1953 All 340: 1953 All LJ 89: 1953 Cri LJ 729 17, 23
(F) ('94) 16 All 136: 1894 All WN 39 (FB) 20
(G) (1874) 5 PC 417: 43 LJ PC 39 20
(H) (1902) 46 Law Ed 1049: 186 US 49 20
(I) ('93) 16 Mad 410: 2 Weir 14 20
(J) (1941) 86 Law Ed 249: 314 US 326 20
(K) (V29) AIR 1942 Mad 267: ILR (1942) Mad 428 (SB) 20
(L) (V38) AIR 1951 SC 230: 1951 SCR 380 (SC) 20
(M) (1838) 9 Law Ed 1233: 12 Pet 657 21
(N) (1866) 18 Law Ed 402: 4 Wall 431 21
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(Z) (V40) AIR 1953 All 180: 1952 All LJ 724 23
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(Z5) (V30) AIR 1943 PC 164: 70 Ind App 129 (PC) 25
(Z6) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 25
(Z7) (1868) 7 Wall 364: 19 Law Ed 214 25

G. P. Bhargava, for Applicants; H. N. Seth, for Opposite Parties.

MALIK C. J.:

I have had the benefit of reading the judgment of my brother Desai. I agree with him that the Panchayati Adalat is not bound by the provisions of the Criminal P. C. and if for the three offences it did not pass separate sentences, it cannot be said that the sentence is illegal provided the sentence passed by it is within its competence.

(2) As regards the second contention that the bench was not constituted in accordance with the provisions of S. 49 (2), Panchayat Raj Act, two points were raised before us: firstly, that the decision was given by as many as seven panches and, secondly, that there was only one panch from village Hajiganj to which the complainant and the accused belonged while there should have been two.

(3) As regards the first point, we gave the appellant an opportunity to establish that the bench consisted of more than five panches or that more than five panches had taken part in the proceedings or pronounced the judgment. Learned counsel admitted that he had no instructions on the point and was not able to substantiate the same. The affidavit in support of the allegation has not been properly sworn and cannot, therefore, be relied upon.

(4) Coming to the second point, sub-s. (2) of S. 49, U. P. Panchayat Raj Act (26 of 1947) is as follows:

> "Every such Bench shall includes one Panch who resides in the area of the Gaon Sabha in which the plaintiff of a suit or proceeding or the complainant of a case resides and likewise one Panch residing in the area of the Gaon Sabha in which the defendant or the accused resides and three Panches residing in the area of the Gaon Sabha in which neither party resides; ....."

The sub-section clearly provides for a case where the complainant is a resident within the area of one Gaon Sabha and the accused is a resident within the area of another Gaon Sabha and in such a case one Panch is to be from the area of the Gaon Sabha of the complainant and one from the area of the Gaon Sabha of the accused and three Panches were to be from the area of the Gaon Sabha in which neither party resides. The legislature does not seem to have made any provision for a case where both the complainant as also the accused come from the same area of the Gaon Sabha.

(5) The other point to be borne in mind is that in a case there may be more than one complainant and more than one accused who may all be residents of areas under different Gaon Sabhas. In such a case it will be difficult to appoint a bench in accordance with the provisions of sub-s. (2) of S. 49.

(6) The third important factor to be borne in mind is that the quorum is of three Panches and none of the three Panches taking part in the trial and forming the quorum may be from the area of the Gaon Sabha of the accused or the complainant.

(7) Under sub-s. (2) of S. 49 it will be possible only in a limited number of cases for the Sarpanch to constitute a Bench. It was suggested that whenever the Sarpanch finds any such difficulty he can always refer the matter to the prescribed authority which in such a case will not be bound by the provisions of sub-s. (2) of S. 49 in making the nomination.

(8) Sub-section (4) of S. 49 provides that

> "Notwithstanding contained in this section the State Government may by rules prescribe the constitution of special Benches for determining any dispute arising between any parties or Gaon Sabhas of different circles or for any other purpose."

Rules 84 (a) and (b) are the rules framed in this connection. Rule 84 (b) is as follows:

> "If in a suit, case or proceeding the Sarpanch of a Panchayati Adalat or his near relation, employer, and employee or partner in the business of his, is a party or in which any of them may be personally interested, or the Sarpanch finds any difficulty to form a bench according to S. 49 of the Act the Sarpanch, instead of forming a bench under the said section shall immediately after the institution of the suit, case or proceeding, as the case may be, submit the papers to the prescribed authority who shall constitute a bench for its trial, under S. 49 (2) or sub-r. (a) of this rule as the case may be, ..."

This provision does not appear to me to be helpful as it refers us back to sub-s. (2) of S. 49, Pancayat Raj Act and the bench has to be constituted in accordance with the provisions of that sub-section. Sub-r. (a) of R. 84 is as follows:

> "(1) 'Constitution of a special bench':
>
> For the purpose of trial or decision of any suit, case or procceding parties of which are residents of different circles or different districts or are residents of places governed by the Act, the prescribed authority having jurisdiction over the Panchayat Adalat in which a suit or case or proceeding is instituted or transferred for disposal shall constitute a special bench consisting of Panches of the said Panchayati Adalat and if convenient and possible may include a Panch of the other circle and shall appoint one of them as Chairman of the bench of the unless the Sarpanch is a member of it. The bench shall hold its sittings at a place to be fixed by the prescribed authority and procedure shall, in other respects, be governed by rules framed for the guidance of Adalat.

(2) The Surpanch shall prepare a list of names of all the panches in alphabetical order and constitute a bench of five panches serially turn by turn from it for the trial of the case, suit or proceeding:

Provided that the Surpanch shall exclude from a bench, after recording his reasons in writing, any panch, if he does not fulfil the provisions of S. 49 or rule made in that behalf or if any party has any reasonable objection against him:

Provided further that so far as possible the bench shall be constituted in the presence of both the parties and the statement to the effect that they have no grievances against the panches of the bench shall be taken in writing."

Clause (1) of sub-r. (a) of R. 84 gives the power for constitution of a special bench where the parties are residents:

(i) of different circles, or

(ii) of different districts, or

(iii) of places governed by the Act

and read as a whole it seems to me to apply to a case where the dispute is between parties living not within the jurisdiction of the same Sarpanch and not to a case where merely by reason of the fact that there are more than one accused or more than one complainant living in areas in the same circle under different Gaon Sabhas that difficulty has arisen.

(9) Sub-rule (d) of R. 84 gives a party a right to object to the Sarpanch regarding the personnel of a bench. The Sarpanch has to decide the objection and his decision is liable to correction in revision by the appellate prescribed authority.

(10) After careful consideration, brother Agarwala and I took the view — 'Mohar Singh v. State', AIR 1954 All 81 (A), that the provisions of S. 49 (2), U. P. Panchayat Raj Act, do not go to the root of the jurisdiction of the bench and that if no objection has been taken to the constitution of such a bench by either party in accordance with the provisions of R. 84 (b), it is not open to them to raise that point in a writ petition under Art. 226 or 227 of the Constitution.

(11) As regards the objection that the application was filed under Art. 227 and not under Art. 226 of the Constitution, if I were of the opinion that the Panchayati Adalat had not been properly constituted and had, therefore, no jurisdiction to convict the accused, it may have been possible to interfere even though proper relief may not have been asked. In this connection I may refer to the recent decision of the Supreme Court in — 'Waryam Singh v. Amarnath', AIR 1954 SC 215 (B), where their Lordships pointed out that Art. 227 restored to the High Courts power of judicial superintendence which they had under S. 15, High Courts Act, 1861, and S. 107, Government of India Act. Such power, their Lordships pointed out, had to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

In this connection I may refer to the judgment of my brother Sapru J. in — 'Motilal v. State', AIR 1952 All 963 (C), where he pointed out that Arts. 226 and 227 must be so interpreted that they do not overlap and that

"while Art. 226 concedes to this Court vast powers of what might be called judicial review, or control by the issue of writs, directions or orders, the main objective of Art. 227 would, more broadly, seem to be to secure administrative supervision not easily exercisable by writs, directions or orders, over all Courts or tribunals (excepting Army tribunals) within its jurisdiction."

And further he said:

"Articles 226 and 227 are thus supplementary to each other. The emphasis under Art. 227 is on administrative control and the limited judicial powers contemplated by it are intended for and merely ancillary to such administrative control. Thus Arts. 226 and 227 are not intended, as far as I can see, for identical situations."

Though, therefore, Art. 227 can be said to be, as has been pointed out by their Lordships of the Supreme Court, not merely administrative superintendence, the power of superintendence conferred by Art. 227 must be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

(12) I agree that this application must be dismissed.

MUKERJI J.:

(13) I agree and have nothing to add.

DESAI J.:

(14) This is an application under Art. 227 of the Constitution for setting aside conviction of the applicants by a panchayati adalat under Ss. 323, 504 and 506, I. P. C. The applicants were prosecuted by the opposite party before the panchayati adalat for the three offences mentioned above. The Sarpanch constituted a Bench consisting of five panches to try the case. The applicants are residents of village Hajiganj and the opposite party also is a resident of the same village. Out of the five panches, only one panch, namely Shri Mewa Lal, belonged to village Hajiganj and the rest belonged to other villages. The Bench passed upon the applicants one sentence of fine to cover all the three offences of which they have been found guilty. They challenged their conviction through an application under S. 85, Panchayat Raj Act, presented before the Sub-divisional Magistrate.

It is not known what were the grounds taken by them in their application but the grounds that were pressed orally before the learned Sub-divisional Magistrate were (1) that the conviction for the offences of Ss. 504 and 506 was illegal when they were convicted under S. 323, I. P. C. and (2) that if the opposite party had been attacked by all of them with lathis, she would not have escaped with only bruises. The learned Sub-divisional Magistrate not seeing any force in these grounds and not being satisfied that there had resulted any miscarriage of justice dismissed their application.

Thereupon they filed the present application. It is stated in the application that it was illegal

for the panchayati adalat to pass one sentence for all the three offences and that the Bench was not constituted in accordance with the provisions of S. 49(2), Panchayat Raj Act, as it included only one panch from village Hajiganj instead of two. The case came up for hearing before our brother Raghubar Dayal J., who was of the opinion that — 'Brij Nandan v. Emperor', AIR 1948 All 136 (D), required reconsideration and that the questions that arise in the present case arose in Misc. 2126 of 1951 which he had referred for decision to a larger Bench, and accordingly he referred this case also to a larger Bench.

(15) The facts in — 'Brij Nandan v. Emperor (D)' were that five men were prosecuted under Sections 147, 452 and 323 read with S. 149, I.P.C. and were convicted by a Magistrate, who did not specify the sections under which he convicted them, and passed a sentence of six months' imprisonment and a fine of Rs. 50/-. Our brother Harish Chandra held that the conviction and the sentence were illegal because the Magistrate ought to have specified the offences of which he convicted the applicants and ought to have given separate sentences for the different offences.

He referred to Ss. 367 and 537, Criminal P. C.; but the provisions of the Criminal P. C. do not govern proceedings before a panchayati adalat. A panchayati adalat is not at all bound by its provisions and its orders cannot be held to be illegal on the ground of any conflict with them. It might have been illegal under the Code to convict without specifying the sections or to pass one sentence for a number of offences, but it does not follow that it would be illegal for a panchayati adalat also to record a conviction without specifying the offences and to pass one sentence for all of them. Whether it is illegal or not would depend upon the provisions of the Panchayat Raj Act alone. None of its provisions makes it illegal for a panchayati adalat to record conviction without specifying the offences or to inflict one sentence for a number of offences. The powers conferred upon a panchayati adalat are so wide that nothing that it does is illegal if it does not contravene any specific provision of the Panchayat Raj Act. Therefore it was not illegal for the panchayati adalat to pass one sentence upon the applicants without specifying the offences and it is not necessary for us to reconsider — 'Brij Nandan v. Emperor', (D).

(16) Section 49 (2), Panchayat Raj Act, undoubtedly requires a bench to consist of one panch residing in a Gaon Sabha in which the complainant resides, one panch residing in a Gaon Sabha in which the accused resides and three panches residing in Gaon Sabhas in which neither party resides. According to it, a Bench must consist of exactly five panches. It follows that if both the parties reside in the area of one Gaon Sabha, the bench must include two panches residing in that Gaon Sabha. If it includes only one, the remaining four would come from the areas of Gaon Sabhas in which neither party resides and that would be against the provisions of S. 49 (2). The opposite party is absent, but the State, which is also impleaded as an opposite party, has not denied the allegation of the applicants that the Bench which tried them included only one panch from the Gaon Sabha of Hajiganj and that the parties both reside in Hajiganj. The bench was, therefore, constituted against the provisions of S. 49 (2).

(17) In —'Girja Prasad v. Zalim Singh', AIR 1953 All 340 (E), it was held by our brother Agarwala that S. 49 (2) does not require that if both the parties come from the same Gaon Sabha there should be two panches from that Gaon Sabha. I respectfully differ. In my opinion, the law in S. 49 (2) is clear and the above decision should be overruled. The question was discussed in 'AIR 1954 All 81 (A)', by the learned Chief Justice who does not appear to have accepted the view of Agarwala, J.

(18) I now come to the question of the effect of non-compliance with this particular provision of S. 49 (2). I am of the opinion that the non-compliance causes a jurisdictional defect in the constitution of the bench and that the panches have no jurisdiction to try the case assigned to them. The law insists upon there being exactly five panches in every bench and upon those panches coming from particular Gaon Sabhas. If a bench must include a panch belonging to a particular Gaon Sabha but does not include him or includes more panches belonging to a Gaon Sabha than are required under S. 49 (2), the constitution of the whole bench becomes defective and the panches are devoid of any jurisdiction. If a person has no right at all under the provision to be a member of the bench it means that he has no jurisdiction whatsoever to try the case.

In the present instance, out of the four panches belonging to Gaon Sabhas other than of Hajiganj, one was not qualified to be a member of the bench, though it may not be known which one. In all four of the panches were qualified to be members and the fifth, on account of his disqualification should be treated as not a member. The law requires a bench of not more than, and not less than, five panches. Hence the bench, being of only four members, was not legally constituted and had no right to try the case. In other words it had no jurisdiction over the subject matter of the case.

I may mention here that the provision that a bench must include five panches is not inconsistent with the provision contained in S. 77A to the effect that if on any date a panch is absent on account of illness etc., the remaining panches may go on with the case provided that at least three of them including the chairman are present. One deals with the constitution of a bench and the other, with presence of its members during the trial of a case. What the two provisions considered together mean is that a bench must consist of five panches, that it is not essential for all of them to be present on every date of hearing and that if at least three panches, including the chairman, are present, they can try the case. The fact that three panches are allowed to try the case does not mean that there is no jurisdictional defect if a bench is constituted with only four or even three panches, or with five panches, one or more of whom possess no residential qualification to be members of it.

(19) The analogy of a High Court having a number of Judges, any number of whom can form a bench to try any case, does not apply to a panchayati adalat. All Judges of a High Court are equally qualified to try any case, but all panches of a panchayati adalat are not equally qualified to try any case. The creation of a Bench of any Judges of a High Court to try any case is not in contravention of any statutory or constitutional provision; on the other hand the creation of a bench of five panches to try a case may contravene the provisions of S. 49. The Constitution vests the power in the High Court and not in its divisions but the Panchayat Raj Act does not vest the power in the panchayati adalat and vests it only in a particular department or bench of it. An offence is triable by a panchayati adalat but not by all or any of its panches; it is triable only by particular five panches possessing certain qualifications and selected by the Sarpanch in a particular order. A list is prepared of all the panches of a panchayati adalat in alphabetical & the Sarpanch has to select five panches possessing the necessary residential qualifications serially turn by turn from it; see R. 84 (2) of the Rules framed by Government under the Act. Only the panches selected by the Sarpanch can try a case; no other panch can try it.

(20) If a court is not constituted in accordance with the law it has no jurisdiction to act as such. In — 'Queen Empress v. Ganga Ram', 16 All 136 (FB) (F), a Full Bench of this Court was called upon to decide whether a Judge of this Court was appointed in accordance with the law and was competent to hear a case. It held that he was legally appointed but observed, though by way of obiter, at page 156, that if he were not legally appointed

> "all his judgments, decrees and orders in civil and criminal cases would have been ultra vires and illegal".

In — 'The Colonial Bank of Australasia v. Willan', (1874) 5 PC 417, at p. 442 (G), the Judicial Committee explained what is meant by "want of jurisdiction". It pointed out that there must be certain conditions upon which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends and that they may be founded

> "either on the character and constitution of the tribunal, or upon the nature of the subject matter of the inquiry".

This supports the view that illegal constitution of a tribunal is a jurisdictional defect. It is stated by Craies in his "Interpretation of Statutes", (1952) p. 246 that

> "when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin the conditions and qualifications annexed to the grant must be strictly complied with".
>
> "A Judge, who is prohibited from sitting by the plain directions of the law, cannot sit, & the consent that he shall sit gives no jurisdiction"; per Peckham, J. in — 'MeClaughry v. Deming', (1902) 46 Law Ed 1049, at p. 1057 (H)".

If the quorum for a bench of Magistrates is fixed at three and only two Magistrates are present, the bench is not legally constituted; see — 'Queen Empress v. Muthia', 16 Mad 410 (I). The reason is, as stated in — 'Textile Mills Securities Corpn. v. Commr. of Internal Revenue', (1941) 86 Law Ed 249 (J), that a court consists of all the Judges appointed to it. A rule made under the Bar Councils Act, 1926, required that all the members of a tribunal must sign their findings. — 'In re V., An Advocate,Madras', AIR 1942 Mad 267 (SB) (K), a member of a tribunal died before the findings were written out and could be signed and it was held by a Special Bench of the Madras High Court that the tribunal ceased to be properly constituted on his death.

The Supreme Court dealt with a similar defect in a tribunal established under the Industrial Disputes Act in the — 'United Commercial Bank Ltd. v. Their Workmen', AIR 1951 SC 230 (L). The tribunal was constituted with three members but one member ceased to be available to it and the Supreme Court decided that the remaining two members had no jurisdiction to function as tribunal. Kania, C. J. observed on page 237:

> "In our opinion, the position here clearly is that the responsibility to work and decide being the joint responsibility of all the three members, if proceedings are conducted and discussions on several general issues took place in the presence of only two, followed by an award made by three, the question goes to the root of the jurisdiction of the Tribunal and is not a matter of irregularity in the conduct of those proceedings."

Maxwell writes in his Interpretation of Statutes, 9th edition, paragraph 371:

> "An Act which empowered two or more Justices, or other persons, to do an act of a judicial, as distinguished from a ministerial, nature impliedly required that they should all be personally present and acting together in its performance."

(21) Jurisdiction means "the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them"; — 'State of Rhode Island v. Commonwealth of Massachusetts', (1838) 9 Law Ed 1233 (M); — 'Sample v. Hager', (1866) 18 Law Ed 402 (N); 'Binderup v. Pathe Exchange', (1923) 68 Law Ed 308 (O). Moody, J. described it in — 'Venner v. Great Northern Rly. Co.', (1907) 52 Law Ed 666 (P), as

> "the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence".

According to Corpus Juris Securdum, Vol. 22, "Criminal Law", paragraph 107, jurisdiction as applied to criminal law means the power to enquire into the facts, to apply the law and to declare the punishment for an offence in a regular course of juridical proceeding or the right of administering justice through laws by the means which the law has provided for that purpose. Therefore if a bench of a panchayati adalat is not constituted in accordance with the law and therefore, cannot try the case to try which it is constituted, it is devoid of jurisdiction over it, whether the defect in the constitution arises out of there being not exactly five panches or out

of there being five panches, one or more of whom are not qualified to sit on the bench.

(22) It is elementary that there can be no waiver of want of jurisdiction. If the jurisdiction of a court is a grant of authority to it by a legislature, it is beyond the scope of litigants to confer it. Territorial jurisdiction stands on a different footing; though defined by a legislation it relates to the convenience of litigants and as such is subject to their disposition. A personal privilege respecting the venue or place of a suit may be waived or lost by failure to assert it seasonably; see — 'Neirbo Co. v. Bethlehem Ship Building Corpn.', (1939) 84 Law Ed 167 (Q), and — 'Industrial Addition Association v. Commr. of Internal Revenue', (1944) 89 Law Ed 260 (R). In criminal matters parties cannot waive what the law directs; see — 'Park Gate Iron and Co. Ltd. v. Coates', (1870) 5 CPD 634 (S).

It is stated by Maxwell at page 392 that

"In criminal matters, a person cannot waive what the law requires"

and that

"any statutory objection which goes to the jurisdiction does not admit of waiver",

and at 391 that

"When public policy requires the observance of the provision, it cannot be waived by an individual. Privatorum conventio juri publico non derogat".

It was pointed out in — 'Patton v. U. S.', (1929) 74 Law Ed 854 (T), that one of the circumstances that gave rise to the ancient doctrine that an accused cannot waive anything was that he was not furnished counsel. Under the Panchayat Raj Act also an accused is not allowed the assistance of counsel; therefore it would not be proper to hold that he waives a defect in jurisdiction on account of his failure to object to it in time. An essential requisite of the doctrine of waiver is that the party knows of the irregularity. If he does not know of it he cannot be said to waive it. Waiver is always a question of fact and there can be no waiver without knowledge as observed in — 'Pence v. Langdon', (1878) 25 Law Ed 420 (U).

Though ignorance of law is no excuse, an accused in fact may not know that the bench constituted by the Sarpanch to try him is not constituted in accordance with the provisions of S. 49, Panchayat Raj Act and if on account of his ignorance does not object to the Bench trying him, it cannot be said that he waives the defect. A Full Bench of the Patna High Court observed in — 'Ramranvijai Prasad Singh v. Ram Kawal', AIR 1949 Pat 139 (FB) (V), that if a court has competence in respect of the person, the place and the character of the case, it may exercise jurisdiction, that if by reason of any limitation imposed by statute, a court is without jurisdiction to entertain any particular action, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court and that a different question arises when it is suggested that a court in the exercise of the jurisdiction, which it possesses, has not acted according to the mode prescribed by the statute. If such a question is raised it relates obviously not to the existence of jurisdiction but to the exercise of it in an irregular or illegal manner and the maxim 'consensus tollit errorem' applies. Maxwell writes at page 390 that:

"The regulations concerning the procedure and practice of civil courts may in the same way be waived by those for whose protection they were intended."

"Matters upon which the jurisdiction of the court depends, since they do not refer to matters of procedure which are enacted for the benefit of the individual, cannot be waived"; see Crawford on Statutory Interpretation, paragraph 272.

W. Bowsted writing in Encyclopaedia of the Laws of England, Vol. 14, under article "Waiver" says that a statutory provision which is introduced for general public purposes, and not for the benefit of a particular person only, cannot be waived. The provision in S. 49 (2) that a bench must include one panch who resides in the area of the Gaon Sabha in which the complainant resides and one panch residing in the area of the Gaon Sabha in which the accused resides, cannot be said to have been enacted for the purpose of any individual. If a bench includes only one panch residing in the area of the Gaon Sabha in which both the parties reside, it cannot be said that the provision that is infringed is one enacted for the benefit of any particular party only and that he can waive the irregularity. The two panches have to be of one Gaon Sabha but not of opposite factions in the village and it cannot be said that the legislature contemplated that when there are two panches residing in the common Gaon Sabha, one would side with or vote for the complainant or look after his interests and the other would side with or look after the interests of the accused.

There is no assumption that the two panches would take opposite views of the case and balance each other. The law requires two panches from the common Gaon Sabha not with any such intention. They are as likely to be on one side as to be on opposite sides. Even if a bench includes only one panch from the Gaon Sabha and he has given his opinion in favour of the accused, the accused can plead that the bench was illegally constituted because there was no second panch from the common Gaon Sabha. He can raise this objection even if, for all one knows, the second panch from the common Gaon Sabha, might have given his opinion against him. S. 49 was enacted with a view to reduce the discretion of the Sarpanch in the matter of constituting a bench as much as possible. It was only a fair provision that there should not be a preponderance of panches residing in a Gaon Sabha in which one of the parties resides; otherwise there would be a danger of judgment being subordinated to local prejudice.

(23) Coming to the cases decided under the Panchavat Raj Act, I find some conflict in them. One of the earliest cases decided is — 'Jiwa Ram v. Panchayati Adalat, Gursena', AIR 1952 All 510 (W). In that case an order was passed by only three panches and was, on that very ground, held to be "without jurisdiction" by our brothers

Sapru and Agarwala. There was no defect in the constitution of the bench; it had five panches, presumably of the required qualifications. Three of them passed the order in accordance with a rule framed by the State Government. The rule was held by our brothers to be ultra vires. The bench had jurisdiction and rightly proceeded to exercise it over the case; it was only in the course of the exercise of the jurisdiction that it committed the illegality. It is not known if any objection was raised to the order being passed by only three of the panches; probably it was not. Still our brothers held that the order was void for want of jurisdiction. A case in which the bench itself was not constituted in accordance with the law stands on a higher footing.

'Ram Prasad v. State', AIR 1952 All 843 (X), followed the decision in — 'Jiwa Ram's Case (W)', In — 'Musai Bhant v. Ganga Charan', AIR 1953 All 118 (Y) our brothers Sapru and Agarwala had to deal with a case in which the bench did not include a panch residing in the area of the Gaon Sabha in which the accused resided. The defect was held to affect the jurisdiction of the bench and its order was quashed on that ground. I notice that it was quashed in spite of the fact that the accused did not object to the constitution of the bench while the case was pending before the Panchayati Adalat. They took the objection for the first time, and that too not in very clear terms, in their application to the Sub-Divisional Magistrate under S. 85, Panchayat Raj Act. If they could have waived the illegality in the constitution of the bench, they could have done it only by not objecting to the illegality while the case was pending before the panchayati adalat. Whatever they did subsequently could not possibly affect the question of waiver. If they waived the illegality and could waive it, they could not have succeeded in the court of the Sub-divisional Magistrate at all. Under S. 49 (3) no panch can take part in any case to which he or any near relation is a party or in which he may be personally interested.

In 'AIR 1952 All 963 (C)', that provision was infringed and a panch who was personally interested in the case took part in trying it. Our brothers Sapru and Agarwala set aside the order of the panchayati adalat on that ground. Under R. 84, Panchayat Act Rules, if it is not possible for a Sarpanch to constitute a bench in accordance with the provisions of S. 49, a special bench is to be constituted by the Sub-divisional Magistrate. In — 'Kameshwara Singh v. Bharat Koeri', AIR 1953 All 180 (Z), I quashed an order, passed by an ordinary bench when a Special Bench ought to have been constituted, as an order without jurisdiction. In — 'Jodhye v. State', AIR 1952 All 788 (Z1), our brother Beg set aside an order passed by a panchayati adalat consisting of five panches constituting a bench and the Sarpanch as the sixth member.

In 'Harihar Tewari v. State', AIR 1952 All 489 (Z2) (Supra), a case again decided by our brothers Sapru and Agarwala it was contended that the bench did not include two panches residing in the Gaon Sabha in which the parties resided. Sapru, J. found that the contention was not substantiated. Agarwala J. held that even if there was only one panch from the common Gaon Sabha, the illegality could be, and was, waived by the accused. I respectfully differ from his opinion that the provisions in S. 49 (2) do not refer to the capacity of a panch for being a member of a bench and have therefore no effect upon his jurisdiction over the subject matter of the case. This case marks a departure from the previous decisions. If a panch does not possess the requisite residential qualification and cannot be appointed to a bench, it necessarily means that he has no jurisdiction to try the case and that a bench of which he is a panch has likewise no jurisdiction to try the case. The residential qualification is one on which depends the right of a panch to be a member of a particular bench.

Further, Agarwala, J. observed at pp. 490-491 that the provision like the one under consideration which is intended solely for the benefit of one of the parties is not a provision which affects the existence of jurisdiction; it merely affects its exercise and can be waived. As I said previously, the provision under consideration is not in ended solely for the benefit of one party or the other. The legislature did not intend that the panch residing in the area of the Gaon Sabha in which the complainant resides should support him and that the other panch should support the accused. It would have been useless for the legislature to have two panches who would oppose each other; it would have been as good as not having either of them on the bench. Really the provision is based upon public policy.

Moreover, as the provision deals with the very constitution of a bench, it deals with the existence of jurisdiction of a bench and not with the exercise of jurisdiction. When an illegality is committed by a court, it must have been committed by assuming jurisdiction over the case, or later while exercising jurisdiction vested in it. If a Bench illegally constituted tries a case, it commits an illegality by the very act of assuming jurisdiction over it, and not while exercising jurisdiction vested in it. In other words, the illegality is a jurisdictional defect. The illegality of constituting the Bench is committed by the Sarpanch; the Bench is not responsible for it. Both it cannot derive jurisdiction from the Sarpanch, if he acts against the law, and cannot try the case just because the Sarpanch assigns the case to it. If still it proceeds to try it, it assumes juridiction not vested in it; and this illegality cannot be waived by either party.

In 'AIR 1953 All 340 (E)', Agarwala, J. held that S. 49 (2) does not contemplate a case in which both the parties reside in the area of one Gaon Sabha and that if they do it is enough if the bench includes one panch only residing in that area. S. 49 (2) applies in all circumstances. It is not unusual or strange for both the parties to come from the area of one Gaon Sabha; as a matter of fact in a majority of cases they would come from the area of one Gaon Sabha. Our brother did not consider how a Sarpanch can comply with the requirement that a bench must have three panches, none of whom resides in the area of the Gaon Sabha in which either

party resides, if it has only one panch residing in that area of the Gaon Sabha in which the parties reside. In an earlier case — 'Kuleshwar v. State', Cri. Revn. No. 1322 of 1950 D/- 15-5-1952 (All) (Z3), our brother Brij Mohan Lall had held that a bench which does not include two panches residing in the area of the common Gaon Sabha is improperly constituted; that decision is not referred to by Agarwala, J.

In 'Mohar Singh v. State', (A), (Supra) it seems to have been accepted that the provision under consideration does require that a bench must include two panches residing in the area of the Gaon Sabha in which both the parties reside, but an infringement of it was held not to go to the root of the jurisdiction of the bench. In my opinion, that decision requires re-consideration in view of what I have said above. If there are more than one complainant residing in the area of more than one Gaon Sabha or more than one accused residing in the area of more than one Gaon Sabha, all that the provision requires is that there must be one punch from each of the areas. The provision does not require that there the panches residing in the areas of all Gaon Sabhas in which every complainant and every accused resides. Cases may arise in which the requirement that the remaining three panches must come from areas of the Gaon Sabhas in which neither party resides cannot be fulfilled; it may happen that there are several complainants or several accused and there is no Gaon Sabha, in the area of which one complainant or one accused does not reside. The legislature, however, has provided for such a contingency by authorising the State Government to prescribe rules for the constitution of special benches.

Accordingly the State Government have made R. 84 (3) to the effect that if a Sarpanch finds any difficulty in forming a bench according to the provisions of S. 49, he should submit the papers to the prescribed authority who will constitute a special bench. The prescribed authority is empowered under R. 84 (d) to constitute a bench either in accordance with the provisions of S. 49 (2) or in accordance with the provisions of R. 84 (a). There are two different sets of circumstances in which a Sarpanch may find it difficult to form a bench and is empowered to refer the matter to the prescribed authority. One is when he or any of his relations etc., is a party and he feels embarrassed in forming a bench; in such a case a bench can be formed in accordance with the provisions of S. 49 (2) and the prescribed authority must form a bench according to them. The other set of circumstances is that the Sarpanch cannot form a bench in accordance with the provisions of S. 49 (2) and in such a case the prescribed authority is required to form a special bench under R. 84 (a). When forming a special bench he is not guided by the provisions of S. 49 (2) at all; this is evident from the fact that the matter is referred to him just because it is not possible to comply with those provisions.

I may also refer to R. 84 (d) which allows a party to a case who is "dissatisfied with the personnel of a bench constituted for its hearing" to make an application to the Sarpanch "stating the grounds of his dissatisfaction and requesting for the reconstitution of the bench" and empowers the Sarpanch to constitute a fresh bench

> "if the party concerned proves to the satisfaction of the Sarpanch that the inclusion of a particular panch of panches in the bench would be prejudicial to fair trial".

Under these provisions, a party can object to the constitution of a bench only when he is dissatisfied with the personnel and apprehends miscarriage of justice. They do not permit him to object solely on the ground that the constitution is against the provisions of S. 49 (2). If a bench is constituted in contravention of those provisions, it cannot be said that either party would be dissatisfied with the personnel or that the non-compliance with the provisions would be prejudicial to fair trial. Even if the bench is not constituted in accordance with those provisions, it may do full justice in the case and its personnel may satisfy both the parties. Because it satisfies both the parties, its constitution is not justified and it cannot assume jurisdiction over the case. There is no provision in the Act or in the Rules giving a right to a party to object to the constitution of a bench only on the ground that it is against the provisions of S. 49 (2). Therefore, if a party fails to object to the constitution seasonably, it cannot be said to have failed to have recourse to a remedy prescribed by the law and thereby to have been estopped from objecting to in a subsequent proceeding.

(24) In the result, I find that the bench which tried the applicants was illegally constituted and had no jurisdiction to try them and that the defect in the jurisdiction could not be, and was not, waived by the applicants. The order of the panchayati adalat convicting them was void for want of jurisdiction and deserved to be set aside.

(25) A panchayati adalat is a court subordinate to a High Court and amenable to its powers of superintendence. These powers include power to interfere with a judicial order, though only on the ground that it is in excess of jurisdiction, or passed without jurisdiction or involves refusal to exercise jurisdiction which vests in a subordinate court. Prior to the enforcement of the Constitution, this High Court had no power to issue writs of certiorari, mandamus and prohibition. There was, therefore, no occasion then for considering whether the powers of superintendence should be exercised through such writs or might be exercised in some other manner.

Now, the Court has the power to issue such writs and the question arises whether the powers of superintendence should be exercised through the issue of such writs or by passing a simple order cancelling or revising the order passed by the subordinate court or tribunal. The Queen's Bench of England exercises its superintending jurisdiction over subordinate courts and tribunals through the issue of the writs of certiorari, mandamus and prohibition; see — 'Shiva Nathaji v. Joma Kashinath', 7 Bom 341 (FB)

(Z4); — 'Ryots of Garabandho v. Zamindar of Parlakimedi', AIR 1942 PC 164 (Z5); 'Province of Bombay v. K. S. Advani', AIR 1950 SC 222 at pp. 224, 225 (Z6). The Law of Extraordinary Legal Remedies by Ferris, 1926, p. 255, Short & Mellors' Practice of the Crown Office, 1890, p. 19, — 'Ex parte Bradely', (1868) 7 Wall, 364 (Z7), and Schwartz's Law and the Executive in Britain, 1949, p. 156. Therefore, the powers of superintendence conferred upon all High Courts by Art. 227 of the Constitution should be exercised through any of the writs of certiorari, mandamus and prohibition and not otherwise. If the remedy of certiorari etc., is not open to a person aggrieved by an order of inferior court or tribunal, it would mean that a High Court has no power to interfere with it; Art. 227 does not confer any other power upon it and it cannot interfere with the order even though no certiorari, mandamus or prohibition can lie against it.

(26) In 'AIR 1954 SC 215 (B)', the Supreme Court laid down that Art. 227 confers not only administrative but also judicial superintendence over subordinate courts and tribunals. In that case the Judicial Commissioner of Himachal Pradesh on an application under Arts. 226 and 227 both set aside an order of a Rent Controller on the ground that it was arbitrary and, therefore, without jurisdiction. Evidently the question whether the powers of superintendence are to be exercised only through an appropriate writ or can be exercised even when the remedy of a writ is not open to the aggrieved party or can be exercised without the issue of an appropriate writ did not arise before, and was not decided by, the Supreme Court. But the Supreme Court did not hold that even when a writ of certiorari etc., can lie, an aggrieved party can invoke the powers of superintendence of Art. 227 and not those of Art. 226.

It seems to me that the existence of a remedy through an appropriate writ bars an aggrieved party's invoking powers of superintendence of the High Court under Art. 227; this necessarily follows from the propositions, which are beyond controversy now, that the superintending jurisdiction exists to correct only such errors as can be corrected through a writ of certiorari etc., and that the superintending jurisdiction is exercised through the issue of one of such writs. If a party is aggrieved by an order of a subordinate court or tribunal, against which he has no statutory remedy, he must apply for an appropriate writ or he would have no remedy from a High Court. If under the superintending jurisdiction a High Court can issue an order or direction, it can only be in co-operation with, or ancillary to, a writ of certiorari, mandamus or prohibition. Only to this extent can a High Court in exercise of its superintending jurisdiction issue an order or direction which is not of the nature of a writ of certiorari etc. The order of the panchayati adalat was passed without jurisdiction and could be quashed by a writ of certiorari; therefore, the applicants' remedy was to apply for a writ of certiorari and not under Art. 227 of the Constitution. For this reason I would dismiss the application.

BY THE COURT.

(27) The application is dismissed. Having regard to the facts of the case, we make no order about the costs.

D.R.R. Application dismissed.

AIR 1955 ALLAHABAD 122 (Vol. 42, C.N. 42)

FULL BENCH

MALIK C. J., AGARWALA AND V. BHARGAVA JJ. (3-11-1954)

Lachmi and others, Applicants v. Somaroo and others, Opposite Parties.

Misc. Writ No. 92 of 1953.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 49 — U. P. Panchayat Raj Rules (1947), R. 84 — Power of Sarpanch under S. 49 — Replacement of two out of five panches — Legality.

Although under the U. P. Act 26 of 1947 if the Panches, capable of acting, are less than three the Sarpanch should have the power to constitute a new Bench, if three Panches are still available who can function, the Sarpanch has no right to interfere and appoint new Panches to replace the old one or put in a new Bench to replace the old Bench. The Act nowhere provides for the removal by the Sarpanch of a validly nominated panch to a Bench except in a case coming within the provisions of R. 84-D. To hold that the Sarpanch has got full discretion to interfere with a Bench and replace one panch by another at any time during the pendency of a case, even after the hearing has been commenced and a part of the evidence has been recorded, would not only be against the rules of natural justice but might result in serious abuse of power. (Paras 7, 8)

(b) U. P. Panchayat Raj Act (26 of 1947), S. 49 — U. P. Panchayat Raj Rules (1947), R. 84D — Replacement of two out of five panchas — Objection not taken under R. 84-D — Writ petition — No interference — (Constitution of India, Arts. 226, 227)).

The Act makes it clear that the Panchayati Adalat is not bound by technical rules of procedure or evidence and the High Court is therefore, always reluctant to interfere with decisions of a Panchayati Adalat on technical grounds. The provisions of S. 49 (2) do not go to the root of the jurisdiction of the Bench and if no objection under R. 84-D was taken to the constitution of the Bench it was not open to the accused to raise that point in a writ petition under Art. 226 or 227 of the Constitution. AIR 1955 All 113 (FB), Relied on. (Paras 9, 10)

Anno: Const. of India, Art. 226 N. 7h; Art. 227 N. 3.

CASE REFERRED: Para

(A) (V42) AIR 1955 All 113: (in Criminal Misc. No. 1974 of 1951 D/- 12-10-1954 All) (FB) 10

Sirish Prasad, for Applicants; Jagnandanlal, for Opposite Party.

MALIK C. J.:

This case was referred to a Full Bench by a learned Single Judge, as in his view, an impor-

tant question of law arose for decision which was likely to arise in other cases.

(2) A complaint was filed by one Sumaroo against Roop Narain and his two sons, Lachmi and Bhaggan, under certain sections of the Indian Penal Code. The Sarpanch constituted a Bench of five Panches whose names were Parshotam Dass, Chairman, Raghunath Prasad, Misri Lal, Harihar Prasad and Ram Lakhan. During the course of the proceedings, it appears that two of the Panches, Harihar Prasad and Ram Lakhan, were replaced by two new panches Bhagirathi and Ram Adhar Singh.

As regards Bhagirathi there is a paper on the file, paper No. 21 from which it appears that a report was made by Parshotam Dass, Chairman, and Misri Lal that Harihar Prasad was not in Banaras and that, therefore, some difficulty was felt in getting the quorum. On this report the Sarpanch passed an order that the only other panch available from the Gaon Sabha of one of the parties was Bhagirathi and, therefore, he was being appointed.

It was said by the learned counsel at the Bar that Ram Lakhan had fallen ill and he was replaced by Ram Adhar Singh. The fact that Ram Lakhan was replaced by Ram Adhar Singh is mentioned in the supplementary affidavit and it is not denied in the counter-affidavit filed on behalf of the complainant, but in what circumstances and on what date is not clear from the file.

(3) On the 3rd August, 1952, the three Panches originally appointed, that is, Parshotam Dass, Ragunath Prasad and Misri Lal and the two new panches, Bhagirathi and Ram Adhar Singh, delivered a judgment in the case. Bhagirathi gave a dissenting judgment and the other four decided in favour of the complainant and convicted the accused and sentenced them to pay various amounts as fine. There was a revision filed against that order in the court of the Sub-Divisional Magistrate, Ist Class, Banaras, but the learned Magistrate dismissed the revision on the 26th of November, 1952.

(4) The only two points dealt with by him were, firstly, whether the charge was read out to the accused and, if not, whether any prejudice had been caused to the accused and, secondly, whether the Chairman was present on all the dates of hearing. The Magistrate held that the charge had been read out to the accused and that there was no satisfactory evidence that the Sarpanch had not attended on all the dates of hearing.

(5) The two points raised before the learned Magistrate were not taken before us. The point raised in this Court is that once the Panches have been nominated by the Sarpanch he cannot replace them by new Panches.

(6) Section 49 of the U. P. Panchayat Raj Act (Act No. XXVI of 1947) provides that after a case, suit or proceeding has been instituted the Sarpanch has to form a Bench consisting of five panches in accordance with the provisions of that section. The Sarpanch in this case did constitute a Bench of five Panches in accordance with the provisions of S. 49.

Section 77-A provides that "If any Panch appointed to a bench constituted under S. 49 for the trial of a case, suit or proceeding is absent at any hearing, the remaining Panches may, notwithstanding anything contained in this Act try the case, suit or proceeding provided, however, that at least three panches, including the chairman, are present and provided further that at least one of the panches present is able to record evidence and proceedings. The mere absence, therefore, of a panch does not affect the proceedings and it is possible for three Panches to continue the trial provided the Chairman and a panch who is literate enough to record the proceedings are available.

Rule 84-B, framed under S. 110 of the Act, provides that where there is disagreement among the Panches constituting a bench, and by reason thereof it is not possible for them to give a decision by the opinion of the majority, the Sarpanch may constitute another bench but no panch, who was a member of the former bench, can be appointed to the new bench.

The only other rule that need be mentioned is R. 84-D which provides that if any party to a case, suit or proceeding is dissatisfied with the personnel of the bench constituted for its hearing, he has to immediately on receiving information about the constitution of the Bench and before commencement of hearing of the case, suit or proceeding, make an application to the Sarpanch stating the ground of his dissatisfaction and request for the reconstitution of the bench. In such a case the Sarpanch has the power to reconstitute the bench.

These are all the provisions contained in the Act and the Rules about constitution of Benches by the Sarpanch. There appears to be no provision in the Act or the Rules for appointment of a new Panch in place of a Panch already appointed and to whose appointment no objection had been taken by the parties.

(7) Section 55 of the Act bars the jurisdiction of courts of law to hear a case which is cognizable by a Panchayati Adalat unless an order has been passed by a Sub-Divisional Magistrate or Munsif under S. 85 quashing the jurisdiction of the Panchayati Adalat. Even in drafting S. 85 of the Act it does not appear to have been kept in mind that there might arise a case where by reason of death, incapacity or other reasons it may not be possible for the Panchayati Adalat to function and give a decision in the case. The relevant portion of the section is as follows:

"If there has been a miscarriage of justice or if there is an apprehension of miscarriage of justice in any case, suit or proceeding, the Sub-Divisional Magistrate ..... may on the application of any party or on his own motion, at any time in a pending case ..... and within sixty days from the date of decree or order, call for the record of the case ....from the Panchayati Adalat and may for reasons to be recorded in writing,

(a) cancel the jurisdiction of the Panchayati Adalat at any stage, or

(b) quash any decree or order passed by the Panchayati Adalat at any stage."

The section empowers the Sub-Divisional Magistrate to quash any decree or order in the interest of justice or to cancel the jurisdiction of the Panchayati Adalat when he apprehends a miscarriage of justice. The case will then have to be tried in the ordinary courts of law.

It has been pointed out that in a case where, say three out of the five Panches are not available on account of death, incapacity or any other reason, it will not be possible for the remaining two to form a quorum. No doubt such a situation can rarely arise but there should be a provision for the reconstitution of a Bench.

One view may be that in such a case there is in fact no Bench and the original position is restored and the Sarpanch can nominate a new Bench for the hearing of the case. He may then re-start in accordance with the provisions of S. 49 and the case can be heard by the new Bench constituted by him, the previous Bench having, by reason of death or incapacity of its members, come to an end.

To illustrate our point we may take a case where all the five Panches nominated by the Sarpanch die. There is then no Bench in existence and there is, therefore, no reason why the Sarpanch should not again act under S. 49 of the Act and constitute a fresh Bench. If the Panches, capable of acting, are less than three, the same result should follow and the Sarpanch should have the power to constitute a new Bench. If, however, three Panches are still available who can function, the Sarpanch has no right to interfere and appoint new Panches to replace the old ones or put in a new Bench to replace the old Bench.

(8) The Act nowhere provides for the removal by the Sarpanch of a validly nominated panch to a Bench except in a case coming within the provisions of R. 84-D. To hold that the Sarpanch has got full discretion to interfere with a Bench & replace one panch by another at any time during the pendency of a case, even after hearing has been commenced & a part of the evidence has been recorded, would not only be against the rules of natural justice but might result in serious abuse of power. A Sarpanch may in that case at his sweet will and pleasure and for reasons of his own that may not be always commendable, replace one Panch by another, if that Panch happens to be absent on account of ill-health or on any other good ground, even though the Act does not make it obligatory on every panch to be present at every sitting of the Bench.

(9) The Act makes it clear that the Panchayati Adalat was not bound by technical rules of procedure or evidence and we are, therefore, always reluctant to interfere with decisions of a Panchayati Adalat on technical grounds. It does not appear from the record of the Panchayati Adalat nor is it suggested in the affidavits filed on behalf of the petitioner, though they have filed several affidavits, that any objection was taken to the nomination of Bhagirathi and Ram Adhar Singh by the Sarpanch. There was a Bench of three Panches properly appointed who functioned throughout & who were parties to the judgment. It is not suggested that the two new Panches, Bhagirath & Ram Adhar Singh, influenced the decision so that the other three Panches might have given a decision different to the one that they gave on the 3rd of August 1952.

(10) We have already said that there is no mention made in the judgment of the learned Sub-Divisional Magistrate that the point was argued before him. In this connection we may refer to R. 84-D which provided that if a party is dissatisfied with the personnel of a Bench, he has to make an objection before the commencement of the hearing of the case immediately on the receipt of the information. If he does not do so he is not allowed to object later on after the proceedings have commenced. In 'Bhagirathi v. The State', AIR 1955 All 113 (FB) (A), it was held that the provisions of S. 49 (2) of the U. P. Panchayati Raj Act do not go to the root of the jurisdiction of the Bench and that if no objection was taken to the constitution of the Bench it was not open to them to raise that point in a writ petition under Art. 226 or 227 of the Constitution.

(11) We are, therefore, not prepared to interfere and dismiss this application but make no order as to costs.

H.G.P. Application dismissed.

(S) **AIR 1955 ALLAHABAD 124 (Vol. 42, C.N. 43)**

MUKERJI J. (21-5-1954)

Nasrullah, Applicant v. State.

Criminal Revn. No. 758 of 1954, against order of S. J., Ghazipur, D/- 8-1-1954.

†**Criminal P. C. (1898), S. 417 — Section does not offend against Art. 14 — Point, however, cannot be raised by private complainant in revision against acquittal — (Constitution of India, Art. 14).**

The fact that a private individual has not been given a right of appeal against acquittal and a State has been given such a right does not offend against the guarantee contained in Art. 14 of the Constitution.

Where the Legislature confers some special benefit or treats the State differently from the treatment it offers to other individuals, there is a classification and the classification is not unreasonable. (Para 1)

The right of appeal is a creature of statute and the statute has not conferred a right of appeal against acquittal on the private complainant. In revision against acquittal by private complainant, the complainant cannot therefore raise the point that he should have a right of appeal since the State has been given such a right. If this question can be raised, it can only be raised in a Government appeal and by an accused, namely, that an appeal should not be permitted, since permitting an appeal to the State alone was opposed to Art. 14 of the Constitution. (Para 1)

Anno: Cr. P. C., S. 417 N. 1.

Syed Sadiq Ali, for Applicant.

ORDER: Mr. Sadiq Ali raised an interesting question in this revision—the question that he raised was that the Government has been given a right of appeal against an acquittal under S. 417 of the Code of Criminal Procedure, while a private complainant, in whose case there is an acquittal, has no such right. It was, therefore, contended by Mr. Sadiq Ali that this differentiation in the treatment between the State and the private individual offended against Art. 14 of the Constitution.

I have no doubt in my mind that the fact that a private individual has not been given a right of appeal and a State has been given a right of appeal from an acquittal does not offend against the guarantee contained in Art. 14 of the Constitution.

Be that as it may, I am of the opinion that the question that Mr. Sadiq Ali has raised cannot be appropriately raised in these proceedings. The right of appeal is a creature of statute and the statute has not conferred a right of appeal on the applicant. He cannot, therefore, come forward and say in a revision against an acquittal that he should have had a right of appeal, since the State has been given a right of appeal. If this question can be raised, it can only be raised, in my view, in a Government appeal and by an accused, namely, that an appeal should not be permitted, since permitting an appeal to the State alone was opposed to Art. 14 of the Constitution.

In my opinion, there is no substance in this plea, for it is well established that where the Legislature confers some special benefit or treats the State differently from the treatment it offers to other individuals, there is a classification and the classification is not unreasonable. On that ground also I see no substance in this plea.

(2) On the merits I see no reason to interfere against this acquittal in my revisional jurisdiction. I, therefore, reject this application.

(3) Mr. Sadiq Ali wishes me to certify this as a fit case for appeal to the Supreme Court. I do not, however, think this a fit case for such a certificate. I accordingly reject the prayer.

R.G.D. Revision dismissed.

(S) **A.I.R. 1955 ALLAHABAD 125 (Vol. 42, C.N. 44)**

RAGHUBAR DAYAL J. (5-7-1954)

Gambhir Kumari, Applicant v. Bishambhar Nath Soni, Opposite Party.

Criminal Revn. No. 1959 of 1953, against Order of Addl. S. J., Dehra Dun, D/- 18-11-1953.

Criminal P. C. (1898), S. 205 — Demand of security while exempting accused from personal attendance.

There is nothing in the Code of Criminal Procedure which provides that security be demanded from an accused person who is exempted from personal attendance at the hearing of a case. The stage for security may arise when the Court is considering the question of calling the accused personally in Court and has reasons to believe that the accused may not obey the summons and, therefore, a warrant be issued against him. Till such contingency arises there is no justification for demanding security from an accused who is exempted from personal attendance at the hearing of a case. (Para 2)

Anno: Cr. P. C., S. 205 N. 5.

L. Chandra and G. S. Pathak, for Applicant; A. G. A., for Opposite Party.

RAGHUBAR DAYAL J.:

This is an application by Maharani Gambhir Kumari against the order of the Additional Sessions Judge of Dehra Dun confirming the order of the City Bench (A) Dehra Dun exempting the applicant from personal attendance at the hearing of a case under Ss. 405 and 406, Penal Code, but modifying the order requiring her to furnish one or two sureties in the sum of Rs. 14 lacs to the effect that she was to furnish a personal bond in Rs. 50,000 and 2 sureties each in like amount.

(2) Personal bond and sureties are required when a person is released from custody. If a person is not in custody no question of granting bail can arise and, therefore, no occasion to demand security. It may be that a certain specific provision of a statute may require the demand of a security from any person. There is nothing in the Code of Criminal Procedure which provides that security be demanded from an accused person who is exempted from personal attendance at the hearing of a case. In fact, Section 205 is the only section which specifically deals with the question of exempting an accused from personal attendance and says that whenever a Magistrate issues a summons he may, if he sees reasons to do so, dispense with the personal attendance of the accused and permit him to appear by his pleader. This section deals with a case where the accused is not in custody.

We have held that every court has inherent power to exempt an accused from personal attendance. I do not see why when personal attendance is dispensed with, the accused be required to furnish security for a certain contingency, the contingency being that the court requires his personal attendance and serves him with a notice of the date on which such attendance is required. Here again, when such a contingency should arise the Court will have the option either to issue a summons to the accused to appear on that date or to issue a warrant, bailable or non-bailable, as may be advisable in the circumstances of the case. The Code of Criminal Procedure lays down the circumstances in which warrants are to be issued instead of summons. The stage for security, therefore, can arise when the Court is considering the question of calling the accused personally in court and has reasons to believe that the accused may not obey the summons and, therefore, a warrant be issued against him. Till such contingency arises there seems to me no justification for demanding security from an accused who is exempted from personal attendance at the hearing of a case.

(3) I, therefore, allow this application in revision and set aside the order of the Court below requiring the applicant to furnish a personal bond in the sum of Rs. 50,000/- & two sureties each in like amount. I confirm the Magistrate's order to this extent only that the applicant's personal at-

tence at the hearing is dispensed with, subject to the Court's calling her when her personal attendance be considered necessary.

V.S.B. Revision allowed

(S) A.I.R. 1955 ALLAHABAD 126 (Vol. 42, C.N. 45)

BRIJ MOHAN LALL J. (30-4-1954)

Brij Mohan Dixit, Applicant v. Gobardhan and others, Opposite Parties.

Revn. No. 465 of 1951 from order of Dist. J., Banaras, D/- 17-11-1950.

Civil P. C. (1908), O. 47, R. 1 — Application to be presented to Judge.

An application for review of judgment should be presented to the presiding officer and not to the Munsarim. 12 All 57, Ref. Observations of Bhargava J. in AIR 1951 All 568, held obiter and dissented from. (Para 8)

Anno: Civil P. C., O. 47, R. 1 N. 2.

CASES REFERRED: Paras

(A) ('89) 12 All 57: 1889 All WN 197 5

(B) (V38) AIR 1951 All 568: 1952 All LJ 111 6

Bishambhar Nath Misra, for Applicant; Gopalji Mehrotra, for Opposite Parties.

ORDER: This is an application in revision by one Pandit Brij Mohan Dixit against an order passed by the learned District Judge of Banaras rejecting his application for review of judgment. The reason given by the learned Judge for throwing out the review application is that it was presented to the Munsarim and not to him (the Judge).

(2) It is contended by the learned counsel for the applicant that it was not obligatory on the part of the applicant to present the petition for review to the Judge personally and that presentation to the Munsarim of the Court amounted to a substantial compliance with law. I have, therefore, to examine how far presentation to Munsarim is permitted by law.

(3) Order 47, R. 1, Civil P. C., lays down that in certain given circumstances and on grounds specified in the said rule any person considering himself aggrieved by a decree or order of a Court may apply for a review of judgment "to the Court which passed the decree or made the order."

Rule 2 imposes further restrictions on the right of presentation of such petitions and lays down that except in certain given circumstances the application for review must be presented to the very Judge who passed the order or made the decree sought to be reviewed. If the learned Judge has been transferred or has, for any other reason, quitted office no petition of the kind contemplated by R. 2 can be presented at all.

What is significant is that there is no indication in either of these two Rules that presentation can be made to any other officer of the Court as distinct from the presiding officer. Whenever it is the intention of the law that presentation to a ministerial officer should be deemed sufficient it has expressly said so.

For instance, it is provided by O. 21, R. 10 that an applicant for execution of decree "shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf.." The words "officer (if any) appointed in this behalf" do not find place either in R. 1 or R. 2 of O. 47. By a comparison of the language of O. 21, R. 10 with the language of Rr. 1 and 2 of O. 47 one is driven unmistakably to the conclusion that it was not the intention of the law to permit presentation of review application before the Munsarim.

(4) Reference may also be made in this connection to the language of O. 16, R. 1 where it is laid down that the parties may obtain "on application to the Court or to such officer as it appoints in this behalf" summonses for attendance of witnesses. The language of this Rule also indicates that wherever the Legislature intended to permit the presentation of any particular application to the Munsarim it has expressly said so.

Again one finds that O. 4, R. 1, Civil P. C., permits the presentation of a plaint "to the Court or such officer as it appoints in this behalf." Order 41, R. 1 enables the appellant to present a memorandum of appeal "to the Court or to such officer as it appoints in this behalf." The absence of similar clauses in Rr. 1 and 2 of O. 47 is not without significance.

A comparison of the language of these Rules leads to the irresistible conclusion that it was never the intention of the Legislature to permit the presentation of the petition of review to the Munsarim of the Court. Such application should be presented, as laid down in R. 1 of O. 47 "to the Court."

(5) In the case of — 'Munro v. Kanpur Municipal Board', 12 All 57 (A) it was held at p. 59 that "the application (for review) should have been presented to the Judge and not to the Munsarim." It is true that no reason was given in support of the above proposition but the fact remains that the view taken by a Divisional Bench of this Court was to the effect that presentation to Munsarim was not proper presentation of an application for review of judgment.

(6) Learned counsel for the applicant has drawn my attention to the case of — 'Ganga Prasad v. Mst. Saroop Dei', AIR 1951 All 568 (B), in which P. L. Bhargava, J. made certain remarks which militate against this view. But it may be pointed out that the remarks were 'obiter dicta'. At column 1, page 569 he remarked as follows:

> "There is nothing on the record to show that the application was presented to the Munsarim. On the other hand, the order-sheet goes to show that the application was presented in Court.."

(7) Since the application was presented in that case to the Court itself and was not presented to the Munsarim the question whether presentation to the Munsarim was or was not proper did not arise for decision. In the circumstances, I am unable, with utmost respect to the learned Judge, to subscribe to the view expressed by him in his 'obiter dicta', viz., that presentation to Munsarim was a proper presentation.

(8) In view of what has been said above I am of the opinion that an application for review of judgment should be presented to the presiding officer and not to the Munsarim. Since the present application was presented to the Munsarim there was no proper presentation and the learned Judge was perfectly right in rejecting it.

(9) There is no force in this revision. It is dismissed with costs.

R.G.D. Revision dismissed.

(S) A.I.R. 1955 ALLAHABAD 127 (Vol. 42, C.N. 46)

MUKERJI J. (26-5-1954)

Sm. Saraswati Devi, Claimant-Applicant v. State.

Criminal Revns. Nos. 842 to 844 of 1953, against the order of S. J., Kanpur, D/- 11-4-1953.

Criminal P. C. (1898), Ss. 88(6A) and 439 — Procedure — Claim to property attached not decided — Revision.

Where the items of property are attached in the belief that they belonged to the declared absconder, and the relatives of the absconder lay claims to them, the law enjoins the Magistrate to investigate the claims and come to a decision and not to resort to letting the objectors pick and choose articles from just one box out of several. (Para 4)

Where the Magistrate asks the objector to pick out his things out of a box, but the objector protests against the procedure and refuses to take just a small portion of the things belonging to him and leaves the court room, the withdrawal under the circumstances can never be interpreted to mean withdrawal of the objection. (Para 5)

If under the circumstances, the Magistrate without deciding the objection, orders the objection to be simply filed a revision is certainly competent, for it is within the jurisdiction of the higher Court to direct a Court subordinate, to act in accordance with law and to give a decision where the law asks that Court to make a decision. (Para 5)

Anno: Cr. P. C., S. 88 N. 10, 11; S. 439 N. 8.

S. N. Katju and T. N. Sapru, for Applicant; J. R. Bhatt, Asst. Govt. Advocate, for the State.

ORDER: These three connected applications in revision arise out of certain objections that were preferred by the three applicants in the three revisions in respect of proceedings under S. 88(6A) of the Code of Criminal Procedure.

(2) It appears that one Chandra Mohan was accused of having committed embezzlement of Government funds while he was in Government employ and was serving as an 'ahalmad' in the Kanpur Collectorate. Chandra Mohan absconded, & on 6-11-1952 he was proclaimed an absconder. On the same day an order was made for the attachment of the property of the absconder Chandra Mohan. Some items of property were attached the same day; other items of property were, however, attached later, that is to say, on 14-11-1952.

(3) After the attachment, objections were preferred by Shyam Mohan the brother of Chandra Mohan, by Pran Chaudhari the mother of Chandra Mohan, and Smt. Saraswati the widowed sister of Chandra Mohan. These three objections were separately preferred, and apparently these three objectors laid claim to different items of property which, according to them, belonged not to the absconder but to the respective objectors.

It appears that Chandra Mohan lived jointly with his mother, widowed sister and his brother Shyam Mohan; at any rate, this was the case of the objectors, and it was because of this joint living that articles belonging to others were attached under a mistaken belief that the articles belonged to the absconder.

(4) The Magistrate fixed a date for the decision of these objections: this date was 17-2-1953. On this date the Magistrate resorted to a very curious procedure. He sent for one of the boxes that had been attached, had it opened and asked the objectors to pick out the articles that according to them were theirs and to take those articles away.

Shyam Mohan was asked to make his selection first, and he selected a few things, namely one shirt, a book of Geeta and other small articles of worship. After Shyam Mohan's 'picking' had been made, the Magistrate asked Smt. Pran Chaudhari to make her selection. This lady refused to pick out things in that manner, and she said that that was not the way for her to select articles. She further said that she was not prepared to take just a small portion of the things that were hers, and after lodging her protest the lady left the court room.

The learned Magistrate thereafter made this order:

"It is no use pursuing the matter any further. Let their objections be filed."

From the aforementioned quotation it is clear that the learned Magistrate did not decide the objections of either of the objectors. The law enjoined the Magistrate to investigate the claims and come to a decision, and not to resort to letting the objectors pick and choose articles from just one box out of several.

(5) Dissatisfied by the order of the Magistrate, the objectors went up in revision to the learned Sessions Judge. The learned Judge dismissed the revisions on two main grounds: first, that the conduct of the lady and the other objectors amounted to a withdrawal of the objections, and secondly, that no order made by a Magistrate under sub-s. (6A) of S. 88 was subject to scrutiny by a higher Court.

According to the learned Judge the only remedy that the objectors had was to file a suit in the civil Court in respect of the properties in dispute.

In my opinion, the learned Judge was wrong in taking this view. The withdrawal of Smt. Pran Chaudhari under the circumstances referred to above could never be interpreted to mean a withdrawal of the objections; indeed, the learned Magistrate did not view it that way, because if that were so, the learned Magistrate would not have said, "let their objections be filed", but would have said, "the objections have been withdrawn".

The learned Judge is also not right when he says that the revision application referred to him was barred. Whether a revision would be barred or not, may be a question which may be debated. But what is, in my view, not debatable is that where there is no decision by a Magistrate on a point on which the law enjoins him to decide, a revision is certainly competent, for it is within the jurisdiction of the higher Court to direct a Court subordinate to act in accordance with law

and to give a decision where the law asks that Court to make a decision.

(6) In my view the learned Magistrate was wrong in the procedure that he followed and he was not justified in not deciding the objections which were preferred by the three objectors in the manner in which the objections should have been decided.

(7) In the result, I allow all the three revisions, set aside the order of the Magistrate dated 17-2-1953 and direct that he should decide the objections of all the three objectors in accordance with law at an early date.

R.G.D. Revisions allowed.

AIR 1955 ALLAHABAD 128 (Vol. 42, C.N. 47)

(LUCKNOW BENCH) RANDHIR SINGH J.

(21-4-1954)

Sheo Murar and others, Applicants v. State.

Criminal Revn. No. 72 of 1953, against order of S. D. M. Malihabad, Lucknow, D/- 27-10-1952.

(a) Criminal P. C. (1898), S. 435 — Applicability to Panchayat Adalat.

Section 435 has no application to a case decided by a Panchayat Adalat. (Para 3)

Anno: Cr. P. C., S. 435 N. 7 Pt. 17.

(b) Penal Code (1860), S. 390 — Theft when is or is not robbery.

Theft will become robbery only if in the committing of theft or in order to the committing of theft or carrying away or attempting to carry away property obtained by theft, force is used. Where, therefore, no force or show of force is found to have been used in the committing of theft, etc., the accused cannot be found guilty of the offence of robbery. AIR 1952 All 785, Disting. (Para 4)

Anno: Penal Code, S. 390 N. 1.

CASE REFERRED: Para

(A) (V39) AIR 1952 All 785: 1952 Cri LJ 1273 4

G. G. Chatterji, for Applicants; R. B. Bisaria, for Addl. Govt. Advocate, for the State.

ORDER: This is an application in revision under Ss. 435/439, Criminal P. C., and under Arts. 226 and 227 of the Constitution of India against the order of S. D. M. Malihabad, Lucknow dismissing an application in revision against the order passed by the Panchayati Adalat, Gonda Moazam Nagar.

(2) It appears that a complaint was instituted under Ss. 379/511/504/506, Penal Code, before the Panchayati Adalat of Gonda Moazamnagar. The allegations made by the complainant were that his gram crop was being stealthily removed from his field. When he noticed the loss on the 17th March and again on 18-3-1952 he made a complaint to the Mukhia, who asked him if he suspected anybody of the theft. The complainant told the Mukhia that he had no idea as to who had committed the theft. The Mukhia advised him to keep a watch and find out the culprits.

The complainant then sat stealthily near the 'mend' of his field on the evening of 19-3-1952, when at about 7 p.m. the four applicants came to the field. They had lathis in their hands. They looked on all sides and then started uprooting gram plants. Just then the complainant emerged from his hiding and challenged the applicants. The applicants then chased the complainant, abused him and decamped. This was followed by a complaint to the Panchayati Adalat. The Panchayati Adalat found the applicants guilty and imposed a fine of Rs. 30/- under Ss. 379/511 and Rs. 25/- and Rs. 20/- respectively under Ss. 504 and 506, Penal Code. The applicants went in revision under S. 85, Panchayat Raj Act, to the Sub-Divisional Magistrate who dismissed it. They have now come up to this Court in revision.

(3) It is conceded by the learned counsel appearing on behalf of the applicants that S. 435, Criminal P. C., has no application to this case and the learned counsel for the applicants has stated that he confines his application to Art. 227 of the Constitution.

(4) The only point which has been pressed on behalf of the applicants was that the facts disclosed in the complaint made out an offence of robbery under S. 390, Penal Code, and such a case could not be heard by a Panchayati Adalat. Reliance has been placed on a decision of this Court in — 'Sant Prasad v. The State', AIR 1952 All 785 (A). Section 390 defines the offence of robbery and the relevant provisions are as follows:

> "Theft is "robbery" if, in order to the committing of the theft, or in committing the theft or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint."

It would, therefore, appear that theft would become robbery only if in the committing of the theft or in order to the committing of theft or carrying away or attempting to carry away property obtained by theft, force is used. In the present case the Panchayati Adalat found and the allegations were also to that effect that the culprits neither took away the property nor attempted to use force while in the act of committing theft. They were detected and in order to escape away, it appears, they made use of a show of force. Such an offence would not, therefore, be covered by the definition of the word "robbery" as given in S. 390, Penal Code.

In the reported case of — 'AIR 1952 All 785 (A)' referred to above, it was in the act of committing theft and in the act of carrying away stolen property that hurt was caused. It was held under those circumstances that the offence amounted to robbery. The reported case has no application to the facts of the present case. The applicants did not use force or show of force in the act of committing theft or in attempting to take away stolen property in the present case and the offence of which they have been found guilty could not, therefore, be said to be robbery. The Panchayati Adalat had, therefore, jurisdiction to take cognizance of the case.

(5) No other point has been pressed in arguments. The application for revision is, therefore, dismissed.

V.S.B. Revision dismissed.

(S) A.I.R. 1955 ALLAHABAD 129 (Vol. 42, C.N. 48)

(LUCKNOW BENCH): MALIK C. J. AND V. BHARGAVA J. (27-9-1954)

Dr. Brijendra Swarup, Applicant v. Election Tribunal at Lucknow and others, Opposite Party.

Civil Misc. Appln. No. 99 of 1953.

(a) Representation of the People Act (1951), Ss. 84, 98 and 100 — One candidate returned — Election challenged — Only one declaration can be claimed.

The view that where there is only one returned candidate, reliefs in Cls. (a) and (c) of S. 84 will overlap is not sound. To such a case relief in Cl. (c) of that section will not apply at all and it is relief in Cl. (a) that will be applicable. The words "any one of the following reliefs may be claimed" in S. 84 will become wholly redundant if it is open to a petitioner to claim more than one relief. Further S. 98 makes it clear that each relief is separate and distinct and either one or the other can be granted, whichever may be appropriate to the relief claimed. (Paras 7, 8)

Where election of one returned candidate is being challenged under S. 84, naturally the other candidates, though they may be parties to the proceedings, are not interested, and it will be against the rules of natural justice if the entire election is held to be void, even though the relief claimed is that the election of a particular returned candidate be held to be void. Similarly, the election as a whole cannot be held to be void, if the charges under S. 100(1) are not made out, merely on the ground that one of the returned candidates was guilty of irregularities mentioned in sub-section (2) of S. 100. (Para 7)

(b) Representation of the People Act (1951), Ss. 84, 81 and 83 — Effect of Ss. 81 and 83 on construction of S. 84.

The provisions of S. 81 and S. 83 do not necessarily indicate that the relief claimed under S. 84 does not really matter and the Tribunal is entitled to grant any relief that it may consider appropriate. (Para 7)

(c) Representation of the People Act (1951), S. 100 — Scope of sub-sections (1) and (2).

Sub-section (2) of S. 100 deals with irregularity or illegality or any corrupt practice indulged in by a particular candidate whose election is challenged, while S. 100(1) is of a more general nature and is not aimed at corruption, illegality or irregularity indulged in by a particular candidate but the corruption, illegality or irregularity which were much more wide spread and general in nature and were likely to have affected the whole election. The question is more or less a question of substance and of degree. (Para 9)

(d) Representation of the People Act (1951), S. 84 — Election Rules, Rule 119 — Period of limitation.

For a petition challenging an election the period of 14 days applies to a claim under S. 84(a) and (b) of the Act, while the period of 60 days applies to a claim under S. 84(c) of the Act. (Point conceded). (Para 6)

Inayat Ullah, Iqbal Ahmad, Saraswati Pd., H. D. Srivastava and S. D. Misra, for Applicant; P. D. Tandon and Mani Kant Tewari and R. N. Misra, for Opposite Party (No. 5).

MALIK C. J.:

This is an application under Art. 226 of the Constitution filed by Dr. Brijendra Swarup.

(2) There was an election held for the Uttar Pradesh Legislative Council from the U. P. Graduates Constituency (West), in the year 1952 and three candidates were elected, they being Dr. Brijendra Swarup, Dr. Ishwari Prasad and Shri Beni Prasad Tandon. Sri Ratan Shukla challenged the election by a petition which he filed on 4-8-1952. The relief claimed by him in the petition was to the following effect:

> "It is, therefore, prayed that (1) the election to the U. P. Legislative Council from U. P. Graduates (West) Constituency be declared wholly void;"

The petitioner also claimed costs and any other consequential relief that may be granted to him. The relief claimed was under S. 84(c), Representation of the People Act, 1951 (Act 43 of 1951). Section 84 is as follows:

> "84. A petitioner may claim any 'one' of the following declarations:
>
> (a) That the election of the returned candidate is void.
>
> (b) That the election of the returned candidate is void and that he himself or any other candidate has been duly elected.
>
> (c) That the election is wholly void."

On any one of these reliefs having been claimed, the Tribunal has to make an appropriate order, under S. 98 of the Act, at the conclusion of the trial of the petition. Section 98 provides that:

> "98. At the conclusion of the trial of an election petition, the Tribunal shall make an order—
>
> (a) dismissing the election petition; or
>
> (b) declaring the election of the returned candidate to be void; or
>
> (c) declaring the election of the returned candidate to be void and the petitioner or any other candidate to have been duly elected; or
>
> (d) declaring the election to be wholly void."

These four reliefs, which the Tribunal can grant, relate back to the three reliefs mentioned in S. 84 of the Act. If the petitioner claims that the election is wholly void, then the Tribunal can either dismiss the election petition, or, declare the election to be wholly void.

(3) A number of grounds were raised in this petition. They were grounds Nos. 10 to 14 and 19 to 28 and a plea was taken, in an objection filed by Dr. Brijendra Swarup, that these paragraphs contained allegations which were not relevant to relief (c) of S. 84, Representation of the People Act, 1951 (Act 43 of 1951). A reference to S. 100 of the Act would make the point clear. Section 100 (1) is as follows:

> "100(1). If the Tribunal is of opinion—
>
> (a) that the election has not been a free election by reason that the corrupt practice of bribery or of undue influence has extensively prevailed at the election; or
>
> (b) that the election has not been a free election by reason that coercion or intimidation

has been exercised or resorted to by any particular community, group or section on another community, group or section to vote or not to vote in any particular way at the election; or

(c) that the result of the election has been materially affected by the improper acceptance or rejection of any nomination,

the Tribunal shall declare the election to be wholly void."

This refers to relief (c) of S. 84 of the Act. It is not necessary for us to quote the Explanation. Sub-section (2) of S. 100 of the Act mentions the grounds on which the Tribunal shall hold the election of a returned candidate to be void. The grounds given are—

"(a) that the election of a returned candidate has been procured or induced, or the result of the election has been materially affected, by any corrupt or illegal practice; or

(b) that any corrupt practice specified in Section 123 has been committed by a returned candidate or his agent or by any other person with the connivance of a returned candidate or his agent; or

(c) that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election, or by any mistake in the use of any prescribed form."

Sub-s. (3) of S. 100 is not relevant for our purposes and need not be quoted.

(4) To have the whole election declared void, a petition has to be filed within 60 days from the expiration of the time specified in sub-r. (1) of R. 112 for the lodging of the returns of election expenses of the candidates with the Returning Officer (see sub-r. (b) of R. 119). In a case where the election of a particular returned candidate is challenged, the petition has to be filed within 14 days, as provided for in sub-r. (a) of R. 119, from the date of publication of the notice in the Official Gazette under R. 113 that the return of election expenses of the candidate and the declaration made in respect thereof have been lodged with the Returning Officer. In this case, the petition was filed, as we have already said, on 4-8-1952, i.e., within 60 days under sub-r. (b) but well beyond 14 days fixed under sub-r. (a) of R. 119.

(5) The learned Members of the Tribunal, however, did not go into the question whether paragraphs Nos. 10 to 14 and 19 to 28 of the election petition contained allegations which were relevant for the grant of the relief claimed that the whole election be declared void. They rejected the application of Dr. Brijendra Swarup and framed issues not because those paragraphs contained material which was relevant for the decision of the petition, but on the ground that, even if an election petition was filed for a declaration that the whole election was void, the Tribunal was not confined to the relief claimed and it could grant a different relief and declare the election of any one returned candidate to be void. Similarly, if the relief claimed was that the election of a returned candidate be declared void, the Tribunal could declare the whole election void.

The Tribunal was also of the opinion that reliefs under S. 84 could be claimed in the alternative. As a matter of fact the Tribunal went on to hold that even if no relief was claimed, the petition could not be rejected and the Tribunal had to grant such relief as in its view was justified in the circumstances. As regards the period of limitation, the Tribunal was of the opinion that where there was a single returned candidate the shorter period of 14 days would apply whatever might be the relief claimed and the longer period of 60 days would be applicable where more than one candidate had been returned.

(6) Learned counsel for the opposite parties has frankly conceded that he is not able to support any of the findings on questions of law recorded by the Tribunal. He has conceded that if the election of one returned candidate is challenged, it is not open to the Tribunal to declare the whole election void; nor is it possible, where the plea taken is that the whole election is void, for the Tribunal to refuse to grant that relief and declare the election of one returned candidate to be void. Learned counsel has also, conceded that the period of 14 days applies to a claim under S. 84 (a) and (b) of the Act, while the period of 60 days applies to a claim under S. 84 (c) of the Act.

(7) The reasoning of the Tribunal on which its conclusions have been based need not be gone into in detail, but we may state that those reasonings do not appeal to us. One point taken by the Tribunal is that where there is only one returned candidate reliefs (a) and (c) would overlap. To our minds, to such a case relief (c) would not apply at all and it is relief (a) of S. 84 that would be applicable. The Tribunal has also drawn some support for its conclusion from Ss. 81 and 83 of the Act. S. 81 deals with presentation of petitions. It provides that:

"An election petition calling in question any election may be presented on one or more of the grounds specified in sub-ss. (1) and (2) of S. 100 and S. 101 ....."

This does not necessarily indicate that the relief claimed did not really matter and the Tribunal was entitled to grant any relief that it may consider appropriate.

Section 83 has even less bearing. It only lays down what the petition should contain and provides that the petition shall contain a concise statement of the material facts on which the petitioner relies and it is to be signed and verified like a pleading, while sub-s. (2) lays down that there should be a list signed and verified in like manner setting out full particulars of any corrupt or illegal practices alleged by the petitioner. If the election of one returned candidate is being challenged under S. 84, naturally the other candidates, though they may be parties to the proceedings, are not interested, and it would be against the rules of natural justice if the entire election is held to be void, even though the relief claimed was that the election of a

particular returned candidate be held to be void. Similarly, the election as a whole cannot be held to be void, if the charges under S. 100 (1) are not made out, merely on the ground that one of the returned candidates was guilty of irregularities mentioned in sub-s. (2) of S. 100.

(8) To our minds, the words "any one of the following reliefs may be claimed" would become wholly redundant if it is open to a petitioner to claim more than one relief. It might also lead to confusion and complications if such a procedure is followed. The language of S. 84 provides further indication that the view that we have taken is correct. Relief (a) of S. 84 is for a declaration that "the election of the returned candidate is void." If the relief claimed could be in the alternative or if more than one relief could be claimed, then it was not necessary in relief (b) to repeat the words "that the election of the returned candidate is void" and then add "that he himself or any other candidate has been duly elected". Similarly, S. 98 provides for four reliefs which are to be granted by the Tribunal at the conclusion of the trial. S. 98 makes it clear that each relief is separate and distinct and either one or the other can be granted, whichever may be appropriate to the relief claimed.

(9) Coming now to S. 100, grounds mentioned in sub-s. (1) are for declaring the whole election void, while grounds mentioned in sub-s. (2) are for holding the election of a returned candidate to be void. Sub-s. (2) deals with irregularity or illegality or any corrupt practice indulged in by a particular candidate whose election is challenged, while S. 100 (1) is of a more general nature and is not aimed at corruption, illegality or irregularity indulged in by a particular candidate but the corruption, illegality or irregularity which were much more widespread and general in nature and were likely to have affected the whole election. The question is more or less a question of substance and of degree and it is not for us to consider whether paragraphs 10 to 14 and 19 to 28 come under sub-s. (1) or sub-s. (2) S. 100.

Those paragraphs have not been placed before us and learned counsel for the petitioner has rightly urged that it was for the Tribunal to decide on the relevancy of the grounds mentioned in those paragraphs and the matter should be left to their decision. Learned counsel has made a grievance of the fact, and to our minds rightly, that the objection of the petitioner has been dismissed on wholly irrelevant grounds on a wrong view of the law without going into the merits.

(10) A question has arisen whether we should interfere at this stage in the exercise of our jurisdiction under Art. 226 or Art. 227 of the Constitution. The view of law taken by the Tribunal is, however, so palpably erroenous that unless it is corrected at this stage it is likely to further complicate matters. We have, therefore, decided to express our opinion on the points of law so that the Tribunal may not engage itself in enquiries which may be wholly irrelevant to the relief claimed before it. The Tribunal will now act according to the view of law enunciated by us above and consider whether the paragraphs objected to contain any grounds which are relevant to the relief claimed, and if so, confine itself only to such issues out of those that it might have framed and take evidence which might be relevant for the grant of the relief claimed in the petition.

(11) We order accordingly, but in view of the very reasonable attitude taken by learned counsel for the opposite parties we make no order as to costs. The stay order is discharged.

(12) We need not pass any separate orders on Application No. 988 of 1954.

V.S.B. Order accordingly.

(S) **A.I.R. 1955 ALLAHABAD 131 (Vol. 42, C.N. 49)**

MOOTHAM J. (29-10-1954)

Dr. Ishwari Prasad, Applicant v. Registrar, University of Allahabad and others, Opposite Parties.

Writ Petn. No. 872 of 1954.

(a) Allahabad University Act (3 of 1921), S. 42 — Chancellor acting under S. 42 is subject to High Court's superintendence — (Constitution of India, Art. 226).

The expressions 'duly elected or appointed' and 'entitled to be' in S. 42 clearly refer to the legal rights of the person concerned under the Act and Statutes made under the Act and, therefore, the section imposes on the Chancellor the duty to act judicially in arriving at his decision. The Chancellor acting in the exercise of the powers conferred upon him by S. 42, therefore, constitutes in law a tribunal subject to the High Court's superintendence. (Paras 7, and 8)

Anno: Const. of India, Art. 226 N. 26 (i).

(b) Constitution of India, Art. 226 — Certiorari — Power to quash by certiorari order of inferior tribunal on ground that it is on face of it erroneous in law.

The purpose of inserting Art. 226 in the Constitution was "apparently to place all the High Courts in this Country in somewhat the same position as the Courts of King's Bench in England. In England, if the record of the proceedings of an inferior tribunal discloses on examination an error of law the proceedings can be quashed by a writ of certiorari and the Supreme Court in AIR 1954 SC 440 has declared such to be the law in India, and has not taken the view that the English rule is to be applied in India subject to certain modifications or limitations. There can, therefore, be no doubt that in the exercise of its jurisdiction to issue a writ of certiorari the Court does not, and has no power to, substitute its own views for those of the inferior tribunal, nor has it power to quash a decision because it thinks it wrong unless the error is an error of law and is apparent on the face of the record. AIR 1954 SC 440 explained and followed; AIR 1954 All 497 (FB) not followed; AIR 1952 SC 179, held cannot be reconciled with AIR 1954 SC 440; Case law discussed.

(Paras 9, 10)

Anno: Const. of India, Art. 226 N. 166, 171.

(c) Allahabad University Act (3 of 1921), S. 42 — Statutes, Ordinances and Regulations made under Act, Ch. II First Statute, proviso to Cl. (ii) —Order of Chancellor that petitioner was not entitled to be member of Executive Council — Order on face of it erroneous in law — (Constitution of India, Art. 226).

In the case of a member of the Executive Council, who comes under Head (i) of the first statute, what the proviso lays down is that he shall hold office as a member of the Executive Council for so long only within the period of three years as he continues to be a member of the Court. Unless there has been a break in the continuity of his membership of the court, he is entitled to be a member of the Executive Council. Even if the status of the member changes during his period of membership, nevertheless he continues to be a member of the Executive Council; the capacity in which the person concerned is a member of the Court is not material. (Paras 14, 15)

Where, therefore, the Chancellor by an order decided that the petitioner was not entitled to be a member of the Executive Council on the ground that the status of his membership of the Court underwent a radical alteration.

Held, that the Chancellor's order was erroneous in law and should be quashed by issuing a writ of certiorari. (Paras 14, 15, 16)

Anno: Const. of India, Art. 226 N. 164, 171.

(d) Interpretation of statutes — Nothing to modify language of statute — Ordinary meaning should be given — (Civil P. C. (1908), Preamble).

It is a well-known rule of construction that if there is nothing to modify or qualify the language which the Statute contains it must be construed in the ordinary and natural meaning of the words. (Para 15)

Anno: C. P. C., Pre N. 7 Pt. 2.

(e) Interpretation of statutes — Intention of legislature — Outside consideration — (Civil P. C. (1908), Preamble).

It is elementary that the principal duty of a Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention. (Para 15)

Anno: C. P. C., Pre. N. 7 Pt. 19.

(f) Constitution of India, Art. 226 — Certiorari — Interference in University matter.

The High Court is always reluctant to interefere in matters relating to the management of educational bodies. The Court's discretion must however be exercised on judicial principles, and if there is nothing in the conduct of the petitioner which disentitles him from the relief which he seeks, Certiorari cannot be refused on the ground that the matter is essentially a University matter and the order was made in good faith and that the harmonious working of the University requires the unquestioning acceptance of the decision of the Chancellor. (Para 16)

Anno: Const. of India, Art. 226 N. 164.

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 144: 1953 All WR (HC) 723 7

(B) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 7

(C) (1915) 1915 AC 120: 84 LJKB 72 8

(D) (V41) AIR 1954 All 497: 1954 All LJ 259 (FB) 9

(E) (V41) AIR 1954 SC 440: ILR (1954) Mys 235 (SC) 9, 10, 11

(F) (1952) 1952-1 KB 338: 1952-1 All ER 122 9, 10, 11, 12

(G) (V39) AIR 1952 SC 192: 1952 SCR 583 (SC) 9

(H) (1841) 1 QB 66: 113 ER 1054 9

(I) (1878) 4 AC 30: 48 LJ MC 65 9

(J) (1922) 1922-2 AC 128: 91 LJ PC 146 9, 10

(K) (V39) AIR 1952 SC 179: 1952 SCR 519 (SC) 10, 11

(L) (V10) AIR 1923 PC 66: 50 Ind App 324 (PC) 13

(M) (V42) AIR 1955 All 129: (Civil Misc. Appln. No. 99 of 1953, D/- 27-9-1954 All) 13

(N) (1942) 1942-2 All ER 106: 1942-2 KB 239 15

(O) (V37) AIR 1950 SC 165: 1950 SCR 553 (SC) 15

Gopal Sarup Pathak, for Applicant; Advocate-General, for Opposite Parties.

ORDER: This is a petition under Art. 226 of the Constitution which raises a question of constitutional law of considerable importance. It has involved the examination of a number of authorities, and I am indebted to learned counsel on both sides for the full and able arguments which have been addressed to me. The facts shortly stated are that the petitioner, Dr. Ishwari Prasad, was a Professor in the University of Allahabad and Head of the Department of Political Science until the 13-3-1954, on which date he retired from the service of the University. He was also a member of the Academic Council of the University and, as such, was under head (vi) of S. 17 of the Allahabad University Act, 1921, an 'ex offiicio' member of the Court, which is the supreme governing body of the University.

(2) The executive body of the University is the Executive Council, the constitution of which is laid down in the Statutes to be found in Chap. II of the Statutes, Ordinances and Regulations made under the Act. The Executive Council consisted at all material times of twenty members, of whom six were members of the Court elected by the Court at its annual meeting. At the annual meeting of the Court held in November, 1952, the petitioner was elected to the Executive Council. The only limitation which is placed by the Statutes on the power of the Court to elect six of its members to the Executive Council is that two of the persons so elected must be members who were themselves elected to the Court by the registered graduates. Of the six persons who were so elected in 1952 I am informed that four were members of the Court elected by the registered graduates; Dr. Ishwari Prasad was not one of these.

(3) Under head (xviii) of S. 17 of the Act read with Cl. (ii) of the first Statute relating to the Court, the Chancellor of the University is empowered to appoint not more than fifteen per-

sons to be members of the Court, and by a letter dated the 8-3-1954, the Chancellor in exercise of the power so vested in him appointed the petitioner to be a member of the University Court in place of Sri K. L. Misra:

"with effect from the date of the former's retirement from the post of Professor and Head of the Department of Political Science of the Allahabad University, viz., 12-3-1954, for the residue of the term of office of Sri K. L. Misra, viz., up to 14-12-1955".

It is common ground that the reference to March 12 is a mistake for March 13.

(4) The question then arose whether the petitioner continued to be a member of the Executive Council after the 13th March, and it arose in this way: Cl. (ii) of the first Statute relating to the Executive Council provides that members of the Council other than 'ex officio' members, and it is not suggested that the petitioner was an 'ex officio' member of the Executive Council, shall hold office for a period of three years, but this rule is subject to the following proviso:

"Provided that a member appointed or elected as a member of a particular body or as a holder of a particular post shall hold office so long only within that period as he continues to be a member of that body or the holder of that post, as the case may be."

A difference of opinion having arisen as to whether the case of the petitioner fell within the ambit of this proviso, the Vice-Chancellor referred to the Chancellor, as he was authorised to do under S. 42 of the Act, the question whether the petitioner was entitled to be a member of the Executive Council after 13-3-1954. On 20-8-1954, the Chancellor by an order of that date decided that he was not so entitled. The petitioner thereupon filed this petition, the respondents being the University of Allahabad and the Chancellor, Vice-Chancellor and the Registrar thereof. The petitioner contends that the decision of the Chancellor that he is not entitled to be a member of the Executive Council is erroneous and he prays, first, for the issue of a writ of 'certiorari' to quash that decision and, secondly, for the issue of a writ of 'mandamus' directing the respondents not to interfere with his attendance at meeting of the Executive Council and in the performance of his functions as such member.

(5) Section 17 of the Act read with Cl. (iv) of the first Statute relating to the Court also makes provision for the nomination of members of the Court by certain associations and individuals who have made donations or annual contributions to the University, and it is part of the petitioner's case that on the 15-12-1954, he was so nominated a member of the Court by the Government of Nepal.

(6) It is common ground that the order of the Chancellor is what is commonly known as "a speaking order", that is to say, it is an order which states the grounds upon which the decision embodied in the order is founded; and the two principal questions which arise in this petition are, first, whether this Court has authority under Art. 226 of the Constitution to quash by a writ of 'certiorari' an order made by a tribunal subject to the supervision of this Court which is on the face of it erroneous in law and, secondly, if the answer to that question be in the affirmative, whether the order under consideration suffers from such defect.

(7) Before however I consider these questions it is necessary for me to determine whether the Chancellor acting in the exercise of the powers conferred upon him by S. 42 of the Act constituted in law a tribunal subject to this Court's superintendence. That will depend upon whether in the exercise of these powers the Chancellor was required to act in a judicial or quasi-judicial capacity, for it is not a matter of dispute in this case that the question which he had legal authority to determine was one which affected the rights of the petitioner. Now it has been held by a bench of this Court in — 'Rameshwar Prasad Kedar Nath v. District Magistrate, Kanpur', AIR 1954 All 144 (A), a decision which is binding on me that since the decision of the Supreme Court in — 'Province of Bombay v. K. S. Advani', AIR 1950 SC 222 (B), the test is a comparatively simple one: Did the enactment which conferred authority on the Chancellor to decide the matter in dispute impose on him either specifically or by necessary implication the duty to act judicially?

(8) It is therefore necessary to examine the relative provisions of the Allahabad University Act, 1921. There is however only one section which requires consideration, S. 42, which reads thus :

"42. If any question arises whether any person has been duly elected or appointed as, or is entitled to be, a member of any authority or other body of the University, the matter shall be referred to the Chancellor, whose decision thereon shall be final."

This section confers upon the Chancellor powers which are in a general sense of an appellate nature, and to the extent that that is so the remarks of Viscount Halding, L. C., in — 'Local Govt. Board v. Arlidge', 1915 AC 120 at p. 132 (C), are apposite, for the Lord Chancellor there said:

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."

I may say at once that it is no part of the petitioner's argument that he did not have a full opportunity of presenting his case, nor is it suggested that there was any want of a sense of responsibility on the part of the Chancellor in deciding the question before him. The real question is I think this: Does the section impose on the Chancellor the duty of deciding the dispute referred to him in accordance with the provisions of the University Act and the Statutes made thereunder, or has he to consider the matter from the point of view of policy and expediency? The section enacts that the Chancellor shall determine whether any person

"has been elected or appointed as, or is entitled to be, a member of any authority or other body of the University."

The expressions 'duly elected or appointed' and 'entitled to be' clearly refer, in my opinion, to the legal rights of the person concerned under the Act and Statutes, and the Advocate-General agreed that the Chancellor could not otherwise dispose of the question referred to him. In such circumstances I can entertain no doubt that the section imposes on the Chancellor the duty to act judicially in arriving at his decision.

(9) I now turn to the first of the two main questions in this case, namely, a consideration of the circumstances in which this Court can quash by 'certiorari' an order made by an inferior tribunal on the ground that it is wrong in law. In — 'Deoria Sugar Mills Ltd. v. Govt. of Uttar Pradesh', AIR 1954 All 497 (D) a Full Bench of this Court held that the wrong interpretation of a provision of law, or the application of a provision of law which was not applicable by an inferior tribunal in arriving at its decision, did not constitute an error apparent on the face of the record or proceedings which would justify interference by the issue of a writ of 'certiorari'. That is of course also a decision binding on me and 'prima facie' concludes the question against the petitioner.

Shortly afterwards however came the decision of the Supreme Court in — 'T. C. Basappa v. T. Nagappa', AIR 1954 SC 440 (E). The first of the two questions which arose for consideration in that case was on what grounds could a High Court in exercise of its powers under Art. 226 of the Constitution grant a writ of 'certiorari' to quash an adjudication by an election tribunal. The Court considered briefly the reasons which led the makers of the Constitution to insert Art. 226 in the Constitution, and pointed out that the purpose was "apparently to place all the High Courts in this Country in somewhat the same position as the Courts of King's Bench in England." And on page 443 of the Report B. K. Mukherjea J., who delivered the judgment of the Court said:

> "We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

On the following page the learned Judge said further:

> "The essential features of the remedy by way of 'certiorari' have been stated with remarkable brevity and clearness by Morris L. J., in the recent case of — 'Rex v. Northumberland Compensation Appellate Tribunal, 1952-1 KB 338 at p. 357 (F). The Lord Justice says:
>
> > "It is plain that 'certiorari' will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the face of an order or decision or irregularity of absence of or excess, of jurisdiction when shown."

In dealing with the powers of the High Court under Art. 226 of the Constitution this Court has expressed itself in almost similar terms, vide — 'Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 at pp. 195-196 (G) and said:

> 'Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is error apparent on the face of the record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made.'

These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of 'certiorari' under Art. 226 of the Constitution."

It is convenient at this point to endeavour to ascertain a little more fully what are "the broad and fundamental principles" which regulate the exercise of this jurisdiction by the English Courts, and for this purpose I desire to refer to four cases. The first of these is — 'Reg. v. Bolton', (1841) 1 QB 66 at p. 72 (H), described in a later case as summarising in impeccable form the principles of the law of 'certiorari'. Lord Denman there said:

> "The case to be supposed is one.....in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do.....is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law....."

In — 'Walsall Overseers v. London and North Western Rly. Co.', (1878) 4 AC 30 at p. 40 (I), Lord Cairns L. C., said:

> "But supposing that the Court of Quarter Sessions did not adopt that course, there was still another mode by which any question of law which appeared to the Court of Quarter Sessions doubtful, might be left open for the exercise of the judgment of a higher tribunal. All that was necessary was that the Court of Quarter Sessions, in making its order, should not make it an unspeaking or unintelligible order, but should, in some way state upon the face of the order, the elements which had led to the decision of the Court of Quarter Sessions.
>
> If the Court of Quarter Sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it, a speaking order; and if then that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court

of Queen's Bench and point to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by 'certiorari', and when so removed to pass judgment upon it, whether it should or should not be quashed.

In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the Court, of Queen's Bench, in the ordinary sense of the term, a Court of re-hearing or of appeal."

The third case to which I want to refer is — 'Rex v. Nat Bell Liquors Ltd.', 1922-2 AC 128 (J) in which Lord Sumner delivering the judgment of the Privy Council said, at page 156 with regard to the superior Court's powers of supervision:

"That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

Finally, in 1952-1 KB 338 (F), Singleton L. J., said at p. 344:

"The decision of the tribunal was a 'speaking order' in the sense in which that term has been used. The Court is entitled to examine it, and if there be error on the face of it, to quash it —"not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty", as Lord Cairns said in the Walsall case (I)."

(10) There can therefore in my opinion be no doubt that, in England, if the record of the proceedings of an inferior tribunal discloses on examination an error of law the proceedings can be quashed by a writ of 'certiorari'. The question I have to consider is whether the Supreme Court in Basappa's case (E) has declared such to be the law in India or whether, as argued by the Advocate General, the Supreme Court has in that case taken the view that the English rule is to be applied in India subject to certain modifications or limitations. The Advocate-General in his very able argument has urged that the superior Court can interfere only where the error apparent on the face of the record involves an incorrect statement of the law and not merely an erroneous application or misinterpretation of the law; if for example, the inferior Court misquotes the section of an Act, that is an error apparent on the face of the record, but if the Court quotes the section correctly and then proceeds to misapply it there is no such error.

An objection to this contention which immediately suggests itself is—as the Advocate-General frankly agreed—this, that although the Supreme Court has said clearly that the essential features of the remedy by way of 'certiorari' have been stated in the Northumberland Tribunal case (F) yet, nevertheless, as there was in that case no misquotation of a provision of law the Supreme Court itself would, had it the Northumberland case (F) before it, have decided it in a contrary sense to that of the English Courts. This is to me a somewhat surprising conclusion, but the Advocate-General places great reliance on two passages in the judgment of Mukherjea J., in Basappa's case (E) and on the decision of the Supreme Court in the earlier case of — 'Parry and Co. Ltd. v. Commercial Employee's Association, Madras', AIR 1952 SC 179 (K). The two passages in Basappa's case (E) relied on by the Advocate-General are to be found on page 444 of the Report in the All India Reporter. What the learned Judge says there is:

"In granting a writ of 'certiorari' the superior Court does not exercise the powers of an appellate tribunal. It does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal."

And then again, lower on the same page, the learned Judge says:

"An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision."

I do not think that there can be read into these passages the meaning which the Advocate-General attributes to them. What it appears to me, if I may say so with very great respect, that the learned Judge is seeking to do is not to modify but to explain and amplify the statement of law immediately preceding each of these passages. There can be no doubt that in the exercise of its jurisdiction to issue a writ of 'certiorari' the Court does not, and has no power to, substitute its own views for those of the inferior tribunal, nor has it power to quash a decision because it thinks it wrong unless the error is an error of law and is apparent on the face of the record. The expressions used by the learned Judge, "palpably erroneous", "manifest error" and "patent error" mean, in my judgment error which is apparent, that is to say apparent on the face of the record.

It is, I think, very significant that interposed between the two passages which I have quoted the learned Judge makes a reference to the case of the — 'King v. Nat Bell Liquors Ltd. (J)' as authority for the proposition that the supervision of the superior Courts exercised through writs of 'certiorari' is exercised not only with regard to the area of inferior jurisdiction but to the observance of law in the course of its exercise. I find it difficult to think that if the Supreme Court had desired to approve the principles laid down in the — 'Northumberland Tribunal case (F)' subject to certain reservations or qualifications it would not have stated what those modifications were.

(11) In AIR 1952 SC 179 (K), the Supreme Court held that the Madras High Court could not issue a writ of 'certiorari' to quash a decision passed within its jurisdiction by a Labour Commssioner under the Madras Shops and Establishments Act, 1947, on the ground that the decision

was erroneous. It is however argued for the petitioner that the view taken in that case of the ambit of the Court's power to issue a writ of 'certiorari' has undergone a change, and that this Court must be guided by the principles laid down in Basappa's case (E). I find it difficult, if I may say so with the greatest respect, wholly to reconcile the two decisions, and I conceive it therefore to be my duty to follow and apply what I believe to be the principles laid down in the later case.

In recent years the scope of 'certiorari' appears to have been somewhat forgotten in England; it was restored to its rightful position in the Northumberland Tribunal case (F), where it was shown that it can be used to correct errors of law which appear on the face of the record even though they do not go to jurisdiction. With the greatest respect, the Supreme Court in Basappa's case (E) has, in my judgment, declared that the supervisory powers of High Courts in India are no less wide than they are in England.

(12) It is convenient at this stage to refer to an argument of the Advocate-General that any development in England of the law relating to 'certiorari' since the coming into force of the Constitution does not form part of the law in India, for the framers of the Constitution intended in Art. 226 to subject the Court's power to issue 'certiorari' to the same restrictions as were at that date applicable in England. The short answer to this submission is, I think, that the 'Northumberland Tribunal case (F)', did not extend but merely declared what the law was and the fact that the correction of an error on the face of the record by a writ of 'certiorari' had been little used in recent years did not mean that the basis for the exercise of the power had fallen into abeyance (see the judgments of Denning L.J., at page 348 and of Morris L. J., at page 356).

(13) I ought also to make some reference to two other cases to which my attention was invited by learned counsel. Reliance was also placed by both sides on the decision of the Privy Council in — 'Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.', AIR 1923 PC 66 (L), a case in which it was held that the decision of an arbitrator could not be set aside on the ground that the mistake of law, if mistake there was, made by the arbitrators did not appear on the face of the award. In my view this case is not of assistance because the remedy in the event of an error of law appearing on the face of an award of an arbitrator is by way of action on the award; the Court in England never interefers with such an award by 'certiorari': see the 'Northumberland Tribunal case (F)', at p. 351.

The Second case is the unreported decision of a bench of this Court in — 'Dr. Brijendra Swarup v. Election Tribunal, Lucknow', (since reported in) AIR 1955 All 129 (M). Sri Pathak says that in this case the Court acted upon the view of the law as stated in the 'Northumberland Tribunal Case (F)', and quashed an order made by the respondent Tribunal on the ground that it contained an error apparent on the face of the record. I do not think that this can with certainty be said to be so. Their Lordships say:

"A question has arisen whether we should interfere at this stage in the exercise of our jurisdiction under Art. 226 or Art. 227 of the Constitution. The view of law taken by the Tribunal is, however, so palpably erroneous that unless it is corrected at this stage it is likely to further complicate matters. We have, therefore, decided to express our opinion on the points of law so that the Tribunal may not engage itself in enquiries which may be wholly irrelevant to the relief claimed before it. The Tribunal will now act according to the view of law enunciated by us above and consider whether the paragraphs objected to contain any grounds which are relevant to the relief claimed, and if so, confine itself only to such issues out of those that it might have framed and take evidence which might be relevant for the grant of the relief claimed in the petition. We order accordingly....."

No authorities are cited, and in my opinion the Court was exercising its powers of superintendence under Art. 227 of the Constitution. The case, therefore, is not of assistance to us.

(14) I turn now to the second of the two main questions in this case whether the Chancellor's order of the 20-8-1954 is on its face erroneous in law. The Chancellor in a full and careful order extending over some six pages decided that the petitioner was not entitled to continue as a member of the Executive Council after the 13-3-1954. This decision is based on the interpretation placed by the Chancellor on the proviso to Cl. (ii) of the first Statute relating to the Executive Council. The view of the Chancellor shortly, but I hope not inaccurately, stated is that although there has been no interruption in the petitioner's membership of the Court the status of his membership underwent a radical alternation; up to the close of the 13 March his status was that of an 'ex officio' member but thereafter he became a member in his individual capacity, and this change of status operated to bring to an end his membership of the Executive Council. In order to appreciate the meaning of the proviso in question it is convenient to read the whole of the Statute of which it is a part.

"1. (1) The members of the Executive Council, in addition to the Vice-Chancellor and the Treasurer, shall be —

Class I — Ex Officio Members

The Deans of the Faculties.

Class II — Other Members.

(i) Six members of the Court, elected by the Court at its annual meeting of whom two must be from among members of the Court elected by the registered graduates;

(ii) (a) Two Principals, elected by the Principals of Colleges, and

(b) One member elected by the Wardens, the Chairman of the Delegacy and the Proctor from among themselves;

(iii) Two members elected by the Academic Council from its own body;

(iv) Three members appointed by the Chancellor.

(2) Members other than 'ex officio' members shall hold office for a period of three years."

Then comes the proviso to which I have referred:

"Provided that a member appointed or elected as a member of a particular body or as the holder of a particular post shall hold office so long only within that period as he continues to be a member of that body or the holder of that post, as the case may be."

The proviso is not perhaps very aptly worded, for the only appointed members of the Executive Council are the three members appointed by the Chancellor under Head (iv) of Cl. (i) of the Statute; such persons need not be members of any particular body or the holders of any particular post, and consequently the proviso has no application to them. It is I think clear that the reference in the proviso to the holders of particular posts can be a reference only to members of the Executive Council who fall into one or other of the categories for which provision is made under Head (ii). It is equally clear that the reference to members of a particular body is a reference to the members of the Executive Council who belong to the categories for which provision is made under Head (i) or (ii), that is as members either of the Court or of the Academic Council elected by the Court or the Academic Council respectively. In the case, therefore, of a member of the Executive Council who comes under Head (i), what the proviso lays down is that he shall hold office as a member of the Executive Council for so long only within the period of three years as he continues to be a member of the Court. The petitioner comes within that category, and unless there has been a break in the continuity of his membership of the Court, he is entitled to be a member of the Executive Council.

(15) The Advocate-General, in support of the view taken by the Chancellor, contends that S. 17 of the Act divides members of the Court into three classes — 'Ex officio' members, life members and other members — and that membership cannot be considered apart from capacity (by which I understand is meant qualification for membership) and tenure of membership. From this he argues that if the status of the member changes during his period of membership. if, for example, an 'ex officio' member becomes a life member, then although his membership of the Court continues without interruption it is not in law the same membership and he can no longer be said "to continue to be a member" within the meaning of the proviso. I find myself unable to accept this argument.

The proviso states that the condition for continuance of office as a member of the Executive Council is, in the case of a member elected by the Court. his continuance as a member of the Court. The words "continues to be a member of that body" in this case, of the Court are, in in a phrase used by Lord Greene, M. R. in — 'Robinson v. London Brick Co. Ltd.', 1942-2 All ER 106 at p. 108 (N), "plain, simple and unqualified". The Advocate-General admits that his argument involves this, that the proviso must be construed as if after the phrase 'member of that body' there are deemed to be added the words 'in the same capacity as he was elected or appointed to it'. It is however a well-known rule of construction that if there is nothing to modify or qualify the language which the Statute contains it must be construed in the ordinary and natural meaning of the words.

In the case to which I have just referred both the Court of Appeal in England and the House of Lords declined to construe the words "if the workman leaves a widow" in S. 8 of the Workmen's Compensation Act as if they were followed by the words "who is claiming compensation under the Act", despite the surprising consequences which would follow, on the ground that there was no sufficient context in the Act to qualify the meaning of words which were in themselves plain and unambiguous. It is said that the University Court, when electing the petitioner to the Council, must have taken into account the fact that the petitioner's tenure of office was limited, and the proviso must be so construed as to allow effect to be given to this fact. Apart from the consideration that there is nothing before me to show that the Court was so influenced, I am of opinion that the proviso cannot be construed in this way.

> "It is elementary that the primary duty of a Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention — 'New Piece Goods Bazar Co. Ltd. v. Commr. of Income-tax, Bombay', AIR 1950 SC 165 at p. 168 (O)".

In my opinion the words "continues to be a member of that body" mean no more that what they say. The capacity in which the person concerned is a member is not material. It is common ground that the petitioner in fact continued, and continues, to be a member of the Court, and in my judgment the condition prescribed by the proviso has been fulfilled. I am bound therefore to hold that the Chancellor's order is erroneous in law.

(16) Finally the Advocate-General submits that even if the Chancellor's order be erroneous the Court ought, in the exercise of its discretion, to refrain from interference in what is essentially a University matter. His contention is that the order was made in good faith — that of course no one disputes — and that the harmonious working of the University requires the unquestioning acceptance of the decisions of the Chancellor; the Court should therefore give no encouragement to persons who think themselves to be aggrieved by such orders even though their legal rights may be affected thereby.

This Court is always reluctant to interfere in matters relating to the management of educational bodies, and I should hesitate, if I were free to do so, before making an order which could be construed as affecting the proper autonomy of the University. The Court's discretion must however be exercised on judicial principles, and in my opinion the question is whether there is any thing in the conduct of the petitioner which disentitles him from the relief which he seeks. No case has been brought to my notice in which 'certiorari' has been refused on the ground suggested by the Advocate-General, and I think the petitioner is entitled to his order. A writ of 'certiorari' will accordingly issue quashing the order of the Chancellor dated 20-8-1954.

(17) In the circumstances it is unnecessary for me to consider the submissions of Sri Pathak that the petitioner was nominated a member of the Court by the Government of Nepal with effect from 15-2-1954, or that the nomination by the Chancellor was effective from midnight of 12-3-1954.

(18) The petitioner also prays for the issue of a mandamus. There is however no evidence before me which shows that the University authorities intend notwithstanding the quashing of the Chancellor's order to interfere in any way with the petitioner, and the Advocate-General has stated that they have no such intention. This prayer therefore fails.

(19) In the circumstances, I shall make no order as to costs.

V.R.B. Order accordingly.

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RAGHUBAR DAYAL AND JAMES JJ. (1-10-1954)

State v. Ram Autar Chaudhry and others, Respondents.

Govt. Appeal No. 1099 of 1950, against order of Addl. S. J., Kanpur, D/- 22-4-1950.

(a) Criminal P. C. (1898), S. 423 — Appeal from acquittal.

In an appeal from acquittal the High Court has the power to review the entire evidence and then to come to its own conclusions, but in arriving at that conclusion it must keep in mind the four matters, namely, (i) the views of the trial judge as to the credibility of the witnesses, (ii) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (iii) the right of the accused to the benefit of any doubt and (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. And, in practical application, keeping in consideration those four matters, must mean that the High Court should find such reasons which may be termed compelling and substantial reasons or which may be deemed to be clinching and conclusive before it would be justified in upsetting an order of acquittal. It would not be so justified merely because it, after considering the criticism of the Sessions Judge and his views, feels that a different view should be taken for reasons which are not so strong as to be classed with substantial or compelling reasons, which seem to be at par with such reasons against which practically nothing be possible to be said. Case Law discussed. (Para 42)

Anno: Cr. P. C., S. 423, N. 15.

(b) Criminal P. C. (1898), S. 164 — Confession after conclusion of investigation.

It is true that an accused is free to make a confession at any time he likes and the person to whom such a confession is made is also free to make a statement about it in court and no question of admissibility or otherwise of such a confession should arise. The question of weight to be attached to such a confession is a different one. But the real point is that a Magistrate is not just 'any person'. He occupies the position of a Magistrate. He purports to act as a Magistrate and not as an ordinary individual. The confession cannot be recorded by a Magistrate under S. 164, after the investigation has concluded and enquiry has commenced before the Committing Magistrate. A confession so recorded by him cannot be taken in evidence. AIR 1936 PC 253 (2); AIR 1954 SC 322, Foll. (Para 43)

Anno: Cr. P. C., S. 164, N. 9.

(c) Criminal P. C. (1898), S. 342 — Nature of examination.

An accused is to be examined with respect to matters coming on the record and having a tendency to go against him in the consideration of his gulit. When there is no evidence of the confession on the record the committing Magistrate is not justified in putting that question about his having made a confession to the accused. (Para 44)

Anno: Cr. P. C., S. 342, N. 14, 15.

(d) Criminal P. C. (1898), S. 367 — Appreciation of evidence.

Even if it is correct for a court to pick up a certain circumstance and then begin with to find whether the other circumstances fitted with it or not, that alone held would not have been the only correct procedure to deal with the case. (Para 45)

Anno: Cr. P. C., S. 367, N. 6.

(e) Criminal P. C. (1898), S. 61 — Unnecessary detention.

Section 61 does not empower a police officer to keep an arrested person in custody a minute longer than is necessary for the purposes of the investigation. It does not give him an absolute right to keep a person in custody till 24 hours and longer for other reasons like the inability of the admission of the accused in jail. His detention at the thana for two days unnecessarily must mean that he was being detained with purpose which the other accused could legitimately claim should affect his statement adversely. (Para 49)

Anno: Cr. P. C., S. 61, N. 1.

(f) Criminal P. C. (1898), S. 164 — Substantial evidence.

A statement under S. 164 cannot be used as substantive evidence. (Para 50)

Anno: Cr. P. C., S. 164, N. 7.

(g) Criminal P. C. (1898), S. 367 — Appreciation of evidence.

An attempt to make a suggestion about the fact, which is not intended to be proved, by leading evidence which is really no evidence and should not be admitted is never a fair procedure for the prosecution to adopt. (Para 53)

Anno: Cr. P. C., S. 367, N. 6.

(h) Criminal P. C. (1898), S. 367 — Appreciation of evidence.

The existence of any ill-feeling is not sufficient as a motive for any criminal conduct of any of the persons having enmity. (Para 57)

Anno: Cr. P. C., S. 367, N. 6.

(i) Evidence Act (1872), S. 133 — Accomplice — Value of evidence.

A statement of accomplice would be unworthy of belief unless corroborated by other good evidence. (Para 61)

Anno: Evid. Act, S. 133, N. 5, 6.

(j) Criminal P. C. (1898), S. 154 — Wrong description of weapons in First Information Report.

A wrong description of a weapon in the First Information Report can lead to a conclusion that either the victim or the natural witnesses did not notice what weapons had been used and the weapons said to be used were either on their own suggestions or the suggestions of more competent minds. Whatever may be the position, a wrong description of the weapons in the First Information Report is bound to affect the value of their testimony. (Para 63)

Anno: Cr. P. C., S. 154, N. 9, 10.

(k) Evidence Act (1872), S. 9 — Identification not being distinctive.

Where the description of a tall stout man with moustaches fitted three of the accused said to be the actual assailants.

Held that this description was not particular description of any accused who was one of the accused to whom this description fitted in. The descriptions given were not such distinctive descriptions which might go a long way in supporting the identification of witnesses. (Para 63)

Anno: Evid. Act, S. 9, N. 5.

(l) Evidence Act (1872), S. 9 — Identification — Duty of Magistrate.

Where the Magistrate did not make any note, in the identification memo, of the distinctive marks of the accused.

Held that any competent Magistrate having experience of identification proceedings would have made a note about it if he had really paid attention to it. The defects in the conduct of the identification proceedings reduced the value of the identification. (Para 63)

Anno: Evidence Act, S. 9, N. 5.

CASES REFERRED: Paras

(A) (V21) AIR 1934 PC 227 (2): 36 Cri LJ 786 (PC) 29, 35

(B) (V41) AIR 1954 SC 36: 1954 Cri LJ 331 (SC) 29, 33

(C) (V40) AIR 1953 SC 122: 1953 Cri LJ 662 (SC) 29, 34, 35

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(E) (V33) AIR 1946 PC 151: 1946 All LJ 349: 47 Cri LJ 905 (PC) 31

(F) (V41) AIR 1954 SC 1: 1954 Cri LJ 225 (SC) 33, 34

(G) (V39) AIR 1952 SC 52: 1952 Cri LJ 331 (SC) 35

(H) (V40) AIR 1953 SC 478: 1954 Cri LJ 1020 (SC) 35

(I) (V40) AIR 1953 SC 459: 1953 Cri LJ 1925 (SC) 35

(J) (V41) AIR 1954 SC 15: 1954 Cri LJ 230 (SC) 35

(K) (V40) AIR 1953 SC 76: 1953 Cri LJ 521 (SC) 36

(L) (V41) AIR 1954 SC 39: 1954 Cri LJ 335 (SC) 37

(M) (V41) AIR 1954 SC 322: 1954 Cri LJ 910 (SC) 38, 43

(N) (V23) AIR 1936 PC 253 (2): 37 Cri LJ 897 (PC) 43

K. L. Misra, Advocate General; U. P. and N. K. Wadhwani, for the State; P. C. Chaturvedi (for Nos. 1 to 3); B. Dayal (for No. 4); S. N. Mulla (for Nos. 5, 6 and 8); A. P. Dube (for Nos. 5, 1, 2, 3 and 6); C. S. Saran (for No. 2); A. P. Pandey (for Nos. 1, 2 and 3); Vishwa Mittra (for No. 4); A. K. Misra (for Nos. 1 and 3); and Nageshwar Prasad (for No. 1), for Respondents.

RAGHUBAR DAYAL J.:

This is a Government appeal against the acquittal of Munnoo, Budhoo, Arjun and Ram Narain of the offence under S. 302, I. P. C., and of Ram Autar Chaudhari Hanuman Prasad, Gopi Lal Sharma and Madan Lal Singhania of the offence under S. 302, read with S. 109, I. P. C. Arjun, opposite party No. 7, has not been served of the notice of this appeal and his case is, therefore, not before us at the moment.

(2) One Radha Krishna, elder brother of Ram Autar Chaudhari respondent, was murdered at about 11-30 p. m. on the 30-7-1948 on the Mall in front of the District Intelligence Staff office, Kanpur, when he, accompanied by his wife and two infants and driver Sen Gupta, was returning from the dinner at the house of Nandan Prasad Saxeria. He and his wife received injuries when attacked by three or four persons with knives and hockey stick.

(3) The prosecution case is that the assailants had followed the jeep car in which Radha Krishna and his party were returning from near the house of Sexeria and could reach the victims because the jeep car stopped suddenly. It is alleged that the stoppage of the car was not accidental but was due to the tampering with the car by one Shital, driver of the respondent Hanuman, at the suggestion of Hanuman and Ram Autar respondents. The tampering was done by pouring of about three quarters of a gallon of water inside the tank of the jeep when Sen Gupta, driver of Radha Krishna, and Ram Adhar, the cleaner of Ram Autar respondent, had been sent away on the ostensible pretext of fetching Ram Autar's and Madan's wives from their houses to the dinner. The actual assailants, who were following in an ekka, were, therefore, sure that the car would stop after going some distance and therefore could reach them.

(4) There is no direct allegation as to who procured the actual assailants and arranged with them the carrying out of the plan. The suggestion seems to be that Hanuman had arranged them because two of these alleged assailants, namely Mannoo and Arjun were employed in the Juggi Lal

Kamlapat Cotton Mills at Kanpur of which Hanuman was the General Manager and also from the fact that it was Hanuman who is alleged to have enquired from Shital as to whether any ekka had followed the car.

(5) The actual conspirators who hatched the conspiracy for the murder of Radha Krishna are said to be Ram Autar, Hanuman, Gopi Lal Sharma and Madan Lal. Of them Ram Autar and Hanuman are said to have had reasons for planning the murder of Radha Krishna. Ram Autar had differences with his brother Radha Krishna on account of Radha Krishna and his wife not approving of the conduct of Ram Autar's wife going out in the company of Hanuman and Madan Lal and also on account of Radha Krishna's taking over the charge of the Ganga Oil Mills at Kanpur from Ram Autar, who though a student of the degree class had been looking after that mill on behalf of his father and one Bhagwan Das, the two proprietors of the mill. It is also alleged that Radha Krishna did not approve of Ram Autar's mixing with Hanuman and Madan Lal and his ways of life, specially his visits to prostitutes in their company. Evidence has been led about these causes of the ill-will between Radha Krishna and Ram Autar respondent.

(6) Hanuman is said to have had a grudge against Radha Krishna on account of the alleged complaining of Radha Krishna to Sri. Padampat Singhania, the proprietor of the J. K. Cotton Mills, against Hanuman, and on account of which complaint Hanuman is said to have been rebuked by the managing director Sohan Lal.

(7) Gopi Lal Sharma and Madan Lal had no grievance against Radha Krishna Chaudhari.

(8) There is no direct evidence about Madan Lal's conspiring with the others about this murder. The other three are said to have been seen together shortly before the dinner on the 30-7-1948. At that meeting Shital approver, driver of Hanuman, was present. Ram Adhar, cleaner of Ram Auter, is also said to have been nearabout, if not actually with the other conspirators in their consultations. Shital had been asked by Hanuman at about 8 O'clock that morning for a suggestion for stopping a car. He could not offer any suggestion and rather felt surprised at the question. Hanuman asked him to come to his house that evening and when he went there the other three persons, namely ,Hanuman, Ram Autar and Gopi Lal Sharma were there. Hanuman again questioned Shital with respect to the query he had put to him in the morning and on his inability to make any suggestion questioned Gopi Lal Sharma, who is a textile engineer in the Lakshmi Ratan Mills. Sharma suggested that the simple way of stopping a car is to mix a certain quantity of water with the petrol.

Shital accused expressed his inability to give an opinion on the suggestion and also raised such protest as was possible for him, an employee of the J. K. Cotton Mills, to the carrying out of Hanuman's directions that he should pour water in the petrol tank of the jeep in which Radha Krishna was expected to go to the dinner. Radha Krishna had to go to the dinner in the jeep car because his own car was out of order for some days. He was, however, ordered to get the tin used for petrol from the garage, fill it with water and to pour water in the jeep when Ram Autar would direct him for the purpose. Ram Autar then handed over a key to Ram Adhar, who, in his turn, passed it on to Shital. Shital then took out one gallon mobil oil tin which had been in use for keeping petrol, filled up about three quarters of it with water and kept it with him in Hanuman's car.

(9) Hanuman and Sharma then left for Saxeria's house. Ram Autar went to Madan Lal's house, took Madan Lal from there and then proceeded to Saxeria's house in his new Studebaker. With him was his cleaner Ram Adhar. Radha Krishna and his wife reached there in the jeep car. All these three cars were parked on the road at some distance from Saxeria's house which is in the lane closeby. The occasion for pouring water came when Sen Gupta and Ram Adhar had been sent away in Ram Autar's car to fetch his wife. Shital alone remained there. Ram Autar had come there to order Sen Gupta to take away his car and to guide him about the use of the gear. He had got that car recently and Sen Gupta, who was a driver of Radha Krishna, had had no occasion to drive this car. He could not have had any occasion to acquaint himself with this car as, according to the prosecution allegations, the differences between the two brothers were such that members of one family were not speaking with the servants of the other family. Ram Autar then after the departure of Sen Gupta and Ram Adhar asked Shital to pour water in the tank and Shital complied with the request at the second asking of Ram Autar.

(10) Sharma's complicity in the crime is alleged to be on account of his friendship with Hanuman with whom he had stayed for some time on his arrival in Kanpur about two months before this incident. He was, as already mentioned, consulted about the manner of stopping the car. It is, however, not in evidence that at any time Hanuman or Ram Autar or Madan Lal or anyone else indicated to Sharma the purpose for which this enquiry was made and that Sharma had expressed his readiness to be a party to the plan for murder. The fact that Sharma did not go to the dinner in his own car and the fact that none of these accused took their wives to the dinner are relied upon for drawing an inference that both these facts were due to their having conspired in committing the murder of Radha Krishna.

(11) Madan Lal's joining the conspiracy is sought to be inferred from the fact that Ram Autar soon after the meeting at Hanuman's place drove to Madan Lal's house and then took Madan Lal with himself to the dinner and also the other fact that their wives also did not join the dinner.

(12) The other circumstances which are relied upon for the charge of conspiracy are that after the dinner Ram Autar, Madan Lal and Hanuman did proceed towards the place of incident on the pretext of having betels from the reputed betel-seller Lakshmi Narain in spite of Saxeria's giving out that the betels got by him were also from the same shop. There was nothing unusual in such a visit at about midnight as it is in evidence

that many well-known people of Kanpur are in the habit of visiting this particular shop. He did not go by the same road by which Radha Krishna had left and which is expected to be the better road but went by the Grand Trunk Road. On their way back from the shop there was a tyre burst in their car. Saxeria speaks about this, and, according to him, it appears that the tyre had really burst; but the prosecution suggests that it was a fake bursting of a tyre and was just an excuse by Ram Autar for stopping the car and getting information from some persons he had already arranged with about the carrying out of the murderous plan. Saxeria states that two persons whom he had described in his statement before the police and whom he does not name in court had some talk with Ram Autar and that after that talk the party went to the Ursila Hospital where shortly before had arrived Radha Krishna deceased and his wife in some car which had happened to reach the place of incident soon after the attack on Radha Krishna.

(13) Hanuman remained outside the hospital. Saxeria, Ram Autar and Madan Lal and also a cousin of Saxeria went in. Ram Autar lamented, cried and enquired as to what had happened to his brother. Shrimati Naraini Devi, wife of Radha Krishna, though in grief, burst out stating to the effect that they had come to see the fun after having played the game and whether the dinner had been arranged for that purpose. There is no agreement between the parties as to whom this suspicious statement was addressed. The prosecution suggests that it was addressed to Ram Autar as she suspected him of having planned the murder. The defence alleges that it was addressed to Saxaria. Any way it was Saxaria who then told her that that was not the proper occasion for such remarks. This remark of Naraini Devi is much emphasized for the prosecution as a definite, prompt expression of her suspicion against Ram Autar and which must be taken to be very good evidence of the strained relations between the parties and a good corroboration of the other prosecution evidence.

(14) Ram Autar fainted in the hospital and was taken aside. This fainting is alleged to be fake by the prosecution even though Dr. Chaturvedi, the Medical Officer attached to the Hospital, did not think so. This alleged fake conduct of Ram Autar is also relied upon as pointing to the correctness of the prosecution charge of conspiracy.

(15) Coming to the main incident of assault, what happened there was that the jeep, which Radha Krishna was driving, stopped all of a sudden with a jerk according to the earlier statements of the two persons competent to speak about it, namely Sen Gupta and Naraini Devi. Naraini Devi, however, stated in Court that there had been some sound of 'Phat Phat' also before the car had stopped. The car stopped in front of D. I. S. office. When the car stopped Radha Krishna and Sen Gupta got down and one of them noticed whether the tank had petrol and was satisfied that it had petrol. Sen Gupta is not consistent in his two different statements - whether it was Radha Krishna who had noticed it or he himself had noticed it. Having noticed that there was petrol in the tank, neither of them did anything to find out why the car stopped. Radha Krishna took his seat in the jeep behind the steering-wheel and Sen Gupta was to get in the jeep when the assailants came on the left side of the jeep on which side was the steering-wheel and attacked Radha Krishna with knives. Sen Gupta at once went away with the child which was sitting on the front side and returned after some time.

Naraini Devi was in the back side of the car with another child. To protect her husband she leaned over him and got many a blow herself. One of the assailants had a hockey stick according to the prosecution witnesses in Court. Their cries brought on the spot Har Narain and Vishwanath, D. I. S. constables, who were sleeping in the D. I. S. office compound and shortly afterwards the Deputy Superintendent of Police Shri Inderjeet Sharma reached the spot. Shri Sharma naturally as a senior officer took charge of the situation and directed Vishwanath to inform the police of police station Colonelganj, 3 furlongs away, about the incident. Vishwanath sent the telephonic message to the effect that three persons had attacked a man on the jeep in front of the office. No further information was conveyed. Details of the incident need not have been conveyed and need not have been known by that time; but something which Vishwanath had noticed himself and which is now relied upon to be of great significance to the prosecution case was omitted by him in his telephonic message and, that is, his having heard the sound of the horses hooves indicating that some horse-driven vehicle was going at a very fast speed in the same direction in which the Colonelganj police station lay.

He suspected that the assailants had made good their escape on that vehicle; but he did not communicate this fact. Its communication might have helped the police to follow the alleged horse-driven vehicle. It is true that it had got some start, but after all the sentry on duty at the gate of the police station might have noticed the vehicle passing the police station or some other passer-by might have been able to give some clue with respect to the progress of that vehicle. Vishwanath himself was not to be the final judge of the usefulness of such an importanat information to the police at police station Colonel Ganj.

(16) On the receipt of the telephonic message S. I. Deo Dharisingh with the police party reached the spot and passed the vehicle in which Radha Krishna and Naraini Devi were being taken to the hospital. He reached the spot, looked up the locality and started the investigation. Mr. Inderjeet Sharma, Deputy Superintendent of Police, retired to his office and there prepared the first information report, a note addressed to the Station Officer, Colonelganj. The significant statements made in this report are that he was informed by Har Narain Singh of his staff that a person going in the jeep car in front of the office had been attacked by some unknown persons with daggers and lathi, that he found Radha Krishna Chaudhari, the victim, lying in the driver's seat in the jeep and his wife weeping and embracing him, that the driver Sen Gupta was standing nearby and about 20 people were on the spot and that

the woman, i.e., Naraini Devi and driver, i.e., Sen Gupta told him that the car failed suddenly and just after a while three persons of whom one was armed with lathi having a 'pharsa' and two armed with daggers attacked Radha Krishna and fled towards the east, the direction from which they had arrived. ,

(17) Having given this description of the incident Shri Sharma started the second paragraph with reference to the arrival of Constable Har Narain Singh and Head Constable Vishwanath on the scene of occurence and their hearing the noise of fastly running of a horse on the road towards the east, indicating that the culprits ran away on some hackney carriage. It is after mentioning this fact relating to the arrival and observation of Vishwanath and Har Narain Singh that he mentioned that one of the culprits was said to be wearing a shirt and a dhoti and was stout and tall with moustaches and that the other two were dressed in banyan and dhoties and had their faces uncovered.

It is not said in the report whether this information was given by Naraini Devi or Sen Gupta and this would not appear to be so as otherwise its normal place should have been in the first paragraph where the facts stated by them had been narrated. Having mentioned these facts the Deputy Suprintendent of Police stated further in his report that the car stopped near the electric pole and that there was sufficient light for the woman, driver and others, who had reached at once, to see the culprits well. None of the others, who are said to have reached the spot at once and to have been able to see the culprits has been traced or produced in Court as a witness. In fact, according to the prosecution case none had reached there in time to see the culprits.

(18) The jeep was moved from the road to the compound of D. I. S. office and, according to the prosecution evidence, constables were deputed on four-hourly duties to keep an eye on the jeep. Udairaj, a prosecution witness, was the first constable put on duty in this connection and was on duty from 11 P. M. to 3 A. M. The other two constables have not been examined. In fact it has been suggested that the investigating officer could not trace who they were, though, curiously enough, according to Udairaj it was Deodharisingh, the sub-inspector who had started the investigation, who had deputed the constables. Whoever might have deputed them, it is a great strain on credulity to think that the names of the two constables could not have been traced. However, on the afternoon of the 31st of July, the jeep was examined by Mr. Dawkins, a motor engineer. According to him he found no defect in the car which could account for the alleged sudden stoppage. He, however, found that water was in the fuel system. He used the hand liner of the fuel pump and found that only water was delivered instead of petrol. He continued pumping until petrol began to come out, and the water which came out of the tank thus was placed inside a jar which was sealed. Its quantity was estimated by him at the time to be about one to one and a quarter gallon.

After he had taken out this water and connected up the line he found no difficulty in starting the engine, which was operating well. In order to express a definite opinion regarding the effect of the amount of water in a running vehicle he opened and examined the fuel tank next day, i.e., on the 1st of August. On opening the tank next day he found that the fuel feed was through a "U" tube reaching from the upper step of the tank to the lower step. This "U" tube did not reach right to the bottom of the tank, making it possible for the engine to operate for some time due to the motion of vehicle keeping the liquid in the tank in motion and resulting in a certain amount of water having reached into the carburettor together with the petrol. He expressed the opinion in his note, Ex P24, prepared on the 1st of August, that the presence of water in petrol caused an engine to first spit and give jerky operation and that later when the quantity of water predominated the vehicle would spit and jerk excessively and then come to a standstill and that while a mixture of water and petrol was being sucked in the jerky operation of the engine that would restrain the speed of the vehicle.

In his deposition Mr. Dawkins further stated that the bottom end of the fuel tube indicated by A on the sketch plan Ex. P23 was about an inch higher than the bottom of the tank and that if the liquid in the tank was below point A it could not be sucked up and whatever reached that level would be sucked. This would mean that the water which had been taken out on the 31st of July was the water which was in the tank above the level of the point A, the lower end of the fuel tube, and that the water in the tank below the point A would be in addition to the water which had been taken out. The other portion of the water mixed with petrol would be in the carburettor. Thus the total quantity of water mixed would, according to Mr. Dawkins' statement, be a total of the water taken out on the 31st of July, the water remaining in the tank below point A and water in the carburettor or which got wasted. This quantity, according to the learned Sessions Judge, would be much above one gallon in volume.

(19) Mr. Dawkins further stated that the presence of water in petrol caused the engine to first spit and give jerky operations and that when later the quantity of the water predominated the vehicle would spit and jerk excessively and then come to a standstill. He was very definite on this point and repeated that before the car as mentioned by him with that amount of water should have stopped, the spitting and jerking must have taken place almost invariably, before the car stopped, and also that if it was said by someone that he did not notice anything unusual in the jeep car from Saxeria's house upto the place where it stopped he would not agree to that if the stoppage was due to the presence of water.

(20) Mr. Dawkins also deposed about the distance from Saxeria's house to the place of incident according to the meter fixed to his car and said that it was just 30 or 40 yards short of a mile and a half and that the route included a portion with an uphill gradient. He further deposed that the petrol in the fuel line and the carburettor above

the point A would be just sufficient for the jeep to go about a mile on the level road.

(21) S. I. Deodhari Singh examined Sen Gupta on the night between the 30th and 31st of July. He contacted Naraini Devi at the house of her brother Brij Mohan the same night and had a talk with her for some time, but, curiously enough, made no record of what she had stated. The police did not record any statement of Naraini Devi or Ram Autar till several days after the incident, the explanation being that Naraini Devi was not available and was not in condition to give an account of incident and that Ram Autar kept out of the way. Ram Adhar, cleaner of Ram Autar, was examined on the 1st of August. Shital driver was next examined on the 16th of August. His confession was recorded by a Magistrate on the 20th of August. On the 22nd of August a simultaneous raid was made for the arrest of the various accused and all of them, except Ram Narain, were arrested that day.

(22) It may be mentioned that on the 7th of August the investigation changed hands. Circle Inspector Indrapal Singh of the D. I. S. took over the investigation from S. I. Deodhari Singh. Saxeria was examined on the 6th of August. Mata Din, the alleged ekka-driver who had taken the assailants to the spot that night, was examined on the 23rd of August.

(23) Budhoo accused is said to have made a confession to a Magistrate on the night of 27-7-1949 during the preliminary enquiry after the challaning of the accused. In fact the case was up for hearing that day and the accused had returned to jail at about 5 p. m. The confession is said to have been recorded at about 8 p. m. This confession has not been taken on the record by the learned Sessions Judge on the ground that it did not come within the confession recorded under S. 164, Criminal P. C., and was, therefore, inadmissible.

(24) The four accused who are said to be the actual assailants, namely Munnoo, Budhoo, Arjun and Ram Narain were put up for identifications and were identified by some of the three identifying witnesses, namely Naraini Devi, Sen Gupta — who were admittedly in the car and had witnessed the incident — and Ram Murat, who deposed to have passed by an ekka going fast and on which were seated the four persons.

(25) All the accused denied their alleged connection with the conspiracy and the murder. We need not at this stage mention their statements in detail.

(26) Dr. Chaturvedi examined the injuries on the corpse of Radha Krishna and found fifteen injuries on the person, which included three punctured wounds two bruises and incised wounds. All of them except an incised wound on the right shoulder were on the left side of the body. One of the punctured wounds was on the abdomen transverse across mid-line 5"above the umbilicus. One of the bruises was on the front and the middle thigh.

(27) Naraini Devi had twenty-one injuries. All of them were with a blunt weapon. Most of them were also on the left side of the body. Three injuries consisting of a contusion on the right buttock, another contusion on the right knee and an abraded contusion on the inner aspect of the right ankle were on the right side. The remaining injuries were on the left side.

(28) It is really surprising that Naraini Devi should receive so many injuries while she was leaning over her husband from the back side and yet should not receive a single injury from a sharp-edged or pointed weapon which apparently were mostly used against Radha Krishna. In this connection mention may be made of the observations of S. I. Deodhari Singh that he had found some blood at one spot and drops of blood at others on the road. The prosecution story as such does not tend to explain the presence of blood on the road.

(29) Before dealing with the evidence, direct or circumstantial, on the record, it is necessary to dispose of a few points of law urged at the hearing of this appeal. The first is the effect of the recent rulings of the Supreme Court on the question of what the High Court is empowered to do when hearing an appeal against acquittal. It is not disputed and cannot be disputed in view of what was held in — 'Sheo Swarup v. Emperor, AIR 1934 P. C., 227 (2) (A)' and fully endorsed by the Supreme Court in — 'Prandas v. State, AIR 1954 SC 36 (B), that the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P. C., in an appeal from an order of acquittal is to be found in the following:

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice."

This was the first case decided by the Supreme Court laying down the law dealing with the jurisdiction of the High Court in an appeal against acquittal. It was decided by a Bench of six Judges on 14-3-1950. Thereafter the same view has been either repeated in exactly those words or has been in a way summarised in some other form. One subsequent case in particular requires direct mention at the moment and it is — 'Wilayat Khan v. The State of U. P.', AIR 1953 S.C., 122 (C), decided on 25-5-1951. It was observed in this case by the three learned Judges who decided it - two of whom

were members of the Bench deciding 'Prandas's case (B)':

"Interference with an order of acquittal made by a Judge who had the advantage of hearing the witnesses and observing their demeanour can only be for compelling reasons and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence or the facts. As stated already, we feel that the grounds which have been given by the High Court for setting aside the order of acquittal are not such as to show that the conclusion arrived at by the Sessions Judge was not the proper one to reach."

(30) The different form in which the same principle seems to have been expressed in the other cases has been that the order of acquittal should be set aside for compelling reasons and that the presumption of innocence of an accused gets reinforced after he had secured acquittal from the trial Court.

(31) It was on consideration of these various cases that one of us held in — 'State v. Puttoo (Criminal Appeal No. 674 of 1951)', (All) (D) when the case came up before him on a difference of opinion between the Judges originally hearing the appeal that

"Substantial and compelling reasons would be deemed to exist when the opinion taken by the Sessions Judge of the material on the record is such which no reasonable Judge should have taken. If it is an opinion which could also be taken. due weight to that opinion can be given only by accepting it and not by upsetting it."

Reference was then made in the case to the observations of the Privy Council in — 'Ramanugrah Singh v. King Emperor', AIR 1946 PC 151 (E) in connection with what the High Court should do in a case on reference under S. 307, Sub-s. (3) Cri P. C., and it was then observed by one of us:

"The question before me then resolves itself to determining whether the view taken by the learned Sessions Judge is a view which a reasonable Judge could have taken or is a view which could not have been taken by any reasonable Judge."

(32) The learned Advocate General has vehemently urged that this view that in an appeal on acquittal the High Court should not or could not upset the order of acquittal unless it was of opinion that a reasonable Judge could not have taken that view does not follow from what the Supreme Court has held and that the Supreme Court had not in any of the decided cases, which number about a dozen, expressed that view or dealt with the case in a manner which would indicate that that is the correct interpretation of the law with respect to the jurisdiction of the High Court as laid down by the Privy Council and endorsed by the Supreme Court. The learned Advocate General submits that the four matters mentioned in the law laid down are not peculiar to the hearing of an appeal against acquittal but are to be considered even in appeal against conviction. It is urged that the High Court has naturally to consider the views of the Sessions Judge or the Court acquitting the accused and will naturally be slow in differing from that opinion in any case, be it of conviction or of acquittal.

It is further urged that the presumption of innocence is incapable of being reinforced or weakened and must continue in its original condition and that the right of the accused to the benefit of doubt is always available to him even at the stage of the original trial and in the appeal, be it against acquittal or conviction. It is also urged with great emphasis that if these matters were to shackle the power of the High Court in dealing with an appeal on acquittal, that would not be consistent with what has also been held that the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. He suggests that this well-settled law with respect to the jurisdiction of the High Court in regard to the appeals against acquittals simply means that the High Court should in its judgment consider the views expressed by the trial Court and that having considered those views the High Court is free to form its opinion about the evidence and decide the case according to the opinion so formed.

In support of such an interpretation reference is made to the fact that the Criminal P. C. or any other statute does not create any distinction in the powers of the High Court in dealing with an appeal against conviction or acquittal. Section 423 of the Criminal P. C., lays down the powers of the appellate Court in disposing of an appeal, and provides that after perusing the record of the case and hearing the appellant or his pleader and the Public Prosecutor, in case they appear, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may do one of the things mentioned in its clauses (a) to (d). Clause (a) deals with the appeal against an order of acquittal and the High Court can reverse such order and direct that further enquiry be made or that the accused be retried or committed to trial or may itself find him guilty and sentence him according to law.

(33) As there was no dispute about the law laid down and the real contention related to the practical application of that law or to the practical dealing with a particular case, we went through the various cases with a view to find how the Supreme Court itself had applied this law in dealing with the appeals which went up to it. Among the 11 cases so far reported, there is none in which the Supreme Court had to deal with an order of acquittal by the High Court and which could, therefore, be a very clear guide as to how to deal with an appeal against an order of acquittal. All these appeals were against the orders of the High Court upsetting the orders of acquittal and in practically all these cases except one the Supreme Court reversed the orders of the High Court and acquitted the accused. In the first case reported in AIR 1954 S. C. 36 (B) already referred to, there is nothing in the actual discussion of the case which is of any use in this connection.

The next case is of — 'Tulsiram Kanu v. The State', AIR 1954 S. C. 1 (F). It was observed by Chief Justice Kania at page 2 that

"Before proceeding to examine the reasons for the High Court's conclusion, we think it necessary to point out that in an appeal against an

order of acquittal on a charge of murder, under S. 417, Criminal Procedure Code, while the appeal Court has full powers to review the whole case, the Court must start with the realisation that an experienced judicial officer (with four assessors) had concluded that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before the Court. It, therefore, requires good and sufficiently cogent reasons to overcome such reasonable doubt before the appeal Court comes to a different conclusion."

The Supreme Court then discussed the evidence and felt that the views of the Sessions Judge were right and those of the High Court were wrong and therefore allowed the appeal. This case supports the view that good and cogent reasons are necessary to upset an order of acquittal and that in its turn implies that merely because the appellate Court thinks differently from the trial Court would not be sufficient to upset the order. Of course, it will always be an open question what would be good and cogent reasons in a particular case.

(34) The next case is AIR 1953 S. C. 122 (C). In this case the High Court Judges expressed their consciousness of the facts that in an appeal from an acquittal the presumption of innocence of the accused continued right up to the end and that great weight should be attached to the view of the Sessions Judge, and kept those considerations in mind according to their own expression in the judgment. They also proceeded to discuss and weigh the evidence in meticulous detail and in doing so they brushed aside several circumstances which weighed with the Sessions Judge as improbabilities in the prosecution story, with the result that they were convinced of its truth, even though they were of opinion that the evidence of the prosecution witnesses had to be subjected to close scrutiny having regard to the admitted existence of the party feelings and enmity between the accused and the eye witnesses. This is, therefore, a case which would satisfy what the High Court should do in an appeal against an acquittal according to the submissions of the learned Advocate General and which should be sufficient for upsetting the order of acquittal.

Chandrasekhara Aiyar J., who delivered the judgment of the Supreme Court, observed at page 124 when considering the testimony of one witness :

"The High Court rejected his testimony for reasons which do not appear to be conclusive,..".

and again at another place on the same page :

"The inference that the Sessions Judge, drew from these circumstances that the witnesses did not probably see the occurrence, but came on the scene after the murder, and evolved a probable story against their enemies is not far-fetched or unreasonable. His conclusion appears to us to be more sound than the one reached by the High Court, who discounted the weight to be attached to the infirmities by a process of rather far-fetched reasoning".

It is at the conclusion of this case that they observed what has already been quoted as to when there should be an interference with an order of acquittal. The two earlier observations just mentioned indicate both that the reason for the High Court to differ from the view of the Sessions Judge should be of some such kind as can be said to be conclusive and that the High Court should also see whether the reason given by the Sessions Judge for a certain view is a far-fetched or unreasonable one or not. We are of opinion that both the final observations and these two observations in the midst of discussion amply bear out that the cogent and good reasons contemplated in AIR 1954 SC 1 (F), and the compelling and substantial reasons referred to in subsequent judgments must be analogous to reasons which can be said to be conclusive and clinching so that there may not apparently remain any room for considering whether the view of the trial Court was a correct one or that of the High Court was a correct one. If the reasons which appeal to the High Court for disturbing a judgment of acquittal are not of such a kind, then it would only be said that the evidence in the case was such that both the views could be reasonably arrived at and that therefore in a case of acquittal the High Court should not differ but confirm the view of the Sessions Judge.

The reason for the High Court's deciding the appeal thus in spite of its own inclinations is to be found in the four matters which have been so significantly mentioned whenever the Privy Council and the Supreme Court formally laid down the jurisdiction of the High Court when dealing with an appeal against acquittal. The facts that the Sessions Judge had the advantage of seeing the witnesses whose statements he had recorded and had occasion to observe their demeanour — whether he had put in writing his views about it or not — place him in a greater advantage than the appellate Court. Apart from this consideration, which can be explained away in many a case because such clear demeanour which should influence the opinion of the Court is not to be met every day, due weight must be given to two other matters, that is the presumption of innocence of an accused and the right of the accused to the benefit of doubt. These two matters, we think, have the effect of tilting the scale when merely on an appreciation of evidence accordingly to their inclinations the two Courts come to different views about the evidence on the record. In an appeal against acquittal the effect of this presumption and the right in favour of the accused would justify and would necessitate in a way the appellate Court's not interfering with the order of acquittal but maintaining it. It is the same two considerations which would explain the non-insistence of considering these matters in the process of arriving at the conclusion by the appellate Court when dealing with an appeal against conviction. The moment the appellate Court is inclined to view the evidence differently from the trial Court, these very facts, that is, the presumption of innocence of the accused and his right to the benefit of doubt must impel and necessitate the appellate Court to upset the order of conviction as otherwise effect is not given to these two considerations in deciding the appeal. In this view of the matter, it appears to

us that though S. 423, Criminal P. C., uses only one expression in connection with the powers of the appellate Court in dealing with appeals, its provisions fully justify the subtle distinction in the powers of the appellate Court in deciding an appeal against conviction and an appeal against acquittal. Section 423 simply provides that if the appellate Court does not see sufficient reason for interference it may dismiss the appeal and impliedly if it sees sufficient reason to interfere it may pass any of the orders contemplated by Cls. (a) and (b) of sub-s. (1) of that section.

(35) The learned Advocate General submitted that in the case under discussion, i. e., AIR 1953 SC 122 (C), the judgment does not indicate that the Supreme Court had given pointed attention to the law as formally laid down with respect to the power of the High Court in an appeal against acquittal because that has not been quoted in that judgment. Omission to quote it should not necessarily lead to that conclusion and specially when we find that earlier in the judgment they had drawn attention to the fact that the High Court was conscious of the two considerations, namely the continuance of the presumption of innocence of the accused and the great weight to be attached to the view of the Sessions Judge. In the subsequent cases, namely those reported in — 'Surajpal Singh v. The State', AIR 1952 S. C. 52 (G) and — 'C. M. Narayan v. State of Travancore-Cochin', AIR 1953 S. C. 478 (H), the High Court had ignored the views of the Sessions Judge. In — 'Puran v. The State of Punjab', AIR 1953 S. C. 459 (I), the Supreme Court did not find that there were any compelling or substantial reasons for the reversal of the acquittal order by the High Court and none had been pointed out by the High Court in its decision, which also did not discuss the evidence of the prosecution witnesses or explain satisfactorily the discrepancies that were of a material nature and which had been pointed out in those statements by the Sessions Judge in his careful and detailed judgment.

In — 'Zwinglee Ariel v. State of Madhya Pradesh', AIR 1954 S. C. 15 (J), the High Court upset the order of acquittal without discussing the evidence of the different witnesses or adverting to the criticism offered by the Additional Sessions Judge and based their conclusion mainly upon certain circumstances with regard to which, however, no opportunity of explanation had been given to the appellant. It was observed by the Supreme Court that the High Court overlooked some of the well-known principles recognised in the administration of criminal justice as laid down by the Privy Council in AIR 1934 P. C. 227 (2) (A) and repeated by the Court for the guidance of appellate Courts in dealing with an appeal against acquittal and that the learned Judges did not appear to have kept in view that the order of acquittal had strengthened the presumption of innocence in favour of the appellant and that he was entitled to the benefit of reasonable doubt.

(36) In — 'Ajmersingh v. State of Punjab', AIR 1953 S. C. 76 (K) it was observed:

> "After an order of acquittal has been made the presumption of innocence is further reinforced by that order, and that being so, the trial Court's decision can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons."

It appears that the two Courts had expressed divergent opinions on the credibility of the prosecution witnesses and that therefore the Supreme Court itself had to deal with that evidence and on consideration agreed with the view of the High Court. It is in this case that the appeal against the High Court's order upsetting an order of acquittal was maintained by the Supreme Court. This does not mean that what is necessary for the High Court is simply to give reasons for differing from the view of the Sessions Judge as suggested by the learned Advocate General. It only indicates that when an appeal against the High Court's order of conviction is to be dealt with by the Supreme Court, it has of necessity to deal with the evidence in the case and come to the conclusion whether the High Court had good and cogent reasons, or, what are said to be substantial and compelling reasons, for upsetting the order of acquittal.

(37) It is observed in the case reported in — 'Trimbak v. State of Madhya Pradesh', AIR 1954 S. C. 39 (L).

> "It is settled law that the presumption of the innocence of an accused person is reinforced by an order of acquittal and a heavy onus rests on the prosecution in an appeal from such an order to prove that the order is manifestly erroneous. The High Court seems to have approached the case as if it was considering an appeal preferred against his conviction by an accused person."

This also indicates that the High Court should consider an appeal against acquittal differently from an appeal against conviction and should pointedly consider whether the order of acquittal is manifestly wrong, that is to say, based on reasons whose incorrectness is not difficult to see.

(38) The last case in the series of decisions is reported in — 'Shiv Bahadur Singh v. State of Vindhya Pradesh', AIR 1954 S. C. 322 (M). It was observed in this case at page 327:

> "The appeal before us was very elaborately argued on behalf of the appellants and we were taken through the evidence of the several witnesses examined on behalf of the prosecution in great detail. We heard the appeal as an appeal on questions of fact with a view to see whether the judgment of the Judicial Commissioner reversing the acquittal of the appellants by the Special Judge was justified."

This again would indicate that when upsetting an order of acquittal the first thing to notice is whether the order of acquittal was justified. It should follow that if the reasons given for the order of acquittal are not such which could be shown to be erroneous on the basis of something which would be conclusive and clinching in nature, that order will be considered to be a justified order even though, if the appellate Court was to form its own opinion independently, it might have been inclined to take a different view due to its own view of things but not on account of any conclu-

sive reason which could be equated with substantial and compelling reason.

(39) It was urged that the substantial and compelling reason would be the finding of the appellate Court that the evidence and circumstances on the record lead to the conclusion that the accused was guilty, as a finding about the guilt of the accused must compel the appellate Court to upset the order of acquittal and convict him. It cannot be disputed that if the appellate Court gives a finding that the accused is guilty, it must upset the order of acquittal and convict the accused. But what the law laid down in all these cases is that in coming to a conclusion about the guilt of the accused, the appellate Court will take into consideration the four matters which have been mentioned while exercising its full power of reviewing the entire evidence on the record. Consideration is to be given to these matters not after reaching the conclusion that the accused is guilty according to its views but before arriving at that conclusion, and if the conclusion of guilt cannot be arrived at or ought not to be arrived at in a case of appeal against acquittal — unless conclusive or substantial and compelling reasons are found to differ from the views expressed by the Sessions Judge — no such conclusion would be recorded and there would be no compulsion to convict the accused.

(40) We have dealt at length with this question due to its every day occurrence in Courts and its importance in connection with the appeals, though it has been so often laid down by the Supreme Court. The necessity arose on account of different interpretations put on the law as laid down when that law was to be applied in practice.

(41) It was also urged by the learned Advocate General that since the decision of the Privy Council no change in law had taken place as the Supreme Court simply endorsed what had been held by the Privy Council and that, therefore, there could not have been any substantial change in the law as understood and applied in the last 20 years. It does not appear that any case in which a High Court convicted an accused on an appeal from acquittal went to the Privy Council to see whether what it has laid down had been correctly applied by the High Court. The Supreme Court has endorsed the view expressed by the Privy Council; but it must be taken that the endorsement of that view is really endorsement of that view as contemplated by the Supreme Court & which can be evident only from the other expressions used by that Court in its various decisions.

(42) In view of the above we are of opinion that in an appeal from acquittal this Court has the power to review the entire evidence and then to come to its own conclusions, but that in arriving at that conclusion it must keep in mind those four matters mentioned above and that in practical application, keeping in consideration those four matters, must mean that the High Court should find such reasons which may be termed compelling and substantial reasons or which may be deemed to be clinching and conclusive before it would be justified in upsetting an order of acquittal. It would not be so justified merely because it, after considering the criticism of the Sessions Judge and his views, feels that a different view should be taken for reasons which are not so strong as to be classed with substantial or compelling reasons, which, in our opinion, seem to be at par with such reasons against which practically nothing be possible to be said.

(43) The other question of law urged related to the admission of the confession made by Budhoo. It was contended that though the confession could not be recorded by a Magistrate under S. 164, Criminal P. C., after the investigation had concluded and enquiry had commenced before the committing Magistrate, the Magistrate recording the confession was not precluded from recording it if the accused was prepared to make it and that, therefore, the Magistrate was a competent witness to prove that Budhoo had made a certain confession to him. We do not agree with this contention and are of opinion that the case reported in — 'Nazir Ahmad v. King Emperor', AIR 1936 P. C., 253 (2) (N) is a complete answer to the contention. It is true that an accused is free to make a confession at any time he likes and the person to whom such a confession is made is also free to make a statement about it in Court and no question of admissibility or otherwise of such a confession should arise. The question of weight to be attached to such a confession is a different one. But the real point is that a Magistrate is not just "any person". He occupies the position of a Magistrate. He purports to act as a Magistrate and not as an ordinary individual. It has been clearly laid down by their Lordships in the aforesaid decision that when a power is conferred upon a certain public servant, it must be exercised precisely in the manner in which it is ordained to be exercised and that it was very undesirable that Magistrates should act like ordinary citizens and should appear as witnesses in Courts of law, and that they should appear as witnesses only in very exceptional cases when law makes it incumbent for them to play that role. This view of the Privy Council was endorsed by the Supreme Court in AIR 1954 S. C. 322 at p. 335 (M) though in another connection. We are, therefore, of opinion that a Magistrate could not have recorded that confession of Budhoo purporting to exercise the powers conferred on him U/S 164 Cr. P. C. and that a confession so recorded by him could not be taken in evidence.

(44) With respect to this particular confession it may also be said that the prosecution did not try to lead evidence about it at the stage of preliminary enquiry before the Magistrate and that therefore they could not have claimed as a matter of right the recording of this evidence in the Sessions Court. We find that Budhoo was questioned about having made such a confession by the committing Magistrate. The justification for putting this question does not appear to be any. An accused is to be examined with respect to matters coming on the record and having a tendency to go against him in the consideration of his guilt. When there was no evidence of the confession on the record the committing Magistrate was not justified in putting that question to Budhoo. It may, however, be mentioned at this stage that when Budhoo was questioned about it on 29-7-1949, he denied having made the confession.

(45) We have been taken through the entire evidence on the record and we have also been taken through the main portions of the judgment of the learned Sessions Judge and we may say at once that we are inclined to agree with the view of the case he had taken. The main grievance against judgment of the Court below has been the approach to the case. It seems to be the prosecution view that the Court should not have dealt with this case in the usual manner on looking to the credibility of witnesses but should have started from a particular fact which, if found in favour of the prosecution, would have naturally led to the conclusion that the other circumstances relied upon fitted with the prosecution case and, therefore, the evidence about those circumstances should have been taken to be worthy of belief. We do not think that that alone would have been the only correct procedure to deal with the case even if it is correct for a Court to pick up a certain circumstance and then begin with to find whether the other circumstances fitted with it or not; and in this case, in particular we are of opinion that this particular circumstance is not of such a nature a finding on which would have made smooth deductions about the other facts necessary to be found before the conviction of the appellants could possibly be recorded.

This particular circumstance is said to be the finding of water in the petrol tank on the 31st of July by Mr. Dawkins. The reasoning is that if water had been mixed in the car, this fact together with the fact that there was an expectation of the car stopping after going a certain distance must lead to the conclusion that people had planned this murder and that it was not an accidental murder by some ruffians on the road when the car happened to stop. The car went smoothly to Saxeria's house and therefore water must have been poured in when the car was standing at Saxeria's house. The best opportunity for this must have been when admittedly Shital alone happened to be with the car, Sen Gupta and Ram Adhar having gone away with Ram Autar's car to fetch his wife. It is also natural for Ram Autar to have reached the car and ordered Sen Gupta to go with his car because he had to explain the working of the gear to Sen Gupta and that therefore Shital's statement that he poured water in the tank at the directions of Ram Autar should have been believed irrespective of the fact whether there was any good corroborative evidence of the statement of the driver Shital — evidence which was sought to be led by producing Raja Ram, a hawker.

It may be said at this stage in fairness to Mr. Wadhwani, who argued the appeal on behalf of the State in the unavoidable absence of the learned Advocate General, that he did not rely on his statement in this Court because he considered it next to impossible for any person even if he happened to pass close to the car to notice the nature of the liquid which was poured in. Firstly, the presence of water in the tank even if proved would not necessarily mean that whatever Shital states with respect to the conspiracy must be true, or that Shital himself must have poured the water inside the tank. Secondly, we are in agreement with the learned Sessions Judge that the story of Shital's mixing the water in the tank should not be accepted as the quantity of water said to be put in by Shital is much short of the quantity of water found inside the tank. In this connection it has been strenuously urged for the State that there is no definite evidence on the record with respect to the quantity of water found and that the Court missed in not getting on record the conclusive evidence on the point and which could have been by examining the tank and finding for itself how far the statement of Mr. Dawkins, the expert, could be relied upon in that connection.

The Court below was moved to look up the tank in case it had its doubts at the stage of the arguments and it did not accede to the request. It appears to us that it is not open to the prosecution to take advantage of indefiniteness, if any, with reference to the quantity of water recovered from the petrol tank. In his very first report which Mr. Dawkins prepared on 31st of July, he mentioned that the water taken out was about one to one and a quarter gallon. The tin in which the water was kept was sealed and kept in possession by the police. It should have been better if the investigating officer had got that water measured at that time. On the 16th of August Shital was examined by the police. Shital states in Court that he had filled in one gallon mobil oil tin with water and poured that water inside the petrol tank. In fact, according to his statement, the quantity of water would be three-fourths of a gallon. It may be presumed that he made a similar statement to the police on the 16th of August. The investigating agency should have, therefore, proceeded further in connection with the quantity of water and during the investigation found out facts which would have shown that what Shital had stated was correct. They did nothing of the kind. Even when the case went to Court, the simple request to have the water in the sealed tin measured was not done. No such request was made to the Court.

If the quantity of water in the tin had been found to be in excess of three quarters of a gallon that would have demolished the prosecution case. This is admitted on behalf of the State even in this Court. If the prosecution failed to rebut the evidence on the record which tends to indicate as strongly as possible in the absence of a definite statement based on actual measurement that the water was more than three quarters of a gallon, it is the prosecution which should suffer and not the accused. Mr. Dawkins estimated the quantity of water as a gallon or a gallon and a quarter on the 31st of July. Besides this quantity of water his statement shows that there had been some water in the carburettor and that there must have been some water inside the tank below the level of the point A, the lower end of the fuel line. According to his estimate this point would be 1" above the bottom and therefore the quantity of water in the tank which could have been pumped out was estimated to be about a gallon.

Thus the approximate quantity of water put in, according to Mr. Dawkins, must have been about two or two and a quarter gallons. Whatever allowance may be made for the possible inaccuracy in the statement of Mr. Dawkins, it appears to us to be plain enough that the quantity of water

put in must have been much more than three quarters to a gallon, which would be the case if Shital had put in water from one gallon mobil oil tin. This should mean, therefore, that either there was no water in the petrol tank at the time of the incident and water had been poured in later or that it was not Shital who had poured in the water in the petrol tank. Whatever be the actual fact, this inference should shatter the credibility of Shital as a good witness. As an approver he commanded little probative value and this inference is sufficient to take away any evidentiary value which could have been given to the statement of the approver in the absence of good corroborative evidence.

(46) Apart from this question of the quantity of water put in, the further statement of Mr. Dawkins with respect to the behaviour of the engine in case water in the petrol tank was the solitary cause for the sudden stoppage of the car goes against the theory that the car stopped on account of the water put in the petrol tank of the jeep. The first information report, which the Deputy Superintendent of Police recorded soon after the incident, presumably on the basis of the statements of both Sen Gupta and Naraini Devi, does not mention that the car stopped either with a jerk or with jerks and spitting out, the necessary incidents of the ultimate stoppage of the car on account of the mixing of water in the petrol tank. As already mentioned, in their statements in Court Sen Gupta states that the car stopped with a jerk and Naraini Devi also says that the car stopped after a little noise of Phatphat. These statements in Court cannot be given greater weight than what they had earlier stated, and appeared to have been made to make their osbervations answer the necessary consequences, according to the expert of water mixing with petrol. They could not have failed to notice the jerks and the sound of spitting out, which according to Mr. Dawkins, goes on increasing from the moment it starts. The failure of these witnesses to notice such incidents in the working of the engine goes against the theory that the car stopped suddenly on account of the water being mixed with petrol.

(47) Similarly, the third statement of Mr. Dawkins about the distance likely to be covered by the jeep on the petrol which would be in the fuel line and the carburettor above the lower end of the fuel line also goes against the prosecution case that the car stopped solely on account of the mixing of water with petrol. The jeep had covered a distance of about a mile and a half. According to Mr. Dawkins, it could not have gone beyond a mile on a level road. There was a steep up-gradient for some distance on this road. The car had to go from the place of parking to Saxeria's gate. This means that, according to the expert, the petrol in the fuel line and the carburettor alone would not account for the car covering this larger distance and that, therefore, the stoppage of the car must have been due to some other cause. The mere fact that Mr. Dawkins could not discover that cause or that the engine started and operated well after the water had been taken out need not mean that the jeep stopped just on account of the water reaching the carburettor. There might have been some other reason for the stopping of the car. It is useless to speculate what such reason could have been. For the purposes of the case it is necessary that the reason alleged should have been proved to be the reason for the stopping of the car and therefore a reason which supports the approver.

(48) Lastly, mention may be made of the other point why the prosecution evidence falls short of establishing that water found in the tank existed in it at the time of the incident. The prosecution did not lead evidence to the effect that nobody could have tampered with the jeep after the incident and during its custody with the police. A mere suggestion that the police could not have allowed anyone to tamper with the car or that no one would have tried to reach the car and pour water in the tank or that, if the police had connived at the pouring of the water, they must have known its exact quantity and there would not have been such difference in the quantity of the water poured in and the quantity found, is insufficient to make up for the lack of evidence that the water found did exist at the time the car stopped.

We are not concerned as to how the others act. We are concerned as to what was the state of affairs at the time when the incident took place. It is for that purpose that it was necessary to show that there was no tampering with the petrol tank beween the incident and Mr. Dawkins's examination of the car. The evidence is lacking. We have already expressed our views at the suggestion that the police could not trace the two constables, who in addition to Udai Raj, were on Sentry duty keeping an eye on the car. Even Udai Raj, the constable examined in the case, has not stated that during his period of duty between 11 p.m. to 3 a.m. that night and again from 11 a.m. to 3 p.m. on the 31st of July, nobody approached the car or nobody could approach it and pour water inside. In view of all these considerations which the learned Sessions Judge had dealt with at great length, we are inclined to agree with his view that it has not been proved that water had been poured in the petrol tank by Shital when the others were having their dinner at the house and Sen Gupta and Ram Adhar had been sent away.

(49) Shital, as already mentioned, is an approver. He is the solitary witness of all the statements sought to be used against the accused. There is no other corroboration pointing to the accuseds' conspiring together. There are other considerations which go a long way in throwing doubt on the veracity of Shital and they may also be mentioned briefly. Shital was arrested on the 16th of August, 1948, and was kept at the thana till the 18th of August. He was interrogated by the Inspector on the 16th of August. There is no justification for his detention at the police thana on the 17th and 18th of August. Circle Inspector Indrapal Singh has stated that he was detained on the 17th & 18th of August because he was arrested at 8 p.m. on the 16th of August and could be kept at the thana till 24 hours after his arrest, i.e., till about 8 p.m. on the 17th of August & as it would be too late for his admission to jail at night on the 17th of August, he was kept on in the thana till the 18th of August. The explanation is not a good one

and only betrays the gross lack of knowledge on the part of the Circle Inspector with respect to his powers in keeping an arrested person in detention in police custody. What S. 61 of the Criminal P.C. provides is that

"No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not in the absence of a special order of a Magistrate under S. 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court."

This does not empower a police officer to keep an arrested person in custody a minute longer than is necessary for the purposes of the investigation. It does not give him an absolute right to keep a person in custody till 24 hours and longer for other reasons like the one suggested, that is, inability of the admission of Shital in jail. Shital should have been sent to court on the morning of the 17th of August for the purpose of his being sent to jail. He had been interrogated on the 16th of August. Apprently there was nothing left to interrogate him about and afer all even after the man had been sent to jail he could have been interrogated there by the police, though, of course, after obtaining permission from the Magistrate. His detention at the thana for two days unnecessarily must mean that he was being detained with some purpose which the accused could legitimately claim should affect his statement adversely. Why the police be so actuated is a different matter, and it is not necessary to be established.

(50) Ram Adhar, cleaner of Ram Autar, was expected to corroborate Shital's deposition about the meeting of the cospirators at Hanuman's house shortly before the dinner as he made a similar statement in his statement recorded under S. 164, Criminal P. C. about Ram Autar's coming and directing Sen Gupta to take his car to fetch his wife, but he did not make such a statement before the committing Magistrate. Ram Adhar was declared a hostile witness in the court of the committing Magistrate. He did not support the prosecution case and alleged that the satements that he made under S. 164 Criminal P. C. were due to the beating of the police which had kept him confined for eight days. He was not produced in the Sessions court, it being reported that his whereabouts could not be traced. Brahma Deo Singh Head Constable and Sukkhoo Singh (P. Ws 50 and 51) depose that they could not trace him at the addresses given and the various mohallas they looked round. His statement before the committing Magistrate was therefore taken on record under S. 33, Evidence Act. His statement before the committing Magistrate does not help the prosecution and affords no corroboration to Shital's statement. His statement under S. 164, Cr. P. C. cannot be used as substantive evidence.

(51) There is nothing in the statement of Shital about any conversation between the three conspirators at the house which should indicate that they were hatching a plot for committing this murder, or for any other offence either. It is also surprising that Sharma who had no grievance against Radha Krishna should have joined the alleged conspiracy. The mere fact that he had put up with Hanuman for some time on arrival in Kanpur about two months before is hardly a good reason for Hanuman's reposing confidence in him for such a conspiracy and his agreeing to take part in it. It may be that Hanuman required the services of an engineer to know how to arrange for a certain stoppage of car but that information he could have got from Sharma before the alleged meeting and that did not make it necessary that Sharma should figure so prominently at the conversation and should have been invited to the dinner though not known to Saxeria. Both these alleged conducts of Sharma appear to be unnecessary.

(52) The evidence of conspiracy against Madan Lal is even less than against Sharma. Merely his going with Ram Autar to dinner is no indication that he was a party to the conspiracy.

(53) Reason for Hanuman having a grievance against Radha Krishna is simply alleged but no attempt has been made to establish it by legal evidence. Sir Padampat Singhania to whom a complaint is alleged to have been made and Sohan Lal Managing Director who rebuked him have not been examined in court. The omission to examine them is explained by the suggestion that they would not have been expected to depose against Hanuman, one of their employees. The reason does not appeal to us. It might have been different that other good legal evidence had been produced and then other evidence was not produced because it was expected that that would not be reliable. But when there is no evidence about that fact it was the bounden duty of the prosecution if it seriously intended to prove it and use it against the accused to examine the witnesses who were competent to depose about it. The fact therefore remains that there is no evidence that Hanuman was rebuked by Sohan Lal or that Radha Krishna had complained to Sir Padampat Singhania. An attempt to make a suggestion about the fact, which is not intended to be proved, by leading evidence which is really no evidence and should not be admitted is never a fair procedure for the prosecution to adopt.

In this connection Sen Gupta driver of Radha Krishna deceased was examined. He deposed that he had overheard Saxeria telling Radha Krishna in the car that Sir Padampat Singhania had rebuked Hanuman on the complaint which Radha Krishna had made to him. Such a statement of Sen Gupta is no evidence of the actual complaint or of the rebuke and should not have been led as it has a tendency to prejudice the court and especially the assessors who might not be able to discriminate between precise good legal evidence and what is not such evidence. Saxeria does not support this statement of Sen Gupta. It follows therefore that Hanuman too had no grievance against Radha Krishna.

(54) The grievance of Ram Autar against Radha Krishan, if any, had been on account of differences between the two brothers. His father Rai Bahadur Jamuna Dass denies any knowledge of the existence of bad blood between his two sons. The evidence about the differences is of Naraini Devi, Sen Gupta, Ram Adhar & Saxeria. There may be

differences of opinion between the two brothers but such differences on account of one brother not approving of the conduct of the other or of one brother having a larger control in the affairs of the firm are not expected ordinarily to be taken so seriously by any of the brothers as to plan a murder. Ram Autar was a student at the college and must have been just looking to the affairs of the Ganga Oil Mills casually and in that setting the taking over of the management of the mill by Radha Krishna could not have been very offensive to Ram Autar. Older people do have objections to the conduct of the young members of the family but both the parties look to these differences in proper perspective. In this connection one other incident was referred to in evidence and that was Ram Autar's purchasing a new Stude Baker and a chaque delivered in payment of it being dishonoured. There is no evidence on the record to support the suggestion in the least, but it is suggested that this dishonouring of the cheque must have been at the instance of Radha Krishna who did not approve of the purchase of the new car.

Rai Bahadur Jamuna Dass states that he had no objection to the purchase of the car. No attempt had been made to show from the papers of the Ganga Oil Mills that any directions had been issued by Radha Krishna that a cheque issued by Ram Autar in payment of the price of Stude Baker be not honoured by the Bank. From the statement of Biswa Nath Talwar (P. W. 20) a shop keeper it appears that when he approached Ram Autar for cash payment on the dishonouring of the cheque he was taken to the Ganga Oil Mills and he was paid in hard cash the price of the Stude Baker. We do not think that this incidental dishonouring of the cheque on account of the funds in deposit of the bank being insufficient by about a couple of thousands of rupees was due to any action of Radha Krishna and could have been responsible for any aggravation of the ill-feeling between the two brothers.

(55) Another motive alleged for the ill-will was the personal immoral conduct of Ram Autar in visiting prostitutes. Here again evidence was led not of the prostitutes said to have been visited or of the persons who had actually seen them there but of betel sellers and tonga drivers who depose about Ram Autar and others visiting the Sandila House in Nandan Mahal Road, Lucknow, and some prostitute, Shamim by name, at Unao. The evidence of such witnesses does not appeal to us and certainly falls short of proving that this conduct of Ram Autar at places other than Kanpur was known to Radha Krishna and that Radha Krishna had really reprimanded Ram Autar in that connection.

(56) The other cause of ill-will between the two brothers is said to be Ram Autar's young wife going in the company of Hanuman and Nadan. Both of these persons are related to her. Hanuman is related as an uncle of Ram Autar's wife and Madan is a cousin of Ram Autar. She is an educated girl. In these times any disapproval of an elder person in this respect could not have been of any great significance and especially going out with relations could not have led to any such disapproval at all.

(57) We are therefore of opinion that even Ram Autar did not have any such enmity with Radha Krishna which can be said to be any motive for planning this murder. We do not agree with the prosecution suggestion that the existence of any ill-feeling suffices as a motive for any criminal conduct of any of the persons having enmity.

(58) The fact is that the arrangement for the dinner which Saxeria gave is said to have been at the instance of Hanuman. It is alleged that that was the part of the conspiracy though Saxeria was not a party to it. The dinner was suggested several days before and was in view of an unsatisfactory dinner given by a relation of Saxeria at the Valerio's some time before. Merely because certain ladies invited to the dinner had not gone in company with their husbands is no reason to conclude that they were left behind because of the conspiracy to murder. If the prosecution allegation is correct we see no reason why any attempt was made to invite the ladies to the function. Only Radha Krishna and other gentleman could have been invited to the dinner. The reply is that in that case they could not have had the opportunity to send back the car and thus could not have given an opportunity to Shital to pour water in the jeep. This would mean that at the time Hanuman suggested the holding of the dinner by Saxeria on the 29th July he had known of the actual plan to be used for stopping Radha Krishna's car but according to the evidence led in the case it appears that the suggestion of pouring water was made by Sharma on the evening of the 30th July.

Further excuses were given for the non-turning up of the wives of Madan Lal, Ram Autar and Hanuman at the dinner. No attempt has been made to show that those excuses were not true excuses. The absence of Madan Lal's wife and of the wife of Ram Autar was due to Madan Lal's wife visiting lady doctor and Ram Autar's wife visiting Madan Lal's wife in that connection. It was very easy to disapprove that this excuse was not a genuine excuse. Similarly the excuse given by Hanuman was that his child was ill and so his wife was prepared to come when it was ready. She however did not turn up. If the child was ill she might have changed her mind. We therefore do not consider that this circumstance has any great effect on the allegation that the accused had conspired to murder Radha Krishna.

(59) The alleged remark of Naraini Devi at the hospital can at best be her suspicion, a natural suspicion in the circumstances. A dinner had been arranged at which, according to her, were present persons towards whom Radha Krishna was not favourably inclined. The car stops all of a sudden, Radha Krishan and she are attacked, she could have suspected that all was due to some plan and she expressed her suspicion. Her suspicion alone cannot be evidence about the conspiracy and cannot give support to other evidence equally weak in that respect.

(60) Lastly, to conclude about a conspiracy on the premise that the assailants of Radha Krishna did know that the car would stop and that therefore there must have been a conspiracy would not be a right approach. It is dependent on the question that the stoppage of the car had been pre-

arranged and that the assailants too had knowledge of it and thus reached there.

(61) This brings us to the second part of the incident, i. e., the actual assault. Four persons are said to have taken part in it. They are Budhoo, Munnoo, Arjun and Ram Narain. Arjun is an absconder and his case is not before us at the moment. We need not say anything about his alleged participation in the incident. The evidence against Ram Narain has been admitted to be inadequate for his conviction and we have not any more to worry about the case against him. One fact however remains that now four persons are alleged to have taken part in the attack while the case in the beginning at the time of the incident was that the assailants had numbered three. That was the telephonic message given by Bishwa Nath Singh to Colonelganj police station and that was the version given in the first information report prepared by Deputy Superintendent of Police Indrajit Sharma soon after the incident. Why the number is raised to four is not clear.

Mata Din ekka-driver deposes about taking three of these four accused to the spot and about the accompanying of the fourth accused on a cycle. Munnoo is said to have gone on the cycle. We are not impressed with the statement of Mata Din. He was just traced during the investigation. He knew of the criminal intentions of his passengers. He was an eye-witness of the incident and just for the sake of his fear he continued to remain on the spot unmindful of any charge of complicity of murder against him. He brought back those passengers after they had committed the murder and drove his ekka knowing full well what he was doing. It appears to us that either he was not the person who had taken these accused persons on his ekka to the spot or he was an accomplice in this murder. He knew of the intentions of the others. He in a way aided them by taking them to the spot and by helping them in making good their escape. He is as good an accomplice as anyone can be in the circumstances and his statement therefore would be unworthy of belief unless corroborated by other good evidence.

(62) The other good evidence in this connection could have been of the statements of Sen Gupta & Naraini Devi, the two occupants of the car, who could be expected to have seen the assailants. Sen Gupta and Naraini Devi did recognise some of these accused at the identification parade. Sen Gupta identified Munnoo, Budhoo and Arjun and Naraini Devi identified Munnoo and Budhoo. According to the statements of both these witnesses Sen Gupta could not have had much occasion to see the assailants. He was just entering the car when the assailants arrived and began to strike Radha Krishna. He then fled away to another house in order to secure help. It is not therefore expected that he could have really a good impression of the assailants. The competency of these witnesses to recognise the assailants is dependent on the presence of sufficient light. In that connection it has been urged that there was an electric lamp at a distance of about eight or ten paces north-west of the jeep and that it afforded ample light for recognition. This fact is noted in the first information report as well. The electric lamp was on the right side of the jeep. The assailants, according to the prosecution case, were on the left side.

The evidence is not consistent with respect to the hood of the jeep car being on at the time or not. Udairaj constable deposes that the hood was on when he was put in charge of the jeep car. The other witnesses namely the Deputy Superintendent of Police, Naraini Devi and Sen Gupta depose otherwise. The first information report or any record of the statements of witnesses does not mention that the jeep had no hood at the time. The incident took place on the 30th of July during the rainy season and it was open to question whether the hood must have been down that night or not. If the hood was on it would have obstructed the passing of light from the electric lamp to the assailants. Further Radha Krishna and Naraini Devi were inside the jeep. The assailants are said to have been standing on the road. Presumably their faces were on a lower level than the upper portions of the body of Radha Krishna and Naraini Devi and that too may account for the coming of the light from a post. Further one significant fact having a bearing on this question is the actual position of the jeep at the time and the actual location of the incident.

Sub-Inspector Deo Dhari Singh prepared a sketch of the locality and did not show the place where the car stood. He showed a certain place by letter B and mentioned in the index that from that place the attack was directed. The language used is ambiguous. It may mean that B is the place of attack or it may mean that the assailants rushed from that place. If it is the place of attack then the description of the position of the light vis-a-vis the jeep given by the witness does not fit in with the position of the electric lamp according to the plan. If the jeep was not at B but the assault took place at B then the prosecution story that Radha Krishna was attacked inside the jeep becomes false. The observation of Sub-Inspector Deo Dhari Singh of blood on the road as already mentioned is not explained by the prosecution story which confines the attack on both Radha Krishna and Naraini Devi inside the jeep. We have already mentioned a surprising feature that Naraini Devi should receive twentyone injuries in protecting her husband by leaning over from the back side and yet should have avoided receiving a single blow with a sharp-edged weapons which were mostly used against Radha Krishna. In the circumstances it appears to us that the statements of both these witnesses Naraini Devi and Sen Gupta about the actual incident are not fully consistent with how the incident must have taken place.

Possibly when the car stopped it would be the driver Sen Gupta who would be busy in looking to what happened to the car. It would be very unusual for the owner of the car to go himself to the petrol tank and to see whether the petrol was sufficient or not. Further if the petrol was sufficient the driver would try to see what was the fault with the engine that had stopped its operating. It may be that Radha Krishna and Naraini Devi also got down from the car and were strolling on the road when they were attacked. Radha Krishna succeeded in running to the jeep and got into it pursued by some of the assailants while Naraini

Devi could not be so quick and continued to receive the blows of the person possessing a lathi or hockey stick as now alleged. That may also account for the discrepancy in the statement of Sen Gupta with respect to Radha Krishna's actually having taken his seat in the jeep or Radha Krishna's just getting into the jeep when the attack took place.

Another statement in the first information report which does not fit in with the prosecution case and which was said to be based on the statements of Naraini Devi and Sen Gupta is that one of the assailants possessed a 'pharsa.' We are not prepared to say that Naraini Devi did not know what a pharsa is or mistook a long knife as pharsa. If she did not know what pharsa is she would not have used that word. If she knew she could not have mistaken a knife for pharsa. The allegation of the use of the pharsa is in the first information report.

(63) In this connection it is also pointed out that the description given in the first information report is that a lathi was fitted in with a 'pharsa' and therefore there is no question of any mistaken information about actual description. Why a wrong description of a weapon is given in the first information report? It can lead to a conclusion that either the victim or the natural witnesses did not notice what weapons had been used and the weapons said to be used were either on their own suggestions or the suggestions of more competent minds. Whatever may be the position, a wrong description of the weapons in the first information report is bound to affect the value of their testimony. After all Naraini Devi whether attacked on the road or inside the jeep may not be in that frame of mind as to notice minutely what is being used and who is using them. She must be very much upset, very much alarmed, & very much concerned about her husband who was the main target of the attack. It follows therefore that the identifications of Budhoo & Munoo by Naraini Devi & Sen Gupta cannot be relied upon, and that the learned Sessions Judge was not wrong in not relying on those identifications for the purposes of holding these two accused guilty. It may also be mentioned in this connection that the description of the assailants was noted in the first information report. We have already mentioned that from the context it would not appear that that description was given by Sen Gupta and Naraini Devi because it was not noted in the first paragraph where other description of the incident was noted.

Further also the contents of the first information report tend to indicate that some persons had arrived in time to see the actual culprits. That should not have been a mere imagination of Indrajit Sharma if it was not a correct affair. If he was told by any one that he had come to the spot at proper time to see the assailants, no explanation is given why such a person has not been examined as a witness. It may be therefore that these descriptions and the other statements have been the result of feeling the necessity to incorporate such facts in the first information report for supporting any prosecution case which may be later worked out. The descriptions given too are not such distinctive descriptions which may go a long way in supporting the identification of witnesses. The description of a tall stout man with moustaches, it appears from the record, fitted three of the accused said to be the actual assailants. This is sufficient that this description was not particular description of any accused who is one of the accused to whom this description fits in. What is significant in connection with the description is the omission to describe Budhoo. Budhoo was a lad of 15 years of age at the time of incident. The first information report does not show that either Naraini Devi or Sen Gupta did mention that one of the assailants was a lad.

In connection with the identification of the accused reference may be made to the fact that the Magistrate conducting the identification proceedings did not make any particular note that the person mixed up included lads of the age of Budhoo. In fact it appears from the statement of Sri Rajendra Nath, the Magistrate (P. W. 32) that he had omitted to note certain features of Munnoo and Budhoo and did not take necessary precautions about them. Budhoo had the ends of his ears pierced and a blackish patch on the skin of his nose. Both Munnoo and Budhoo had small-pox marks on their faces. The Magistrate states that care was taken that they were mixed with the people who possessed similar marks. He did not make any note in the identification memo and deposes that there was no necessity of noting it in the memo. We are not inclined to share his view and are of opinion that any competent Magistrate having experience of identification proceedings would have made a note about it if he had really paid attention to it. Munnoo had a deep dimple chin. That too went unnoticed. These defects in the conduct of the identification proceedings also reduce the value of the identification of Naraini Devi and Sen Gupta of these two accused Budhoo and Munnoo.

(64) Lastly, we may refer to the evidence of Ram Das, Ram Shanker and Chhotey in connection with the alleged unguarded confession of Budhoo to his wife that he had murdered a Seth presumably Radha Krishna Chaudhuri. Ram Das and Chhotey (P. Ws. 17 and 18 respectively) were the neighbours of Budhoo. Budhoo got annoyed with his wife 17 or 18 days before his arrest, i. e., on or about the 4th of August and threatened to kill her if she did not cease going about like an awara woman and in the same way as he had killed a Seth. These two witnesses fond of their lives felt so alarmed that they thought of changing their houses and therefore approached the third witness Ram Shankar who is not a house-agent to find a house for them. The entire story does not appear to us to be natural and true.

(65) In view of the above it is clear that this is hardly a case for a difference of opinion with the views of the learned Sessions Judge. In fact this is a case in which we are of opinion that he had taken a correct view of the material on record. We therefore dismiss the appeal against the respondents other than Arjun, who has not yet been served with the notice of this appeal. The respondents other than Arjun are on bail. They need not surrender. Their bail bonds stand discharged.

(66) Leave to appeal to the Supreme Court is refused as we do not consider this case fit for a certificate for an appeal to the Supreme Court.

D.H.Z. Appeal dismissed.

(S) A.I.R. 1955 ALLAHABAD 154 (Vol. 42, C.N. 51)

(FULL BENCH)

MALIK C. J. AGARWALA AND V. BHARGAVA JJ. (3-11-1954)

Devendar Kumar Bharti, Applicant v. Mahanta Raghuraj Bharti and others, Opposite Party.

Civil Revn. No. 452 of 1949, against Order of Civil J., Basti, D/- 15-2-1947.

(a) Civil P. C. (1908), O. 33, R. 7 (2), S. 149 — Refusal of leave — Time for payment of court-fee — When can be granted — Effect on limitation.

Where a court has finally disposed of an application for leave to sue in forma pauperis so that it has ceased to have seizin of the case it cannot, by a subsequent order, grant time to pay the court-fees. This view follows from the fact that there is no proceeding pending before the court to which S. 149 can apply. AIR 1936 All 584 (FB), Approved. (Para 24)

But where the application for leave to sue in forma pauperis is still pending or at the time of refusing to grant leave, the court can grant time under S. 149, Civil P. C., to pay the court-fees, and if the court-fees are paid within the time allowed by the Court, the plaint would be deemed to have been filed on the date on which the application for leave to sue in forma pauperis was made. Case Law Fully Discussed. (Para 24)

Anno: C. P. C., O .33 R. 7 N. 5.

(b) Civil P. C. (1908), O. 33, R. 15 — Applicability to pending application.

Order 33, Rule 15 can only apply to a case where an application for leave to sue in 'forma pauperis' has been dismissed and an order for costs has already been passed. But where an application is still pending and at that stage the Court grants time under S. 149, R. 15 cannot be made applicable. AIR 1936 All 584 (FB) Foll. (Para 7)

Anno: C. P. C., O. 33 R. 15 N. 1.

(c) Civil P. C. (1908), O. 33, R. 2 — Application for leave to sue as pauper — Nature of document.

An application under O. 33, R. 2 has to be treated as one single document, i. e., an application for permission to sue as a pauper and though it contains the particulars required to be set out in a plaint and is signed and verified in the manner prescribed for the signing and verification of pleadings, it cannot be treated as a composite document consisting of an application for permission to sue as a pauper as well as a plaint. (Paras 13, 26)

Anno: C. P. C., O. 33, R. 2 N. 1.

CASES REFERRED: Paras

(A) (V23) AIR 1936 All 584: 1936 All LJ 760 (FB) 2, 4, 5, 7, 8, 9, 12, 13, 15

(B) ('78-80) 2 All 241: 6 Ind App 126 (PC) 2, 9, 16, 18, 26

(C) (V22) AIR 1935 All 620 (2): 1935 All LJ 681 (FB) 17

(D) (V24) AIR 1937 All 781: 1937 All LJ 1208 17

(E) (V35) AIR 1948 Oudh 157: 23 Luck 70 17

(F) (V26) AIR 1939 Cal 394: ILR (1939) 2 Cal 68 18

(G) (V23) AIR 1936 Cal 28: 62 Cal 711 18

(H) (V24) AIR 1937 Cal 241: 170 Ind Cas 758 18

(I) (V25) AIR 1933 Cal 730: ILR (1939) 1 Cal 112 18

(J) (V30) AIR 1943 Bom 292: 208 Ind Cas 543 19

(K) (V31) AIR 1944 Bom 63: ILR (1943) Bom 721 19

(L) (V11) AIR 1924 Mad 118: 76 Ind Cas 767 20

(M) (V21) AIR 1934 Mad 467: 58 Mad 169 20

(N) (V22) AIR 1935 Mad 878: 158 Ind Cas 790 20

(O) (V23) AIR 1936 Mad 101: 59 Mad 805 20

(P) (V30) AIR 1943 Mad 646: 211 Ind Cas 431 20

(Q) (V37) AIR 1950 Mad 50: 1949-2 Mad LJ 145 20

(R) (V41) AIR 1954 Pat 170: 1953 BLGR 485 21

(S) (V16) AIR 1929 Pat 637: 9 Pat 439 21

(T) (V31) AIR 1944 Nag 357: ILR (1944) Nag 623 22

(U) (V25) AIR 1938 Lah 41: 171 Ind Cas 412 22

(V) (V42) (S) AIR 1955 All 53: (Civil Revn. No. 474 of 1946, D/- 22-9-1954 All) (FB) 23

Gyanendra Kumar, for Applicant; S. C. Asthana and K. D. Jaini, for Opposite Party.

MALIK C. J.: (Agarwala J. Concurring.)

This revision has been filed under S. 115, Civil P. C., by one of the defendants Devendra Kumar Bharti against an order passed by the learned Civil Judge of Basti granting time to the Opposite party No. 1 upto 15-3-1947, for payment of the necessary court-fees. Opposite party No. 1 filed an application under O. 33 of Civil P. C., (Act 5 of 1908) for permission to institute the suit in forma pauperis. Notice of this application was issued to the other side and after recording the evidence of the parties, the court came to the conclusion that the plantiff was not a pauper and was in a position to pay the requisite court-fee. While rejecting the application, the court granted time to the Opposite party No. 1 to pay the court-fee. It was urged that this the court could not do. The order against which this revision application has been filed reads as follows:

"The application for permission to sue in forma pauperis is rejected accordingly with costs to the opposite parties. The applicant is however allowed time uptil 15-3-1947 for payment of the necessary court-fee if he proposes to proceed wth this suit. Order accordingly."

(2) This case came up before a Division Bench of this Court and in view of the decision of a Full Bench of this Court in — 'Chunna Mal v. Bhagwant Kishore', AIR 1936 All 584 (A) which, the learned Judges thought, needed reconsideration the case was referred to a larger Bench. In — 'Chunna Mal's Case (A)', in the

majority judgment of Sulaiman, C. J. and Bennet, J. it was held that the Court could not grant time while dismissing the application for leave to sue in forma pauperis. The decision of the Privy Council in — 'Stuart Skinner v. William Orde', 2 All 241 (B) was distinguished on the ground that in that case before an order had been made dismissing the application for leave to sue in forma pauperis the plaintiff had paid the court-fee. It was suggested in — 'Chunna Mal's case (FB) (A)', that, if the Court wished to grant time to pay the court-fees, it should keep the application for leave to sue in forma pauperis pending till the court-fees are paid. It was, however, held unanimously that after the application for leave to file the suit in forma pauperis was dismissed, the Court could not by an order of a subsequent date grant time under S. 149 of the Code to pay the court-fees.

(3) The point that has arisen for consideration is whether when a court is of the opinion that an application for permission to sue in forma pauperis should be rejected, it can at the time of rejecting the application grant time to the applicant to pay the court-fees.

(4) It has been suggested that since — 'Chunna Mal's case (FB) (A)', was decided by a Bench of three Judges this case should go before a larger Bench. The facts that gave rise to the decision in — 'Chunna Mal's case (A)' are in certain material particulars different from the facts of this case and we do not, therefore, consider it necessary to refer it to a larger Bench. In — 'Chunna Mal's case (A)' the application under O. 33 was rejected on 29-9-1954 with costs. On 1-10-1934 an application was filed under O. 47, R. 1 for review on the ground that some further evidence, oral and documentary, had come into possession of the applicant from which he could prove that he was not in a position to pay the court-fee. At the time of disposing of this review application, which the learned Judge dismissed, he granted time to the applicant to pay the court-fee.

(5) In the case before us, the application for leave to file the suit in forma pauperis had not been previously rejected. It was in the same order by which the permission was refused that time was granted to the applicant to pay the requisite court-fee. In our view the two positions are entirely different. In — 'Chunna Mal's case (FB) (A)' all the three learned Judges were of the opinion that, after an application for permission to sue in forma pauperis had been finally rejected, there was nothing pending before the Court to which the provisions of S. 149 could be made applicable. In that case the point that arose for decision was as follows:

> "Whether after rejecting the application for permission to sue as a pauper, can the Court by a separate and subsequent order allow the applicant to pay the requisite court-fee under S. 149, Civil P. C., and treat the application as a plaint?"

The learned Judges answered this question in the negative, and if we may say so with respect, we entirely agree with their decision.

(5A) The other point, on which there was difference of opinion, did not arise in that case and was as follows:

> "Whether while rejecting the application for permission to sue as a pauper the court can under S. 149, Civil P. C., allow the applicant to pay the requisite court-fee and treat the application as a plaint?"

(6) Order 33, R 8 provides that:

> "Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner....."

There is, however, no provision in the Code as to what is to happen when the Judge is of the opinion that the plaintiff should not be allowed to sue in forma pauperis and it is on that account that Judges have differed as to what should be the proper course.

(7) Order 33, R. 15 deals with a case where an application has already been rejected and it runs as follows:

> "An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the State Government and by the opposite party in opposing his application for leave to sue as a pauper."

It will be clear from the provision quoted above that this rule deals with a case where an application to sue as a pauper has already been rejected. In the case of 'Chunna Mal v. Bhagwant Kishore (FB) (A),' Sulaiman, C. J. and Bennet, J. took the view that the Court cannot grant time to pay the court-fee as in that case the question of previous payment of the costs would not arise and the order would therefore be in conflict with the provisions of O. 33, R. 15. But in a later portion of their judgment, the learned Judges suggest that the plaintiff can ask for time to pay the court-fee and request the Court to withhold the order of dismissal under O. 33, R. 7 till the court-fees were paid. Even if the procedure suggested is followed and the court-fees are allowed to be paid before the prayer for permission to sue in 'forma pauperis' is disposed of, O. 33, R. 15 will not apply and no question of previous payment of costs would arise. As was pointed out by Allsop. J., O.33, R. 15 can only apply to a case where an application for leave to sue in 'forma pauperis' has been dismissed and an order for costs has already been passed. But where an application is still pending and at that stage the Court grants time under S. 149 of the Code, R. 15 cannot be made applicable.

(8) We agree with Allsop J's decision in — 'Chunna Mal's case (FB) (A)' that once it is admitted that the application for permission to sue in forma pauperis may be converted into a plaint by payment of the court-fee it must be conceded that this can only be done under the provisions of S. 149 of the Code. If S. 149 is applicable, there does not seem to be any good reason why the Court should

not exercise the discretion given under that section while it is still seized of the application.

(9) There seems to be no difference of opinion on the point that while the application for permission to file a suit in 'forma pauperis' is still pending if the petitioner offers to pay or pays the court-fees the provisions of S. 149 of the Code will apply. Section 149 is as follows:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

The opinion expressed in the majority judgment is that this provision can only apply to a plaint insufficiently stamped and if there is no plaint insufficiently stamped it is not possible to apply the provisions of S. 149 to it. If, however, this is the correct view, it is not possible for the petitioner at any stage of the proceedings to pay the court-fees and convert the petition into a plaint, nor will it be possible to consider that the fee had been paid in the first instance. But the learned Judges have themselves taken a different view in — 'Chunna Mal's case (FB) (A)'. In 2 All 241 (PC) (B) it was held by the Privy Council that the petition can be converted into a plaint on payment of court-fees and the same view has been taken by almost every High Court in India.

(10) The question, therefore, that arises for consideration is whether the application for leave to file a suit in forma pauperis can be considered to be a document which can be converted into a plaint on payment of court-fees before orders have been passed rejecting it and whether the Court can grant time to pay the requisite court-fees on it as a plaint before or at the time of passing such an order.

(11) An examination of the provisions of O. 33 will show that R. 1 provides that a suit may be instituted by a pauper. Rule 2 provides that every application for permission to sue as a pauper shall contain the particulars required in regard to plaints, a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof and it shall be signed and verified in the manner prescribed for the singing and verification of pleadings. In some Courts a rule has been made, in line with the provisions of O. 44, that along with an application for leave to sue in forma pauperis a duly verified but unstamped copy of the plaint may be filed. No such rule has been made by this Court and the application for permission to sue in forma pauperis contains all the details and the reliefs that are required in a plaint along with a proper verification so that it can be treated as a plaint when the application is granted or when the court-fees are paid.

(12) According to the view expressed by Sulaiman, C. J. and Bennet, J. in — 'Chunna Mal's case (A)' it is open to a plaintiff, before his application has been finally disposed of, to offer to the Court that he is prepared to pay the court-fees and the court may in such a case grant time and on payment of the court-fees the plaint would be deemed to date back to the date when the application for leave to sue in forma pauperis was filed. The learned Judges were of the opinion that this was possible only if the petitioner considered that he was not entitled to sue in forma pauperis and offered to pay the court-fee. But that where the Court was not satisfied that the petitioner was a pauper the request, either express or implied, that the petitioner be allowed time to pay the court-fees could not be granted while refusing the prayer to sue in forma pauperis.

(13) Argument has centred round the question whether the application for leave to sue in forma pauperis is a composite document and must be deemed to be both an unstamped plaint and also an application for leave to sue in forma pauperis or it must be deemed to be a single document with only one prayer that leave be granted to file the suit in forma pauperis. In — 'Chunna Mal's case (A)' various anomalies were pointed out which were likely to arise if the document was held to be a composite document, both an unstamped plaint and an application for permission to sue in forma pauperis. In our view the document cannot be considered to be a composite document, i.e., a plaint as also an application for permission to sue without payment of the court-fees. The document no doubt contains everything that is required in a plaint except that it is unstamped and there is a prayer that the petitioner is unable to pay the court-fee and be excused from payment of the court-fee. If the Court holds that the applicant is a pauper and grants the permission, the petition becomes a plaint in accordance with the provisions of the Code.

Rule 8 provides that the application when granted shall be deemed to be a plaint. In our view it is not the provisions of R. 8 that make it a plaint but even if there was no such provision, the permission having been granted the application would become a plaint and would have to be registered as such without payment of the court-fees. If, on the other hand, before the application is disposed of the court-fees are paid then again the potential plaint or a document which was in germino a plaint becomes a plaint as the only defect which existed in it had been rectified.

Then arises the question & that is the point for decision in the case whether the Court can grant time when refusing to grant permission to sue in forma pauperis. Once the Court has dismissed the application, there is nothing more pending before it and two separate orders do not seem to be needed before the Court ceases to have seisin of the application for leave to sue in forma pauperis. Before the Court has finally rejected the application, the Court has before it a document in which the petitioner has claimed various reliefs but has prayed that he be allowed to claim them without payment of court-fee. While the Court is still seized of the case it might say 'you shall not

be exempted from payment of the court-fee, but you can claim the other reliefs if you pay the court-fee within the time allowed to you under S. 149 of the Code.'

(14) It is possible to take another view which probably is a simpler view that the document filed by the pauper is an unstamped plaint with a prayer superimposed that the petitioner may be allowed to claim reliefs without payment of court-fees so that if the permission is granted, there is nothing more that need be done and the document becomes a plaint. The Court, however, may, instead of rejecting the application and putting an end to the proceedings before it, refuse to allow the prayer for exemption from payment of court-fee, but at the same time grant time under S. 149, Civil P. C., to pay the court-fee. On payment of such amount S. 149 of the Code would apply and the suit would be deemed to have been filed on the day when the unstamped plaint with the prayer for permission to institute the suit in forma pauperis was filed.

(15) In 'Chunna Mal's case (A)', it was pointed out that if the petition is deemed to be an unstamped plaint with a prayer to file it without payment of court-fees then O. 7 of the Code would also apply and Orders 7 and 33 are not in all respects similar. Order 7, however, provides for the filing of a suit in the ordinary way on payment of court-fees, while O. 33 provides for filing of a suit without payment of court-fees. The special provisions of O. 33 would, therefore, exclude the general provisions of O. 7 and there will be no possibility of a conflict between the two Orders.

Section 149 of the Code applies to all documents filed in Court and if the document is deemed to contain all the particulars required in a plaint with a prayer superimposed that the plaintiff be permitted to file the suit in forma pauperis, i.e. without payment of court-fees then there is no reason why to such a document S. 149 should not be applied and the Court should not be entitled to allow time for payment of the requisite court-fees. Nor can there be conflict between the provisions of O. 7, R. 11 and S. 149 of the Code. Order 7 applies to suits filed in the ordinary way and not to an application under O. 33 of the Code and R. 11 of O. 7 will, therefore, not apply to such an application. The petition cannot be treated as two documents, an unstamped plaint and an application praying to be excused from payment of the court-fees. It is one document in which the prayer is that the petitioner be allowed to claim the reliefs mentioned in it, without payment of court-fees. The other reliefs are, therefore, subordinate and do not arise unless the main prayer relating to court-fee is either granted or becomes unnecessary by payment or by time being granted for payment.

(16) In '2 All 241 (PC) (B)', their Lordships of the Judicial Committee pointed out that it was possible for a plaintiff to pay the court-fees and then the suit would be deemed to have been filed on the date that the application for permission to sue in 'forma pauperis' was filed. The view that by reason of the plaintiff withdrawing the prayer to file the suit in 'forma pauperis' the document becomes an unstamped plaint to which S. 149 applies, but if the Court considers that the plaintiff should not be allowed to file the suit in 'forma pauperis' but grants time to pay the court-fees the same result would not follow, is, to our minds, not based on any sound reason. Most of the High Courts in India, as appears from the authorities cited by counsel, have taken the view indicated by us above.

(17) Our attention has been drawn to a case in — 'Mt. Shamzadi Begam v. Alakh Nath', AIR 1935 All 620 (2) (FB) (C). That case related to an appeal under O. 44 of the Code, but the observations in the body of the judgment are helpful. In — 'Bir Ram v. Lachmi Rai', AIR 1937 All 781 (D), Iqbal Ahmad, J. took the view that when an application to sue in forma pauperis is rejected but the Court grants time to pay the court-fees, the Court must be deemed to have exercised the powers vested in it by S. 149 and had intended to treat the application to sue in forma pauperis as a plaint and to such a case O. 33, R. 15 did not apply. The same view was taken by a Bench of the Oudh Chief Court in — 'Tej Dat Singh v. Dat Singh', AIR 1948 Oudh 157 (E), by Ghulam Hussain and Misra, JJ.

(18) Coming to the decision of the Calcutta High Court, the recent rulings of that Court seem to be in favour of the opposite party. The only case in which a different view was taken was a judgment of a learned Single Judge, Edgley J. in — 'Biswa Nath v. Khejer Ali Molla', AIR 1939 Cal 394 (F). In that case even though the plaintiff had applied for payment of the court-fees before the application was dismissed and had actually paid the same, the learned Judge held that the plaint must be deemed to have been filed on the day that the court-fees were paid and the plaintiff's suit was, therefore, held to be time barred. This decision of the learned Single Judge goes against the decision of the Privy Council in 'Stuart Skinner's case (B)'.

In — 'Jagadishwaree Debi v. Tinkari Bibi', AIR 1936 Cal 28 (G), the application for leave to sue in forma pauperis was refused on 30-1-1928 and on 8-11-1928 time was allowed for payment of the coure-fees and the court-fees having been paid the suit was registered on 4-4-1928. The question arose whether the suit should be deemed to have been filed on the day when the court-fees were paid or on the day when the application was filed. The learned Judges purported to follow the decision in 'Stuart Skinner v. William Orde (PC) (B)', & certain other decisions mentioned in their judgment, but with great respect to them, they did not notice that the application for leave to sue in forma pauperis having been finally rejected on 30-1-1928, the Court was not seized of any proceeding to which S. 149 could apply and the decision in 'Stuart Skinner's case (PC) (B)', or some of the other cases relied on did not, therefore, apply.

In — 'Bhusan Chandra v. Kanailal Sadhukhan', AIR 1937 Cal 241 (H), the application for leave to sue in forma pauperis was dismissed on 24-3-1936 and thereupon the plaintiff asked for permission to pay the court-fees and he was given a month's time and he actually made the payment on 15th April. Reliance was placed on S. 3, Small Cause Courts Act, the explanation to which was as follows :

"A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made...."

The learned Judge refused to hold that the explanation applied only to a case in which the application to sue in forma pauperis had been granted and not to a case where it had been rejected. In — 'Kali Dasi v. Santosh Kumar', AIR 1938 Cal 730 (I), the application to sue in forma pauperis was rejected but time was granted to pay the court-fees and the court-fees were paid within the time allowed. The two objections (1) that O. 33, R. 15 applied to such a case and (2) that the suit must be deemed to have been instituted on the date the court-fees were paid were both overruled.

(19) Reference has been made by the learned counsel to a Bombay decision in — 'Mahadev Gopal v. Bhikaji Vishram', AIR 1943 Bom 292 (J). In that case on 15-4-1940 the application for leave to sue in forma pauperis was refused. On the same day however the learned Judges passed the following order :

"Receive rupee one on account of court-fee today and allow suit to be filed. Balance of costs to be paid in seven days."

The question arose whether the suit should be deemed to have been filed on the day when the court-fees were paid or on the day when the pauper application was made. The learned Judges held that if the Court decides to reject the application under O. 33, R. 5 or R. 7, it may treat the application as an unstamped plaint and may in its discretion under S. 149 allow the applicant time to pay the requisite court-fees, and upon such payment within the time allowed, number and register the plaint. In such a case the suit will be deemed to have been instituted on the day on which the application for leave to sue as pauper was made. In — 'Vamanrao Lallubhai v. Pranlal Bhagwandas', AIR 1944 Bom 63 (K), a contrary view was taken by a learned Single Judge who held that the Court could not grant time when rejecting an application for leave to sue in forma pauperis to pay the court-fees under S. 149 of the Code.

(20) A number of single Judge cases of the Madras High Court has been cited, namely : — 'Balaguru Naidu v. Mithu Ratnam', AIR 1924 Mad 118 (L); — 'Duraipandiyan v. Solaimalai Pillai', AIR 1934 Mad 467 (M); — 'Krishna Ayyangar v. Janaki Ammal', AIR 1935 Mad 878 (N); — 'Kanthimathi Ammal v. Ganesa Iyer', AIR 1936 Mad 101 (O) and — 'Anasuyamma v. Subbareddi', AIR 1943 Mad 646 (P), in which the learned Judges granted time when rejecting an application for leave to file a suit in forma pauperis and it was held that under S. 149 of the Code time could be granted and if the court-fees were paid within the time allowed, S. 149 would apply. Mack J. in — 'Ganga Bhavanamma v. Surayya', AIR 1950 Mad 50 (Q), held that the normal procedure in such cases where an application for leave to sue in forma pauperis is rejected is to leave a party to file a fresh suit under O. 33, R. 15 on payment of the court-fees and the costs that had been previously incurred. But the learned Judge recognised that a practice had grown up of giving pauper applicants after the rejection of their petitions to sue in forma pauperis time to pay court-fee and allowing them in fact to sue without first paying the costs of those opposing their pauper applications, and the learned Judge proceeded to say :

"I do not, however, propose to say anything to upset the existing practice which appears to have developed out of a feeling of charity towards bona fide pauper suitors except to say that a Court is under no legal obligation at all to give time to pay court-fees when it rejects a pauper petition, though in special cases such a concession may perhaps be granted. The normal procedure contemplated by the Code is, when the petition is rejected, to leave the petitioner to his remedy under O. 33, R. 15, Civil P. C."

(21) The latest case of the Patna High Court that has been cited is a decision by Narayan and Ahmad, JJ. In — 'Mathura Singh v. Sm. Sudama Debi', AIR 1954 Pat 170 (R), where it was held that the Court having once dismissed the pauper application without giving any time to the applicant for payment of the court-fee, it could not by a subsequent order give time to deposit the court-fee. The learned Judges, however, did not differ from their previous decision that an application to sue as a pauper may be deemed to be an unstamped plaint and that the Court had power under S. 149, Civil P. C., to allow the requisite stamp to be paid thereon within the time fixed by it. See the decision of Jwala Prasad and Rowland, JJ. in —'Bank of Bihar Ltd. v. Ramchanderji Maharaj', AIR 1929 Pat 637 (S).

(22) In — 'Chudaman Shamrao v. Babaji Daduappa', AIR 1944 Nag 357 (T), Bobde J. took the same view and so did Jai Lal and Abdul Rashid, JJ. in — 'Ram Het Gir v. Banwari Lal', AIR 1938 Lah 41 (U).

(23) The latest decision of this Court which has not yet been reported is — 'Mst. Latifunnissa v. Mst. Khairunnissa', decided by Malik, C. J. and Brij Mohan Lall and Chaturvedi, JJ. (since reported as (S) AIR 1955 All 53 (FB) (V)). The observations in that case lead to the same conclusion that we have arrived at though the point for decision in that case was different.

(24) We are, therefore, of the opinion that where a court has finally disposed of an application for leave to sue in forma pauperis so that it has ceased to have seizin of the case it cannot by a subsequent order grant time to pay the court-fees. This view follows from the fact that there is no proceeding pending before the Court to which S. 149 can apply, but where the application for leave to sue in forma pauperis is still pending or at the time of refusing to grant leave, the Court can grant time under S. 149 of the Code to pay the court-fees, and if the court-fees are paid within the time allowed by the Court, the plaint would be deemed to have been filed on the date on which the application for leave to sue in forma pauperis was made.

(25) This revision has, therefore, no force and must be dismissed with costs. We order accordingly.

V. BHARGAVA J.:

(26) I have had the benefit of reading the judgment proposed to be delivered by my Lord the

Chief Justice on behalf of himself and my brother Agarwala, J. I only want to express the difficulty that I have felt, on the language of the various rules of O. 33, Civil P. C., in agreeing with the view that a court can, when refusing permission to sue as a pauper under R. 7(3), grant time to the applicant to pay court-fee under S. 149, Civil P. C., so that on payment of the court-fee the document becomes a plaint instituted on the date on which the document was first presented as an application for permission to sue as a pauper. I entirely agree with the view that an application under R. 2 of O. 33 has to be treated as one single document, i.e., an application for permission to sue as a pauper and though it contains the particulars required to be set out in a plaint and is signed and verified in the manner prescribed for the signing and verification of pleadings, it cannot be treated as a composite document consisting of an application for permission to sue as a pauper as well as a plaint.

It appears to me that a Court, in order to exercise its powers under S. 149, Civil P. C., and grant time to the applicant to pay the requisite court-fee, must have before it a plaint deficiently stamped at the time of passing the order. Sectoin 149, Civil P. C., cannot be interpreted to empower a court, when granting time for payment of court-fee, to convert an application into a plaint. Such conversion of the application into a plaint can be permitted by the court on the request of the applicant himself provided the applicant makes that prayer, before the court proceeds to pass orders on the application under R. 7(3), either expressly or impliedly by tendering the requisite court-fee. In such a case, if the court accepts the court-fee tendered, the application must be deemed to have been amended the prayer for permission to sue as a pauper abandoned and the document converted into a plaint. On such conversion into a plaint the document would take effect from the day on which it was presented. This seems to be the principle which was laid down by their Lordships of the Privy Council in '2 All 241 (PC) (B)'.

(27) If the applicant himself does not voluntarily choose to convert his application into a plaint by an express or implied request, the court dealing with the application has to pass orders either allowing or refusing the applicant to sue as a pauper under R. 7(3), and whatever be the order passed by the court the application is finally disposed of. At the stage of the passing of the order under R. 7(3) the court has before it a single document, viz., an application for permission to sue as a pauper, and does not have a plaint before it. If the prayer is allowed and the applicant is permitted to sue as a pauper, the document becomes a plaint not because it already consisted of a plaint and an application for leave to sue as a pauper, but only because R. 8 by a fiction of law directs that application to be treated as a plaint. On the other hand, no provision has been made for bringing a plaint into existence by a fiction of law where the prayer to sue as pauper is refused as is the case when the prayer is allowed. Rule 15 of O. 33 gives the indication that on refusal of the prayer the applicant has the right to institute the suit in the ordinary manner, and even this right can be exercised after first paying the costs, if any, incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

At the time when the court is passing an order under R. 7(3) either allowing or refusing permission to sue as a pauper the court has before it one single document only, which is an application for such permission, and does not have before it a plaint. Consequently, it appears to me that the court cannot by the same order exercise its powers under S. 149, Civil P. C., to grant time to the applicant to pay the court-fee while continuing to proceed to deal with the application as an application for leave to sue as a pauper, because this would amount to treating the document as both an application and a plaint which would be the only position justifying the court in passing two distinct orders at the same time.

(28) This strict interpretation of the language of the various rules of O. 33, Civil P. C., will, however, lead to great hardship and will cause irreparable loss to applicants who may have moved the Court bona fide, for permission to sue as paupers, but who for some reason or the other could not succeed in satisfying the court that they were entitled to do so. In numerous cases, the time for instituting the suit may expire before the court passes final orders on the application and the lapse of time may not be the fault of the applicant, but may be due to the prolonged proceedings in court. It appears that the necessity for a provision that the time which elapses between the presentation of an application under R. 2 of O. 33 and the refusal of permission to sue as a pauper under R. 7 of O. 33 shall be excluded in computing the period of limitation when the suit is subsequently filed as permitted by R. 15 of O. 33, was overlooked; and consequently, courts would be justified in giving a liberal interpretation, so as to cause the least amount of hardship and injustice. There is further concensus of opinion in almost all the courts in India that the provisions of O. 33 should be so interpreted as to leave discretion with courts to give adequate relief to the 'bona fide' applicants by exercising their power under S. 149, Civil P. C., at the same time when they refuse to grant permission to sue as a pauper under O. 33, R. 7(3). In these circumstances, I am not prepared to differ from the view taken by my Lord the Chief Justice, and consequently, concur in the order proposed.

D.R.R. Revision dismissed.

(S) A.I.R. 1955 ALLAHABAD 159 (Vol. 42, C.N. 52)

FULL BENCH

MALIK C. J., AGARWALA, V. BHARGAVA, MUKHERJI AND M. L. CHATURVEDI JJ.

(12-10-1954)

Kalap Nath Singh and another, Defendants-applicants v. Shyama Nand and others, Plaintiffs-Opposite Party.

Civil Revn. No. 363 of 1944, against Order of Civil J., Banaras, D/- 19-11-1943.

Civil P. C. (1908), Ss. 149, 152 and O. 33, R. 7 — Application to sue in forma pauperis rejected

— Court, if and when can allow applicant to pay court-fee. ILR (1937) All 22: AIR 1936 All 584: 164 Ind Cas 305, (FB) partly overruled and partly approved.

There can be no doubt that an order under S. 149 can only be passed when there is a document still before the Court, and once the Court has lost seisin of the case and there is no document before it, it cannot grant time to pay the court-fee under that section. AIR 1936 All 584, (FB) Approved. (Para 3)

When a Court is not satisfied that the petitioner is a pauper but has no reason to think that the application was not a bona fide one, it should, before it has signed the order disallowing the prayer to be allowed to sue in forma pauperis, grant time for payment of court-fees. If, before signing the order disallowing the prayer to sue in forma pauperis an application, oral or written, has been made to the Court praying that time for payment of court-fees be granted, it is the duty of the Court to pass a suitable order on that application as part of the order disallowing the prayer to sue in froma pauperis. If by mistake or oversight this has not been done, the Court has jurisdiction to correct its own error by reviewing its previous order rejecting the application and by adding thereto a suitable order dealing with the prayer contained in the application for time. ILR (1937) All 22: AIR 1936 All 584: 164 Ind Cas 305, (FB) Overruled. (Para 6)

Anno: C. P. C., S. 152 N. 3; O. 33 R. 7 N. 5 Pt. 9.

CASES REFERRED: Paras

(A) (V23) AIR 1936 All 584: 1936 All LJ 760 (FB) 1, 2, 4

(B) (V42) AIR 1955 All 154: (Civil Revn. No. 452 of 1949, D/- 3-11-1954-All) (FB) 2

(C) (V42) (S) AIR 1955 All 53: (Civil Revn. No. 474 of 1946, D/- 22-9-1954-All) (FB) 2

K. L. Misra, N. R. Sharma and S. N. Singh, for Applicant: Ambika Prasad, M. B. Bhatnagar, Janki Prasad, Rajeshwari Prasad and S. N. Varma, for Opposite Party.

MALIK C. J.:

This case was referred to a Bench of five Judges by our brothers Sankar Saran and Gurtu who were of the opinion that the decision of the Full Bench in — 'Chunna Mal v. Bhagwant Kishore', AIR 1936 All 584 (A) needed reconsideration. In that case the point referred to the Full Bench for decision was as follows:

"Whether after rejecting the application for permission to sue as a pauper, can the court by a separate and subsequent order allow the applicant to pay the requisite court-fee under S. 149, Civil P. C., and treat the application as a plaint."

The facts given in that judgment are that the application for leave to sue in forma pauperis was rejected on 29-9-1934. On 1-10-1934, an application was made for review on the ground of discovery of some new material to prove that the applicant was a pauper. This application was rejected, but at the time of rejecting the application time was granted to pay the court-fee. Sulaiman, C. J., Bennet and Allsop, JJ., all agreed that, after the application for leave to sue in forma pauperis had been finally disposed of, it was not possible for the court to grant time under S. 149, as there was no document before the court to which S. 149 of the Code could apply. The learned Judges also considered the question, whether at the time of rejecting the pauper application the court could grant time to pay the court-fee. Sulaiman, C. J., and Bennet, J., were of the opinion that even while dismissing the pauper application the court could not by the same order grant time to pay the court-fee. Mr. Justice Allsop took a different view.

(2) The second point on which the learned Judges had differed was again referred to a Full Bench, and it came up before a Bench of which three of us were members, but the judgment has not yet been delivered — 'Divendar Kumar v. Mahant Raghuraj Bharti', AIR 1955 All 154 (FB) (B) since reported. There was another case under O. 33 in which there was a difference of opinion between one of us and Pearey Lal Bhargava, J. Pearey Lal Bhargava, J., was of the opinion that on the death of the petitioner no rights survived and the application for leave to sue in forma pauperis could not be continued by the legal representatives of the deceased.

The other view was that, if the legal representatives were themselves paupers, they could claim in their own right to continue the application to sue in forma pauperis and, in case it was held that they were paupers and that the application filed by their predecessor was a bona fide application, the suit would be deemed to have been filed when the original petition was presented in court. The case was again referred to a Full Bench which held that on the death of the petitioner his legal representatives could pay the court-fees and continue the suit or if they were themselves paupers they could apply to continue the proceedings without payment of court-fees, and in that connection discussed the nature of an application for leave to sue in forma pauperis and agreed with the view expressed by Allsop, J., in — Chunna Mal's case (A)'; 'Latifunnissa v. Mst. Khairunnissa', (S) AIR 1955 All 53 (FB) (C).

(3) There can be no doubt that an order under S. 149 of the Code can only be passed when there is a document still before the court, and once the court has lost seisin of the case and there is no document before it, it cannot grant time to pay the court-fee under that section.

(4) Learned counsel for the opposite parties has urged that on 13-11-1943, at the time when the court was passing the order on the pauper application an oral request was made to the court to grant time and the court asked the applicant to make a written application, and the order of the 19th of November was, therefore, passed on an oral prayer made on the 13th of November while the court was still seised of the case. But the application of the 13th of November, does not bear out that contention. On the other hand, from the application it appears that it was filed not before the court but probably before the Munsarim. No mention is made on the order sheet of the 13th of November that such an application was filed by

the plaintiffs on that day. The stamp was not punched or initialled by the Court Reader, as would have been done if it was filed in court, but was punched and initialled by the Munsarim of the court and the application was put up before the court for the first time on the 19th of November, when the court passed the following order:

"Time for payment of court-fee is given till 22nd December".

The application on which this order was passed reads as follows:

"1. That the court has been pleased to disallow the applicant's application for permission to sue as pauper.

2. That under the circumstances it is necessary that the court be pleased to allow at least two months' time to deposit the requisite court-fee otherwise plaintiff's suit may involve question of limitation.

It is, therefore, prayed that the court be pleased to allow at least two months' time to deposit the court-fee."

No mention is made in this application that an oral request was made. Almost a year afterwards, when the learned Judge who had passed the order of the 13th of November had been transferred and the defendants had raised a plea of limitation, an application along with an affidavit was filed that a request was made before the pauper application had been rejected but the court asked the petitioner to make a written application. The application and the affidavit show that by that time the plaintiffs were fully aware of the difficulties that they had to face on account of the decision in — 'Chunna Mal's Case (A)' and an attempt was made as far as possible to bring it in line with that decision. We are not satisfied that any request was made to the court on the 13th of November, before the pauper application was finally disposed of, to grant time.

(5) After the court has once lost seisin of the case and the document is no longer before it the court cannot exercise jurisdiction under S. 149 of the Code and grant time. We, therefore, hold that the lower court, after having finally disposed of the pauper application on 13-11-1943, had no jurisdiction on 19-11-1943, to grant time to pay court-fee under S. 149, Civil P. C.

(6) It often happens that pauper applications, which are contested take some time before final orders can be passed thereon and during this period sometimes limitation for filing the suit on payment of court-fees expires. If a bona fide application for leave to sue in forma pauperis has been filed, merely because the petitioner has not been able to prove that he was a pauper on the date of the suit, his claim should not be allowed to get barred and he should be given a chance to pay the court-fee and continue the proceedings. When, therefore, a court is not satisfied that the petitioner is a pauper but has no reason to think that the application was not a bona fide one, it should, before it has signed the order disallowing the prayer to be allowed to sue in forma pauperis, grant time for payment of court-fees. If before signing the order disallowing the prayer to sue in forma pauperis an application, oral or written, has been made to the Court praying that time for payment of court-fees be granted, it is the duty of the Court to pass a suitable order on that application as part of the order disallowing the prayer to sue in forma pauperis. If by mistake or oversight this has not been done, the Court has jurisdiction to correct its own error by reviewing its previous order rejecting the application and by adding thereto a suitable order dealing with the prayer contained in the application for time. In the case before us, however, no prayer was made and no order granting time was passed at the time when the petition was rejected on 13-11-1943, and we have already held that after the pauper application has been finally dismissed there is no jurisdiction in the court to grant time, several days later, to pay the court-fee.

(7) This revision application is, therefore, allowed. The order of the lower court granting time for payment of court-fees is set aside. The parties shall bear their own costs of this revision.

V.R.B. Revision allowed

(S) AIR 1955 ALLAHABAD 161 (Vol. 42, C.N. 53)

RAGHUBAR DAYAL AND AGARWALA JJ.

(6-9-1954)

Sessions Judge Meerut, Applicant v. F. S. Fanthome, City Magistrate Meerut, Opposite Party.

Criminal Misc. Contempt Case No. 11 of 1954.

Contempt of Courts Act (1952), S. 3 — Contempt by subordinate Court — Non-compliance with orders of superior Court — Action amounts to contempt — Duty of the Subordinate Courts.

It is not for the superior Courts to say under what law they have issued the directive. The subordinate Courts should presume for the time being, unless the contrary appears, that the order is lawful. If it appears to them that the order is without jurisdiction, they may not comply with it but this will be at their own peril. If it turns out that the order was passed within jurisdiction they will be disobeying it at the cost of being punished for contempt of Court.

Even when they refuse compliance with an order passed without jurisdiction, they must do so in courteous language. Any discourtesy shown by them to a superior Court is again bound to involve them in proceedings for contempt. No subordinate Court is entitled to demand of the superior Court the law under which the order has been passed before complying with it. They must find the law for themselves if they intend to question the order; otherwise they should strictly comply with it both in letter and in spirit.

It must be understood by all concerned that any discourtesy or disobedience shown to the orders of superior courts will be visited by the High Court with the severest penalties.

(Para 6)

J. R. Bhatt Asst-Govt. Advocate, for Applicant.

AGARWALA J.:

A case under S. 324, I.P.C., was pending before Sri F. S. Fanthome, City Magistrate, Meerut. An order convicting the accused Vijay Pal Singh in

the case was passed by the learned Magistrate on 3-5-1954. Two days later, Vijay Pal Singh made an application to the learned Magistrate praying that certain garments, which were material exhibits in the case, viz., a shirt and a banyan, which were alleged to be stained with the complainant's blood be sealed with the court seal in the presence of the learned Magistrate and the parties so that there might be no chance of their being tampered with later on. The learned Magistrate rejected this application with a short order, which is quoted below in full:

"The state of the garments has received mention in the judgment. No need to seal them now."

Sd. F. S. Fanthome
5-5-1954.

The accused then filed an appeal in the Sessions Court at Meerut on the 6th of May and on the same day made an application to that court stating that an appliction had been made in the court of the City Magistrate requesting him to seal the aforesaid garments under the seal of the court, but the application was rejected. The accused asserted in the application that the state of garments did not find mention in the judgment in the manner in which it was emphatically and repeatedly pressed before the lower court and that the court did not at all take into consideration what the defence had argued regarding the blood stains on the clothes. The prayer in the application was that Exs. 1 and 2 might be sealed under the court seal in the interest of justice and equity. The learned Additional Sessions Judge, who was then acting for the Sessions Judge, directed the learned Magistrate

"to place these clothes material Exs. 1 and 2 under a sealed cover. He must get them placed under a sealed cover after fully examining and noting their condition and in his own presence".

(2) The learned Magistrate instead of complying with this order returned the order with the following remarks:

"R. I. O. (returned in original) with the request that the law under which this directive is issued may kindly be communicated.

It is respectfully submitted that the condition of these material exhibits has already received specific mention in the judgment passed by this Court. The accused has also had an order on this very subject from this Court. So far as this Court is aware no revision has been moved against that order."

The learned Sessions Judge, who had now taken over charge, considered that this was a clear and open defiance of the orders of the Court passed on the 6th of May and constituted a contempt of that Court. He, therefore, brought this matter to the notice of this Court with a prayer that this Court might take such action as it may deem proper. The matter was put up before a Bench of this Court who, considering that as a 'prima facie' case was made out against Sri F. S. Fanthome, issued notice to him to show cause why he should not be punished for contempt of Court.

(3) In answer to the above notice Sri F. S. Fanthome appeared before us on 2-8-1954. A statement was made by him before us in which he stated that the exhibits had already been sealed with the court seal immediately after he had delivered his judgment on 3-5-1954, and the condition of the garments had already been described in his judgment convicting the accused.

(4) The explanation of Sri F. S. Fanthome as to why he did not comply with the order of the learned Addl. Sessions Judge and as to why he wrote in that manner to him is that he thought that the fact that the exhibits had been sealed by him already must have been not known to the learned Addl. Sessions Judge when he passed the aforesaid order and that he also wanted to be certain whether the learned Additional Sessions Judge desired him to reopen the bundle and then to note something in addition to what he had already noted about the garments in his judgment. He further states that he never intended to question the authority of the learned Additional Sessions Judge or to disobey him. He stated that he believed it was his duty to make unquestioning compliance with the order issued by the superior court. He expressed regret to have sent a reply that could be construed as refusal to comply with the order. He promised that he would not repeat the mistake again.

(5) The action of Sri Fanthome in writing the note to the order of the Additional Sessions Judge and in not carrying out that order undoubtedly makes him guilty of contempt of that court. He had no business to enquire about the law under which the order was passed. The learned Additional Sessions Judge was seized of the appeal against the order convicting the accused and sentencing him to imprisonment, and as such had perfect jurisdiction to pass the order which he did. No revision against the order of the Magistrate of 5-5-1954, was necessary to give the learned Additional Sessions Judge jurisdiction to pass the order of 6-5-1954. It was the clear duty of Sri Fanthome to comply with that order.

(6) It is not for the superior courts to say under what law they have issued the directive. The subordinate courts should presume for the time being, unless the contrary appears, that the order is lawful. If it appears to them that the order is without jurisdiction, they may not comply with it but this will be at their own peril. If it turns out that the order was passed within jurisdiction they will be disobeying it at the cost of being punished for contempt of court. Even when they refuse compliance with an order passed without jurisdiction, they must do so in courteous language. Any discourtesy shown by them to a superior court is again bound to involve them in proceedings for contempt. No subordinate court is entitled to demand of the superior court the law under which the order has been passed before complying with it. They must find the law for themselves if they intend to question the order; otherwise they should strictly comply with it both in letter and in spirit. It must be understood by all concerned that any discourtesy or disobedience shown to the orders of superior courts will be visited by this Court with the severest penalties. We hope that no such disobedience of orders of superior courts, as has been shown in this case, will occur in future. We would have taken a very serious view of the case

but for the fact that Sri Fanthome has expressed his regret before us for what he did in the present case and has also held out a promise that he will not repeat the mistake in future. We, therefore, consider that a warning to him to behave properly in future would meet the ends of justice.

(7) We, therefore, discharge the notice with the aforesaid warning. Sri Fanthome will, however, pay the costs of the Assistant Government Advocate which we assess at Rs. 80/-.

D.R.R. Order accordingly.

AIR 1955 ALLAHABAD 163 (Vol. 42, C.N. 54)

M. L. CHATURVEDI J. (18-10-1954)

Ram Sewak, Applicant v. Election Tribunal and others, Opposite Parties.

Civil Misc. Writ No. 1062 of 1954.

(a) Constitution of India, Arts. 226, 227 — Question of fact — No interference — (Civil P. C. (1908), S. 115.)

In the case of cumulative votes the question whether a voter has cast votes separately in favour of the three different candidates or he has cast more than one vote in favour of one of the candidates, is a pure question of fact and the finding of the Election Tribunal which is not vitiated by any error of law must be accepted in the proceedings under Art. 226 or 227 of the Constitution.

(Para 4)

Anno: Const. of India, Art. 226 N. 7h; Art. 227 N. 3b; Civil P. C., S. 115 N. 2, 12.

(b) Municipalities — U. P. Municipal Election Rules — R. 51 — Application under — Grant of, by general oral instructions.

Where the electors who were deputed to work as officials in election in different wards made applications under R. 51 for permission to cast their votes by postal ballot and the Returning Officer instead of applying his mind to each and every application separately gave general verbal directions that all such applications should be granted,

Held that it meant that the applications should be allowed if they were otherwise in order, i.e., if the applicants were electors in different wards. The general oral instructions were therefore quite sufficient to comply with the requirements of R. 51 (2). (Para 6)

(c) Municipalities — U. P. Municipal Election Rules — Rules 64 and 51 — Applicability and scope — Application under R. 51 — Vote placed in ballot box — Validity.

Rule 64 contains the grounds for rejection of ballot papers properly placed in the ballot boxes. It assumes that the ballot papers had been properly put and it then narrates the grounds on which those papers can be rejected. The rule has no application to a case where the procedure is provided by a different rule, such as R. 51. After an application under R. 51 for sending a vote by post has been accepted, the official can send his vote only in that manner, and if he does not send his vote in that manner, his vote cast in the ballot bax cannot be accepted.

(Para 7)

S. N. Dwivedi, for Applicant.

ORDER : This is a petition under Arts. 226 and 227 of the Constitution challenging the validity of an order of an Election Tribunal.

(2) Elections for membership of the Municipal Board, Konch, district Jalaun, were held on 26-10-1953. The Municipal Board was divided into a number of wards, and I am concerned in the present petition mainly with ward No. 7. From this ward three members were to be elected and there were a number of candidates, including the petitioner and respondents Nos. 2 to 4. The petitioner and respondent No. 2, namely, Ambika Prasad, secured equal number of votes, and the lots, therefore, had to be drawn. The draw went in favour of the petitioner and he was declared elected on 28-10-1953. Respondents Nos. 3 and 4 had secured a higher number of votes and they were, therefore, also declared to have been duly elected.

Respondent No. 2 then filed an election petition, which has ended in his favour. The petition was moved on a number of grounds, but I am concerned only with one of them, namely, the finding of the Election Tribunal concerning the validity of the votes cast by three persons, namely, Raghunath Prasad, Gajraj and Gafoor Ahmad. Gajraj and Gafoor Ahmad had voted in favour of respondent No. 2 and their votes have been held to have been wrongly rejected by the Returning Officer. Raghunath Prasad voted in favour of the petitioner and the Election Tribunal has held that the Returning Officer wrongly accepted his vote. In the present petition the decision of the Election Tribunal concerning the validity of the votes of all the three persons, mentioned above, has been challenged before me.

(3) I may first dispose of the contentions with respect to the vote cast by Gafoor Ahmad. His vote, cast in favour of respondent No. 2, was rejected by the Returning Officer with an endorsement "Cumulative. Rejected". This expression means that Gafoor Ahmad had cast more than one vote in favour of the same candidate and, therefore, one of the votes cast by him was being rejected.

The contention of respondent No. 2 before the Election Tribunal was that Gafoor Ahmad had really cast three votes in favour of three different candidates one in favour of respondent No. 2, one in favour of respondent No. 3 and one in favour of respondent No. 4. The Election Tribunal has accepted this contention of respondent No. 2 mainly on the ground that three votes cast by Gafoor Ahmad were put separately in three packets containing the votes cast in favour of respondents Nos. 2, 3 and 4 respectively, and the forms Nos. 15 and 16 prepared by the Returning Officer also show that one of the votes was cast in favour of respondent No. 2.

(4) The contention of the learned counsel for the petitioner is that the vote having been rejected by the Returning Officer at the time of the counting of the votes, it was the statement of the Returning Officer only which could have explained the position, and the Election Tribunal

has acted illegally in holding that Gafoor Ahmad had cast votes in favour of three different persons.

I am unable to accept this contention of the learned counsel. It was a pure question of fact as to whether Gafoor Ahmad had cast votes separately in favour of the three candidates or he had cast more than one vote in favour of one of them. The documentary evidence produced before the Election Tribunal pointed out to the conclusion that Gafoor Ahmad had cast three separate votes and that one of those votes was cast in favour of respondent No. 2. The finding of the Election Tribunal, in my opinion, is not vitiated by any error of law and is a finding on a pure question of fact which must be accepted in the present proceedings.

It was also urged that Gafoor Ahmad's name as a person whose vote was wrongly rejected was not mentioned in the election petition, and it has only come out in the evidence produced by the parties. This may be so, but it does not appear that any prejudice was caused to the petitioner as far as this question is concerned and, in my opinion, it was open to the Election Tribunal to consider whether Gafoor Ahmad's vote cast in favour of respondent No. 2 had been wrongly rejected by the Returning Officer. I uphold the finding of the Election Tribunal concerning the vote of Gafoor Ahmad.

(5) I now come to the votes cast by Raghunath Prasad and Gajraj. Both these persons are Government servants who had a right to cast their votes in respect of elections from ward No. 7. But they themselves were appointed to different wards in connection with the same elections to the Municipal Board. Raghunath Prasad voted in favour of the petitioner and Gajraj voted in favour of respondent No. 2.

The procedure that is to be followed in such cases is provided in rule No. 51. In brief, what this rule provides is that if a Government servant is posted on duty in connection with the very election to a different ward, he may file an application to the Returning Officer for permission to vote by postal ballot. The Returning Officer is required to see whether the claim of the petitioner to cast such a vote is just and whether he is an elector in the ward where he wishes to cast his vote. If he is satsified on both these points, then he grants the application and intimation of it is given to the Returnng Officer of the ward where the vote is to be cast by postal ballot. The applicant, in such a case, is supplied with a registered envelope and he is permitted to send his vote by registered post to the Returning Officer of the ward where he proposes to cast his vote.

There appears to be no doubt so far that both Raghunath Prasad and Gajraj were permitted to give their votes by postal ballot, as they were posted on duty in connection with elections in wards other than ward No. 7. Gajraj sent his vote by registered post, but Raghunath Prasad's vote was found in the ballot box of ward No. 7. The Election Tribunal has held that the vote cast by Raghunath Prasad was not a valid vote. inasmuch as he should have sent it by registered post, as required by the rules, and he was not authorised to cast his vote in the ballot box of ward No. 7. But it has held that the vote cast by Gajraj was a valid one inasmuch as Gajraj had sent it by registered post to the Returning Officer.

(6) The argument of the learned counsel for the petitioner as regards both these votes is that it has not been proved in this case that applications were made by these persons for permission to cast the votes by postal ballot and that, assuming that such applications were made, there is no evidence that the Returning Officer applied his mind to a consideration of the question whether the prayer of these persons was just and whether they were electors in the ward.

The finding of the Election Tribunal is that applications were filed by both these persons and the Returning Officer duly granted those applications. But the argument of the learned counsel is that, according to the statement of the only witness produced in the case — a clerk in the election department — it appears that the Returning Officer had verbally given directions that all such applications should as a rule be granted and permission be given to the applicants to cast their votes by postal ballot. He argues that the Returning Officer was directed by law to apply his mind to the case of each and every applicant and then to come to a conclusion whether the prayer was just or not.

I am unable to accept the contention of the learned counsel on this point either. Shankar Lal's statement comes to this that the Returning Officer had given oral instructions to his clerk to issue permissions for voting by post if the applications were otherwise regular. This means that instructions were that applications by officials appointed to other wards should be allowed and they be permitted to vote by postal ballot if they were electors and authorised to cast their votes. The only two matters which the Returning Officer was expected to see were whether the prayer was a just one and whether the applicant was an elector in the ward. Instead of applying his mind to each and every application separately he issued general oral instructions saying that such applications be granted if they were otherwise in order. It means that they were to be granted if the applicants were electors. Of course the instructions applied only to those cases where the officials had been deputed to different wards in connection with this very election held on the same date.

I am of the opinion that these general oral instructions were quite sufficient to comply with the requirements of Rule 51(2). It has been fully proved in the case that both Raghunath Prasad and Gajraj were officials deputed to work in different wards and they were entitled to cast their votes. They were both granted permissions to vote by postal ballot and, on the proof of these facts, I have no doubt that the Returning Officer very rightly permitted them to vote under Rule 51. When an official, who is entitled to vote, is deputed on duty to a different place, it is clearly just that he should be permitted to cast his vote by postal ballot, which is really the only manner in which he can exercise his right. I think that, on the findings arrived at by the Election Tribunal, it must be held that both Raghunath Prasad and Gajraj were properly permitted to cast their votes

by postal ballot. It is true that the applications that they made are not forthcoming, but it is quite apparent that no permission to them could have been granted to vote by postal ballot if they did not actually file the applications for that permission. On the circumstances of the case and the evidence that is on the record, I am inclined to agree with the finding of the Election Tribunal on this point also that both these persons also applied for permission to send their votes by registered post.

As stated above, Raghunath Prasad had not sent his vote by post, but it was actually found in the ballot box of ward No. 7. Under the provisions of Rule 51, after having once obtained permission to send his vote by registered post, I am of the opinion that that was the only manner in which he should have cast his vote, and the vote cast in the ballot box of ward No. 7 has rightly been rejected by the Election Tribunal. In any case, it cannot be said that the decision of the Tirbunal on any of the above points was manifestly wrong, so as to justify interference under Art. 226.

(7) The other point argued by the learned counsel was that Raghunath Prasad's vote could not be rejected because the grounds on which a vote can be rejected are all contained in rule No. 64, and this rule contains no ground which would cover the facts of the present case. The argument is that that being the position, Raghunath Prasad's vote should not have been rejected. Here again in my opinion the contention of the learned counsel for the petitioner is not correct. Rule 64 contains the grounds for rejection of ballot papers properly placed in the ballot boxes. It assumes that the ballot papers had been properly put and it then narrates the grounds on which those papers can be rejected. The rule would have no application to a case like this where the procedure is provided by a different rule, namely, R. 51. After an application under R. 51 for sending a vote by post has been accepted, then the official can send his vote only in that manner, and if he does not send his vote in that manner, his vote should not be accepted.

(8) For the reasons given above, I do not see any force in this petition which is hereby rejected.

H.G.P. Petition rejected.

(S) AIR 1955 ALLAHABAD 165 (Vol. 42, C.N. 55)

RAGHUBAR DAYAL AND ROY JJ. (3-12-1954)

Nanak Chand and others, Appellants v. State of Uttar Pradesh and others, Respondents.

Special Appeal No. 40 of 1954.

(a) High Court Rules and Orders — Allahabad High Court Rules — Chapter 8, R. 5 — "Judgment" — Notice to parties — (Letters Patent (Cal), Cl. 15).

It is not necessary for a certain order to amount to a 'judgment' that it must be passed after the issue of notice to parties. It is the nature of the order and its effect on the proceedings which would determine whether it amounts to a 'judgment' or not. (Para 3)

Where the single Judge entertaining the petition under Art. 226 dismissed it on the ground that whether the petitioners had acquired the rights of Adhivasis or licensees of the land in question, that was a private right for possession of land and that for any infringement of such a right by the order of the District Magistrate, they could file a suit in an appropriate court for such relief as they be advised, including the recovery of damages to which they might be found entitled and that in this application it would not be possible to assess the correct damages on mere affidavits.

Held that the order did decide the right of the petitioners to file a petition under Art. 226 of the Constitution and to get a decision thereon. It terminated the proceedings started on the petition. No further action could be a taken in the High Court on that petition. It should, therefore, amount to a 'judgment' and the special appeal was maintainable. AIR 1953 SC 198, Foll; AIR 1953 All 647, Distinguished. (Para 3)

Anno: L. P. (Cal), Cl. 15 N. 2.

(b) Constitution of India, Art. 226 — Mandamus — Orders without jurisdiction.

An order was passed by the District Magistrate directing Sub-Divisional Officer to eject refugees living in certain villages from all the lands by certain date as the said lands were to be allotted to the retired servants of the old Rampur State. In view of this order, the Sub-Divisional Officer, issued an order to the Tahsildar to eject those persons from the lands in dispute occupied by them and in case of objection to dispossess them from the land through the help of the police:

Held that those orders were without justification. They certainly tended to affect the rights of the petitioners in their possessing the land which they had occupied in certain circumstances. Therefore these orders were beyond the jurisdiction of the District Magistrate and the Sub-Divisional Officer and therefore a writ of mandamus could be issued to the District Magistrate and the Sub-divisional Officer to withdraw their orders, and not to dispossess the petitioners in pursuance of those orders. (Para 4)

Anno: Const. India, Art. 226 N. 109.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 198: 1953 SCR 1159 (SC) 3

(B) (V40) AIR 1953 All 647 3

(C) ('12) 35 Mad 1: 8 Ind Cas 340 (FB) 3

B. L. Dikshit, for Appellants; Standing Counsel, for Respondents.

RAGHUBAR DAYAL J.:

One hundred and fifty persons filed a petition under Art. 226 of the Constitution praying for the issue of a suitable direction or writ in the nature of mandamus commanding the opposite parties, namely the State of Uttar Pradesh, the Collector of District Rampur, the S. D. O. of Suar, district Rampur, and Tehsildar of Tehsil Suar, district Rampur, to withdraw the orders, dated the 2nd and 8th of February, 1954, and to refrain from dispossessing the petitioners, except through Court

of law. The petition alleged how they came to occupy certain land in the district of Rampur with the consent and the authority of the State Government and their representative, the then Collector of Rampur. It is not necessary to enter into those allegations.

The order, dated 2-2-1954, was by the District Magistrate of Rampur to the Sub-Divisional Officer Suar, directing him to eject refugees living in certain villages from all the lands by 1-3-1954, as the said lands were to be allotted to the retired servants of the old Rampur State. In view of this order, the Sub-Divisional Officer, Suar, issued an order to the Tehsildar of Tahsil Suar on 8-2-1954, to eject those persons from the lands in dispute occupied by them and in case of objection to dispossess them from the lands through the help of the police.

(2) The learned single Judge entertaining the petition dismissed it on the ground that whether the applicants had acquired the rights of Adhivasis or licensees of the land in question, that was a private right for possession of land and that for any infringement of such a right by the order of the District Magistrate, Rampur, they could file a suit in an appropriate court for such relief as they be advised, including the recovery of damages to which they might be found entitled and that in this application it would not be possible to assess the correct damages on mere affidavits. The petitioners, therefore, filed this special appeal against the dismissal of their petition.

(3) At the hearing of the appeal the learned Standing Counsel appearing for the opposite parties submitted that the appeal was not competent as the order of the learned Single Judge did not amount to a 'judgment' within the meaning of R. 5, Chapter 8, Rules of Court, as by the order under appeal the Court had not determined any rights of the parties. It is conceded that if this order had been passed after issuing notice to the opposite parties and hearing the parties the order would have amounted to a 'judgment' which could have been appealable as a special appeal. We do not agree with the contention. It is not necessary for a certain order to amount to a 'judgment' that it must be passed after the issue of notice to parties. It is the nature of the order and its effect on the proceeding which would determine whether it amounts to a 'judgment' or not. The order under appeal did decide the right of the petitioners to file a petition under Art. 226 of the Constitution and to get a decision thereon. It terminated the proceedings started on the petition. No further action can be taken in this Court on that petition. It should, therefore, amount to a 'judgment' in view of the case reported in — 'Asrumati Debi v. Rupendra Deb', AIR 1953 SC 198 (A).

The Supreme Court did not finally decide what should amount to a 'judgment', but it is clear from this case that any order which terminates the proceedings before the Court — proceedings which cannot be said to be steps towards obtaining a final adjudication in the suit — would be a 'judgment'. The order under appeal can be compared to an order for the rejection of a plaint which has been considered to be a 'judgment' within the meaning of that expression in the Clauses of the Letters Patent of the various High Courts. There is nothing in the case reported in — 'Vishnu Pratap v. Sm. Revati Devi', AIR 1953 All 647 (B), referred to by the learned Standing Counsel which would go against this view. It was observed at p. 652 :

> "This interpretation, if accepted, would widen the scope of the word 'judgment' in Cl. (13) of the Letters Patent so as to include every order passed on any application raising a dispute during the pendency of a suit or proceeding even though it may not affect the merits of the controversy between the parties in the suit itself nor may it terminate or dispose of the suit or proceedings on any ground. Such a wide interpretation cannot be accepted."

This observation means that every order passed on any application raising a dispute in a suit or proceeding will not be a 'judgment', but that it can be a judgment if it affects the merits of the controversy between the parties in the suit or if it terminates or disposes of the proceeding on any ground. All orders terminating the proceedings will also be not judgments unless those proceedings be not (sic) steps towards obtaining the final adjudication in the suit as was made clear by the Supreme Court in the aforesaid case in interpreting what had been said by Sir Arnold White, C. J., in — 'Tuljaram Raw v. Alagappa Chettiar', 35 Mad 1 (FB) (C). We, therefore, hold that this special appeal is maintainable.

(4) The petitioners do not really desire a decision in this petition with respect to their right and its nature in the land they occupy. Their main grievance is against the legality of the order directing their ejectment by force through the help of the police. Nothing has been shown on behalf of the opposite parties which would justify the aforesaid orders, dated the 2nd and 8th of February, 1954. Whether the petitioners have got any right in the land in dispute or not, they are the persons in possession of the land and in case they have no right in the land they can be ejected under a proper process of law. Ordinarily they should be sued for ejectment. If they were to be evicted by the opposite parties by force, there should be some law which gives this power to the opposite parties. No such law has been referred to us.

An Act which gives power to the competent authority to eject certain persons in possession in certain circumstances came into force on 15-2-1954. It is Act No. 29 of 1953, the Uttar Pradesh Government Land (Eviction and Rent Recovery) Act, 1953. Even under its provisions the competent authority cannot order an ejectment without giving an opportunity to the other party to present his case. Any way this Act was not in existence when these impugned orders were passed. Those orders were, therefore, without justification. They certainly tended to affect the rights of the petitioners in their possessing the land which they had occupied in certain circumstances. We, therefore, consider these orders to be beyond the jurisdiction of the District Magistrate and the Sub-Divisional Officer and therefore order that a writ of mandamus be issued to the District Magistrate, Rampur, and the Sub-Divisional Officer, Suar,

Rampur, to withdraw their orders, dated the 2nd and 8th of February, 1954, respectively and not to dispossess the petitioners in pursuance of those orders. We direct the opposite parties to pay the petitioners' costs, which we assess at Rs. 100.

D.H.Z. Order accordingly.

(S) AIR 1955 ALLAHABAD 167 (Vol. 42, C.N. 56)

MALIK C. J. AND MOOTHAM J. (23-11-1954)

Central Distillery and Chemical Works Ltd., Meerut, Applicant v. Commr. of Income Tax U. P., C. P. and Lucknow, Opposite Party.

Misc. Cases Nos. 418 and 419 of 1948.

Income-tax Act (1922), S. 10(2) (xv) — "Expended wholly and exclusively" — Capital expenditure.

Where a notification issued under R. 81(3), Defence of India Rules, did not in any way terminate the agreement between the assessee company and the Managing Agents and the assessee company was liable to pay the remuneration and commission at the rate fixed in the agreement.

Held, that the mere fact that by reason of the necessity arising out of the prosecution of the war the Government appointed a Controller to supervise the working of the concern and the Controller took charge and did the work which the Managing Agents would normally have done, the Managing Agents could not be deprived of the commission and remuneration legally payable to them and, that being the position, the amount of remuneration could be claimed by the assessee company as an expenditure laid out and expended wholly and exclusively for the purpose of the business. (Paras 2, 6, 8)

Held further that the expense so claimed was not an expenditure in the nature of capital and hence was admissible under S. 10 (2) (xv). 1897 AC 1, Distinguished. (Paras 2, 13)

Anno: Income-tax Act, S. 10, N. 13.

CASE REFERRED: Para

(A) (1897) 1897 AC 1: 66 LJ QB 1 10

V. D. Bhargava and G. S. Pathak, for Applicant; J. Swarup and S. C. Das, for Opposite Party.

MALIK C. J.:

These are two connected references, one of them being under S. 66(2), Income-tax Act and the other under S. 21, Excess Profits Tax Act. The facts given in the statement of the case as also in the Appellate Order of the Tribunal related only to the Income-tax reference and no facts have been given as regards the reference made under S. 21, Excess Profits Tax Act.

(2) The two questions that have been referred to us for decision are as follows :

"1. Whether on the facts and in the circumstances of this case the sum of Rs. 34,582/- could be claimed by the assessee company as an expenditure laid out and expended wholly and exclusively for the purpose of the business?

2. Whether on the facts and in the circumstances of this case the expense so claimed was an expenditure in the nature of capital and hence not admissible under S. 10(2)(xv), Income-tax Act?"

(3) The assessee is a company known as Central Distillery and Chemical Works Limited, Meerut, incorporated under the Indian Companies Act on 14-10-1935. On 1-2-1937, the assessee company entered into a managing agency agreement with Messrs. Krishna, Gupta and Devalal. The managing agency agreement recited that

"Whereas Mr. Sam Ernest Devalal, sole proprietor of M/S Devalal & Co., and now one of the partners of the said firm Krishna, Gupta and Devalal, secured the sanction of the Government of the U. P. for a licence for the manufacture of industrial Alcohol, Chemicals etc., and whereas in consideration of the services rendered by him in having promoted and brought about the formation of the said company that the firm of M/S Devalal and Co., as the same is now or may hereafter be constituted shall be the first Managing Agents of the Company....."

The remuneration payable to the Managing Agents was a fixed amount and besides the remuneration mentioned in the agreement they were also probably entitled to some commission. What exactly the remuneration was does not appear either from the Appellate Order or the Statement of the Case and the copy of the agreement that has been placed before us does not appear to be a correct copy of the deed.

(4) Under the Defence of India Rules —R. 81, sub-r. (3)— the Governor issued a notification on 27-3-1942, authorising the Excise Commissioner, U. P., to exercise control over the work of the company with effect from 1-4-1942. The functions of the Controller were set out in detail in this notification and they amounted to his seeing that the company was worked efficiently so that there might be maximum production of Power Alcohol and it might be available at the cheapest rate. The Controller was also given power of control over the staff and had the power to replace the staff working in the company by making fresh appointments. There was nothing in the notification terminating the managing agency agreement, nor did it expressly provide that the Managing Agents would no longer be entitled to the remuneration fixed in the said agreement.

(5) In the relevant assessment year 1945-46, the corresponding accounting period of which was 1-10-1943 to 30-9-1944, a sum of Rs. 34,582/- was payable to the Managing Agents as remuneration and commission. The question arose whether the assessee company could claim deduction of this amount as amount "wholly and exclusively" expended for the purpose of the business. The ground on which the claim was disallowed was that since there was a Controller appointed by the Government the Managing Agents had no work to do and, therefore, it could not be said that the amount was wholly and exclusively spent for the purpose of the business.

(6) It is not denied that the agreement being for a fixed period of 20 years and the notification issued under R. 81(3), Defence of India Rules, not having in any way terminated the agreement be-

tween the Managing Agents, the assessee company was liable to pay the remuneration and commission at the rate fixed in the agreement. The mere fact that by reason of the necessity arising out of the prosecution of the war the Government appointed a Controller to supervise the working of the concern and the Controller took charge and did the work which the Managing Agents would normally have done the Managing Agents could not be deprived of the commission and remuneration legally payable to them. That being the position, we see no reason why this amount was not an admissible expenditure under S. 10(2) (xv), Income-tax Act.

(7) Learned counsel for the Commissioner of Income-tax has, however, suggested that this amount would not be an admissible expenditure as the amount was not shown in the Profit & Loss Account prepared for the relevant accounting period. This is not one of the grounds given in the Appellate Order or in the Statement of the Case for disallowing the deduction of the amount as an allowable expenditure. Moreover, it appears from the Statement of the Case that the shareholders of the company passed a resolution on 31-3-1943, that they were still bound to make the payment to the Managing Agents and the payment be made to them. It also appears from the same statement that the Controller was approached to sanction the payment but he did not sanction it.

Learned counsel has referred us to a portion of the order of the Appellate Tribunal that the Directors did not enter this amount in the Profit & Loss Account. The portion of the Appellate Order read out to us did not relate to the remuneration and commission payable to the Managing Agents. Moreover, there is nothing in the Statement of the Case or the Appellate Order to indicate how the Profit & Loss Account was prepared and by whom; nor is there anything to show in what circumstances that amount was not included in the Account. The amount was no doubt paid later, as the Controller had refused to sanction the payment. It is, however, admitted that the accounts were maintained on the mercantile basis and if the liability had accrued to the company, the question, whether the payment was actually made in that year, was not material.

(8) The first question, therefore, must be answered in the affirmative.

(9) We may point out that the appeal before the Tribunal arising out of the Excess Profits Tax assessment was not separately dealt with, though the provisions under the Income-tax Act and the Excess Profits Tax Act are not exactly identical. In the absence of any further facts, therefore, we must hold that our answer to this question would govern both the references.

(10) As regards the second question, the Tribunal held that the amount payable as remuneration and commission to the Managing Agents was capital expenditure and could not, therefore, be claimed as an allowable expenditure under S. 10 (2)(xv), Income-tax Act. For this finding the Tribunal has relied on the recital contained in the managing agency agreement from which it has deduced that the assessee company has acquired a running business and as part of its terms of acquisition it retained the services of the Managing Agents on the remuneration stipulated in the deed, and has tried to bring this case in line with the decision of the House of Lords in — 'Royal Insurance Co. v. Watson (Surveyor of Taxes)', 1897 AC 1 (A).

The decision in that case is, however, distinguishable and was not applicable to the facts of the case before the Tribunal. Upon the transfer of an insurance business the transferees had agreed to take into their service the transferors' manager at a fixed salary, with liberty to commute the same by payment to him of a gross sum to be calculated upon life tables if the services of the manager were terminated. The manager worked for only a short time. His services were then terminated and he was paid a gross sum in commutation of his salary. It was this amount, that was paid to him in commutation of his salary, that was claimed as an allowable expenditure. It was held that

> "the agreement to pay the commutation money was in fact part of the consideration for the transfer of the business, that the payment was therefore a 'sum employed as capital' and could not be deducted."

The question did not arise in that case as to the salary payable to the manager for the work done by him. The manager was paid the amount not because of the services rendered by him to the transferee-company, but by reason of the agreement between the transferors and the transferees that if the manager's services were not retained, he would be paid a lump sum. This sum, therefore, could not be connected with the services rendered by the manager to the assessee and was paid as agreed upon in the deed of transfer and was, in the circumstances, held to be a part of the purchase price.

(11) In the case before us, there is no provision for any commutation. The amount claimed is remuneration payable to the Managing Agents for the services to be rendered by them. The terms of the agreement are also quite different. From the portion already quoted it would appear that managing agency agreement was entered into with Messrs. Krishna, Gupta and Devalal because one of their partners, Devalal, had

(1) secured the sanction of the Government of U. P. for a licence for the manufacture of industrial Alcohol, Chemicals, etc., and

(2) rendered services in having promoted and brought about the formation of the assessee company.

(12) The promotors are not infrequently appointed as Managing Agents after the formation of the company. That may be a reason for giving the managing agency to a particular concern, but it does not necessarily follow that the remuneration paid to them can be said to be a part of the purchase price paid for acquisition of the business.

(13) The answer to the first part of the second question must, therefore, be in the negative. We hold that the amount was admissible as an allowable expenditure under S. 10(2)(xv), Income-tax Act.

(14) The assessee company is entitled to its costs which we assess at Rs. 400/- in each case. This order shall cover the other reference also.

V.R.B. Answer accordingly.

(S) AIR 1955 ALLAHABAD 169 (Vol. 42, C.N. 57)

FULL BENCH

MALIK C. J., AGARWALA AND V. BHARGAVA JJ. (11-11-1954)

Rahmat Ali Fatehullah, Petitioner v. Calcutta National Bank Ltd., Opposite Party.

Review Appln. in First Appeal No. 38 of 1952, reported in AIR 1953 All 452.

Companies Act (1913), S. 171 — "Other legal proceedings", meaning of — "Against the company" — Decree obtained by company — Subsequent winding up proceedings — Review application by defendant — Permission of Company Judge is not necessary — Observations of Tek Chand J. in AIR 1941 Lah 392 (FB), held overruled by AIR 1946 FC 16; AIR 1948 Pat 398, Dissented from.

The meaning of the words 'other legal proceedings' in S. 171 must not be confined within narrow limits & need not necessarily be proceedings analogous to a suit initiated by means of a petition similar to a plaint. (Para 16)

The words 'against the company' in S. 171 do not mean that if the company is arrayed as the opposite party, permission of the Company Judge will be necessary whenever any legal proceeding has to be instituted or continued against the company. The wrong 'against the company' mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company and in such a case the question, whether the claim was put forward or the suit was filed by the company before or after the winding-up order, should make no difference. (Para 17)

Liquidation proceedings under the Companies Act are for making available the assets of the company in 'pari passu' satisfaction of its liabilities, and if persons, other than secured creditors, are allowed to enforce their claims without any control exercised by the Company Judge, it may defeat or delay that object. But where a company has initiated a proceeding in a court of law whether before or after the winding-up order, no permission of the Company Judge is needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him. **(Para 19)**

Where a winding up order is made in respect of a company after it has obtained a decree in a suit instituted by it and after an appeal preferred by it against an order allowing defendant's objection under S. 47, Civil P. C. has been decreed, an application for review of the aforesaid judgment of the appellate Court can be made by the defendant without obtaining leave of the Company Court under S. 171 of the Companies Act. AIR 1945 All 354; AIR 1946 FC 16, Foll; (1901) 85 LT 141, Expl. and Rel. on.; Observations of Tek Chand, J., in AIR 1941 Lah, 392 (FB), held overruled by FC; AIR 1948 Pat 398, Dissent. from. (Para 20)

Anno: Com. Act, S. 171 N. 3.

Sambhu Prasad, for Petitioner; S. N. Kakkar, for Opposite Party.

CASES REFERRED: Paras

(A) (V35) AIR 1948 Pat 398: 26 Pat 470 7, 15
(B) (V28) AIR 1941 Lah 392: ILR (1941) Lah 760 (FB) 7, 14, 15
(C) (V28) AIR 1941 All 154: ILR (1941) All 175 8, 15
(D) (V28) AIR 1941 All 335: ILR (1941) All 565 8
(E) (V32) AIR 1945 All 354: ILR (1945) All 352 9, 10
(F) (V33) AIR 1946 FC 16: 1946 FCR 40 (FC) 10
(G) (1923) 1923 AC 647: 92 LJ Ch 587 10
(H) (V3) AIR 1916 Lah 24: 91 Pun Re 1916 11
(I) (V5) AIR 1918 Lah 181: 62 Pun Re 1918 (FB) 11
(J) (1901) 85 LT 141 11, 18
(K) (V24) AIR 1937 Lah 926: 176 Ind Cas 206 12
(L) (V25) AIR 1938 Lah 754: 179 Ind Cas 376 13

MALIK C. J.:

On a difference of opinion between brothers Desai and Brij Mohan Lall, the following point of law was referred to a larger Bench for decision:

"Where a winding up order was made in respect of a company after it had obtained a decree in a suit instituted by it and after an appeal preferred by it against an order allowing defendant's objection under S. 47, Civil P. C., had been decreed, can an application for review of the aforesaid judgment of the appellate Court be made by the defendant without obtaining leave of the Company Court under S. 171, Companies Act (VII of 1913)?"

(2) It is not necessary to set out the facts in detail. All that we need mention is that the Calcutta National Bank Ltd. had brought a suit against Qudratulla and his son Rahmat Ali Fatehulla for recovery of a large sum of money on the allegation that the principal debtor was the father and the son had guaranteed repayment of the debt. During the pendency of the suit the bank had applied for and had got certain aeroscraps attached before judgment. Rahmat Ali Fatehulla had claimed that those aeroscraps belonged to him exclusively and that he had been carrying on a separate business. The objection to attachment of the property was, however, dis-

missed. The learned Judge ultimately decreed the suit against the father but, on a finding that it had not been proved that the son was a guarantor, the suit against Rahmat Ali Fatehullah was dismissed.

When in execution of the decree the bank proceeded to sell up the aeroscraps which had been attached Rahmat Ali Fatehullah filed an objection in the execution Court claiming the property to be his own. He also filed an application in the suit that, since the suit had been dismissed against him, the attachment before judgment stood discharged, as the property had belonged to him. Both these applications were disposed of by the same order, the decision being in favour of Rahmat Ali Fatehullah. The bank filed an appeal which was allowed by a Bench of this Court. After the appeal was allowed an order was passed by the Calcutta High Court winding up the bank. Thereafter an application was filed for review, of which notice was issued, and, when it came up for hearing, a preliminary objection was taken that no review application could be filed without the sanction of the Company Judge under S. 171, Companies Act.

(3) Section 171 provides that after an order for winding up is passed no suit or other legal proceeding shall be instituted or continued against the company without the permission of the Company Judge.

(4) The words of the section appear to be simple enough but a great deal of argument has been advanced as regards their exact meaning. One view which has appealed to brother Brij Mohan Lall, and for which there is some authority, is that if a suit is filed by a company, other later proceedings in that suit are not 'other proceedings' against the company but are defensive actions by the defendant who has been called upon to defend a suit filed by the company itself. If this view is accepted then the word 'suit' would mean "everything connected with it right up to the last stage". For example, if a suit has been filed by a company, even though the later proceedings may have been initiated by the other side, they are not other proceedings against the company; in other words, if the suit was decreed by the trial Court and an appeal was to be filed by the defendant after the winding up order then that appeal would be supposed to be a continuation of the suit itself and not a proceeding against the company but a defensive action in the suit filed on behalf of the company.

(5) The other view taken by brother Desai, and for which also there is some authority, is that the crucial date is the date of the winding up order and one has to see who is the party who initiated the proceedings pending on that date. For example, if a suit was filed by the company and the suit was decreed after the winding up order then the defendant can file an appeal without the permission of the Company Judge as, on the date of the winding up order, there was no proceeding against the company but the proceeding pending was the suit filed by the company itself. If, on the other hand, the suit was decreed before the winding up order and the defendant has to file an appeal or continue an appeal already filed then permission of the Company Judge under S. 171 is required.

(6) Section 171 does not bar the institution or continuation of a suit or other legal proceeding by the company but against the company. Some difficulty has arisen with regard to the meaning of the words 'or other legal proceeding'. They have been interpreted in some cases to mean "other original proceedings like a suit in the Court of first instance".

(7) In — 'Benaras Bank Ltd. v. Sashibhushan Misra', AIR 1948 Pat 398 (A), Manohar Lall and Mukherji JJ. followed the view of Tek Chand J. in the Full Bench decision of the Lahore High Court in — 'Smt. Shukantla v. Peoples' Bank of Northern India Ltd.', AIR 1941 Lah 392 (B) that:

> "This expression 'legal proceeding' in this section (S. 171) is coupled with 'suit' and obviously means proceedings 'ejusdem generis', that is to say, original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint. It does not include proceedings taken in the course of the suit nor proceedings arising from the suit and continued in a higher Court like an appeal from an interlocutory or final order passed in the suit."

(8) The other view which was taken by Braund J. in — Raj Kumar Singh v. Benares Bank Ltd., Benares', AIR 1941 All 154 (C) was that an appeal or a revision can be treated as a legal proceeding. The same view was taken by him in — 'Kishore Khanna v. Benares Bank', AIR 1941 All 335 (D). He was of the opinion that even if the proceeding had been started on behalf of the company, if the company had gone into liquidation, no appeal could be filed without the sanction under S. 171, Companies Act.

(9) In — 'Shiromani Sugar Mills, Ltd. v. Governor-General in Council', AIR 1945 All 354 (E), the learned Judges, Iqbal Ahmad C. J. and Braund J. held that—

> "the expression 'suit or other legal proceeding' in S. 171, Companies Act, ought not to be given an artificially narrow construction by confining it to proceedings of the technical nature of a 'suit'."

The proceedings in that case were, however, not proceedings arising out of a suit but proceedings under S. 46, Income-tax Act commenced by the Income-tax Department and the question was whether those proceedings were legal proceedings.

(10) In — 'Governor-General in Council v. Shiromani Sugar Mills Ltd.', AIR 1946 FC 16 (F), the decision of the Allahabad High Court in — 'Shiromani Sugar Mill's case (E)' was approved and the learned Judges disagreed with the Lahore view that 'other legal proceedings' must mean "original proceedings in a Court of first instance, analogous to a suit, initiated by means of a petition similar to a plaint". They observed:

> "Section 171, must, in our judgment, be construed with reference to other sections of the Act and the general scheme of administration of the assets of a company in liquidation laid down by the Act. In particular, we would refer

to S. 232. Section 232 appears to us to be supplementary to S. 171 by providing that any creditor (other than Government) who goes ahead, notwithstanding a winding up order or in ignorance of it, with any attachment, distress, execution or sale, without the previous leave of the Court, will find that such steps are void. The reference to 'distress' indicates that leave of the Court is required for more than the initiation of original proceedings in the nature of a suit in an ordinary Court of law.

Moreover, the scheme of the application of the company's property in the 'pari passu' satisfaction of its liabilities, envisaged in S. 211 and other sections of the Act, cannot be made to work in co-ordination, unless all creditors (except such secured creditors as are 'outside the winding up' in the sense indicated by Lord Wrenbury in his speech in — 'Food Controller v. Cork', 1923 AC 647 at p. 671 (G)), are subjected as to their actions against the property of the company to the control of the Court. Accordingly, in our judgment, no narrow construction should be placed upon the words 'or other legal proceedings' in S. 171. In our judgment, the words can and should be held to cover distress and execution proceedings in the ordinary Courts. In our view, such proceedings are other legal proceedings against the company, as contrasted with ordinary suits against the company."

In view of the observations of Spens C. J. in — 'Shiromani Sugar Mill's case (E)' it is no longer necessary to refer to various decisions in which a contrary view was taken. Since, however, they were cited at the Bar we may briefly refer to them.

(11) In — 'Milawa Ram v. People's Bank of India', AIR 1916 Lah 24 (H), it was held that a revision application filed against a company was other legal proceeding and it was not maintainable without the permission of the Company Judge. This view was overruled in — 'Kishen Singh v. Industrial Bank of India', AIR 1918 Lah 181 (I), where it was held that an appeal or an application for revision against an order passed in a proceeding initiated by the company did not come under S. 171. Reliance was placed on a case of the House of Lords in — 'Humber v. John Griffiths Cycle Co.', (1901) 85 LT 141 (J).

(12) In — 'Jiwan Dass v. People's Bank of Northern India', AIR 1937 Lah 926 (K), it was held by Addison and Din Mohammad JJ. that in an action brought by the company an appeal could be filed without the permission of the Company Judge.

(13) The same view was taken by Tek Chand J. in — Simla Banking and Industrial Co., Ltd., Lahore v. Indo Swiss Trading Co., Ltd., Calcutta', AIR 1938 Lah 754 (L).

(14) In AIR 1941 Lah 392 (B) the same view was affirmed on a different interpretation of the words 'legal proceeding'. It was held that

"A suit under O. 21, R. 63 against a company in liquidation being a suit within the meaning of S. 171, Companies Act, cannot be commenced without the leave of the Court which had ordered the winding up."

(15) In AIR 1948 Pat 398 (A) Manohar Lall J., dissented from the view expressed by Braund J., in AIR 1941 All 154 (C) and purported to follow the observations of Tek Chand J., in AIR 1941 Lah 392 (B), which view, however, had been overruled by the Federal Court in the year 1946.

(16) After the decision of the Federal Court it must now be held that the meaning of the words 'other legal proceedings' must not be confined within narrow limits and need not necessarily be proceedings analogous to a suit initiated by means of a petition similar to a plaint.

(17) Whenever a matter comes up before a court and an objection is taken, that leave under S. 171, Companies Act had not been obtained, the Court has to decide whether it is a suit or other legal proceeding against the company, If the words 'against the company' merely mean that the company is arrayed as the opposite party, as was held by Braund J., permission of the Company Judge would be necessary whenever any leagl proceeding has to be instituted or continued against the company. That this could not be the meaning is obvious from the fact that where the company has come to Court and has instituted the proceeding, which it can do without the leave of the Company Judge, the defendant will be required to take his permission to institute or continue any legal proceeding to defend himself. To hold that would put the defendant in a difficuit position and it would be necessary, before he can take any proceeding against the company even by way of defence or to disprove the company's claim or to get some order passed in favour of the company vacated, to take the permission of the Company Judge.

The words 'against the company' must mean a proceeding where a liability is intended to be fastened on the company or its assets and not a proceeding commenced by a person with the object of escaping liability arising out of a proceeding commenced by the company itself. It would probably be useful to clarify the position a little further. If a person wants to file a suit to escape liability on the ground that the company's claim against him is unfounded, it is a proceeding against the company, but where the company has started the proceeding, that is, put forward its claim in a court of law, any remedy available by way of defence to escape liability, which the company wants to fasten on him, should not be deemed to be a proceeding commenced or continued against the company and in such a case the question, whether the claim was put forward or the suit was filed by the company before or after the winding-up order, should make no difference.

(18) In (1901) 85 LT 141 (J), Lord Davey said:

"It was the respondents who themselves proceeded with the action after the winding-up order, by prosecuting their appeal in the Court of Appeal, and when once an action by the company itself has been proceeded with, there is no necessity for the defendants in that action to obtain leave for any defensive proceeding on their part."

Braund J. distinguished these observations and confined them to a case where the action had been taken by the company and proceeded with after the winding-up order. As Lord Davey was merely stating the facts of the case before him, he should not be understood to have meant that if the appeal had been filed and proceeded with by the company before the winding-up order, his decision would have been the other way.

(19) This appears to us to be also just and proper as in such a case it is the company which wants to fasten the liability while the person against whom such liability is attempted to be fastened, in a legal proceeding pending in a court, wants to escape that liability. Liquidation proceedings under the Companies Act are for making available the assets of the company in 'pari passu' satisfaction of its liabilities, and if persons, other than secured creditors, are allowed to enforce their claims without any control exercised by the Company Judge, it may defeat or delay that object. But where a company has initiated a proceeding in a court of law whether before or after the winding-up order, no permission of the Company Judge should be needed for anything done by the defendant or the opposite party to escape the liability thus intended to be fastened on him.

If, however, the proceedings in a court of law are started by a person other than the company, either with the object of fastening a liability on the company or with the intention of escaping a liability in respect of a claim which has not been brought into Court by the company itself, the permission of the Company Judge is required for the institution or the continuance of the proceedings. For instance, if a person files a suit for a declaration that the company owes to him a certain sum of money or that he does not owe the company any sum of money, the permission of the company Judge is necessary. If, however, the company has instituted a suit or other proceeding to enforce a claim, any action taken by the defendant or the opposite party by way of defence, or if the company has obtained a decree or order, any defensive action by way of appeal, revision, review or setting aside of an 'ex parte' decree or order should not require the permission of the Company Judge.

If the proceedings have been instituted or continued on behalf of the Company after the winding-up order, according to the view taken by Braund J. the subsequent proceedings by way of defence would come under the rule laid down by Lord Davey. There does not appear to us, with great respect to the learned Judge, to be any good reason for coming to the conclusion that the result should be otherwise where the proceedings had been instituted and continued by the company before the winding-up order, specially as under S. 171, Companies Act the company is not required to obtain the permission of the Company Judge for the institution or the continuance of a legal proceeding.

(20) In our view, therefore, in a case like the present, where the company has obtained a decree, an application to have that decree reviewed by reason of some error apparent on the face of the record is not a legal proceeding commenced against the company within the meaning of S. 171, Companies Act and no leave of the Company Judge was necessary.

V.S.B. Answer accordingly.

(S) AIR 1955 ALLAHABAD 172 (Vol. 42, C.N. 58)

AGARWALA AND ASTHANA JJ. (21-10-1954)

Jaddu Koeri, Applicant v. Deep Chand Koeri and another, Opposite Party.

Civil Revn. No. 142 of 1950, against order of Dist. J., Ghazipur, D/- 18-11-1949.

Debt Laws — U. P. Agriculturists' Relief Act (27 of 1934), S. 12 — Question of paramount title — (Civil P.C. (1908), O. 1, Rr. 10, 13; O. 34, R. 1) —ILR (1949) All 803: AIR 1949 All 589, Overruled.

Ordinarily a person claiming a title paramount to the mortgagor or the mortgagee will not be impleaded in a suit on the basis of the mortgage, but this rule is not an inflexible rule and will depend on the contingencies of each case. The rule is based on convenience and to avoid unnecessary complication in a mortgage suit. If, however, it is necessary to decide the question of paramount title set up by the defendant in order to afford appropriate relief to the plaintiff and to avoid multiplicity of suits such a question can be gone into in a mortgage suit. There is, however, no question of want of jurisdiction in such cases. It can, at the most, be one of misjoinder but when it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee or is in possession and likely to resist the claim of a successful plaintiff in the mortgage suit or has really got no interest in the mortgaged property and has been set up by the defendant mortgagee to defeat the plaintiff's claim for redemption it may be convenient to join him as a party to the mortgage suit. If it is not done then it is possible that the decree for redemption which is obtained by the plaintiff may become infructuous as he will not be able to obtain possession over the property which stands in the name of another person and who is setting up a paramount title at the instance of the mortgagee.

There is nothing in S. 12 which debars a Court in a case under this section from entering into the question whether the person who was claiming an interest in the mortgaged property had really any such interest or was really a creature of the mortgagee and had been set up by him in order to defeat the plaintiff's claim for redemption. No question of want of jurisdiction arises in such a case. The trial Court having the powers of the Assistant Collector. 1st class, has the jurisdiction to decide the question of tenancy raised before it.

If it is considered to be a case of misjoinder of parties or causes of action, the objection about it should be taken at the earliest possible opportunity before the settlement of

issues as provided in O. 1, R. 13, Civil P. C. and when such objection is not taken it will be deemed to have been waived and will not be entertained in appeal or revision. It is not open to the defendant to raise this question in revision when he himself invited a decision about his tenancy rights from the lower court and that question was decided against him. Case law discussed. ILR (1949) All 803: AIR 1949 All 589, Overruled.

(Paras 6, 13, 15)

Anno: O. 1, R. 13, N. 1, 12; O. 34, R. 1, N. 5, 19.

CASES REFERRED: Paras

(A) (V36) AIR 1949 All 589: 1949 All LJ 125 4, 6
(B) ('50) 1950 All LJ 878 4, 7
(C) (V36) AIR 1949 All 318: 1949 All LJ 122 4, 8
(D) (V12) AIR 1925 Cal 973: 88 Ind Cas 866 9
(E) (V24) AIR 1937 All 251: 169 Ind Cas 609 10
(F) (V11) AIR 1924 Pat 613: 3 Pat 244 11
(G) (V24) AIR 1937 Mad 176: 165 Ind Cas 1006 12

S. N. Verma, for Applicant; G. P. Bhargava, for Opposite Party.

ASTHANA J.:

One Khedu was the tenant of plots nos. 141 and 152. He mortgaged these plots with passession to one Bhuttoo by means of the mortgage deed dated 14-6-1908. Some time after the mortgage Khedu died. His son Deep Chand made an application under S. 12, U. P. Agriculturists' Relief Act for the redemption of the mortgage on the allegation that the mortgage debt was paid up from the usufruct of the mortgaged property. He also claimed possession over the above plots. Besides the mortgagee Bhuttoo one other person, viz., Jaddu Koeri whose name was entered in the revenue papers over the aforesaid plots was also impleaded as a defendant in the case on the allegation that he had been set up by the mortgagee and his name in the revenue papers was merely fictitious and that in fact the mortgagee Bhuttoo was in possession of the mortgaged property.

(2) The mortgagee Bhuttoo did not contest the suit. Jaddu Koeri alone contested the suit and his defence was that the plaintiff Deep Chand was not entitled to redemption as Khedu had sold his equity of redemption in respect of the aforesaid plots to Azim and Brijraj Tewari and they had reliquished their rights in favour of the zamindar who admitted him as the tenant of the disputed plots.

(3) The trial court framed seven issues in the case which are as follows:

1. Whether the plaintiff is a tenant and entitled to sue?
2. Whether Bhuttoo is the mortgagee?
3. Whether the mortgage as alleged exists?
4. Whether defendant No. 2 is tenant?
5. Whether the mortgage money has been paid up. If not how much is due?
6. To what relief is the plaintiff entitled?
7. Whether the suit is barred by S. 10, Civil P. C.?

(4) The finding of the trial court was that the plaintiff Deep Chand was the tenant of the aforesaid plots and was entitled to redemption, that Bhuttoo was really the mortgagee of these plots and in possession of them as such, that Jaddu Koeri was not the tenant of these plots and his name in the papers was fictitious and he was really a man of the mortgagee and that the mortgage money was paid up and the plaintiff was entitled to redemption and possession over the mortgaged property. Jaddu Koeri filed an appeal against this decision before the District Judge of Ghazipur and the finding of the trial court was upheld and the appeal was dismissed with costs. Against this decision Jaddu Koeri filed a revision to this Court which was heard by a learned Single Judge.

It appears from his judgment that the only point which was raised before him on behalf of the applicant was that the question of the status of the applicant should not have been gone into by the courts below in a case under S. 12, U. P. Agriculturists' Relief Act. In support of this contention reliance was placed on two single Judge cases of —'Jagarnath Sahu v. Srikant Dube', AIR 1949 All 589 (A) and 'Ram Datt Singh v. Ajodhia Singh', 1950 All L. J. 878 (B). It was held in both these cases that the scope of S. 12, of the Act did not permit an investigation into the question of tenancy of a person claiming as a tenant of the property mortgaged. Sri Bhargava for the plaintiff relied on the case of —'Ram Kripal v. Bhagwati Saran', AIR 1949 All 318 (C), in support of his contention that the rule did not apply to the facts of the present case. In view of the conflicting decisions on the question of law the learned Single Judge has referred the question to a Bench for decision.

(5) The question for consideration is whether it was open to the plaintiff to implead the applicant as defendant on the allegation that he was really not in possession of the mortgaged property but his name was entered in the revenue papers over it as benamidar at the instance of the real mortgagee who was in possession of it and whether the court could decide the question of tenancy raised by him.

(6) The first case relied on on behalf of the applicant is that of AIR 1949 All 589 (A). It was held in this case by Seth, J. that the jurisdiction of a court deciding an application under S. 12, U. P. Agriculturists' Relief Act, whether as a court of original jurisdiction or as a court of appeal, was a special jurisdiction conferred upon it by a special provision of the statute and was limited within the four corners of that section, that it had jurisdiction to adjudicate upon the question of redemption and no more and the determination of an adverse claim to tenancy rights by one of the defendants whom the mortgagor alleged to have been fictitiously put up by the mortgagee was outside the scope of the proceedings under S. 12, of the Act.

In this case the sons of the mortgagors had made an application under S. 12 of the Act for the redemption of the mortgage and among the defendants they impleaded not only the two mortgagees but also their father, Rachha Sahu, on the allegation that his name stood fictitiously recorded as a tenant over two of the mortgaged plots Nos. 554 and 240 though the mortgagees themselves

were in actual possession of these two plots. With due deference to his Lordship I am unable to agree with his view. There is no doubt that in a case of redemption the questions which have to be determined are whether the applicant is entitled to redeem the mortgage and if so whether without payment of any sum or on payment of some money. If in order to determine this question it is necessary to determine incidentally some other questions which arise in the case I do not think that the Court is debarred from entering into those questions in order to grant the appropriate relief to the plaintiff. It cannot be said that the revenue Court before which the application under S. 12 was made was not competent or had no jurisdiction to decide the question of tenancy raised by one of the defendants.

In order to grant the relief to the plaintiff it was necessary to decide whether the mortgaged property was really in possession of the mortgagees and the name of the other defendant or defendants in the revenue papers was fictitious or otherwise. There can be no doubt that if the finding of the Court were that the contending defendant who was setting up a paramount title had no connection with the mortgage and was in possession of the property on his own behalf as a tenant he could not be dispossessed in a suit for redemption nor could a decree be passed against him in that suit. If, however, the finding was that the mortgagees were really in possession of the property and the defendant who was setting up his claim as a tenant over it was really not in possession of it except that his name was entered in the revenue papers at the instance of the real mortgagees in order to defeat the claim for redemption then certainly the suit can be decreed against him.

If it were open to a mortgagee to set up a third person who has really no connection with the mortgaged property in order to defeat the claim for redemption then a mortgagor would be put to unnecessary trouble and harassment to obtain possession over the mortgaged property and he will have to file several suits against different persons for the recovery of the mortgaged property. I do not think that this is equitable. I have not been able to find anything in S. 12 which debars a court in a case under this section from entering into the question whether the person who was claiming an interest in the mortgaged property had really any such interest or was really a creature of the mortgagee and had been set up by him in order to defeat the plaintiff's claim for redemption.

It may be that under O. 34, R. 1, Civil P. C. a person claiming a paramount title to the mortgaged property is not a necessary party, but if he appears to be a proper party for the correct decision of the case and to grant the relief to the plaintiff and his presence is necessary to decide the question he may be impleaded as a defendant in that suit and where such a person has been impleaded and has raised his pleas and has invited a decision from the court it is not open to him subsequently in appeal or in revision when the decision has gone against him to say that the court had no jurisdiction to decide the question raised by him. Even if it is assumed that a person setting up a paramount title is not a proper party in a suit for redemption but if he is so impleaded and a decision is given against him it can at the most be a case of misjoinder of parties and the decision of the court cannot be vitiated simply on this ground unless it has in any way prejudiced such defendant.

(7) The next case relied on by the applicant is of '1950 All LJ 878 (B)'. This was a case under S. 12, U. P. Agriculturists' Relief Act and in this case besides the mortgagees some other persons were impleaded as defendants on the allegation that they were members of a joint Hindu family with the mortgagees, that the mortgagee rights had been acquired out of the joint family funds and that these defendants were in possession of the mortgaged property as mortgagees. The defence taken up by these defendants was that they had no concern with the mortgage but they were in possession as tenants. The trial Court found that the contending defendants were not in possession of the mortgaged property as tenants but as mortgagees and it, therefore, decreed the suit for redemption.

On appeal the learned District Judge reversed the finding and held that they were not in possession as mortgagees but were in possession as tenants. He, therefore, dismissed the suit for possession against them. The plaintiffs filed a revision against this order and it was held by Ghulam Hasan, J. that the plaintiffs could not get a decree for possession against the contending defendants in view of the finding of the lower appellate court. In my opinion this decision is not of much help to the applicant. There is no doubt that in view of the finding of the lower appellate court that the contending defendants were not in possession of the mortgaged property as mortgagees but were in possession of it as tenants there can be no doubt that the plaintiffs could not eject them in a suit for redemption and their appropriate remedy was to file a separate suit for their ejectment.

(8) The next case is of 'AIR 1949 All 318 (C)'. This case was relied on by the opposite party. In this case one of the defendants whose name was entered in the revenue papers as tenants of the mortgaged property was impleaded as defendant in the suit for redemption on the allegation that he was really not in possession of the mortgaged property, that the mortgagee Rameshwar was actually in possession of it and that he had wrongly set up the other defendant and got his name entered in the revenue papers in order to defeat the claim for redemption. It was held by Bhargava, J. that the Court could determine the question whether the mortgagee had put up a fictitious person as a tenant to prevent the mortgagor from obtaining possession over the mortgaged property, that if the finding was that the allegations were untrue and the persons concerned was a bona fide tenant the court would have no jurisdiction to oust him, but initially it had jurisdiction to enter into the question raised. I am inclined to agree with this view for the reasons already given above.

(9) The next case is of — 'Bhuban Mohan Ghose v. Co-operative Hindustan Bank', AIR 1925

Cal 973 (D). This was a suit brought by the mortgagee for the enforcement of a mortgage. Besides the mortgagors one Susila Bala was impleaded as a defendant in the case on the allegation that she was merely a benamidar of the mortgagors, i.e., the defendants 1 and 2. The defence of Susila Bala was that she was really the owner of the mortgaged property and not a benamidar of the mortgagors as alleged by the plaintiff. The question whether Susila Bala was in possession of the property or was merely the benamidar of the mortgagors was decided by the court and was found against her. It was contended in appeal that as she was claiming a paramount title to the mortgaged property this question could not have been gone into in the mortgage suit and the trial court had committed a mistake in deciding it as it had no jurisdiction.

By a Division Bench of the Calcutta High Court it was held that a suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and the mortgagee are sought to be investigated, it is open to objection on account of misjoinder and inconvenience, that the question, however, was not one of jurisdiction and at most the misjoinder was an irregularity or inconvenience, and where there had been no prejudice by reasons of the misjoinder the irregularity, if any, was not such as would justify an appellate court in setting aside the decree.

(10) In — 'Bisheshar Dayal v. Mt. Jafri Begam', AIR 1937 All 251 (E), a Bench of this Court consisting of Thom and Allsop, JJ. held that there was nothing in O. 34, R. 1 which prohibited a mortgagee from impleading in the mortgage suit any person who according to his allegation was disputing his title as mortgagee, that to hold otherwise would in many instances lead to more highly undesirable and inequitable results and would lead to unnecessary multiplication of suits, that either before or after filing the mortgage suit he would have to bring another suit against the person claiming title as a prior transferee to the mortgaged property for a declaration that that person's title was invalid. They observed that it would be unfortunate if he had to follow such a devious course.

(11) In — 'Khub Lal Upadhya v. Jhapsi Kundu', AIR 1924 Pat 613 (F), a Division Bench of the Patna High Court consisting of Dawson Miller and Mullick, JJ. made the following observations:

"Although it is, as a general rule, desirable in mortgage suits to exclude all issues between the parties except those immediately concerned with the mortgage suit itself, the Court may in certain cases allow other issues to be determined in such a suit even if they should depend upon separate causes of action and the Court may in proper cases grant leave for that to be done. Where the defendants raising a paramount title are in possession and likely hereafter, if their differences are not settled by the mortgage suit, to resist the possession of a successful plaintiff in a mortgage suit, it would in many cases be very convenient to allow the issues of their title to be determined in the mortgage suit so that after determination of those issues the plaintiff will know whether he may or may not get an undisturbed possession of the property instead of having to bring a separate suit later on."

(12) In — 'Kasi Chettiar v. Ramasami Chettiar Firm', AIR 1937 Mad 176 (G), decided in 1936 by a Division Bench of the Madras High Court consisting of Varadhachariar and Mockett, JJ. it was held that the rule that in a mortgage suit pleas in the nature of a claim by way of title paramount are not to be introduced was not applicable to a case where a mortgage executed by a member of a joint Hindu family was sought to be enforced against the other members of the family as his heirs and the latter set up that the property mortgaged was family property and not the separate property of the mortgagor and that it was proper that a plea of this nature must be tried before a mortgaged property is brought to sale.

(13) From a consideration of the above authorities it will appear that, ordinarily a person claiming a title paramount to the mortgagor or the mortgagee will not be impleaded in a suit on the basis of the mortgage, but this rule is not an inflexible rule and will depend on the contingencies of each case. The rule is based on convenience and to avoid unnecessary complications in a mortgage suit. If, however, it is necessary to decide the question of paramount title set up by the defendant in order to afford appropriate relief to the plaintiff and to avoid multiplicity of suits such a question can be gone into in a mortgage suit.

There is, however, no question of want of jurisdiction in such cases. It can, at the most, be one of misjoinder but when it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee or is in possession and likely to resist the claim of a successful plaintiff in the mortgage suit or has really got no interest in the mortgaged property and has been set up by the defendant mortgagee to defeat the plaintiff's claim for redemption it may be convenient to join him as a party to the mortgage suit. If it is not done then it is possible that the decree for redemption which is obtained by the plaintiff may become infructuous as he will not be able to obtain possession over the property which stands in the name of another person and who is setting up a paramount title at the instance of the mortgagee. In such cases after obtaining a decree for redemption he will have to file another suit for possession of the mortgaged property against that person.

(14) In the present case the applicant contended that the plaintiff was not the tenant of the disputed plots as his father had sold them and the persons to whom they had been sold had relinquished their tenancy rights in them. It was, therefore, necessary for the lower court to determine whether the sale deed alleged to have been executed by the plaintiff's father was a valid sale deed and binding on him and whether in view of that sale deed the plaintiff had lost his equity of redemption and was no longer the tenant of the disputed plots. In order to determine this question the lower court had to enter into the question of the genuineness of the sale deed and when it found that the sale deed was not genuine and binding on the plaintiff then the plaintiff as the

son of the mortgagor Khedu inherited the tenancy rights from him and was entitled to redeem them. After this finding it was not necessary to determine whether the applicant was the tenant of these plots because in view of this finding he could not possibly acquire tenancy rights in those plots nor could the zamindar have conferred them on him. It was also necessary for the lower court to determine whether the mortgagees were in actual possession of the mortgaged property and that finding too is in favour of the plaintiff.

(15) In my opinion no question of want of jurisdiction arises in this case. The trial court had the powers of the Assistant Collector, Ist class, and as such had the jurisdiction to decide the question of tenancy raised before it. If it is considered to be a case of misjoinder of parties or causes of action, which in the circumstances of the present case I do not think that it is, the objection about it should have been taken at the earliest possible opportunity before the settlement of issues as provided in O. 1, R. 13, Civil P. C. and when such objection is not taken it will be deemed to have been waived and will not be entertained in appeal or revision. It is not open to the applicant now to raise this question when he himself invited a decision about his tenancy rights from the lower Court and that question was decided against him. I am of opinion that in order to determine the plaintiff's right of redemption the question of his tenancy right and that of the applicant which incidentally arose had to be decided and the lower Court in deciding it has acted properly and has also avoided multiplicity of suits. It has not committed any mistake.

(16) The application has no force and is rejected with costs.

(17) AGARWALA J.: I agree.

D.H.Z. Revision dismissed.

(S) AIR 1955 ALLAHABAD 176 (Vol. 42, C.N. 59)

MALIK C. J. AND MOOTHAM J. (22-11-1954)

Jethmal Parasram, Applicant v. Commr. of Income Tax, Delhi, East Punjab and Ajmer-Merwara, Opposite Party.

Misc. Case No. 128 of 1949.

(a) Income Tax Act (1922), S. 42(3) — "Operations carried out in British India".

Provided the income, profits and gains can be deemed to be taxable income under S. 42 (1), the purchase of goods in British India for sale outside can be rightly considered as one of the operations contemplated by S. 42(3) of the Income Tax Act, 1922. (Para 7)

Anno: Income Tax Act, S. 42, N. 5.

(b) Income Tax Act (1922), S. 42 — Purchase of goods in British India — Sale in Indian State — Accrual of profits.

Where purchase of goods is made in British India for purpose of sale in an Indian State, then the entire profits do not accrue inside the Indian State where the goods are sold. A part of it must be deemed to have accrued in British India where the goods are purchased; AIR 1950 SC 134; AIR 1953 SC 105, 107, Foll. (Para 4)

Anno: Income Tax Act, S. 42, N. 1.

(c) Income Tax Act (1922), S. 42(3) — Cl. (3) of S. 42 is to be read with cl. (1).

Clause (3) of S. 42 cannot be read independently of clause (1). While cl. (1) deals with the question when income should be deemed to have accrued or arisen within taxable territories, cl. (3) provides how such income is to be apportioned when part of the operations, which resulted in the income, were carried out within the taxable territories and part outside. AIR 1951 Mad 597; AIR 1953 SC 105; AIR 1954 SC 198, Rel. on. (Para 6)

Anno: Income Tax Act, S. 42, N. 5.

(d) Income Tax Act (1922), S. 4(1)(a) — Sale in Indian State — Part of sale money received in British India — Taxable income.

Where the sales of goods are made in an Indian State, then any part of the sales moneys realised in British India can be said to include income which can be assessed under S. 4(1)(a). (Para 9)

Anno: Income Tax Act, S. 4, N. 4.

CASES REFERRED: Paras

(A) (V37) AIR 1950 SC 134: 1950-18 ITR 472 (SC) 4

(B) (V40) AIR 1953 SC 105: 1953-23 ITR 101 (SC) 4, 6

(C) (V38) AIR 1951 Mad 597: 1950-18 ITR 888 5

(D) (V41) AIR 1954 SC 198: 1954-25 ITR 27 (SC) 6

G. S. Pathak, R. K. S. Toshniwal and R. S. Pathak, for Applicant; J. Swarup and S. C. Das, for Opposite Party.

MALIK C. J.:

This is a reference under S. 66(1) Income tax Act but in view of certain decisions of the Supreme Court it is not necessary for us to give our reasons at any length.

(2) The assessee was assessed to income tax on his status of an individual and as a resident in British India. The assessee carried on business in cloth in Ajmer in British India which was the Head Office and at two branches at Kishangarh in an Indian State. These branches made purchases of cloth in British India for sale inside the State. The purchases made were of considerable amount. In the assessment year 1942-43 the total cloth purchased in British India was for Rs. 1,24,118/- and in the next year 1943-44 for Rs. 1,91,148/-. The Income-tax Officer considered that purchase of cloth in British India for sale outside amounted to part of the operations for making profits, being carried out in British India, and applying the provisions of Section 42 (3), Income-tax Act added 10 per cent. on the total value of the purchase in the first year and 12½ per cent. in the subsequent year to assessable income of the assessee in the relevant years. The case ultimately came up to the Tribunal which reduced the rate to 7 per cent. and 9 per cent. but upheld the rest of the order.

(3) At the suggestion of the assessee the following question was referred to us for decision:

"Whether purchase of goods in British India for the purpose of sale outside British India can be rightly considered as one of the operations contemplated by section 42 (3) of the Indian Income-tax Act, 1922?"

(4) On the strength of a decision of the Bombay High Court an argument was advanced before the Appellate Tribunal that the entire profits must be deemed to have accrued at the place where the goods were sold. This view was, however, not accepted by the Supreme Court in the — 'Commr. of Income-tax, Bombay v. Ahmedbhai Umarbhai and Co., Bombay', AIR 1950 SC 134 (A). In the — Anglo-French Textile Company Ltd., v. Commr. of Income-tax, Madras', AIR 1953 SC 105 at p. 107 (B) the same view was re-affirmed. Their Lordships said—

"In our judgment, the contention of the learned counsel for the appellant — and on which his whole argument is founded— that it is the act of sale alone from which the profits accrue or arise can no longer be sustained and has to be repelled in view of the decision of this Court in — 'Commr. of Income-tax Bombay v. Ahmedbhai Umarbhi and Co., Bombay (A)."

It must, therefore, be held that the entire profits did not accrue inside the Indian State where the cloth was sold and that a part of it must be deemed to have accrued in British India where the cloth was purchased.

(5) Sri G. S. Pathak, on behalf of the assessee has, however, urged that the provisions of Section 42(3) can apply only if S. 42(1) is applicable. He has urged that if income is taxable under S. 42(1) then, how much of it is to be taxed when part of the income has resulted from operations carried on within the taxable territories and part of the income outside it, has to be worked out in accordance with the provisions of Section 42 (3). In — 'Anglo-French Textile Co., Ltd., v. Commr. of Income-tax, Madras', AIR 1951 Mad 597 (C) a Bench of the Madras High Court had held that the profits which are liable to Indian Income-tax by reason of a foreign company having a business connection in British India by means of a regular agency, the income, profits and gains accruing or arising to the assessee abroad, must be attributable in some measure to its business connection in British India, and the profits liable to Indian Income-tax have to be apportioned in the manner prescribed by S. 42 (3) of the Act.

(6) This view was affirmed by the Supreme Court in AIR 1953 SC 105 (B) and again in — 'The Anglo French Textile Co., Ltd. v. Commr. of Income-tax, Madras', AIR 1954 SC 198 (D). Bhagwati J., pointed out that "Section 42 (3) ..... is a part of the scheme which is enacted in Section 42". When income, profits and gains can be deemed to have accrued within the taxable territory under S. 42 (1) of the Act, and a part of the operations, which resulted in the income, profits and gains, was carried out outside it, but a part of the operations had been carried out within British India, how the profits are then to be apportioned is indicated in Section 42 (3). It provides that only such profits and gains as are reasonably attributable to that part of the operations which were carried out within the taxable territories, will be deemed to have accrued or arisen within those territories. Clause (3) of Section 42 cannot be read independently of Cl. (1). While Cl. (1) deals with the question when income should be deemed to have accrued or arisen within taxable territories Cl. (3) provides how such income is to be apportioned when part of the operations, which resulted in the income, was carried out within the taxable territories and part outside.

(7) Our answer to the first question, therefore, is that provided the income, profits and gains can be deemed to be taxable income under S. 42(1) the purchase of goods in British India for sale outside can be rightly considered as "one of the operations contemplated by S. 42 (3) of the Indian Income-tax Act, 1922."

(8) There is a second question that has been referred which is as follows:

"Where the sales of goods are made in an Indian State, whether any part of the sales moneys realised in British India can be said to include income which can be assessed under Section 4 (1) (a) of the Indian Income-tax Act, 1922?"

The assessee is a resident in British India. The price of some of the cloth that was sold in the Indian State of Kishangarh was realised in British India by the head office at Ajmer. Profits were calculated on the amount thus realised and were added to the taxable income of the assessee.

(9) Section 4 (1) (a) provides that the total income of any previous year of any person includes all income, profits and gains from whatever source derived which are deemed to be received in British India in such year by or on behalf of such person. The money was received in British India and learned counsel has not been able to give us any reason why S. 4 (1) (a) is not applicable to such income.

(10) Our answer, therefore, to the second question is also in the affirmative.

(11) As the assessee has partly won and partly lost we make no order as to costs. The fee payable to the counsel for the Commissioner of Income-tax is Rs. 400/-.

V.S.B.

Order accordingly.

(S) A.I.R. 1955 ALLAHABAD 177 (Vol. 42, C.N. 60)

RAGHUBAR DAYAL AND ROY JJ. (21-10-1954)

Sri Krishna Chandraji, Applicant v. Shyam Behari Lal, Opposite Party.

Civil Misc. Revn. No. 75 of 1954, against Order of Civil J., Kanpur, D/- 16-2-1952.

Court-fees Act (1870), S. 7 (IV) (C), Sch. 2 Art. 17 (iii), (vi) — Suit for declaration with consequential relief. AIR 1949 All 207 and 1935 All LJ 1319, Not foll.

The expression 'consequential relief' in S. 7 (iv) (c) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a

substantive relief. The ingredient that the relief cannot be claimed independently of the declaration as a substantive relief means that it is necessary for a relief to be a consequential relief that that relief be not capable of being claimed, in the absence of a claim for declaration, as a substantive relief, that is to say, no suit for that relief can lie unless the suit also contemplates a declaratory relief. It is only in such suits that it can be said that the relief sought is so linked with the declaratory relief that it should be considered a relief consequential to the declaratory relief.

(Paras 4, 6)

The plaintiff filed the suit against defendant claiming the reliefs, (a) that it be declared that the plaintiff No. 2 was the sarbarkar of the plaintiff No. 1 (b) that the defendant be removed from the management of the temple of plaintiff No. 1 and the charge of the temple and movable therein be handed over to plaintiff No. 2 as sarbarkar on behalf of the plaintiff No. 1.

Held that relief (b) could be sued for independently of the relief for a declaration, therefore it was not a consequential relief to the relief for declaration and the Court-fee paid on relief (a) according to Sch. II, Art. 17, Cl. (iii) and on relief (b) according to Cl. (vi) of the same Article was sufficient. AIR 1932 All 485 (FB), Foll. Case law discussed; AIR 1949 All 207 and 1935 All LJ 1319, Not foll.

(Paras 8, 9)

Anno: C. F. Act, S. 7 (IV) (C) N. 1.

CASES REFERRED: Paras

(A) (V36) AIR 1949 All 207: ILR (1949) All 410 4

(B) (V19) AIR 1932 All 485: 54 All 812 (FB) 4, 8

(C) ('35) 1935 All LJ 1319 4

(D) (V20) AIR 1933 All 488: 55 All 791 (FB) 7

(E) (V22) AIR 1935 All 817: 58 All 146 (FB) 7

(F) (V24) AIR 1937 All 148: ILR (1937) All 443 7

(G) (V31) AIR 1944 All 208: ILR (1944) All 388 7

(H) (V31) AIR 1944 All 279: ILR (1944) All 564 8

Standing Counsel, for Applicant; K. C. Saksena, for Opposite Party.

RAGHUBAR DAYAL J.:

This is a reference under S. 6-C(1), Court Fees Act by the Chief Controlling Revenue Authority in Suit No. 114 of 1951. 'Thakur Shri Krishna Chandraji v. Shyam Behari Lal', in the Court of the First Civil Judge, Kanpur.

(2) Thakur Shri Krishna Chandraji and Bankey Behari Lal filed this suit against Shyam Behari Lal claiming several reliefs, the first two of which are:

"(a) that it be declared that the plaintiff No. 2 is the sarbarakar of the plaintiff No. 1,

(b) that the defendant be removed from the management of the temple of plaintiff No. 1 and the charge of the temple and movable therein be handed over to plaintiff No. 2 as sarbarakar on behalf of the plaintiff No. 1."

Court fee on relief (a) was paid according to Schedule II, Art. 17, clause (iii) and on relief (b) according to clause (vi) of the same Article of the Court Fees Act.

(3) The Inspector of Stamps reported to the Court concerned that the Court fee paid was insufficient and it ought to have been paid in accordance with the provisions of S. 7(iv)(a), Court Fees Act on the market-value of the property as the reliefs in the suit were for declaration that plaintiff No. 2 was the sarbarkar of plaintiff No. 1 and that the defendant be removed from the management of the property of plaintiff No. 1. The Inspector of Stamps expressed the opinion that the reliefs involved a declaration of title and consequential relief. The learned First Civil Judge did not agree with the report of the Inspector of Stamps and held that the Court fee paid was sufficient. It is subsequent to this order that this reference was made to this Court without taking recourse to the provision of S. 6-B, Court Fees Act which empowers the Chief Inspector of Stamps to apply in revision against the order passed by a Court on the report of the Inspector of Stamps. The point in this reference by the Chief Controlling Revenue Authority is whether it is a case of declaratory decree with consequential relief in terms of S. 7(iv)(a) and the plaint required an ad valorem Court fee of Rs. 2,284/14/-on the jurisdictional value of the property involved.

(4) The learned Standing Counsel in support of the reference has referred us to the case reported in — 'Madan Mohan v. Tejram George Coronation Hindu School Association', AIR 1949 All 207 (A). In that suit the principal reliefs sought were that (a) it be declared that the plaintiff was in fact the President of a certain school and was entitled to function as such; (b) it be declared that certain resolutions and all the proceedings carried out by the defendants were void and 'ultra vires'; (c) the defendants be restrained from altering or adding to the name of the institution; (d) the defendant No. 2 be restrained from functioning as the President; and (e) the defendants be restrained from interfering with the plaintiff's functioning as the President.

It was held that the injunctions sought were not independent reliefs but necessarily flowed from the declarations sought for in reliefs (a) and (b). They could be granted only if the title of the plaintiff to the aforesaid declarations was established and that, therefore, they were consequential reliefs. It is submitted by the learned Standing Counsel that relief (b) in the present suit with respect to the removal of the defendant from the management of the temple and with respect to the delivery of the charge of the temple and moveables to plaintiff No. 2 was a consequential relief to the declaratory relief (a) because it flowed from it and could not be granted till the plaintiff succeeded in obtaining the desired declaration. If the expression "consequential relief" simply means a relief which flows from the declaratory decree and the relief which cannot be granted until the declaratory relief is granted, the contention would be sound because it makes no difference what from the relief flowing from the declaratory relief may have

It was observed in the aforesaid 1949 case (A) at p. 208:

"A consequential relief means a relief which necessarily flows from the principal relief sought. It is a relief which in the circumstances of the case cannot be allowed if the principal relief is refused."

In this connection reference was made to the cases reported in — 'Kalu Ram v. Babu Lal', AIR 1932 All 485 (FB) (B) and — 'Ram Chhabila v. Sat Narain', 1935 All L. J. 1319 (C). The latter case was similar to the 1949 case and just decided the point raised in that case. It did not refer to the earlier Full Bench case reported in 'AIR 1932 All 485 (B)', and which laid down what the expression "consequential relief" should mean. According to the definition given in that case at p. 487 it is to be found in the following :

"In our opinion, the expression 'consequential relief' in S. 7(iv)(c) means some relief which would follow directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. A consideration of all the Clauses (a) to (f) of sub-s. (iv), S. 7 of the Court-fees Act leads to the same conclusion."

It may be mentioned at this stage that S. 7(iv)(c), Court-fees Act in force in those provinces in 1932 related to the suits for obtaining a declaratory decree or order where consequential relief was prayed. The present S. 7 (iv)(a), Court-fees Act as applicable to this suit is in a different form and relates to suits for obtaining a declaratory decree or order where consequential relief other than reliefs specified in sub-sec. (iv-A) is prayed. Sub-sec. (iv-A) relates to suits for, or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value. It may be that this sub-sec. (iv-A) includes a suit of the type which was for consideration in the five-judge Full Bench case reported in 'AIR 1932 All 485 (B)'. But that does not mean that merely because sub-sec. (iv-A) is introduced in S. 7 subsequently and because reliefs specified in sub-sec. (iv-A) are excepted from consequential reliefs contemplated in sub-sec. (iv) (a) of S. 7, the expression "consequential relief" would include the reliefs which were claimed in the Full Bench case and were held not to amount to "consequential relief".

The legislature has not thought it fit to inroduce any precise definition of the expression "consequential relief" after the decision of that Full Bench case. The exception made in S. 7(iv)(a) with respect to the reliefs specified in sub-sec. (iv-A) may be just to make it clear beyond doubt that what has been decided in the Full Bench case did really not amount to a 'consequential relief". We are of opinion that, in the absence of any different meaning given to the expression "consequential relief" in the previous Act, the meaning given to that expression in the Full Bench case should be taken to be binding. We have not been referred to any case decided subsequently which gives a different meaning to this expression and considers the meaning given to it by the Full Bench to be wrong. As already mentioned, reference to this case is made in the 1949 case.

(5) According to our view the definition given in the Full Bench case does not mean that all reliefs which flow from the declaratory relief must amount to "consequential reliefs". The definition mentions four ingredients which go to make up the meaning of this expression "consequential relief". The first is that the relief should follow directly from the declaration given; the second is that the valuation of the relief be not capable of being definitely ascertained; the third is that the relief is not specifically provided for anywhere in the Act; and the fourth is that the relief cannot be claimed independently of the declaration as a substantive relief.

The 1935 and 1949 cases referred to above seem to have taken into consideration only the first ingredient, that is, that the relief said to be consequential relief should follow directly from the declaration given. Of course, all consequential reliefs must follow from the declaration given. If they are not so connected with it, they cannot be called "consequential relief", which in its plain term must mean a relief necessary as a consequence of the declaratory relief. If the expression "consequential relief" simply meant all reliefs which followed from the declaration given the Full Bench would not have mentioned the other considerations or ingredients which led to the meaning of the expression "consequential relief". A relief which followed from the declaratory decree can certainly be not granted unless the declaratory relief is granted. This consideration, therefore, is no independent consideration but is just a clarification of the first ingredient.

(6) We need not discuss the implications or the requirements of the ingredients Nos. 2 and 3 as that does not appear necessary for our present case. The fourth ingredient mentioned above seems to us to have an important bearing on the question whether a certain relief answers the description of a consequential relief or not. This ingredient is that such a relief should be one which cannot be claimed independently of the declaration as a substantive relief. Claiming a certain relief is different from the granting of the relief. Of course, no consequential relief can ever be granted unless the declaratory relief has been granted. But that does not mean that any relief which follows a declaratory relief must be a consequential relief or that it cannot be claimed without asking for a relief of declaration as a substantive relief.

It may be that the facts which would justify to a declaration of right may have to be determined before a certain relief is granted. But if no such declaration is sought, the mere fact that such facts have to be adjudged will not make the other relief which alone is claimed to be a consequential relief or a relief which cannot be granted or claimed. We are of opinion that this fourth ingredient, means that it is necessary for a relief to be a consequential relief that that relief be not capable of being claimed, in the absence of a claim

for declaration, as a substantive relief, that is to say, no suit for that relief can lie unless the suit also contemplates a declaratory relief. It is only in such suits that it can be said that the relief sought is so linked with the declaratory relief that it should be considered a relief consequential to the declaratory relief.

(7) It has been strenuously contended by the learned Standing Counsel and the learned Counsel for the defendant-opposite party that the definition in this Full Bench case was for the purposes of that case and was applicable only to cases where the relief sought related to the adjudging of certain instruments to be void and to the cancellation of those instruments. We do not agree with this contention. The definition has been given irrespective of the facts of the case. It was in the light of the definition given that the facts of that case were scrutinised and it was held that what was said to be a consequential relief was not a consequential relief.

We have been referred to two Full Bench cases, — 'Sri Krishna Chandra v. Mahabir Prasad', AIR 1933 All 488 (D) & — 'Bishan Sarup v. Musa Mal', AIR 1935 All 817 (E) and to the cases reported in — 'Munni Singh v. Basdeo Singh', AIR 1937 All 148 (F) and — 'Madan Mohan v. Raghunandan Prasad', AIR 1944 All 208 (G). The first three cases had no occasion to refer to the definition of the expression "consequential relief" given in the Full Bench case and therefore their reference to the Full Bench case was with respect to the distinction, if any, between the facts in that case and the facts in the case under consideration. In the last case reference to that definition was made. There is nothing in that case to indicate that that definition simply amounted to this that a consequential relief is a relief which followed from a declaratory relief. The point for consideration in that case was different and was whether a second declaratory relief could be considered to be a consequential relief to the first declaratory relief.

(8) It follows from what has been said above with respect to the definition of the expression "consequential relief" given in 'AIR 1932 All 485 (FB) (B)', that one of the facts to be considered in the present reference is whether relief (b) with respect to the removal of defendant and the delivery of the charge of the temple and its property is such a relief which could not have been claimed without asking for the relief of declaration. It appears to us that the suit for relief (b) alone was maintainable, and in this connection we may refer to the case reported in — 'Sri Thakur Sitaramji Maharaj Mandir v. Raghunath Das', AIR 1944 All 279(H). That was a suit by Sri Thakur Sitaramji Maharaj & Seth Lakhmi Kunwar who claimed that he was the duly appointed sarbarakar of the other plaintiff. The defendant had been working as a sarbarakar. Relief (a) was that the defendant be removed from the management of the temple of plaintiff No. 1 and the charge of the temple and movables therein be handed over to plaintiff No. 2 as manager on behalf of plaintiff No. 1.

This relief is practically in the same terms in which relief (b) in the present suit is. It was held in that case that S. 7(v), Court-fees Act did not apply to that suit and that the court-fees paid on the relief claimed in accordance with Sch. II, Art. 17, Cl. (vi) was the correct one. It should follow that relief (b) could be sued for independently of the relief for a declaration, that therefore it is not a consequential relief to the relief for declaration and that the court-fees paid is sufficient.

(9) Our answer to the reference, therefore, is that this is not a case of a declaratory decree with consequential relief in terms of S. 7(iv)(a), Court-fees Act and the plaint does not require an 'ad valorem' court-fee of Rs. 2,284/14/- on the jurisdictional value of the property involved.

(10) We assess the cost of the learned Standing Counsel at Rs. 160/-.

D.H.Z. Reference answered.

A.I.R. 1955 ALLAHABAD 180 (Vol. 42, C.N. 61)

RAGHUBAR DAYAL AND ROY JJ. (18-10-1954)

Mohd. Matin Kidwai, Applicant v. District Executive Engineer, N. E. Rly., Izatnagar and another, Opposite Party.

Civil Revn. No. 1055 of 1954, against order of Dist. J., Badaun, D/- 22-7-1954.

(a) Payment of Wages Act (1936), Ss. 17, 15(3) — Rejection of application under S. 15(3) — Appeal.

No appeal lies when an authority under the Payment of Wages Act rejects an application by an employee under S. 15(3) and does not make any order or direction to the employer for making any payment to the employee. AIR 1946 Oudh 148; AIR 1943 All 243, Foll. AIR 1941 Sind 191, Explained. (Para 5)

Anno: Pay. of Wages Act, S. 15 N. 1; S. 17 N. 1.

(b) Payment of Wages Act (1936), S. 17 — Interpretation of — Duty of Court — (Interpretation of Statutes — Powers and duty of Court) — (Civil P. C. (1908), Pre.).

The Court is not to interpret the precise language of S. 17 in any different manner merely because the Legislature had not been logical in providing for all the eventualities in connection with certain dispute. (Para 2)

Anno: Pay. of Wages Act, S. 17 N. 1; Civil P. C., Pre. N. 7.

(c) Payment of Wages Act (1936), S. 15(3) — Enquiry under — Discretion — Exercise of — Authority can reject application.

Under S. 15(3) the authority has to make an enquiry not for making the pretence of enquiry but for coming to a conclusion how far the claim of the employee is justified and no provision giving an authority power to decree the claim in full can be interpreted to mean that it has no power to decree the claim in part or to dismiss it in full if the enquiry shows that nothing be due. Subsection (3) of S. 15 does not enjoin the authority to make the order in favour of the employee in all circumstances. He is given discretion to pass that order, and it means that he is to pass an order which he considers to

be just. He can, therefore, reject the application on merits if he is not satisfied that it should be allowed wholly or in part.

(Para 3)

Anno: Pay. of Wages Act, S. 15 N. 1.

CASES REFERRED: Paras

(A) (V33) AIR 1946 Oudh 148: 21 Luck 348 2

(B) (V28) AIR 1941 Sind 191: ILR (1941) Kar 394 2

(C) (V30) AIR 1943 All 243: ILR (1943) All 490 2

(D) (V33) AIR 1946 All 276: ILR (1946) All 248 2

(E) (V42) AIR 1955 Bom 75: 56 Bom LR 859 2

K. C. Saksena, for Applicant.

RAGHUBAR DAYAL J.:

Mohammad Matin Kidwai, an employee of the Oudh Tirhut Railway, was dismissed from service sometime in 1945. He instituted a suit against the dismissal alleging it to be wrongful, and also for the arrears of salary due to him. The suit was decreed with respect to the alleged wrongful dismissal. It was decreed that his dismissal was wrongful. His suit for the arrears of the salary was dismissed. That litigation came to an end when this Court disposed of the second appeal in September 1952.

Thereafter, the applicant was reinstated from 1-10-1952. He was not paid any salary or wages for the period from the date of dismissal to 30-9-1952. He filed an application under S. 15, Payment of Wages Act, 1936 to the proper authority claiming these unpaid wages amounting to over Rs. 12,000/-. This application was rejected by the authority in view of his opinion that the claim for the period 3-2-1945 to 23-4-1952 was time barred and that there was bona fide dispute with respect to the remaining claim.

Against this dismissal of his application he went up in appeal to the District Judge. This appeal was dismissed on the ground that no appeal lay to the District Judge under S. 17, Payment of Wages Act, against that order of the authority. He had, therefore, filed this application in revision against the order of the District Judge.

(2) We have heard learned counsel for the applicant at length and are of opinion that the order of the court below was perfectly correct. It is fully supported by the case decided in — P. Kumar v. Running Shed Foreman, E. I. Rly.', AIR 1946 Oudh 148 (A).

A contrary view is expressed in — 'Mahomed Haji Umar v. Divisional Superintendent, N. W. Rly.', AIR 1941 Sind 191 (B). The question was not directly before the court. But the opinion expressed in — 'Khema Nand v. East Indian Rly.', AIR 1943 All 243 (C) is also against the applicant. The question was left open in — 'Triloki Nath v. Lord Krishna Sugar Mills Ltd., Saharanpur', AIR 1946 All 276 (D). On the other hand, the case reported in — 'C. S. Lal v. Shaikh Badshah', AIR 1955 Bom 75 (E) supports the applicant. But the expression of opinion in this case was as much 'obiter dicta' as it was in the case reported in AIR 1943 All 243 (C). We are inclined to agree with the view expressed in AIR 1946 Oudh 148 (A). Section 17, Payment of Wages Act is—

"(1) An appeal against a direction made under sub-section (3) or sub-section (4) of section 15 may be preferred, within thirty days of the date on which the direction was made, in a Presidency town before the Court of Small Causes and elsewhere before the District Court—

(a) by the employer or other person responsible for the payment of wages under section 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees, or

(b) by an employed person, if the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged exceeds fifty rupees, or

(c) by any person directed to pay a penalty under sub-section (4) of section 15.

(2) Save as provided in sub-section (1), any direction made under sub-section (3) or sub-section (4) of section 15 shall be final."

It is clear that an appeal is allowed under this section against a direction made under sub-s. (3) of S. 15 in certain circumstances which are mentioned in its cls. (a) and (b). We are not concerned in the present case with the provisions of sub-s. (4) of S. 15. It was held in AIR 1946 Oudh 148 (A) that an appeal is against a direction which is given, and when no direction is given and an application under S. 15 is rejected no appeal can lie against the rejection of the application. This position is not really disputed by the Sind Chief Court in AIR 1941 Sind 191 (B). But considering the illogical position that an employee could appeal against an order rejecting his claim partially, that is, allowing his claim to some extent and giving direction to the employer to make payment of the amount allowed and disallowing the application for the balance of the claim and yet no appeal be allowed against the total rejection of the employee's claim, it was held that the expression "direction" in S. 17 should not only apply to positive direction to the employer to make a certain payment, but should include an order which may be said to be a negative direction to the employer not to make the payment of the amount claimed by the employee. It is not necessary to elucidate this logical position for the purpose of this case, as we are of opinion that even if the interpretation of the precise language used in the statute leads to that conclusion the court is not to interpret the precise language in any different manner merely because the Legislature had not been logical in providing for all the eventualities in connection with the certain dispute. It was pertinently remarked in AIR 1943 All 243 (C):

"It may be hard that there should not be an appeal in certain cases, but I find it difficult to hold that a refusal to make a direction is a direction."

(3) It has been strenuously urged that if such an interpretation be given to the provisions of S. 17, then it may be possible to urge that S. 15, sub-s. (3) did not contemplate the rejection of the application, as sub-s. (3) provides that after

making the necessary enquiry the authority may direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together with the payment of such compensation as the authority may think fit. The authority has to make an enquiry not for making the pretence of enquiry but for coming to a conclusion how far the claim is justified and no provision giving an authority power to decree the claim in full can be interpreted to mean that it has no power to decree the claim in part or to dismiss it in full if the enquiry shows that nothing be due. Sub-section (3) itself does not enjoin the authority to make the order in favour of the employee in all circumstances. He is given discretion to pass that order, and it seems to mean that he is to pass an order which he considers to be just. He could, therefore, in our opinion, reject the application on merits if he is not satisfied that it should be allowed wholly or in part.

(4) Again, it is not for us to consider at this stage what would be the effect of S. 22 on such a claim as that of the employed when that claim is rejected by the authority.

(5) We are clearly of opinion and accordingly hold that no appeal lies when an authority under the Payment of Wages Act rejects an application by an employee under S. 15(3) and does not make any order or direction to the employer for making any payment to the employee. We, therefore, reject this application.

H.G.P. Application rejected.

A.I.R. 1955 ALLAHABAD 182 (Vol. 42, C.N. 62)

AGARWALA AND M. L. CHATURVEDI JJ.

(15-10-1954)

Brahma Metal and General Engineering Factory, Appellant v. Bahadur Singh, Respondent.

F. A. F. O. No. 252 of 1954, against order of Dist. Magistrate and Workmen's Compensation Commr., Muzaffarnagar, D/- 20-9-1954.

(a) Workmen's Compensation Act (1923), S. 10 — Delay — Condonation.

Where the claim for compensation is filed beyond one year, but the commissioner finds that there was sufficient cause for delay he can condone the same. (Commissioner held was justified in condoning the delay, on the ground that the applicant was suffering from typhoid fever). (Para 3)

Anno: Workmen's Compensation Act, S. 10 N. 3.

(b) Workmen's Compensation Act (1923), S. 22 — Form of application — Defect.

The law does not require that a claim should be thrown out simply on the ground that the claim was not made, when it was originally made, in the prescribed form. This is a defect of procedure which can be rectified with the permission of the Commissioner at any stage, and once it is rectified, the irregularity is cured. (Para 4)

Anno: Workmen's Compensation Act, S. 22, N. 1.

(c) Workmen's Compensation Act (1923), Ss. 2 (1)(l), 11 and 25 — Disability — Evidence — Medical certificate of Civil Surgeon — Examination of Civil Surgeon.

Where, from the other evidence on the record it is established beyond doubt that the applicant was totally disabled by the injury caused to him, it was held not necessary to decide whether it was necessary to produce and examine the Civil Surgeon before admitting in evidence the certificate given by him. (Para 5)

Where the order of the employer terminating the services of the applicant, admits total disability of the applicant, it does not lie in the mouth of the employer to say that there was no proof on the record that the applicant was totally disabled. (Para 5)

Anno: Workmen's Compensation Act, S. 11, N. 1; S. 25, N. 1.

(d) Workmen's Compensation Act (1923), Ss. 2 (1)(m), 4 and 5 — Compensation — Monetary value of accommodation provided to employee has to be included.

Compensation is to be awarded under the Workmen's Compensation Act on the basis of 'wages' of the injured employee. When the question is what compensation is to be awarded to an employee who has been injured, the term 'wages' has to be interpreted in the light of the definition given in the Workmen's Compensation Act and not in the light of the definition given in the Payment of Wages Act. The words 'privilege or benefit' in the definition in Workmen's Compensation Act includes the benefit of 'free accommodation'. Therefore the monetary value of the accommodation which was provided free to the applicant is to be included in the term 'wages' for the purpose of assessing the amount of compensation. (Paras 6, 7)

Anno: Workmen's Compensation Act, S. 2(1)(m), N. 1; S. 4, N. 1; S. 5, N. 1.

(e) Workmen's Compensation Act (1923), S. 4 — Compensation — Amount of — Amount paid to employee not as compensation cannot be taken into account and cannot be deducted while calculating the amount of compensation. (Para 8)

Anno: Workmen's Compensation Act, S. 5, N. 1.

CASE REFERRED: Para

(A) (V24) AIR 1937 Cal 697: ILR 1937-2 Cal 714 5

S. B. L. Gour, for Appellant.

AGARWALA J.:

This is an employer's appeal under S. 30(1)(9), Workmen's Compensation Act. The respondent Bahadur Singh was employed in the Appellant's factory, the Brahma Metal and General Engineering Factory at Shamli, district Muzaffarnagar. He suffered injury in the course of his employment and claimed compensation. He was drawing a salary of Rs. 180/- per month and had free quarters, the rent of which has been valued at Rs. 18/- per month. The Commissioner had awarded compensation of Rs. 5600/- to the respondent on the basis of the salary of Rs. 180/- plus the benefit of a free house of Rs. 18/-, total Rs. 203/- per month.

(2) The accident in which the respondent was injured happened on 5-5-1952. Upto January 1953, he was in the hospital and thereafter from 29-4-1953 upto the end of May, 1953 he was, according to his allegation, suffering from typhoid fever. On 29-5-1953, he made an application to the Commissioner upon which the Commissioner granted him compensation as stated above.

(3) The first ground of attack taken before the Commissioner on behalf of the appellant was that the claim was not made by the respondent within time as the time fixed for filing such an application under the Workmen's Compensation Act was one year from the date of the accident. The Act, however, provides that the Commissioner may, if he finds that there was sufficient cause, entertain the claim even after the period of limitation. The Commissioner has found that there was sufficient cause for the delay in preferring the claim. The allegation as to the respondent being in the hospital upto January 1953, and then suffering from typhoid fever upto 29-4-1953, has been believed by the Commissioner. In the circumstances the Commissioner was perfectly justified in condoning the delay and entertaining the claim.

(4) The second ground of attack was that the application which was made by the respondent was not in the form as prescribed in the rules made under the Workmen's Compensation Act. This appears to be so, but the defect was rectified before the Commissioner and the Commissioner ordered that the defect having been rectified, there was nothing on the basis of which the claim could be thrown out. We agree with the order of the Commissioner in this respect and do not consider that the law requires that a claim should be thrown out simply on the ground that the claim was not made, when it was originally made, in the prescribed form. This is a defect of procedure which can be rectified with the permission of the Commissioner at any stage, and once it is rectified, the irregularity is cured.

(5) The third ground of attack was that the certificate produced by the respondent before the Commissioner in proof of his disability was not admissible due to the non-production of the Civil Surgeon who granted the same. In support of this argument reliance was placed upon the decision in the case — 'Ali Akbar v. Java Bengal Line, Calcutta', AIR 1937 Cal 697 (A).

It is not necessary for us to decide in this case whether it is necessary to produce the Civil Surgeon before the certificate granted by him could be taken into consideration by the Commissioner; because, from the other evidence on the record it is established beyond doubt that the respondent was totally disabled by the injury caused to him.

A proof of this fact is provided by an order passed by the appellant firm itself. The order is quoted in the judgment of the Commissioner. It reads:

> "In the circumstances mentioned above, no alternative is now left with the Management but to terminate his services due to total disability for service with effect from 6th May, 1952. I, therefore, order accordingly."

It was not denied before the Commissioner that the order was made by the appellant. The order speaks for itself. The respondent is admitted to have been totally disabled and on that account his services were terminated. It does not lie in the mouth of the appellant now to say that there was no proof on the record that the respondent was totally disabled.

(6) The fourth ground of attack was that in calculating compensation the monetary value of free accommodation should not have been taken into consideration. Compensation is to be awarded under the Workmen's Compensation Act on the basis of 'wages' of the injured employee. The question is, 'Is the monetary value of free accommodation to be considered as part of 'wages'.

The contention of the learned counsel for the appellant is that the word 'wages' is to be taken as defined in the Payment of Wages Act, 4 of 1936. Under the Act the word 'wages' has been defined to mean

> "all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable.....It does not include the value of any house, accommodation, supply of light, water, medical attendance or other amenity, or of any service excluded by general or special order of the Provincial Government....."

According to this definition, the free accommodation granted to an employee is not to be taken into account when considering the 'wages' of the employee.

The definition of wages, however, as given in the Workmen's Compensation Act is different. It is as follows:

> "'wages' includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any compensation or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment."

(7) The words 'privilege or benefit' would in our opinion include the benefit of "free accommodation". When the question is what compensation is to be awarded to an employee who has been injured, the term 'wages' has to be interpreted in the light of the definition given in the Workmen's Compensation Act and not in the light of the definition given in the Payment of Wages Act. We, therefore, consider that the Commissioner was right in including the monetary value of the accommodation which was provided free to the respondent in the term 'wages' for the purpose of assessing the amount of Compensation.

(8) It was next contended that the appellant had paid certain amounts to the respondent and that this should have been deducted from the compensation awarded. We find that the Commissioner has discussed this question at length and has come to the conclusion that the amounts paid were not paid towards compensation. In view of this finding, the Commissioner was justified in not taking into account the amounts paid to

the respondent from time to time. According to the respondent these amounts were paid towards his salary which was due upto 24-2-1954, on which date the order terminating his services was passed.

The appellant terminated the services of the respondent not on the date of the incident but by means of an order passed on 24-2-1954. The order purported to terminate respondent's services with retrospective effect from 6-5-1952, that is, from the date of the incident itself. This the appellant was not competent to do. There is, therefore, no force in this point as well.

(9) It was then urged that certain irregularities had been committed by the Commissioner so far as the procedure was concerned. No such irregularities were urged before the Commissioner and we are unable to say that any irregularity was committed by the Commissioner. In any case we are not satisfied that any substantial question of law is involved in the present appeal.

(10) We, therefore, dismiss this appeal under O. 41, R. 11, C. P. C.

R.G.D. Appeal dismissed.

A.I.R. 1955 ALLAHABAD 184 (Vol. 42, C.N. 63)

MALIK C. J. AND GURTU J.

(12-7-1954 and 24-9-1954)

Ram Adhar and others, Appellants v. District Board of Allahabad through its President and another, Respondents.

Special Appeals Nos. 39, 53 to 57, 59, 60 and 63 to 65 of 1954 against judgment of V. Bhargava J., D/- 22-2-1954.

(a) U. P. District Boards Act (10 of 1922), S. 174 — License fee — (Constitution of India, Art. 226 — Extent of power).

If the licence fee has been imposed under S. 174 for regulating an offensive, dangerous or obnoxious trade, then the fee that can be charged must be more or less commensurate to defray the expenditure incurred by the Board and it cannot be any arbitrary sum with the object of making it a general source of revenue.

Held, that 'prima facie', it could not be said that the income from the licence fee was such that it was necessarily in excess of the expenditure and was being used by the Board for purpose of augmenting their general revenue. In the summary proceedings under Art. 226 of the Constitution it was not possible to hold that the licence fee that was fixed by the District Board, was excessive. (Paras 9, 15)

Anno: Constitution of India, Art. 226, N. 42.

(b) Constitution of India, Art. 226 — Other remedy open — Extent of power.

Though under Art. 226 the High Court does not generally interfere if other suitable remedies are open to the applicants, where a tax or a licence fee is imposed which is challenged as improper, and it affects a large number of people the Court has the right to see if the complaint is justified. (Para 13)

It is not possible, nor is it desirable that the High Court should in such cases examine the figures in any detail to judge whether the licence fee was or was not excessive, but the affidavits must 'prima facie' show that the licence fee was not unreasonable.

Held, that the affidavits had not been drafted with the care with which they should have been drafted. The Court had, therefore, no option but to direct the party to file a supplementary affidavit furnishing such details as might 'prima facie' show that its contention that it had to raise the licence fee to meet the necessary expenses was justified. (Para 13)

Anno: Constitution of India, Art. 226, N. 19, 42.

CASE REFERRED: Para

(A) ('53) Writ Petn. No. 7735 of 1951, D/- 6-3-1953 (All) 3

M. M. Lal, Hazela for Appellants.

MALIK C. J.:

These Special Appeals against the orders passed in writ petitions under Art. 226 of the Constitution have been filed by various kankar-lime kiln owners. The District Board of Allahabad has under the bye-laws enhanced the licence fee for running a lime kiln from Rs. 5/- to Rs. 50/-. The above noted amendment to the bye-laws was printed in the U. P. Gazette dated 1-12-1951. Some of the applicants who owned these kilns did not take out a license as required under Notification No. 934/XXI-37 (2)-50, dated 23-11-1951, and they were prosecuted for having run these kilns without a proper license. The contention on behalf of these applicants was that the imposition of Rs. 50/- as license fee per year was not a license fee but was a tax and was beyond the powers of the District Board.

(2) One of these petitions — Writ Petition No. 108 of 1953 — came up before Mr. Justice Bhargava, who dismissed it on 22-2-1954, on the ground that remedy by way of a regular suit was much more appropriate and consequently the writ petition could not be entertained.

(3) A number of these petitions on identical grounds were heard by Mr. Justice Chaturvedi — Civil Misc. Writ No. 398 of 1953, connected with Civil Misc. Writs Nos. 399 to 406 and 678 to 681 of 1953. The learned Judge entertained these applications and ordered that

> "a direction be issued to the District Board of Allahabad through the Chairman of the said Board (respondent No. 1) prohibiting the Board from taking any steps to recover the fees fixed by the amendment mentioned above from the petitioners."

The learned Judge followed the decision of a Division Bench of this Court in — 'Ata Tel Udyoga Karta Sangh v. District Board, Allahabad', Writ Petn. No. 7735 of 1951, D/- 6-3-1953 (All) (A).

(4) A further point was taken before Mr. Justice Chaturvedi after the arguments were concluded that as the petitioners had not moved the District Magistrate under S. 186, District Boards Act, they were not entitled to move the present petitions. This prayer was not allowed as there was nothing to show whether an appeal lay to the

District Magistrate and whether an appeal had or had not been in fact filed and rejected.

(5) Against the decision of Mr. Justice Chaturvedi the District Board has filed appeals, while in the case decided by Mr. Justice Bhargava the petitioners have filed appeals before us.

(6) Under S. 106, District Boards Act (No 10 of 1922):

"The board may charge a fee to be fixed by bye-law for any licence, sanction or permission which it is entitled or required to grant by or under this Act."

(7) The question then arises whether the Board is entitled or required to grant a licence, sanction or permission for running a kankar-lime kiln. Obviously S. 105 does not help the Board as that section provides that:

'The Board may charge fees to be fixed by bye-law or by public auction or by agreement, for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of, the board including any public road or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise."

(8) Reliance has been placed on S. 174(1) and cls. (k) and (r) of sub-s. (2). The relevant provisions are as follows:

174(1) "A board by special resolution may, and where required by the State Government shall, make by-laws applicable to the whole or any part of the rural area of the district, consistent with this Act, and with any rule, for the purpose of promoting or maintaining the health, safety, and convenience of the inhabitants of such area and for the furtherance of the administration of the district under this Act."

(2) "In particular, and without prejudice to the generality of the power conferred by subsection (1), a board may, in the exercise of the said power, make any bye-laws described in the list below—

....

(k) regulating slaughter-houses and offensive, dangerous or obnoxious trades, callings, or practices and prescribing fees to defray the expenditure incurred by a board for this purpose;

....

(r) prohibiting or regulating any act which occasions, or is likely to occasion, a public nuisance for the prohibition or regulation of which no provision is made elsewhere by or under this Act."

(9) If the license fee has been imposed, as was urged by learned counsel, under S. 174 for regulating an offensive, dangerous or obnoxious trade, then the fee that can be charged must be more or less commensurate to defray the expenditure incurred by the Board and it cannot be any arbitrary sum with the object of making it a general source of revenue.

(10) The contention of learned counsel for the petitioners is that a license fee of Rs. 50/- per year per kiln for running a kankar lime kiln is excessive and is really intended to be a source of general revenue and not to meet any special expenditure incurred in connection with this trade.

(11) Mr. Justice Chaturvedi accepted this contention and held that the charges made were excessive. The learned Judge pointed out that in 1950 the District Board proposed an amendment to the bye-law No. 7 and it wanted to enhance the license fee for a brick-kiln from Rs. 15/- to Rs. 600/-, and for a lime kiln from Rs. 5/- to Rs. 150/- per kiln, but ultimately the figures were reduced and for a lime-kiln it was fixed at Rs. 50/- per kiln.

(12) We went through the affidavits filed by the petitioners as also the counter-affidavit filed on behalf of the Board and were not satisfied that sufficient material had been placed before the Court to enable it to come to a conclusion whether the rates fixed were or were not excessive. In the affidavits filed by the petitioners it was pointed out how the amount had been increased and there was a general assertion that it was much more than was necessary to meet the expenses. In the counter-affidavit, paragraph 21, filed on behalf of the Board, it was said that

"the District Board took good care in fixing the licence fee at a figure which is just sufficient to meet the expenses which the District Board expected to incur in working out the bye- laws."

In paragraph 23 it was said that

"the bye-laws were framed for the first time in 1937 and a nominal licence fee was imposed at that time. In subsequent years it was found that the expenses have gone up. It is a matter of common knowledge that prices went up by ten times during the war and, therefore, the District Board was compelled to enhance the licence fee."

In paragraph 24 it was urged that

"the licence fee imposed by the amendment is just sufficient to meet the expenses which the District Board thought was reasonable to incur on this object. The objections are false."

Paragraph 25 of the counter-affidavit is as follows:

"That the District Board has to incur expenses on the following heads for the enforcement of the bye-laws and on account of the Pay Commission Report the salary of the various persons employed by the District Board had to be raised.

Heads of expenses:

1. Clerks for issue and maintenance of registers.
2. Postage and stationary.
3. Salary of the staff.
4. T. A. of the said staff.
5. Litigation charges for enforcing the bye-laws.
6. Printing of 'forms and registers'."

No figures were mentioned on behalf of the Board. This bye-law came into force in 1951 and by the time the matter came up for hearing the Board must have had actual figures of the amount received as income and the amount spent under the various heads.

(13) It is true that under Art. 226 of the Constitution this Court does not generally interfere if other suitable remedies are open to the applicants

but where, as in this case, a tax or a licence fee is imposed which is challenged as improper, and it affects a large number of people the Court has the right to see if the complaint is justified. It is not possible, nor is it desirable, that we should in such cases examine the figures in any detail to judge whether the licence fee was or was not excessive, but the affidavits must 'prima facie' show that the licence fee was not unreasonable. The affidavits in these cases have not been drafted with the care with which they should have been drafted and we have, therefore, no option but to direct the District Board to file a supplementary affidavit furnishing such details as may 'prima facie' show that their contention that they had to raise the licence fee to meet the necessary expenses was justified.

(14) We give the Board one month's time to file a supplementary affidavit. The petitioners thereafter are given ten days' time to file affidavits in reply if they so desire.

Order dated 24-9-1954 by MALIK C. J.:

On 12-7-1954, we dictated a detailed order and, for the reasons given in that order, we gave the District Board of Allahabad one month's time to file a supplementary affidavit. The supplementary affidavit was filed on 11-8-1954. A copy of that affidavit was given to counsel for the applicants who filed a counter-affidavit on 23-8-1954. On account of certain allegations made in that counter-affidavit about oil and flour mills, the District Board filed a rejoinder affidavit on 7-9-1954, and sent a copy of it to counsel for the applicants by registered post. We have, however, not looked into the rejoinder affidavit filed on 7-9-1954, as we do not consider it necessary to do so.

From the affidavit filed by the Board, it appears, that the total income from the lime and brick kilns during the years 1950-51, 1951-52, 1952-53, 1953-54 was not very much. In 1950-51 the total income was Rs. 2,055/-; in 1951-52 it was Rs. 1,8050/-; in 1952-53 it was Rs. 3,935/-; and it was Rs. 2,675/- in 1953-54. The details of the expenditure incurred during these years under various heads have also been given. It is not possible in this writ petition to go into these figures in detail but, 'prima facie', it cannot be said that the income from the licence fee is such that it is necessarily in excess of the expenditure and is being used by the Board for purposes of augmenting their general revenue. In these summary proceedings, it is not possible to hold that the licence fee, that was fixed by the District Board, was excessive.

(16) This writ petition has no force and is dismissed but we make no orders as to costs.

D.H.Z. Order accordingly.

(S) A.I.R. 1955 ALLAHABAD 186 (Vol. 42, C.N. 64)

AGARWALA AND M. L. CHATURVEDI JJ.

(15-10-1954)

Lala Jamuna Prasad and others, Decree-holders, Appellants v. Sarda Prasad and others, Judgment-debtors, Respondents.

Ex. First Appeal No. 224 of 1951, against decree of First Civil Judge, Kanpur, D/- 19-5-1951.

Limitation Act (1908), S. 7 — "Discharge" — Execution of decree for partition — Manager of joint family including minor, can give discharge and can execute decree — (Civil P. C. (1908), O. 32, R. 6).

The Manager of a joint Hindu family can recover possession of joint family properties from a trespasser, or some other person who is not entitled to remain in possession thereof, and time begins to run against the entire joint family, when the Manager is a major, at the time of the commencement of the trespass. AIR 1920 Mad 793, Relied on. (Para 3)

The word "discharge" in S. 7 is not confined to discharge of a pecuniary liability. It refers to discharge of any liability, pecuniary or otherwise. Where a person is wrongfully in possession of property, he is liable to vacate possession in favour of the true owner. The liability, such as this is also covered by S. 7, and if possession is delivered by such person to the Manager of a joint Hindu family, it is a discharge of that liability qua the entire joint family, because the Manager can act for the entire joint family, for the purpose of receiving delivery of possession. The same principle should apply in the case of execution of partition decree by delivery of possession over immovable property. (Para 3)

The only exception to the power of the Manager of a Joint Hindu family to give a discharge on behalf of the members of the family is contained in O. 32, R. 6, Civil P. C. which provides that no next friend or guardian for the suit shall, without the leave of the Court, receive any money or other movable property on behalf of a minor either by way of compromise before decree or order, or under a decree or order in favour of the minor. If the guardian happens to be the manager of the Joint Hindu family even then he cannot act contrary to the mandatory provisions of O. 32, R. 6. 36 Mad 295 (PC), Relied on. (Para 3)

Where there is no question of the receipt of money or other movable property but it is a case of taking possession over immovable property and the case is not governed by the provisions of O. 32, R. 6, the original power of the manager to act on behalf of the entire joint family remains intact so far as taking possession over immovable property in execution of the decree is concerned. (Para 4)

Anno: Limit. Act, S. 7 N. 15, 16, 29; Civil P. C., O. 32, R. 6 N. 1.

CASES REFERRED:	Paras
(A) (V7) AIR 1920 Mad 793: 52 Ind Cas 725	3
(B) ('13) 36 Mad 295: 40 Ind App 132 (PC)	3

P. N. Shukla and H. N. Kapoor, for Appellants; Surendra Nath Verma, for Respondents.

AGARWALA J.:

This is an appeal by the judgment-debtors arising out of execution proceedings. The only point for consideration is whether the application for execution made by the respondents decree-holders in the Court below was barred by limitation.

(2) The facts are simple. In 1937 a suit for partition of the family properties was filed. The suit was decreed on the basis of an award on 2-9-1938. An appeal against it was dismissed on 22-11-1938. By the award the house in dispute was allotted to the respondents decree-holders. A part of it was in possession of the judgment-debtors appellants. The decree-holders-respondents did not make any application for getting possession over the portion of the house which was in the occupation of the judgment-debtors within three years of the decree. They made the application after eleven years on 28-11-1949.

The decree-holders were Gajju Lal, his son Jwala Prasad, and four sons of Jwala Prasad, namely, Sharda Prasad, Dharam Pal, Ram Pal and Krishna Pal. Of these decree-holders all the sons of Jwala Prasad were minors on the date of the decree. They were defendants to the suit in which the decree was passed and Jwala Prasad was shown as their guardian in the decree. The execution application was made by Sharda Prasad, Dharam Pal and Ram Pal majors and by Krishna Pal minor through Sharda Prasad as his guardian.

The decree-holders alleged that Sharda Prasad had attained majority within three years of the application for execution and that, therefore, the execution application was within time. The objection of the judgment-debtors was that the application was barred by time because Jwala Prasad, if not Gajju Lal, was a major when the decree was passed and being the Manager of the joint Hindu family to which all the decree-holders belonged was able to give a discharge within the meaning of Section 7, Limitation Act.

Now Sec. 7 of the Limitation Act, on which reliance has been placed by both the parties, provides:

> "Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased."

(2) According to the decree-holders, Jwala Prasad could not, though a Manager of the joint Hindu family, have given a discharge in connection with the decree for possession without the concurrence of the guardian of the minors, and the mere fact that he himself was the guardian of the minors could not have vested him with the right of giving such concurrence. The judgment-debtors' case, on the other hand, is that Jwala Prasad being the manager of the joint Hindu family could have given a discharge without the concurrence of the guardian of the minors, even if such a guardian were a different person.

(3) We think that the contention of the judgment-debtors is right. The manager of a joint Hindu family can recover possession of joint family properties from a trespasser, or some other person who is not entitled to remain in possession thereof, and time begins to run against the entire joint family when the manager is a major at the time of the commencement of the trespass vide —'Narsimha Deo Guru v. Krishna Chandra Dev Garu', AIR 1920 Mad 793 at p. 798 (A). The word "discharge" in S. 7 is not confined to discharge of a pecuniary liability. It refers to discharge of any liability, pecuniary or otherwise. Where a person is wrongfully in possession of property, he is liable to vacate possession in favour of the true owner. The liability, such as this is also covered by S. 7, and if possession is delivered by such person to the Manager of a joint Hindu family, it is a discharge of that liability qua the entire joint family, because the manager can act for the entire joint family for the purpose of receiving delivery of possession. There is no reason why the same principle should not apply in the case of a decree for execution by delivery of possession over immovable property.

The only exception to the power of the manager of a Joint Hindu family to give a discharge on behalf of the members of the family is contained in O. 32, R. 6, Civil P. C., which provides that no next friend or guardian for the suit shall, without the leave of the Court, receive any money or other movable property on behalf of a minor either by way of compromise before decree or order, or under a decree or order in favour of the minor. If the guardian happens to be the manager of the Joint Hindu family, even then he cannot act contrary to the mandatory provisions of O. 32, R. 6. This was laid down by the Privy Council in — 'Ganesha Row v. Tuljaram Row', 36 Mad 295 (B).

(4) In the present case, however, there is no question of the receipt of money or other movable property. It is a case of taking possession over immovable property, and is, therefore, not governed by the provisions of O. 32 R. 6. As such, the original power of the Manager to act on behalf of the entire joint family remained intact so far as taking possession over immovable property in execution of the decree was concerned. In our opinion, therefore, this application for execution was barred by time.

(5) We, therefore, allow this appeal, set aside the decree of the court below and dismiss the application for execution. In the circumstances of the case, however, we make no order as to costs either of this Court or of the court below.

R.G.D. Appeal allowed.

(S) **A.I.R. 1955 ALLAHABAD 187 (Vol. 42, C.N. 65)**

LUCKNOW BENCH

BEG AND RANDHIR SINGH JJ. (22-9-1954)

Mst. Kalpa, Defendant-Appellant v. Sita Ram and another, Plaintiff-Respondent.

F. A. F. O. No. 24 of 1951, against judgment and decree of Civil J., Gonda, D/- 8-2-1951.

Civil P. C. (1908), O. 23, R. 3, O. 43, R. 1 — Party denying compromise — Duty of Court — Passing of decree in terms of disputed compromise — Legality — Appeal.

Where, in a suit, a petition of compromise between the plaintiff and defendant No. 1

was filed and verified before the Court but subsequently defendant No. 1 filed a statement that she had entered into no compromise nor appeared for verification in the Court, but the Court refused to go into the factum of compromise in view of the verification having been made earlier by his predecessor and passed the decree in terms of the compromise which was denied:

Held (i) that the order though not very clear, should be treated as a composite order comprising of an order for the record of the compromise and the judgment in the case and as such appealable under O. 43 R. 1 (m).

(Para 3)

(ii) that it was evidently the duty of the Court below to have come to a conclusion on the allegations made by defendant No. 1 with regard to the making of the compromise; for if a party to a compromise denies having entered into the compromise, the Court will have to come to a finding as to whether there had or had not been a compromise effected between the parties and then also to decide if the agreement or the adjustment was lawful.

(Para 3)

(iii) that defendant No. 1 could raise that point in the Court below instead of filing a separate suit; for, if it was not open to a party before an order for record of compromise had been passed to prove that he did not make or verify the compromise, it would mean that the Court could take no action even if a fraud was practised upon it. That evidently could not be the intention of the law. AIR 1935 All 738, Dist. (Para 4)

Anno: Civil P. C., O. 23 R. 3 N. 6, 17; O. 43 R. 1 N. 7.

CASE REFERRED: Para

(A) (V22) AIR 1935 All 738: 155 Ind Cas 1067 3

Kashi Prasad Saxena, for Appellant; M. L. Tilhari, Respondent (No. 1.)

RANDHIR SINGH J.:

This first appeal from an order raises some points of interest, which are not wholly free from difficulty.

(2) It appears that a suit was instituted by one Sita Ram on 14-3-1950, against the appellant (defendant No. 1) and one Chhedi Lal, on the allegations that the plaintiff was the nearest reversioner to the estate of Shrimati Kalpa's deceased husband and that Shrimati Kalpa, though a life owner, was wasting property in collusion with defendant No. 2. The appellant (defendant No. 1) did not enter appearance but defendant No. 2 filed a written statement on 17-4-1950.

On 16-5-1950, a petition of compromise is said to have been filed by the plaintiff and the appellant (defendant No. 1) and verified before the Court on 29-5-1950. On 29-5-1950, an order was passed that the case be put up on 7-7-1950, for the disposal of an application for amendment of the plaint. It was also mentioned in the order that the orders on compromise will be passed at the time of judgment. An application for the setting aside of the 'ex parte' proceedings against defendant No. 1 was made on 7-7-1950, in which it was alleged that the appellant (defendant No. 1) had been unwell and was unable, therefore, to enter appearance. It was prayed that the order to proceed 'ex parte' against her be set aside.

This application of defendant No. 1 was heard on 20-8-1950, and was allowed on payment of costs and the case was fixed for hearing for 14-9-1950. The case could not be taken upon that date and was then adjourned to 18-9-1950. On 18-9-1950, a written statement was filed on behalf of defendant No. 1, in which she stated that she had entered into no compromise with the plaintiff, nor had she appeared before the court for verification of any such compromise.

An issue was framed by the Court and the case was adjourned from time to time till ultimately the case came up before the Court on 8-2-1951. On this date the learned Civil Judge heard the parties and passed the order against which the appellant has now come up in appeal. In the order passed by the learned Civil Judge on 8-2-1951, he held that it was not open to him to go into the factum of the compromise in view of the verification of the compromise having been made earlier by his predecessor. He also remarked that it was open to the appellant (defendant No. 1) to go in appeal against that order under O. 43, R. 1 (m), Civil P. C. The learned Judge ultimately decreed the suit in terms of the compromise. The defendant No. 1 has now come up in appeal against this order.

(3) A preliminary objection has been raised on behalf of the respondent to the admissibility of the appeal on the ground that the order dated 8-2-1951, was not an order recording a compromise and as such was not appealable. This argument has been met by the learned Counsel for the appellant and it has been argued that the order passed on 8-2-1951, was a composite order comprising of an order for recording the compromise and the judgment of the Court.

A perusal of the judgment of the lower Court no doubt shows that the order has not been passed in clear terms. He seems to have treated at one place the order dated 29-5-1950, which makes a mention of the verification of the compromise before the Court, as an order recording the compromise. Then again, at a later stage he seems to have treated the order which he passed on 8-2-1951, as an order for the record of a compromise, as he remarks that it would be open to the defendant to go in appeal against that order under O. 43, R. 1 (m). As remarked above, the order is not very clear but it would be safer to treat it as a composite order comprising of an order for the record of the compromise and the judgment in the case and as such appealable under O. 43, R. 1 (m).

If the Court does not pass an order recording the compromise or refusing to record the compromise but decides a case after a compromise has been filed, the question would arise as to whether there was or was not an order for the recording of the compromise, as required by O. 23, R. 3, Civil P. C. A ruling of this Court in — 'Mt. Shah Jahan Begam v. Ghulam Rabani', AIR 1935 All 738 (A), has been cited on behalf of the respondent in support of the proposition that an omission to pass an order to record a compromise was a mere irregularity curable under S. 99, Civil P. C.

If there had been a mere omission to record the compromise, we could possibly have treated it as an irregularity, but it appears to us that the lower Court did not consider the objection raised by defendant No. 1 to the compromise before the final order decreeing the claim in terms of the compromise was passed. It was evidently the duty of the Court below to have come to a conclusion on the allegations made by the defendant with regard to the making of the compromise. If a party to a compromise denies having entered into the compromise, the Court will have to come to a finding as to whether there had or had not been a compromise effected between the parties and then also to decide if the agreement or the adjustment was lawful. It is only after the Court is satisfied that there had in fact been a compromise and further that that compromise was a lawful compromise, that there would be no option left to the Court but to record it and to pass a decree in terms of the compromise.

(4) It has been argued on behalf of the respondent that even if defendant No. 1 had alleged that the compromise had been brought about by fraud, it was not open to the defendant No. 1 to raise that point in the Court below and the only courses open to the defendant No. 1 was to proceed by a regular suit for the setting aside of the decree. The argument advanced on behalf of the respondent need not be examined in view of the circumstances of this case. Defendant No. 1 did not in the present case admit that there had been a compromise but alleged that the deed of compromise was obtained by fraud. She definitely challenged the making of the compromise or her appearance in Court for the verification of that compromise. In fact, she denied having made the compromise at all and it was, therefore, the duty of the Court to come to a finding on this point and then to examine if the terms of the compromise were lawful.

The learned Civil Judge held that as the compromise had been verified in Court, it was not open to him to find out if the compromise had in fact been made. There may be cases in which a person by false personification obtains a verification of a compromise in Court purporting to be a compromise on behalf of the defendant or the plaintiff. If it is not open to a party subsequently and before an order for record of compromise has been passed to prove that he did not make or verify the compromise, it would mean that the Court could take no action even if a fraud was practised upon it. That evidently could not be the intention of the law. We do not propose to express any opinion about the merits of defendant No. 1's allegation in this case, lest it should prejudice the case of the parties at the trial, but there is no doubt that the allegations made by defendant No. 1 were in respect of the factum of the compromise and should have been gone into by the Court below. The Court has not gone into the merits of this allegation and the only course open to us is to set aside the order dated 8-2-1951, passed by the Court below and send back the case for retrial.

(5) We accordingly allow the appeal and set aside the order passed by the Court below and remand the case with directions to readmit it to its original number and to proceed according to law. The lower Court should first of all decide as to whether there had been a compromise between the parties & if it was a lawful compromise. If the Court below is satisfied, it would be open to the Court to order the compromise to be recorded and pass a decree in terms of the compromise. If, however, it is not established that there had been a compromise between the parties or that it was not a lawful compromise, the Court shall proceed to try the suit on merits.

(6) Costs in this Court shall be the costs in the suit.

H.G.P. Case remanded.

A.I.R. 1955 ALLAHABAD 189 (Vol. 42, C.N. 66)

LUCKNOW BENCH — KIDWAI AND MULLA JJ. (30-9-1954)

Thakur and others, Appellants v. State, Complainant-Respondent.

Criminal Appeal No. 246 of 1954, against order of S. J. of Bahraich, D/- 24-3-1954.

(a) Evidence Act (1872), Ss. 45 and 1 — Medical evidence — Conflict with oral testimony — Assessment of evidence — (Criminal P. C. (1898), S. 367).

Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method. (Para 5)

Anno: Evidence Act, S. 1 N. 12; S. 45 N. 5; Cr. P. C., S. 367 N. 6.

(b) Criminal P. C. (1898), S. 174 — Post mortem examination.

The post mortem examination is a very important piece of evidence in criminal trials, and the medical officers, who are entrusted with this work, should do it with utmost care and attention and should not perform it as a mere formal duty. They should, as a rule, fill in all the relevant heads mentioned in the printed form, and apart from giving the approximate time of death they should invariably mention the kind of weapon which was probably used in causing the different injuries. (Para 5)

Anno: Cr. P. C., S. 174 N. 10.

(c) Evidence Act (1872), S. 32(1) — Dying declaration — Evidentiary value.

Before the testimony of a verbal dying declaration can be accepted, it should at

least be consistent. There should not be serious discrepancies relating to the evidence of a dying declaration. (Para 6)

Anno: Evidence Act, S. 32 N. 5.

(d) Evidence Act (1872), S. 134 — Evidence of independent witnesses — (Criminal P. C. (1898), S. 367).

It is not necessary that independent evidence must be examined but where there is evidence that a large number of independent witnesses could have deposed about the incident, their absence from the list of witnesses and the presence of only partisan witnesses does create a doubt whether the version, which is being given by them, is to be believed. (Para 7)

Anno: Evidence Act, S. 134 N. 1; Cr. P. C., S. 367 N. 6.

Kalbe Mustafa, for Appellants; Addl. Govt. Advocate, for the State.

JUDGMENT: Appellants Thakur, Bansi Lal, Bhallar, Sangam, Ghulam, Baleshwar and Fakirey have been convicted under Ss. 302/149, I. P. C., by the Sessions Judge, Bahraich. Bhallar and Baleshwar have been sentenced to death while the other five appellants have been transported for life. The two appellants Bhallar and Baleshwar are further convicted under S. 148, I. P. C., and sentenced to 3 years' R. I. The other five appellants are further convicted under S. 147 and sentenced to one year's R. I. each. All these sentences were to run concurrently.

(2) The seven appellants belong to one family group. Bansi Lal and Thakur are brothers. Fakirey, Ghulam and Baleshwar are the sons of Thakur while Sangam and Bhallar are the sons of Bansi Lal.

(3) The prosecution case is that one Kanta Prasad Kurmi was the Pradhan of village Tulshipur, police station Sonwan, district Bahraich. In his capacity as Pradhan of the village he had filed a civil suit in the court of the Munsif Bahraich against Thakur and Bhallar appellants alleging that these two persons were constantly interfering with his possession over two plots and wanted to take forcible possession of that land. He had prayed that a decree for permanent injunction be passed against them and they should be stopped from interfering with his possession. This suit was filed on 28-8-1953 and an affidavit in support of it was tendered on the next day, i.e. 29-8-1953.

Another case under S. 325, I. P. C., against Bhallar, Thakur, Fakirey and Sangam appellants was being investigated at the report of one Kirpa Ram, brother of P. W. 4, Triloki Mukhia, and when the police submitted a charge sheet in this case on 3-10-1953, Kamta Prasad was cited as a prosecution witness. These two cases created a bitter animosity in the heart of these appellants against Kamta Prasad, and so on 11-10-53 at about noon when he and his son Basdeo, who is only a young boy, were returning from their field with loads of 'chari' on their heads, all these seven appellants suddenly emerged from behind the 'arhar' crop of Lalji Khattri and surrounded Kamta in Lalji's field.

Bhallar and Baleshwar appellants were armed with axes while the other five had lathis. They started beating Kamta who fell down. Basdeo raised an alarm which attracted persons round about who rushed up to the scene of occurrence and reprimanded the assailants. The assailants then went away in three different directions. When Basdeo and the witnesses approached Kamta Prasad, they found that he was seriously injured but still alive. On enquiry from some of these witnesses it is alleged that Kamta gave the names of the seven appellants as his assailants. One Ganga Ram then brought a cot and they carried Kamta to his house. Kamta survived for about an hour and a half only. It is alleged that Kamta Prasad named the seven appellants at his house also before he died.

After Kamta's death Basdeo went to the police station Sonwan which is at a distance of three miles only with Triloki Mukhia. He lodged the first information report which was recorded at 5 p.m. The Investigating Officer came the same day to the scene of occurrence and found only Bhallar and Baleshwar at their houses. The other persons named in the First Information Report were absconding. After completing the investigation he submitted a charge sheet against all the seven appellants.

(4) The appellants have denied their participation in this crime. Some of them have even denied their presence in the village on the date of the incident but no evidence has been produced in support of their being anywhere else. They have further stated that they were implicated in this case because there was enmity between them and Triloki Mukhia who had gone with Basdeo to the police station.

(5) Before dealing with the evidence in this case we would like to consider some general aspects of the case. Firstly, the point for consideration is whether all the seven persons, who are named, participated in this assault or whether only a few of them could have taken part in this crime. In deciding this question we have first to deal with the medical evidence in the case. The post mortem report shows that the deceased Kamta Prasad received seven injuries out of which one was a contusion, one was an abrasion and five were lacerated wounds. The prosecution evidence clearly states that the deceased was attacked by all the seven appellants, and even after he had fallen down, he was beaten with axes by the two appellants, Baleshwar and Bhallar.

In our opinion the injuries on the person of the deceased are clearly in conflict with this version of the case. It is inconceivable that seven persons would be assaulting an unarmed person and will continue beating him even after he had fallen down and will succeed in inflicting only seven injuries on his person. It is also difficult to believe that axes would be used by two young men and they will cause the trivial injuries that were found by the doctor. The only two injuries which are a little serious, are a lacerated wound on the right arm and a lacerated wound on the head.

If the medical evidence is believed, it is clear that seven persons could not have participated in

this crime. Where there is a conflict between the medical evidence and the oral testimony of witnesses, the evidence can be assessed only in two ways. A Court can either believe the prosecution witnesses unreservedly and explain away the conflict by holding that the witnesses have merely exaggerated the incident or rely upon the medical evidence and approach the oral testimony with caution testing it in the light of the medical evidence. The first method can be applied only in those cases where the oral evidence is above reproach and creates confidence and there is no appreciable reason for the false implication of any accused. Where the evidence is not of that character and the medical evidence is not open to any doubt or suspicion, the only safe and judicial method of assessing evidence is the second method.

The medical evidence in this case is not open to doubt or suspicion and the oral evidence cannot be called irreproachable. There is also some room for suspecting that some of the appellants might have been implicated. The second point, which we would like to consider before dealing with evidence, is whether on the evidence it can be held that an axe was used. The post mortem report does not contain any opinion of the doctor who conducted it as to what was the type of weapon which was used in causing the injuries noted by him. When the doctor comes in evidence, he states that lacerated wounds can be caused both by a blunt weapon as well as by a sharp-edged weapon.

In our opinion the post mortem examination is a very important piece of evidence in criminal trials, and the medical officers, who are entrusted with this work, should do it with utmost care and attention and should not perform it as a mere formal duty. They should, as a rule, fill in all the relevant heads mentioned in the printed form, and apart from giving the approximate time of death they should invariably mention the kind of weapon which was probably used in causing the different injuries. In the absence of any such note being made in the post mortem report and the evidence of the doctor being indefinite on this point we are left to come to a conclusion on this question on the severity of the injuries alone.

No doubt the prosecution witnesses are unanimous in their statements that an axe was used but looking to the trivial nature of the injuries it is not possible for us to accept that an axe had been used, it would have caused much more serious injuries. The chief injury which is a big lacerated wound on the right arm consists of some contusions also and therefore it is probable that a lathi was used by the assailants and that no axe was used. As we have observed above if the prosecution evidence had been of an irreproachable character, we could have accepted that an axe was used but as we cannot place much reliance upon the statements of prosecution witnesses, we cannot hold that an axe was used in this case.

(6) The evidence against the appellants consists of the oral testimony of five witnesses, P. W. 1 Basdeo, P. W. 3 Dilasa, P. W. 4 Triloki, P. W. 5 Narain and P. W. 6 Sukhai. In addition to this evidence some witnesses have also been examined to prove that the deceased gave out the names of the assailants when people collected round him at the spot and again at his house. The learned trial Court has rejected the evidence of that group of witnesses which prove the dying declaration of the deceased at his house. He has, however, accepted the testimony of those witnesses who prove the dying declaration of the deceased at the spot.

In our opinion before the testimony of a verbal dying declaration can be accepted, it should at least be consistent. There should not be serious discrepancies relating to the evidence of a dying declaration. Amongst the witnesses who have been examined everyone gives a different version of this dying declaration. It is not clear from the record as to who questioned Kamta Prasad and at what stage he gave out these names. It is also not clear whether he gave out two names or five names or seven names. P. W. 8 Mahesh states that the villagers who had collected over there gave out only two names. Under the circumstances no reliance can be placed on this type of a verbal dying declaration.

(7) That leaves us with the evidence of the eye witnesses alone. Out of the eye witnesses the testimony of one witness, namely Sukhai was rejected and rightly rejected by the trial Court. The other four witnesses, namely Basdeo, Dilasa, Triloki and Narain really belong to one group. Kirpa, the brother of Triloki, was beaten by some of these appellants and there is evidence that a report under S. 325, I. P. C., was being investigated by the police at that time. There is thus evidence of enmity between Triloki and the appellants. Dilasa is a cousin of Triloki while Kamta Prasad deceased was also a cousin of Triloki. Under these circumstances the evidence of these three witnesses Basdeo, Dilasa and Triloki cannot be called independent evidence.

It is not necessary that independent evidence must be examined but where there is evidence that a large number of independent witnesses could have deposed about the incident, their absence from the list of witnesses and the presence of only partisan witnesses does create a doubt whether the version, which is being given by them, is to be believed. The fourth witness Narain, although he does not belong to this family group, is also an interested witness and is associated with the group of Triloki. There is evidence that in that pending 325 I. P. C. case he was cited as a witness for the prosecution against the appellants. We, therefore, find that the witnesses in this case are not reliable, and it is difficult to accept their statements against the appellants when it is obvious that quite a number of appellants have been falsely implicated.

We do not find anything to guide us to distinguish the cases of those persons who might have committed this crime and those who have been implicated on account of enmity. All the witnesses name all the seven appellants and narrate a story of Kamta Prasad being beaten with axes even after he had fallen down. We

have already observed above that this story cannot be accepted by us in the light of the medical evidence on which we rely.

(8) It was contended by the Government Advocate that the case against Baleshwar and Bhallar stood on a different footing as there was consistent evidence against them. The only evidence in addition to the evidence which is against all the appellants is the statements of Narain and Mahesh. Although Narain states that these two appellants Bhallar and Baleshwar continued beating the deceased with axes after he had fallen down but as we cannot accept this story, we cannot rely upon his statement. Similarly Mahesh only names Baleshwar and Bhallar as the persons whose names were being given out by the villagers as the assailants of Kamta deceased.

The statement of Mahesh does not show that Kamta deceased himself gave out any names, and under these circumstances much weight cannot be attached to the evidence of Mahesh. We, therefore, find that the cases of the appellants really cannot be distinguished. It may be that some of these appellants committed this crime but the tendency to implicate a large number of innocent persons is responsible for our not being able to punish the offenders. There is nothing on the record to help us in putting our fingers on the real assailants, and as we are convinced that many of them are falsely implicated, we have to give the benefit of doubt to all the appellants.

(9) We, therefore, allow the appeals of all the appellants, set aside their convictions and sentences and direct that they shall be released forthwith unless they are wanted in connection with some other offence. The reference made by the Sessions Judge is rejected.

V.R.B. Appeals allowed.

A.I.R. 1955 ALLAHABAD 192 (Vol. 42, C.N. 67)

AGARWALA AND SAHAI JJ. (16-11-1954)

F. S. Abdulqayum, Appellant v. Manindra Land and Building Corpn. Ltd., and another, Respondents.

Ex. First Appeal No. 329 of 1954, against decree of Addl. Civil J., Banaras, D/- 30-1-1954.

(a) Companies Act (1913), S. 11 (6) — Change in the name of company during pendency of suit — Decree in old name — Execution in new name, (Civil P. C. (1908), O. 21 R. 10).

A change in the name of the plaintiff company during the pendency of the suit does not affect the rights of the company. If therefore the decree is passed in the old name of the company, it can be executed by the company in its new name. (Para 2)

Anno: Companies Act, S. 11 N. 1; C. P. C., O. 21 R. 10 N. 2.

(b) Civil P. C. (1908), S. 100 — Question of fact — (Companies Act (1913), S. 11(4)).

The question whether the Company did or did not obtain the approval of the Central Government to change its name as provided by Sub-s. (4) of S. 11 of the Companies Act is a question of fact and cannot be raised for first time in second appeal. (Para 3)

Anno: Companies Act, S. 11 N. 1; Civil P. C., Ss. 100-101 N. 51.

V. K. S. Chaudhary, for Appellant.

AGARWALA J.:

This is a judgment-debtor's appeal arising out of execution proceedings. A suit was filed by Manindra Banking Corporation, Ltd., and it was decreed in that name. During the pendency of the suit, however, Manindra Banking Corporation Ltd., changed its name to Manindra Land and Building Corporation, Ltd. A certificate incorporating the company in the altered name was granted to the company.

After the decree, the Company wanted to file an application for execution of the decree by stating its name as "Manindra Banking Corporation, Ltd., now known as Manindra Land and Building Corporation, Ltd." The judgment-debtor raised an objection that since the decree was not passed in the new name, the Company could not execute the same. This objection was overruled and execution was allowed to proceed by the court below. Against that order the judgment-debtor has come up in appeal to this Court.

(2) Two points have been raised before us. The first point was the same as was raised in the court below, namely, that the new name not having been entered in the decree, execution could not be carried out in the new name. This objection has no substance.

Sub-s. (6) of S. 11, Companies Act states:

Section 11. "(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."

The change of name does not, therefore, affect the rights of the Company. The decree in its former name can be executed in the new name which has already been incorporated.

(3) The second point raised was that the Company did not obtain the approval of the Central Government to change its name as provided by Sub-section (4) of S. 11, Companies Act. This is a question of fact and it was not raised in the court below as there is no mention of it in the judgment. Learned counsel is unable to say whether in fact the approval of the Central Government was or was not obtained, but in the circumstances we cannot allow this objection to be raised at this stage.

(4) There is no force in this appeal and we dismiss it under O. 41, R. 11, Civil P. C.

R.G.D. Appeal dismissed.

(S) A.I.R. 1955 ALLAHABAD 193 (Vol. 42, C.N. 68)

DESAI AND M L. CHATURVEDI JJ.

and on difference

AGARWALA J. (27-8-1954)

Dr. Ram Manohar Lohia, Applicant v. The Supdt., Central Prison, Fatehgarh and another, Opposite Parties.

Criminal Misc. Writ No. 20 of 1954.

(a) Constitution of India, Arts. 13, 19(1)(a) and (2) — U. P. Special Powers Act (14 of 1932), S. 3 — Validity — If offends Art. 19(1)(a) and saved by Art. 19(2).

Per Agarwala J. (agreeing with Desai J., M. L. Chaturvedi J., dissenting): The provision of S. 3, U. P. Special Powers Act, 1932, making it penal for a person by spoken words to instigate a class of persons not to pay dues recoverable as arrears of land revenue, was inconsistent with Art. 19(1)(a) of the Constitution on 26-1-1950. The restrictions imposed by S. 3 were not in the interests of public order. (Para 88)

Per Desai J.: The Act clearly and expressly infringes the freedom of speech by prohibiting the uttering of certain words. The Preamble only supplies the reason or intention behind the prohibition. When an Act is impugned on the ground that it runs foul of the guarantee of free speech, the Court is only concerned with the question whether it does so or not; it is not concerned with the reason why it does so, (unless the case is sought to be brought within the prescribed limitations). The object behind the Act might have been to facilitate the collection of certain dues by prohibiting the incitement of illegal refusal to pay them, but there is no difference between enacting a law to collect dues by limiting the freedom of speech and enacting a law to restrict a speech so that Government dues may be collected. A Legislature cannot enact a law infringing the freedom of speech, whether the infringement is its primary object or is a subsidiary object or is an unintended effect. No matter in what enactment, and for what purpose, the restriction on the freedom of speech is imposed, it is barred unless covered by sub-cl. (2). There can be no more direct infringement of the right of free speech than the prosecution for the making of a certain speech. The enactment of the Act is as direct an infringement of the constitutional guarantee of free speech as is possible. The impugned Act could have been challenged even if the punishment provided under S. 3 were mere admonition and the offender were not liable to be arrested. (Para 13)

The impugned provision in the Special Powers Act does not impose the restrictions in the interests of the security of the State. The security of the State is not affected merely by an incitement to cultivators not to pay the irrigation dues. If the irrigation dues are not paid, the State would lose some income; but that can hardly be said to affect the security of the State. The security of the State depends upon factors other than its consolidated funds. Undoubtedly money has to be spent in providing for the security of the State, but the words "in the interests of the security of the State" cannot be understood to mean "in the interests of the consolidated fund of the State." The non-payment of irrigation dues itself does not affect the security of the State, incitement to the non-payment still less affects it. Incitement to the non-payment not only does not always result in the non-payment, but also is not contemplated by the Northern India Canal and Drainage Act itself to deprive the Government of the dues because the Government have been conferred ample powers to realise them forcibly. The security of the State is endangered only by a serious and aggravated form of public disorder as distinguished from minor breaches of the peace which endanger only public order. Incitement to non-payment of irrigation dues is not such a serious and aggravated form of public disorder as is likely to endanger the security of the State. (Para 15)

The non-payment of Government dues and its incitement are not offences against public order and a prohibition of the incitement to the non-payment has nothing to do with the maintenance of public order. (Para 16)

The words "in the interests of public order" mean "for maintenance of public order." The interests of public order lie only if it is maintained. A restriction can be imposed in the interests of public order, if in the event of its not being imposed disturbance of public order is apprehended. It is not necessary that the apprehension be immediate or present or that the disturbance of public order be substantial. Whatever be the nature of gravity of the disturbance of public order, if there is an apprehension of it, a restriction can be imposed in order to remove the apprehension. All that is required is that the State must apprehend disturbance if no restriction is imposed. (Para 17)

In considering Art. 13, the Court is merely concerned with the provision that is impugned, and not with the question in what areas it was in force. Even if it was not enforced in any area, it could become void. If S. 3 was not enforced anywhere in January 1950, it only shows that there was no necessity for it, i.e., that restricting the right to instigate the non-payment was not in the interests of public order then. (Para 17)

Section 3 of the Act did not impose restriction on the right of free speech in the interests of public order. Disturbance of public order is not a natural and probable consequence of the instigation to non-payment of dues realisable as arrears of land revenue. (Para 20)

The question whether a restriction on the right guaranteed by Art. 19(1)(a) is reasonable or not cannot arise when the restriction is not found to be in the interests of public order, etc., or in relation to libel, etc. The restriction under consideration is a prohibition of instigating a class of persons not to

pay certain dues realisable as arrears of land revenue. Though it is stated in the preamble of the Act that it was enacted to deal with illegal refusal to pay certain dues, the restriction is on instigation of non-payment of all sums recoverable as land revenue regardless of whether they are legally due or not. A sum may be recoverable as arrears of land revenue even though it is not legally due. Therefore, it cannot be contended that the words "recoverable as arrears of land revenue" mean legally recoverable as such. It may appear unreasonable to prohibit instigation of non-payment of sums which are illegally demanded from a class of persons. But, if the prohibition is found to be in the interests of public order, it justifies itself. If it is not found to be in the interests of public order, it would fall on that ground alone. No other flaw is discernible in the restriction.

(Para 21)

Per M. L. Chaturvedi J. (dissenting): The object of the statute is to make instigations of every kind punishable, as the Government does not want interference in the recovery of its legal dues. The direct activity made punishable by the Act is not the curtailment of any freedom of speech; and the validity of the Act, therefore should not be judged with reference to Art. 19 but with reference to the provisions of Art. 22 of the Constitution. (Paras 36, 38)

Assuming that Art. 19 applies to the case the impugned section is a permissible piece of legislation and is protected by Art. 19(2) as it can be said to have been enacted in the interests of 'public order'.

(Paras 40 and 53)

"An exhortation to the members of the public not to obey the laws in general or any particular law is likely to disturb the state of tranquillity prevailing among the members of the public, and the preaching of disobedience of a law or laws is meant to disturb that public tranquillity. Of course, while referring to the law or laws, I mean those laws, which have been duly promulgated and are valid laws not inconsistent in any manner with the provisions of the Constitution. The criticism of a law or laws is one thing, because that may be with a view to have the laws changed and it is the very essence of democracy that every member of the public should have the right to propagate his views and to make all legitimate attempts to change a law or laws, which he considers improper or working a hardship on the public or any class of public. But exhortation to disobey duly promulgated and valid laws has a tendency of disturbing the state of tranquillity prevailing among the members of the public as a result of the regulations or laws enforced by the Government. The same is the position with respect to an exhortation not to pay taxes duly imposed or other legal dues recoverable by the State. That, to my mind, is the position keeping in view the meaning and significance of the expression "public order", as laid down in 'Romesh Thappar's case', AIR 1950 SC 124, and the provisions of the impugned section would be justified as having been enacted 'in the interest of' public order."

(Para 47)

What the impugned section makes punishable is an instigation not to pay the legal dues of the Government, which means the disobedience of the laws which have made those dues recoverable by the Government by the exercise of certain coercive process. This sort of instigation, in the circumstances at present prevailing in the country, is likely to lead even to breaches of peace and violence. The majority of persons to whom exhortation is made are likely to be uneducated people, who can easily be misled to take the law into their own hands and to resist the realisation of the legal dues by the public servants. This, in the ordinary course of things, is likely to lead to riots and breaches of public peace. An exhortation, therefore to the members of the public to disobey the duly promulgated and valid laws, specially where those laws happen to authorise the public servants to realise the dues by coercive processes, is an act which can be classed as one subversive of public order. So applying even the narrower definition to the expression "public order", namely, the maintenance of public peace and tranquillity, the making of an instigation in this respect penal is really in the interest of public order, and the legislation is justified under the amended provisions of Cl. (2) of Art. 19 of the Constitution. (Para 48)

Whether the consequence of a particular act or speech is likely to disturb the public order is a matter which in the first instance, has to be left to the discretion of the Legislature, and there is a presumption that the restrictions imposed by the Legislature are reasonable ones because it is the members of the Legislature, who are the representatives of the people and who are expected to know better their reactions to particular actions or speeches. The issue of reasonableness is certainly justiciable. But there is a presumption in favour of the validity of a legislation on this point and a restriction imposed by a legislation should be held by the Courts to be unreasonable only if, in spite of the presumption in favour of the legislation, the Court comes to the conclusion that the restriction contained in it is not a reasonable one. (Para 50)

The impugned section has been brought into force in the case of an emergency, and this is an additional reason for holding that the provisions of the statute do not create an unreasonable restriction on the freedom of speech. (Para 52)

Per Agarwala J.: Section 3 of the impugned Act is a legislation directly dealing with the freedom of speech and expression and prejudicing the right guaranteed under Art. 19 (1) (a) of the Constitution, and as such its validity must be considered with reference to Cl. (2) of that Article. (Para 70)

In order to decide whether a particular law restraining the freedom of speech of inciting disobedience to a law is in the interest of

public order or not, two things are to be remembered; first, that incitement to a breach of every law does not necessarily lead to its breach and even if it leads to its breach it does not necessarily result in public disorder and second that the connection between the impugned law and the threat to public peace and tranquillity must be clear and proximate and not far-fetched or problematic. (Para 81)

It cannot be laid down as a general proposition that an incitement to the breach of any kind of law would have a proximate and clear connection with the disturbance of public order. (Para 82)

"It is more than probable that barring extreme cases, the incitement to non-payment will not be obeyed, and even if it is obeyed, will not lead to violence, and that in any case the connection between the incitement and public order is too far-fetched and problematic rather than clear and proximate. That a wide-spread agitation for non-payment of taxes and other dues mentioned in the Special Powers Act may sometimes lead to a disturbance of public order may be admitted. But what may happen in extreme cases is not the true test of the validity or constitutionality of a piece of legislation. The question is whether the impugned legislation covers acts which are innocent in themselves or which have no proximate connection with the disturbance of public order. If the impugned legislation covers such acts, the legislation would be bad even though it also covers acts which in extreme cases may lead to disturbance of public order unless the two kinds of acts can be separated. Let us suppose that the instigator were to clearly say that the payment of the liability may be refused or deferred, but that there should be no resistance to the coercive process of recovery or the enforcement of the liability. To my mind, such instigation cannot reasonably be said to threaten public order. The impugned section does cover such cases. Again, it can hardly be said that if one individual instigates another individual not to pay certain dues or to defer payment of a certain liability when there is no general campaign of non-payment and there is no incitement to a general disobedience of laws, there will be a threat to public order. Such instigation is also covered by the provisions of the impugned section, and therefore the section is unconstitutional because as it stands, it is not possible to make it applicable to those extreme cases alone in which there may be a threat to public peace and tranquillity." (Para 83)

(b) Constitution of India, Arts. 226, 19, 21 and 22 — Habeas Corpus — Deprivation of personal liberty under Statute by preventive or punitive detention — Person if can challenge constitutionality of Act on ground that it infringes Art. 19 — (U. P. Special Powers Act (14 of 1932), S. 3).

Per Desai J.: It is not correct to say that the scope and nature of a petition of habeas corpus excludes the possibility of a challenge in regard to the constitutionality of an Act. (Para 18)

A person who is arrested for purposes of prosecution under S. 3, U. P. Special Powers Act, can undoubtedly challenge the constitutionality of the Act on the ground that the Act directly infringes the freedom of speech and expression; there is no reason and no authority, for saying that the bare fact that an action taken under a certain enactment results in a person's being deprived of his personal liberty, prevents him from challenging the constitutionality of the provision on the ground of its being inconsistent with Art. 19. Observation in AIR 1954 All 601, held obiter. AIR 1950 SC 27—AIR 1951 SC 270, Distinguished. (Paras 7, 8)

Article 21 guarantees that a person shall not be deprived of his personal liberty except according to procedure established by law. This guarantee is broken the moment he is arrested for doing an act that is made penal by a Statute which is unconstitutional, and the High Court has, not only the power, but also the duty to issue a writ of habeas corpus to enforce his right to personal liberty. The function of a writ of habeas corpus does not extend beyond an enquiry into the jurisdiction of the Court by which the warrant of arrest was issued and the validity of the warrant upon its face. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. But proceedings under an unconstitutional Act are absolutely void and the Act, being void, has no effect to confer jurisdiction. An unconstitutional law is no law and an offence created by it is not a crime. If a Court tries a person for an act which is made penal by a void Act, it transcends its jurisdiction and he is entitled to a discharge just the same as if the non-jurisdiction of the Court were apparent in any other manner. (Para 8)

Per M. L. Chaturvedi J.: The validity of an enactment is to be judged with respect to the provisions of Art. 19, if the legislation directly attempts to control a citizen's freedom of speech. But if the freedoms, enumerated in Art. 19, are restricted indirectly as a result of the operation of a legislation, authorising punitive or preventive detention, then the validity of the legislation is not to be judged with reference to Art. 19 but with reference to the Articles dealing with the subject of detention. If the legislation, permitting detention, is in conformity with Arts. 20 to 22, the mere fact, that it indirectly affects the freedoms under Art. 19, will not make it a void legislation. So that the crucial point to be determined is what is the exact action which the impugned legislation hits at. If it is the curtailment of any of the freedoms guaranteed under Art. 19, then it has to be judged with reference to the provisions of that Article, but on the other hand if those freedoms are affected as an indirect result of a legislation authorising punitive or preventive detention, then the provisions of Art. 19 are not to be taken into consideration. So that it is not every legislation, which permits punitive or preventive detention, which is immune from a consideration as to its validity by reference to the

freedoms guaranteed under Art. 19. What has to be seen in every case is the actual action which the statute prohibits. The law, as laid down in Gopalan's case, (AIR 1950 SC 27) is not that if a legislation directly interferes with freedom of speech and is not saved by the provisions of Cl. (2) of Art. 19, then it should be held to be invalid, if it merely provides for the imposition of a fine by way of punishment; but that it would be valid if it provides for imprisonment instead of fine.

(Para 31)

Per Agarwala J.: Where an Act directly curtails the right of freedom of speech and as a result of the violation of the provisions of which a person is punitively detained then in such a case he can rely upon the rights to the freedoms guaranteed to him by Art. 19. While Art. 19(1) is not contravened when curtailment of the freedom mentioned therein is brought about as a result of detention preventive or punitive under laws otherwise valid, (and it may be further said that while in the case of preventive detention, Art. 19(1) is not contravened at all), Art. 19(1) is contravened when punitive detention is effected as a result of the exercise of these freedoms.

(Para 69)

Anno: Constitution of India, Art. 19 N. 7; Art. 21 N. 5; Art. 22 N. 1; Art. 226 N. 80, 81.

(c) Constitution of India, Arts. 13, 245 — Constitutionality of statute — Doctrine of severability —Part of law void — Effect.

Per Desai J.: If any provision of an Act is unconstitutional it can be ignored as if it did not exist, without affecting the enforcement of the others. If good and bad provisions are joined together by using the word "and" or "or", and the enforcement of the good provision is not made dependent on the enforcement of the bad one, i.e., the good provision can be enforced even if the bad one cannot be, or had not existed, the two provisions are severable and the good one will be upheld as valid and given effect to. On the other hand, if there is one provision (as distinct from several joined together) and it hits valid objects as well as invalid ones which cannot be separated without altering the language, (which is beyond the jurisdiction of Courts) and is capable of being used for a legal purpose as well as for an illegal one, it is invalid and cannot be allowed to be used even for the legal purpose. Case law Ref. (Para 10)

Anno: Const. of India, Art. 13 N. 5.

(d) Constitution of India, Art. 19(1)(a) and (2) — Freedom of speech and expression — Limitations on.

Per Desai J.: Whatever limitations exist on the freedom of speech in this country are those mentioned in sub-cl. (2) of Art. 19 and no other. The limitations that are supposed to be inherent in the idea of freedom of speech guaranteed by the American Constitution are specifically expressed in our Constitution. Most of the limitations mentioned in the American decisions are to be found in sub-cl. (2). If there were any doubt on the point it is removed by the latest amendment to sub-cl. (2), by which the words "incitement to an offence" have been added. Article 19(1) must, therefore, be taken as a command of the broadest scope that explicit language, read in the context of sub-cl. (2) will allow. (Para 12)

Per Agarwala J.: The restrictions in Art. 19 (2) being in the nature of exceptions to the general rule of the absoluteness of freedom of speech and expression are to be directly construed. Moreover, since the exceptions to the absolute freedom of speech and thought are specifically and expressly laid down in the Constitution, there can be no other exceptions than those which are so specifically and expressly mentioned. If the liberty of a citizen is curtailed by any law then it must be shown that the law falls within the four corners of these exceptions and it must also be shown that the restrictions are reasonable.

(Para 67)

Per M. L. Chaturvedi J.: The law in America as regards the freedom of speech, as also on many other points, is different from the law laid down by our Constitution. The First and the Fourteenth Amendments of the American Constitution do not impose any restrictions on the freedom of speech, and the Courts, therefore, had to make their own rules as regards the reasonableness or the existence of that freedom, and as regards the limitations which could be imposed by the State in the exercise of its 'police powers'. In our Constitution, the position is very different. The Freedoms, as enumerated in Art. 19 (1), are made subject to the succeeding clauses of the same Article, and when judging the constitutionality of an Act the Courts in India have to judge those Acts according to the provisions of the Constitution itself.

(Para 50)

(e) Criminal P. C. (1898), S. 344 — Remand pending adjournment.

Ordinarily Magistrates write in the order-sheet of the case, when adjourning it to the next date, that the accused should remain in custody as before; but the omission to so mention in the order-sheet does not matter when the warrant contains the Magistrate's authority for the detention. One authority for detention is enough. (Para 4)

Anno: Criminal P. C., S. 344 N. 16, 21.

(f) Constitution of India, Art. 226 — New plea as to questions of fact.

Per Desai J.: The question whether there existed any magisterial authority for detaining the applicant in custody after a certain date or not is a question of fact which cannot be permitted to be raised for the first time in argument. The applicant should have alleged it in the affidavit and given an opportunity to the opposite party to contest the allegation.

(Para 4)

Anno: Const. of India, Arts. 32 and 226 N. 42 (j) and 54.

(g) Constitution of India, Art. 22(2) — 'Shall be produced before the nearest Magistrate'.

Petitioner arrested without a warrant by a Station Officer on his own authority — Within

few minutes of arrest City Magistrate going to the spot in his executive capacity—Arrested person produced before such Magistrate who was fully competent to authorise detention in custody — Petitioner remanded to jail custody by City Magistrate — Held that in the circumstances the arrest not having been made by the Station Officer under the direction or supervision of the Magistrate, it was not necessary for him to produce the accused before another Magistrate and in producing the accused before the City Magistrate on the spot there was full compliance with Art. 22 (2). AIR 1954 All 601, Distinguished. (Paras 5 and 55)

Anno: Const. of India, Art. 22 N. 4.

(h) Constitution of India, Art. 19(2) — 'Incitement to offence' and 'incitement to break law'.

Per Desai J.: Article 19(2) does not in so many words save a law in relation to incitement to break a law. "Incitement to break a law" is not same as "incitement to an offence", because every breach of law does not amount to an offence. (Para 14)

Per Agarwala J.: Our Constitution safeguards to every citizen of India the freedom to preach non-violent disobedience to civil laws, not being laws mentioned in Cl. (2) of Art. 19. If the contention that an incitement to breach of every kind of laws is likely to lead to a breach of public order were true, it would hardly have been necessary for the fathers of the Constitution to single out in Cl. (2) of Art. 19, laws relating to seven matters only including 'incitement of offences'. Indeed the reference to "incitement to an offence" clearly shows that an incitement to a breach of every civil law is not necessarily contemplated in Cl. (2). (Paras 79, 80)

Anno: Const. of India, Art. 19 N. 36.

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Gopi Krishna Sahai; S. C. Khare; M. N. Shukla and Khuswaqt Rai, for Applicant; K. L. Misra, Advocate-General and Sri Ram, Dy. Govt. Advocate, for Opposite Parties.

DESAI J.:

This is an application by Dr. Ram Manohar Lohia for a writ of 'habeas corpus'. He is being prosecuted on two charges, each of committing an offence under S. 3, U. P. Special Powers Act, 14 of 1932. He contends that the Act, and particularly S. 3 of it, stands repealed under Art. 13 of the Constitution on account of its being inconsistent with the provisions of Art. 19.

(2) The applicant is the General Secretary of the Praja Socialist Party of India. The Government of Uttar Pradesh has increased irrigation rates for water supplied from canals to cultivators and the Praja Socialist Party of Uttar Pradesh is carrying on an agitation against the increase on the ground that it places an unbearable burden upon the cultivators who are adversely affected by the progressive fall in prices of foodgrains. The applicant visited Farrukhabad in connection with the agitation and addressed two public meetings on 4-7-'54, one at Kaimganj at 4 p. m. and the other at Farrukhabad at 8-30 p. m. In the speeches he incited cultivators not to pay "the enhanced irrigation rates" to Government. He also severely criticised the State Government; but we are not concerned with that criticism as it does not form the basis of the charges which he has to answer at the trial.

The Station Officer, Kaimganj, followed him from Kaimganj to Farrukhabad and lodged a report against him for the offence under S. 3, U. P. Special Powers Act, at police station, Farrukhabad, and asked the Station Officer, Farrukhabad, in writing to arrest him. Consequently the Station Officer , Farrukhabad, arrested the applicant the same day at 10 p. m. and informed him of the reason for the arrest and showed him the written authority. Just then there arrived Sri. A. H. Drummond, City Magistrate of Farrukhabad and Sub-Divisional Magistrate of Kaimganj; the Station Officer produced the applicant before the City Magistrate there and then and the City Magistrate granted a remand for two days. The applicant was then sent to the District Jail.

The Station Officer after investigation submitted a charge-sheet against the applicant for two offences, each of S. 3, for making the two speeches in the Court of Sri. P. R. Gupta, a Judicial Officer, where the case is pending. The Magistrate went to the jail on 6-7-'54 to try the applicant who protested against his trial within the jail premises. The Magistrate rejected the protest. Then the applicant made an application for referring the case to the High Court under S. 432, Criminal P. C., and that application also was rejected. Thereupon the applicant applied for an adjournment of the case on the ground that he wanted to move this Court for transfer of the case and the Magistrate adjourned it to 7-8-'54. Though the offence of S. 3 is bailable, the applicant has not applied for bail. He filed the present application on 9-7-1954.

(3) The only grounds urged by the applicant are that the Act is 'ultra vires' because it contravenes Art. 19 of the Constitution and that his arrest and detention are illegal and contrary to Art. 21 of the Constitution. Two counter-affidavits have been filed in reply to the application, one by the Assistant Jailor of the Central prison where the applicant is being confined at present and the other by the Station Officer of police station, Farrukhabad. The Assistant Jailor affirms that the applicant has been arrested for the offences of S. 3 of the Act, that he was produced before the Court inside the jail on 6-7-54, that the case was adjourned to 19-7-1954, and that he is being confined in the jail under the orders of the Judicial Officer. The Station Officer, police station Farrukhabad, in his counter-affidavit mentions the circumstances in which the applicant was arrested and affirms that he is being confined as an under-trial on charges of S. 3 of the Act.

(4) Though the applicant mentioned Art. 21 as having been contravened by his detention in the jail, he meant to rely on Art. 22. Under that Article a person on being arrested must be informed of the grounds for his arrest and must be allowed the right to consult and be defended by a legal practitioner; also he must be produced before the nearest Magistrate within 24 hours & no arrested person can be detained in custody beyond 24 hours without the authority of a Magistrate. I find that none of these provisions was infringed in the present case; the applicant was informed of the reasons for his arrest by the Station Officer, Farrukhabad, at the time of the arrest and was produced there and then before a Magistrate and had been detained from the date of his arrest in custody with the authority of one Magistrate or another. Sri A. H. Drummond remanded him to custody for two days on 4-7-54 and Sri P. R. Gupta commenced his trial in the jail on 6-7-'54 and, when adjourning it to 19-7-'54, passed an order for continuing his detention in the jail.

In the warrant directing the Superintendent of the Central Jail to keep him in custody, the Magistrate has ordered that he should be produced before him in Court on 19-7-'54. It amounts to his authorising the applicant's detention in jail custody. Ordinarily Magistrates write in the order-sheet of the case, when adjourning it to the next date, that the accused should remain in custody as before; but Sri P. R. Gupta or rather his clerk did not say in the order passed on 6-7-'54 that the applicant should remain in custody up to 19-7-'54. That omission does not matter when the warrant contains the magistrate's authority for the detention. One authority for detention is enough. Moreover whether there existed any magisterial authority for detaining the applicant in custody after 6-7-'54 or not is a question of fact which cannot be permitted to be raised for the first time in argument. Had it been the applicant's case that there existed no authority, he should have alleged it in the affidavit and given an opportunity to the opposite party to contest the allegation. He simply pleaded in his application that his detention contravened the provisions of Art. 21 without stating the facts constituting the contravention.

(5) Sri S. C. Khare contended that the applicant was not produced before a Magistrate within 24 hours of his arrest within the meaning of Art. 22. His argument was that Sri A. H. Drummond went to the spot of arrest of the applicant in his capacity of an executive officer (probably to see that there was no disturbance of public order) and not to exercise any judicial or magisterial functions such as of granting a remand and authorising the detention of an arrested person in custody.

It is true that Sri A. H. Drummond and the Sub-Divisional Magistrate, Kaimganj, closely followed the Station Officer of Farrukhabad when he proceeded to arrest the applicant and arrived at the place of arrest within a few minutes of the arrest, They might have gone there for the purpose of seeing that the arrest did not result in any disorder. They might have gone there to exercise their executive authority. But it cannot be disputed that they had also magisterial powers and were not prevented from exercising them if an occasion arose for the same, merely because they had gone to the place primarily for the purpose of exercising executive powers. There were absolutely no restrictions upon the exercise of magisterial powers by Sri. A. H. Drummond and when the Station Officer, Farrukhabad, produced the arrested applicant before him, he was fully competent to authorise his detention in custody within the meaning of Art. 22.

'Swami Hariharanand Saraswati v. The Jailor I/C, District Jail, Banaras', AIR 1954 All 601 (A) on which Sri Khare relies does not support his contention at all. There the Swami was arrested by a Magistrate inasmuch as he was taken into custody by the police under his orders and under his direct supervision, and was produced before the same Magistrate who remanded him to custody; and it was held that he should have been produced before another Magistrate. A person can be arrested not only by a police officer, but also by a Magistrate. If he is arrested by a police officer, he must be produced before the nearest Magistrate within 24 hours. If he is arrested by a Magistrate, then also he must be produced within 24 hours before the nearest Magistrate, that is, before another Magistrate.

There is nothing to suggest that Art. 22(2) will not apply if the arrest is made by a Magistrate. Since it must apply also to an arrest by a Magistrate, the arresting Magistrate must produce him

before the nearest Magistrate. He cannot refuse to produce him before another Magistrate by saying that he has produced him before himself as a Magistrate. This argument would amount to not applying the provision to an arrest by a Magistrate. If a person arrested by a Magistrate is not required to be produced before another Magistrate by reason of the fact that the person arresting him is himself a Magistrate, it would mean that the arresting Magistrate has to do nothing after arresting him, in other words, that he is not bound by Art. 22(2). The Magistrate who arrested the Swami was, therefore, bound by Art. 22(2) to produce him before the nearest Magistrate, that is, before another Magistrate.

In the present case, the arrest was not made by Sri A. H. Drummond, nor was it made under his orders or supervision. It was the Station Officer, Farrukhabad, who had arrested him on his own authority, and he could be produced before Sri A. H. Drummond who, being at the spot, was the nearest Magistrate. Therefore, full compliance with the provision of Art. 22(2) was done.

(6) Now, I come to the main question whether the U. P. Special Powers Act is inconsistent with Art. 19(1)(a) of the Constitution which is:

"All citizens shall have the right to freedom of speech and expression."

It is laid down in Cl. (2) that the above provision cannot affect the operation of any existing law, in so far as it imposes

"reasonable restrictions on the exercise of the right in the interests of the security of the State, public order, decency and morality, or in relation to contempt of Court, defamation or incitement to an offence."

Article 13 lays down that all laws in force immediately before the commencement of this Constitution, in so far as they are inconsistent with the provision of Part III (which includes Art. 19) shall, to the extent of such inconsistency, be void. The following questions arise:

"(1) What is the meaning of "freedom of speech", whether it means freedom limited only by the expressed limitations or freedom limited in addition by unexpressed limitations?,

(2) Whether the impugned Act is inconsistent with, or restricts the applicant's right to, freedom of speech and expression?

(3) If so, is the restriction on the exercise of his right in the interests of the security of the State etc? and

(4) Is the restriction reasonable?"

(7) Before I deal with the above questions, I shall dispose of a preliminary objection raised by the learned Advocate General. He aruged that there arises no question of the freedoms enumerated in Art. 19 in respect of a citizen who has been deprived of his total freedom by being detained in custody either for punitive or for preventive purposes. The argument is based on a misapprehension of what was decided by the Supreme Court in — 'A. K. Gopalan v. State of Madras', AIR 1950 SC 27 (B), on which he exclusively relies, and on a misunderstanding of the applicant's grievance. A. K. Gopalan was detained by an order passed under S. 3, Preventive Detention Act, 1950, by the Madras Government on the ground that it was necessary to detain him with a view to preventing him from acting in a manner prejudicial to the security of the State or the maintenance of public order. He applied for a writ of 'habeas corpus' against his detention, contending that the Preventive Detention Act contravenes the provisions of Art. 19. In the words of Kania C. J.:

"As the preventive detention order results in the detention of the applicant in a cell it was contended on his behalf that the rights specified in Art. 19(1)(a), (b), (c), (d), (e) and (g) have been infringed. It was argued that because of his detention he cannot have a free right to speech as and where he desired and the same argument was urged in respect of the rest of the rights mentioned in sub-cl. (b), (c), (d), (e), and (g). Although this argument is advanced in a case which deals with preventive detention, if correct, it should be applicable in the case of punitive detention also to any one sentenced to a term of imprisonment under the relevant section of the Indian Penal Code."

That argument was repelled by the Supreme Court. Kania, C. J., observed at p. 35:

".....the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant saving clause of article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life."

At p. 36 the learned Chief Justice observed:

"Reading Art. 19 as a whole, therefore, it seems to me that that it has no application to a legislation dealing with preventive or punitive detention as its direct object."

Patanjali Sastri, J., observed at p. 70 that:

".....Art. 19 guarantees to the citizens the enjoyment of certain civil liberties while they are free."

By reason of the preventive detention A. K. Gopalan might have been prevented from exercising the rights enumerated in Art. 19(1), but in the words of Mukerjea, J., at p. 96:

".....this would not make the law providing for preventive detention a legislation taking away or abridging the rights under Art. 19(1)(g) of the Constitution....."

When the learned Judge stated at p. 93 that:

"On the other hand, Arts. 20, 21 & 22 are primarily concerned with penal enactments or other laws under which personal safety or liberty of persons could be taken away in the interests of

the society and they set down the limits within which the State control should be exercised."

and at p. 94 that they

"embody the the entire protection guaranteed by the Constitution in relation to deprivation of life and personal liberty both with regard to substantive as well as to procedural law",

he only meant that the validity of a penal enactment not directly infringing the rights enumerated in Art. 19 depends upon the provisions of Arts. 20, 21 and 22. If the penal enactment does not directly infringes the rights but an infringement arises incidentally out of an action taken under it, its validity is not affected thereby. The Preventive Detention Act, 1950, does not directly infringe the rights mentioned in Art. 19 and is not inconsistent with it. If on account of an action taken under it (e.g. detention under S. 3) a person is deprived of certain freedom, that is only an incidental effect of the working of the Act and the Act cannot be said to be inconsistent with Art. 19. The quintessence of the decision in the case is that arresting a person, whether for doing something or for preventing him from doing something, is not infringing any of the rights conferred by Art. 19(1).

The Constitution makes a distinction between the right of personal liberty and the right of freedom of speech, expression, trade, forming association, interstate movement, acquring property etc. Only the former is infringed by confinement or detention which is nothing but confining within four walls and not allowing to go out without permission. This is certainly a restriction on movements, but it does not infringe the rights mentioned in Art. 19(1)(d), which is the right of moving freely from one State to another. Depriving a person of his personal liberty (by arrest) does not deprive him of the rights conferred by Art. 19(1), which in theory, he can still exercise. If he cannot utter some words or cannot hold certain property or cannot practise a profession while he is in confinement, it is the result not of the confinement but of the prison regulations. The prison regulations may be said to prejudice his rights but not the confinement. Therefore A. K. Gopalan's grievance that on account of his detention he was deprived of the rights enumerated in Art. 19 was without substance.

The present case is different from — 'A. K. Gopalan's case (B)'. The applicant's contention is that the Special Powers Act itself infringes the freedom of speech and expression; he complains of the arrest on the ground that the Act under which he was arrested is unconstitutional and not on the ground of any consequences arising out of his detention. He could have complained about the unconstitutionality of the Act even if he had not been arrested, or had been released on bail. A. K. Gopalan was not detained by way of punishment for any speech made by him; he was detained in order that he might not act prejudicially to the public safety and the maintenance of public order. If a person is punished for a certain speech, it means that the freedom of speech is directly abridged; but the same cannot be said if he is detained so that he may not speak in a certain manner.

In — 'Ram Singh v. State of Delhi', AIR 1951 SC 270 (C), the decision in — 'A. K. Gopalan's case (B)' was followed and the Act was held constitutional, even though it allowed Ram Singh's detention with the express object of preventing him from making certain speeches. Section 3 may contemplate that a person is to be detained so that he may not make certain speeches, still it cannot be said to be a provision directly affecting the freedom of speech and consequently inconsistent with Art. 19(1). I find that there is no reason, and no authority, for saying that the bare fact that an action taken under a certain enactment results in a person's being deprived of his personal liberty, prevents him from challenging the constitutionality of the provision on the ground of its being inconsistent with Art. 19.

(8) There is an observation in AIR 1954 All 601 (A), that:

"the true position in regard to the scope and nature of a petition of 'habeas corpus' excludes the possibility of a challenge in regard to the constitutionality of an enactment. It is clear that the petitioners can challenge the validity of the impugned Act in proceedings which have been initiated under the Act against them. They have, therefore, another and a more appropriate remedy open to them for that purpose."

I think it was only a dictum by way of obiter. The Swami's application for 'habeas corpus' was none the less allowed. With great respect to my learned brothers I do not think that the law prohibits the constitutionality of an Act being challenged in a 'habeas corpus' proceeding. The applicant complains against his arrest and not against conviction, and the writ of 'habeas corpus' is the only remedy available to him. He can undoubtedly challenge the constitutionality of the Specia Powers Act during his argument at the end of his trial, but that must necessarily take time. If the Act is unconstitutional, he could not be arrested by the police without a warrant and he must not be permitted to remain in jail even for one moment and he has a right to be released instantaneously. Therefore, he cannot be told to await the result of his trial. Article 21 guarantees that he shall not be deprived of his personal liberty except according to procedure established by law. This guarantee is broken the moment he is arrested for doing an act that is made penal by a Statute which is unconstitutional, and this Court has, not only the power, but also the duty to issue a writ of 'habeas corpus' to enfore his right to personal liberty. The function of a writ of 'habeas corpus' does not extend beyond an enquiry into the jurisdiction of the Court by which the warrant of arrest was issued and the validity of the warrant upon its face. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. But proceedings under an unconstitutional Act are absolutely void and the Act, being void, has no effect to confer jurisdiction. An unconstitutional law is no law and an offence created by it is not a crime. If a Court tries a person for an act which is made penal by a void Act, it transcends its jurisdiction and he is entitled to a discharge just the same as if the non-jurisdiction of the Court were appa-

rent in any other manner; see Bailey on Habeas Corpus, Vol. I, paragraphs 30, 31 and 37. Mere error in judgment or proceedings constitutes no ground for the issue of a writ of 'habeas corpus'. In—'Ex Parte Siebold', (1879) 25 Law Ed 717 (D), it was laid down that the only ground on which relief can be given to a prisoner on 'habeas corpus' is the want of jurisdiction over the person, or the cause, or some other matter rendering the proceedings void, and that if the validity of a judgment is assailed on the ground that the Act under which the applicant was charged was unconstitutional, it affects the foundation of the whole proceeding, and the conviction is not only merely erroneous but illegal and void and cannot be a legal cause for imprisonment. If no appeal lies the judgment may be final, but

> "personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on 'habeas corpus' by a superior court." (Per Bradley J. at p. 719 of Law Ed.)

Miller J. stated in — 'Ex. Parte Yarbrough', (1883) 28 Law Ed. 274 at p. 275 (E),

> "If the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction and the prisoners must be discharged."

In — 'Ex Parte Nielsen', (1888) 33 Law Ed. 118 (F), it was stated by Bradley J. that it is firmly established that if the law under which the proceedings are taken is unconstitutional, the court has no jurisdiction to render a judgment and that if it still renders one, it is void and can be questioned collaterally in 'habeas corpus' proceedings. It is stated in Corpus Juris Secundum, Vol. 39 "Habeas Corpus", paragraph 18 that:

> "The unconstitutionality of a statute or ordinance under which a person is detained generally is ground for relief on 'habeas corpus'."

If relief can be given on 'habeas corpus' even after conviction and imprisonment it can certainly be given during the pendency of the case. Then even the question of going up in appeal will not arise. The British Parliament being supreme, an Act of Parliament cannot be challenged as unconstitutional; so there should not arise any occasion for challenging the constitutionality of an Act on a 'habeas corpus' application in England. But there also the law is that:

> "If it appears clearly that the act for which the party is committed is no crime,..... the Court discharges him."

upon the return to the writ of 'habeas corpus'; see Halsbury's Laws of England, 2nd Edn., Vol. 9, Section 1215. I have not come across any authority stating that a 'habeas corpus' application cannot lie on the ground of invalidity of an Act. It is, therefore, not correct to say that the scope & nature of a petition of 'habeas corpus' excludes the possibility of a challenge in regard to the constitutionality of an Act. In the end I should mention that the learned Advocate General did not plead that this Court had no jurisdiction to enter into the question of the constitutionality of the Act in these proceedings.

(9) Every supply of canal water is deemed to be given at the rates and subject to the conditions prescribed by the rules made by the State Government, (see Section 31, Northern India Canal and Drainage Act, (1873)). If any sum lawfully due under the provisions of the Act remains unpaid after the date on which it becomes due, it can be recovered by the Collector from the person as if it were arrears of land revenue under S. 45. Section 70 is the only section dealing with the offences under the Act. It punishes certain acts such as damaging or obstructing canals. interfering with the supply of water, fouling water of a canal and destroying a level mark or water gate, etc., but not the non-payment of any sum due under the Act or inciting its non-payment.

Violation of a rule made under the Act, for breach whereof a penalty may be incurred, is also an offence, the non-payment of a sum due under the Act or inciting its non-payment does not violate any rule made under the Act for breach whereof a penalty may be incurred. No penalty is incurred for not paying the sum due under the Act on the date on which it falls due; if it is not paid the Collector can recover it but the defaulter is not subject to any penalty. Therefore, not paying any sum due under the Act, or instigating its non-payment, is not an offence under the Northern India Canal and Drainage Act. It is not an offence under any other enactment also.

(10) The U. P. Special Powers Act was enacted in 1932 in order "to make provision against and to take powers to deal with instigation to the illegal refusal of the payment of certain liabilities" (vide the preamble). Originally it was to remain in force for one year, but the period was extended and ultimately in 1940 it was made permanent. The provisions of the Act were to come into force in those districts to which the Act was extended by a notification in the State Gazette. Between April and June, 1954 the provisions of the Act were extended to 33 districts, including the Farrukhabad district. Section 3 of the Act is as follows:

> "Whoever by words either spoken or written or by signs or by visible representations or otherwise instigates expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, shall be punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250/-, or with both."

The word "liability" is defined in S. 2 to mean —

(1) land revenue,
(2) any sum recoverable as arrears of land revenue,
(3) any tax, rate, cess or other due or amount payable to Government,
(4) as above, payable to any local authority,
(5) rent of agricultural land,
(6) anything recoverable as arrears of, or
(7) along with rent of agricultural land.

We are not concerned with any other provisions of the Act. Section 3 punishes several acts. It punishes certain words either spoken or written.

It punishes certain signs. It punishes certain representations. It punishes instigation of non-payment of liability to one person. It punishes instigation of non-payment of liability to a class of persons. It punishes instigation of deferment of payment. It punishes as many as 40 different acts. When one has regard to the fact that "liability" comprises seven different kinds of dues, it follows that in all 280 different acts are punishable under S. 3; in other words that the section contains as many as 280 provisions each punishing an act. All these provisions are separate from one another. For the sake of convenience they have been put together in one section, but each could have formed a separate section. If any provision is unconstitutional, it can be ignored, as if it did not exist, without affecting the enforcement of the others. If good and bad provisions are joined together by using the word "and" or "or", and the enforcement of the good provision is not made dependent on the enforcement of the bad one, i. e., the good provision can be enforced even if the bad one cannot be, or had not existed, then the two provisions are severable and the good one will be upheld as valid and given effect to. On the other hand, if there is one provision (as distinct from several joined together) and it hits valid objects as well as invalid ones which cannot be separated without altering the language, (which is beyond the jurisdiction of courts) and is capable of being used for a legal purpose as well as for an illegal one, it is invalid and cannot be allowed to be used even for the legal purpose. In 'Herndon v. Lowry', (1936) 301 US 242 at p. 259 (G), Roberts J. said:

> "where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

Similar view was expressed in 'Stromberg v. California,' (1930) 283 US 359 at p. 369 (H), and 'Thornhill v. State of Alabama,' (1939) 310 US 88 at p. 97 (I). In 'Romesh Thappar v. State of Madras' AIR 1950 SC 124, at p. 129 (J), it was stated:

> "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void."

Mahajan J. (now C. J.) observed in the case of 'Chintaman Rao v. State of Madhya Pradesh,' AIR 1951 SC 118, at p. 120 (K):

> "The law ..... cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right."

The provision in S. 3 of the Act that instigating a class of persons by spoken words not to pay to Government any sum recoverable as an arrear of land revenue is an offence is distinct and severable from the other provisions in the same section punishing other acts. Its validity does not depend upon the validity of the other provisions. It is not of such a nature as to be valid if applied for one purpose and invalid if applied for another purpose. It does not matter if the applicant instigated the non-payment of only the excess over the irrigation dues that were previously payable by the cultivators. We are not concerned with what the applicant did. Our concern is with the question whether the particular provision is against the Constitution or not. There is nothing to suggest that the disturbance of public order depends upon the nature of the liability, the non-payment of which is instigated. As regards that question, if public order is likely to be disturbed by instigation of non-payment of 'takavi', it is likely to be disturbed by instigation of non-payment of the excess of the irrigation dues.

Consequently the unconstitutionality of a provision punishing one act will not affect the constitutionality of another provision punishing another act. The punishment of one act does not depend upon the punishment of another act. The applicant is being prosecuted for the act of expressly instigating by spoken words a class of persons not to pay money recoverable as arrears of land revenue. That act is punishable under S. 3. What we have to see is whether the particular provision of S 3 penalising that act is inconsistent with Art. 19 (1)(a) or not; we are not concerned with the other provisions of the section. Even if they are consistent with Art. 19(1)(a), the particular provision penalising the act done by the applicant may be inconsistent and consequently void; on the other hand, the other provisions may be inconsistent and still the particular provision penalising the act may be consistent & consequently be upheld as constitutional. If there is any illegality in any of the provisions penalising an act, it is not a contagious illegality and the other provisions do not become infected by it merely on account of their juxtaposition in the same section or being contained in the same Act.

(11) The learned Advocate General vehemently argued that the freedom of speech guaranteed by Art. 19 is not absolute and is subject to limitations such as that nobody can incite the breach of a law. He relied upon numerous decisions of the Supreme Court of America such as — 'Benjamin Gitlow v. State of New York', (1924) 268 US 652 (L); (1930) 283 US 359 (H); — 'Terminiello v. Chicago', (1948) 337 US 1 (M) and — 'American Communications Asso. v. Douds', (1949) 339 US 382 (N). In (1924) 268 US 652 (L), Sanford J. stated at p. 666:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom. That a state, in the exercise of its police power, may punish those who abuse

this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. A state may punish utterances endangering the foundations of organised government and threatening its overthrow by unlawful means. **** It does not protect publications or teachings which tend to subvert or imperil the government, or to impede or hinder it in the performance of its governmental duties."

In — 'American Communications Asso. v. Douds', (N), Vinson C. J. observed at p. 394:

"Freedom of speech thus does not comprehend the right to speak on any subject at any time."

In the case of 'Terminiello', (M), it was stated by Douglas J. at p. 4:

"That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

In the Selected Essays on Constitutional Law, Vol. 2, at p. 1033 is quoted an observation of Judge Hamersley of Connecticut that:

"The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the State. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business, or property."

At p. 1050 it is stated:

"Judge Hand places outside the limits of free speech one who counsels or advises others to violate existing laws. It is true, he says, that any discussion designed to show that existing laws are mistaken in means or unjust in policy may result in their violation, but if one stops short of urging upon others that it is their duty or their interest to resist the law, he should not be held to have attempted to cause illegal conduct."

Dicey in his Law of the Constitution, 9th Edn., p. 579, refers to the — 'King v. Aldred', (1909) 22 Cox C. C 1 (O), as containing a summary of the law of seditious libel and quotes the following from the charge of Mr. Justice Coleridge to the Jury:

"A man may lawfully express his opinion on any public matter, however distasteful, however repugnant to others, if of course he avoids defamatory matter or if he avoids anything that can be characterised either as blasphemous or as an obscene libel. Matters of State, matters of policy, matters even of morals — all these are upon to him. ********* If he makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then whatever his motive, whatever his intentions, there would be evidence on which a jury might, on which I think a jury ought to, decide that he is guilty of a seditious publication."

(12) But the case is governed not by the law prevailing in America or England, but by the law contained in our written Constitution. When the First and the Fourtheenth Amendments to the American Constitution protect the freedom of speech against interference by the Union and the States, they refer to the freedom of speech as understood at the time of the Amendments and not absolute freedom. Unlike our Constitution, they do not prescribe the limitations on the right of free speech, though no one can have an absolute freedom to say anything he likes at any time or any place. In the interests of the States and the public, there must be some limitations on the right of free speech. Consequently freedom of speech guaranted by the Amendments has got to be understood as subject to implied or inherent limitations. Our Constitution, on the other hand, prescribes the limitations expressly, vide sub-cl. (2) of Art. 19. When in sub-cl. (2) it is stated how far the freedom of speech can be interfered with, it follows that the freedom guaranteed under sub-cl. (1) is absolute freedom and that it is not subject to any limitations that are not to be found in sub-cl. (2).

The enquiry before us is simply whether the alleged restriction on the freedom of speech is covered by sub-cl. (2) of Art. 19 or not. In AIR 1950 SC 27 (B), Kania C. J. uttered a warning against reading Art. 19 with a pre-conceived notion and observed at p. 35 that:

"It clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses."

In the same case Patanjali Sastri J. observed at p. 69:

"Liberty has, therefore, to be limited in order to be effectively possessed. Accordingly, Art. 19, while guaranteeing some of the most valued phases or elements of liberty to every citizen as civil rights, provides for their regulation for the common good by the State imposing certain 'restrictions' on their exercise."

Das J. pointed out at p. 109 that:

"....none of the seven rights enumerated in cl. (1) is an absolute right, for each of these rights is liable to be curtailed by laws made or to be made by the State to the extent mentioned in the several cls. (2) to (6) of that Article."

These observations make it clear that whatever limitations exist on the freedom of speech in this country are those mentioned in sub-cl. (2) and no other. The limitations that are supposed to be inherent in the idea of freedom of speech guaranteed by the American Constitution are specifically expressed in our Constitution. Most of the limitations mentioned in the American decisions are to be found in sub-cl. (2). If there were any doubt on the point, it is removed by the latest amendment to sub-cl. (2), by which the words "incitement to an offence" have been added. With reference to the First Amendment, Black J. stated in — 'Bridges v. California', (1941) 86 Law Ed. 192 at p. 203 (P) that:

"It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

With reference to Art. 19(1), I would say that it must be taken as a command of the broadest

scope that explicit language, read in the context of sub-cl. (2), will allow.

(13) I am unable to agree with the learned Advocate General that S. 3, Special Powers Act, does not infringe the guarantee of the freedom of speech. He argued that the preamble of the Act shows that it was not designed to put any restriction on the freedom of speech. What the preamble does is really to supply the motive behind the enactment of the Act. The Act prohibits certain speeches by penalising the making of those speeches. Freedom of speech means freedom from subsequent punishment; see — 'Terminiello v. Chicago', (M), and (1939) 310 US 88 (I). In the latter case Murphy J. observed at p. 102 that:

> "Freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

The Act clearly and expressly infringes the freedom of speech by prohibiting the uttering of certain words. The preamble only supplies the reason or intention behind the prohibition. When an Act is impugned on the ground that it runs foul of the guarantee of free speech, the Court is only concerned with the question whether it does so or not; it is not concerned with the reason why it does so, (unless the case is sought to be brought within the prescribed limitations).

The object behind the Act might have been to facilitate the collection of certain dues by prohibiting the incitement of illegal refusal to pay them, but there is no difference between enacting a law to collect dues by limiting the freedom of speech & enacting a law to restrict a speech so that Government dues may be collected. A legislature cannot enact a law infringing the freedom of speech, whether the infringement is its primary object or is a subsidiary object or is an unintended effect. No matter in what enactment, and for what purpose, the restriction on the freedom of speech is imposed, it is barred unless covered by sub-cl. (2). There can be no more direct infringement of the right of free speech than the prosecution for the making of a certain speech. The enactment of the Act is as direct an infringement of the constitutional guarantee of free speech as is possible.

There is absolutely nothing in the decision of the case of 'A. K. Gopalan', (B), that would suggest that the impugned Act does not contravene Art. 19(1)(a). The Preventive Detention Act, 1950, does not contravene that provision, but it does not follow that the Special Powers Act also does not. There are important distinctions between the two Acts, one is preventive and does not directly refer to speech or expression, whereas the other is punitive and directly prohibits on pain of penalty the making of certain speeches. Undoubtedly the word "act" in S. 3, Preventive Detention Act, includes making a speech, and since it makes a person liable to be detained so that he might not make a prejudicial speech, it can be argued that it infringes the guarantee of free speech.

Preventive detention for reasons connected with the security of the State or the maintenance of public order is permissible, vide 7th Schedule, List III, Entry 3. If a Preventive Detention Act directly infrings the guarantee of free speech, but was enacted for either of the above objects, it would be saved by cl. (2) of Art. 19. A. K. Gopalan, therefore, could not, and did not, challenge the validity of Preventive Detention Act on the ground that it directly infringed his freedom of speech by detaining him so that he could not speak in a certain manner. The Supreme Court upheld it but not on the ground that taking action (such as of detention) against a person in order to prevent him from making a certain speech does not directly infringes his right of free speech.

Moreover, punishing a person for making a speech may not be same as taking action in order to prevent his doing so; the Supreme Court did not express any opinion on this matter and I would not hazard any. The decision in 'A. K. Gopalan's case (B)' is, therefore, no authority for saying that S. 3, Special Powers Act, is not inconsistent with Art. 19(1)(a). The reasons for which the Preventive Detention Act was upheld do not apply in the present case.

I have already pointed out that the contention of A. K. Gopalan was that he was deprived of his freedom of speech not by any provision of the Preventive Detention Act, but by being detained in exercise of the powers conferred by it. The reply was that if the detention resulted in his being deprived of the freedom of speech, it was an indirect or incidental effect; the Preventive Detention Act by itself did not cause that deprivation of the freedoms guaranteed by Art. 19(1)(a). If any deprivation of the freedoms flows from the detention, the Constitution itself permits it through Sch. 7, List III, Entry 3, and none can make a complaint about it. The applicant's complaint on the other hand, is that the Act itself prohibits his making certain speeches. He complains about his arrest because of its being the result of the operation of the impugned Act and not because of any consequences arising out of the arrest.

In 'A. K. Gopalan's case (B)' the detention was the cause and the deprivation of the freedom the result and cause of grievance. In the instant case, the impugned Act is the cause of the deprivation of the freedom and grievance of the applicant and the arrest is merely the effect, and, for the purposes of the application, of no consequence at all. I repeat that the impugned Act could have been challenged even if the punishment provided under S. 3 were mere admonition and the offender were not liable to be arrested. This disposes of the second question.

(14) The learned Advocate General contended that the impugned Act imposes the restrictions on the exercise of the right of free speech in the interests of the security of the State as well as of public order. I did not understand him to argue that it is a law in relation to incitement to an offence. Undoubtedly he vehemently argued that the freedom of speech does not permit an incitement to break a law. This argument must be rejected. Article 19(2) does not in so many words save a law in relation to incitement to break a law. "Incitement to break a law" is not same as "incitement to an offence", because every breach

of a law does not amount to an offence. I have shown that non-payment of the irrigation dues is not an offence under the Northern India Canal and Drainage Act; I doubt if it is even a breach of any provision in the Act. That Act imposes only a cvil liability and provides the means for getting the liability discharged. If a cultivator does not pay the irrigation dues, he commits no greater breach of law than is committed by a person who does not fulfil a contract made by him.

(15) I do not consider that the impugned provision in the Special Powers Act imposes the restrictions in the interests of the security of the State. The security of the State is not affected merely by an incitement to cultivators not to pay the irrigation dues. If the irrigaton dues are not paid, the State would lose some income; but that can hardly be said to affect the security of the State. The security of the State depends upon factors other than its consolidated funds. Undoubtedly money has to be spent in providing for the security of the State, but the words "in the interests of the security of the State cannot be understood to mean "in the interests of the consolidated fund of the State". The non-payment of irrigation dues itself does not affect the security of the State, incitement to the non-payment still less affects it. Incitement to the non-payment not only does not always result in the non-payment, but also is not contemplated by the Northern India Canal and Drainage Act itself to deprive the Government of the dues because the Government have been conferred ample powers to realise them forcibly. In AIR 1950 SC 124 (J), Patanjali Sastri J. stated at p. 128:

> "The differentiation is also noticeable in Entry 3 of List III (Concurrent List) of the Seventh Schedule, which refers to the 'security of a State' and "maintenance of public order" as distinct subjects of legislation. The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind."

This means that the security of the State is endangered only by a serious and aggravated form of public disorder as distinguished from minor breaches of the peace which endanger only public order. Incitement to non-payment of irrigation dues is not such a serious and aggravated form of public disorder as is likely to endanger the security of the State.

(16) "Public order" is not defined anywhere. Chapter VIII of the Indian Penal Code bears the heading "Offences Against The Public Tranquillity" and contains Ss. 141 to 160 which punish offences of unlawful assembly and affray. Stephen divides all offences against public tranquillity of the State under two heads, one of those offences in which a normal tranquillity of a civilized society is disturbed either by actual force or at least by the show and threat of it and the other of those in which no actual force is either employed or displayed but in which steps are taken tending to cause it; see History of the Criminal Law of England by Stephen, Vol. II, page 243.

Under the first head come the offences of treason, unlawful assemblies, levying of war and rebellions and under the second head come formation of secret societies, seditious conspiracies and libel. In his Commentaries on the Laws of England, 21st Edn. 4th Volume, he includes in crimes against public order the offences of treason, official secrets, counterfeit coins, unlawful meetings, affray, forcible criminal trespass, sedition and defamation. See also Stephen's Digest of the Criminal Law, Part II, dealing with offences against public order; in that part are included offences of treason, mutiny, disclosure of official secrets, unlawful assembly, affray, conspiracy and libel. If any inference is to be drawn from this inclusion of certain offences in the class of offences against public order, it is that the non-payment of Government dues and its incitement are not offences against public order and that a prohibition of the incitement to the non-payment has nothing to do with the maintenance of public order.

List II of the Seventh Schedule of the constitution includes "public order" in entry 1 and prevention of animal diseases and cattle trespass, irrigation and canals, protection of wild animals and birds, weights and measures, inns, theatres, betting and gambling, land revenue, taxes, affray and duty etc. in other entries. If public order covered every offence, there was no necessity of making separate provisions for many of the matters mentioned above. If the collection of land revenue, taxes and irrigation dues had any direct connection with the maintenance of public order, no separate provision would have been made for land revenue, etc.

In list II of the Seventh Schedule of the Government of India Act, 1935, entry I was "public order, preventive detention for reasons connected with the maintenance of public order". In — 'Basudeva v. Rex', AIR 1949 All 513 (FB) (Q), it was held by a Full Bench of this Court that the U. P. Prevention of Black-Marketing (Temporary Powers) Act (22 of 1948) was 'ultra vires' the State Legislature because preventive detention for the purpose of preventing black-marketing is not preventive detention for reasons connected with the maintenance of public order. In other words, the offence of black-marketing was held to be not an offence against public order. It was observed by Wali Ullah, A. C. J., at p. 523 that:

> "the expression 'for reasons connected with' must mean a real and genuine connection and not the fanciful, or highly problematic, connection between the maintenance of public order on the one hand and the subject of legislation, viz., black-marketing,....."

The decision was confirmed by the Federal Court in — 'Rex v. Basudeva', AIR 1950 (FC) 67 (R). Patanjali Sastri J., observing at p. 69, that:

> "The connection contemplated must, in our view, be real and proximate, not far-fetched or problematical."

Under the Bihar Maintenance of Public Order Act, (5 of 1947) a person can be detained with a

view to preventing him from acting in any manner prejudicial to the maintenance of the public order. In — 'Lalu Gope v. The King', AIR 1949 Pat 299 (S), it was decided that committing thefts in running goods trains was not acting prejudicially to the maintenance of public order. The words 'for reasons connected with the maintenance of public order" in List II of the Seventh Schedule of the Government of India Act, 1935, entry I, were considered by the Federal Court in — 'Machindar Shivaji v. The King', AIR 1950 FC 129 (T), where the question was about the validity of the C. P. and Berar Safety Act of 1948 made on the authority of that entry.

Patanjali Sastry J. observed that the question before them was whether the Act was made "with a view to prevent only such act or acts as are likely to endanger the public peace." Thus impliedly he interpreted "maintenance public order" as maintenance of public peace. An offence or a breach of law which has no effect at all on the public peace or tranquillity cannot be taken to be an offence endangering public order. A law punishing such an offence cannot be taken to be a law in the interests of maintenance of public order.

The Madras Government imposed a ban upon the entry into, or the circulation in, the State of Madras of a certain newspaper published in Bombay in exercise of the powers conferred by the Madras Maintenance of Public Order Act, 1949. The Act was passed by the State on the authority of entry 1 of List III of the Seventh Schedule of the Government of India Act, 1935. The words "public order" in that entry were interpreted by the Supreme Court in the case of — 'Romesh Thappar v. State of Madras (J)', at p. 127, in the following words:

> "Now 'public order' is an expression of wide connotation and signifies that state of tranquillity which prevails among the members of a political society as a result of the internal regulations enforced by the Government which they have established."

Sri S. C. Khare referred us to — 'Brij Bhusan v. State of Delhi', AIR 1950 SC 129 (U), but we find that it is of no assistance to us. It was held in that case that a provision in an enactment requiring pre-censorship was not within the provision of the unamended Cl. (2) of Art. 19 which did not use the words "maintenance of public order."

(17) The words "in the interests of public order" mean "for maintenance of public order". The interests of public order lie only if it is maintained. A restriction can be imposed in the interest of public order, if in the event of its not being imposed disturbance of public order is apprehended. It is not necessary that the apprehension be immediate or present or that the disturbance of public order be substantial. Whatever be the nature of gravity of the disturbance of public order, if there is an apprehension of it, a restriction can be imposed in order to remove the apprehension. All that is required is that the State must apprehend disturbance if no restriction is imposed.

The precise question before us is whether the State feared that public order might be disturbed, if the right of a person to instigate a class of persons not to pay the dues recoverable by the State as arrears of land revenue were not restricted. There might have been in 1932 an apprehension of a serious disturbance of public order if the right of free speech were not restricted; but it does not necessarily follow that the fear existed in January 1950 and the necessity for imposition of the restriction continued. There was no constitutional guarantee in 1932 as it exists now and the validity of the Act could not have been challenged prior to 1932 on the ground on which it is challenged before us. By virtue of Art. 13, as soon as the Constitution was enforced, the question arose whether the Act continued to be in force or had become void.

The Act will be held to be continuing in force after the Constitution only if the restriction imposed by section 3 of it was at that time in the interests of public order. The bare fact that it was in the interests of public order in 1932 would not suffice to keep it alive after the Constitution. Therefore, in January 1950 it must have been apprehended by the State that public order would be disturbed if the right to instigate the non-payment of certain dues were not restricted, before it could be held to remain in force. If it was not in the interests of public order to impose any restriction then, the Act automatically became void and could not be revived subsequently on the recurrence of the apprehension. It will be irrelevant, therefore, to consider the conditions prevailing in 1954 and the fact that a political party has embarked upon an agitation against the payment of certain Government dues. We know that conditions were peaceful in January 1950 and there was no apprehension of disturbance of public order if the right to instigate the non-payment of certain Government dues was not restricted.

The Act was not in force in the Farrukhabad district in January 1950; it was enforced in that district in 1954. Still it was a law in force within the meaning of Art. 13; see the definition in sub-cl. (3)(b). In considering Art. 13, the Court is merely concerned with the provision that is impugned, and not with the question in what areas it was in force. Even if it was not enforced in any area, it could become void. If S. 3 was not enforced anywhere in January 1950, it only shows that there was no necessity for it, i.e., that restricting the right to instigate the non-payment was not in the interests of public order then.

(18) The words "for reasons connected with the maintenance of public order" were considered by the Federal Court in — 'Rex v. Basudeva (R)'. Black-marketing in essential commodities may at times lead to a disturbance of public order, but so also may the rash driving of a car or the sale of adulterated food-stuff. But, observed Patanjali Sastry J. at p. 69,

> "Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of Entry I of List II of the Government of India Act, 1935."

The act apprehended must be connected with public order in such a manner that if it is allowed

to be done public order might be disturbed; unless there is such a connection, the restriction on the apprehended act cannot be said to be in the interests of public order. The learned Advocate General contended that the words "in the interests of" are more comprehensive than the words "for reasons connected with", and that the decisions interpreting the words "for reasons connected with public order" cannot aid us in interpreting the words "in the interests of public order". I do not think that the latter words convey an idea materially different from the former words. No interest can exist without some connection and it seems to me that if a restriction cannot be said to be for reasons connected with the maintenance of public order, it cannot also be said to be in the interests of public order. The Constitution never contemplated that a freedom granted by it could be infringed on the ground of a remote or problematical contingency; otherwise all freedoms could be liable to be infringed on one excuse or another and the granting of them would be in name only.

(19) In — 'Schenck v. United States', (1918) 249 US 47 (V), the Supreme Court laid down the following test of liability for speech:

"The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has right to prevent."

The test was approved in the case of Terminiello, (1948) 93 Law Ed 1131 at p. 1135 (M) where Douglas J. observed:

"There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, Courts, or dominant political or community groups."

In (1941) 86 Law Ed. 192 at p. 203 (P), it was stated as:

"a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished."

The necessity for the test arose in these cases because the Legislature had not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance; see (1941) 86 Law Ed. 192 at p. 202 (P). In (1924) 69 Law Ed. 1138 at p. 1148 (L), it was stated that the test

"was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of a substantive evil arising from utterances of a specified character."

In — 'American Communications Asso. v. Douds (N)', it was made clear that the words "clear and present danger" do not supply a mechanical test in every case without regard to context. In the instant case the State legislaure thought that certain utterances were likely to endanger public order and, therefore, prohibited them. The question that is presented before us is not whether the prohibition fulfills the test of clear and present danger, but whether it is in the interests of public order. The duty of the Court, before which legislative abridgment of the rights is asserted, was stated in the following words by Roberts J. in — 'Schneider v. Irvington', (1939) 84 Law Ed. 155, at p. 165 (W)

"The Courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Sir Alfred Denning L. J. in the Hamlyn Lecture on Freedom of Mind and Conscience, Freedom Under the Law, 1949, stated at p. 35 that:

"Every one in the land should be free to think his own thoughts to have his own opinions, and to give voice to them, in public or in private, so long as he does not speak ill of his neighbour; and free also to criticise the Government or any party or group of people, so long as he does not incite anyone to violence."

Even if political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law and though it would be a folly to disregard the casual relation between the detestation of existing policies and forcible resistance of the authority which puts them in execution,

"yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard bought acquisition in the fight for freedom." (Per Judge Hand in — 'Masses Pub. Co. v. Patten', (1917) 244 Fed 535 at p. 540 (X), quoted in Selected Essays on Constitutional Law, Vol. 2, page 1050).

Section 3 of the Act does not punish incitement to violence or to resistance by force the recovery of government dues; it punishes incitement to non-payment of Government dues, in other words, political agitation against certain Government dues. The applicant told us that when he advocated non-payment of irrigation dues he did not expect any substantial response from the cultivators and that he still advocated the non-payment in order to exert pressure upon Government and to make them change their policy.

"It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected..... Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, even stirs people to anger." (Per Douglas J. in 'Terminie-llo v. Chicago (M)', at p. 1134 of Law Ed.).

Holmes and Brandeis JJ. thought that the greater danger to a democracy lies in the suppression of public discussion and that ideas and doctrines thought harmful or dangerous are best fought with words; see 'American Communications Asso. v. Douds (N)', at p. 395. Finally, I find that maintenance of public order or preservation of public peace was not at all the object for the enactment of the Act. It itself does not purport to have been enacted in the interests of public order; its avowed object was to deal with agitation against payment of certain liabilities.

(20) In conclusion I find it difficult to accept the learned Advocate General's Contention that S. 3 of the Act, imposes restriction on the right of free speech in the interests of public order. Disturbance of public order is not a natural and probable consequence of the instigation to non-payment of dues realisable as arrears of land revenue.

(21) The question whether a restriction on the right guaranteed by Art. 19(1)(a) is reasonable or not cannot arise when the restriction is not found to be in the interests of public order, etc., or in relation to libel, etc. The restriction under consideration is a prohibition of instigating a class of persons not to pay certain dues realisable as arrears of land revenue. Though it is stated in the preamble of the Act that it was enacted to deal with illegal refusal to pay certain dues, the restriction is on instigation of non-payment of all sums recoverable as land revenue regardless of whether they are legally due or not. A sum may be recoverable as arrears of land revenue even though it is not legally due. Therefore, it cannot be contended that the words "recoverable as arrears of land revenue" mean legally recoverable as such. It may appear unreasonable to prohibit instigation of non-payment of sums which are illegally demanded from a class of persons. But, if the prohibition is found to be in the interests of public order, it justifies itself. If it is not found to be in the interests of public order, it would fall on that ground alone. No other flaw is discernible in the restriction.

Other objections to the restriction are really on the ground of its being not in the interests of public order and have already been dealt with. A restriction must not be arbitrary or excessive; see 'Chintaman Rao v. State of Madhya Pradesh (K)', If an utterance is likely to disturb the public order, the ordinary remedy is to prohibit it and the prohibition cannot be said to be arbitrary or of an excessive nature. The Act is of a permanent nature, though it might have been enacted to meet a certain emergency. It might not have been in force in every district of the State at the time of its enactment, but it has been in force in a number of districts now. However, these matters have absolutely no relevancy to the question whether the restriction is reasonable or not.

(22) I have come to the conclusion that on 26-1-1950 the impugned provision was not in the interest of public order. If it was, nothing has happened since then to make it not in the interest of public order in 1954.

(23) I have treated irrigation dues as dues recoverable as arrears of land revenue. They may also be treated as rates due to Government, but it will make no difference to what I have stated above.

(24) The application should be allowed.

M. L. CHATURVEDI J.:

(25) This is a petition for the issue of a writ of 'habeas corpus' filed under Art. 226 of the constitution.

(26) The petitioner, Dr. Ram Manohar Lohia, is the General Secretary of the Praja Socialist Party of India. The Party is, at the present time, advocating the non-payment of irrigation dues which were enhanced a year or two ago under the orders of the Government of the State of Uttar Pradesh. The agitation is against the payment of the enhanced dues only. On 4-7-1954, the petitioner addressed one meeting at Kaimganj in the district of Farrukhabad at 4 p. m., and another at Farrukhabad at 8-30 p. m. In both these meetings, he severely criticised the enhancement of the irrigation dues and also exhorted the audience not to pay the enhanced dues. The Station Officer, Kaimganj, decided to prosecute the petitioner under S. 3, U. P. Special Powers Act, 1932, and he sent a 'chit' to the Station Officer, in charge police station Kotwali, Farrukhabad, asking the latter to arrest the petitioner for having committed offences under the said section. The Station Officer of Kotwali, Farrukhabad, also decided to prosecute the petitioner under the same section, and the petitioner was arrested at Railway Road, in Farrukhabad, at the house of one Lalla Babu, where the petitioner had been invited to dine. The arrest was made by the Station Officer of Kotwali, Farrukhabad, and he told the petitioner that he was being arrested under S. 3, U. P. Special Powers Act, which will hereafter be called as the impugned section.

Immediately after the arrest of the petitioner, the City Magistrate of Farrukhabad, Sri A. H. Drummond, accompanied by the Sub-Divisional Magistrate and the Station Officer, Kaimganj, arrived at the place where the petitioner was arrested. The Station Officer of Kotwali, Farrukhabad, in his affidavit, states that he produced the petitioner before the City Magistrate as soon as he arrived on the spot, and the City Magistrate granted a remand of two days. The petitioner was then taken to the district jail of Farrukhabad and lodged there. It is then stated that two cases for making two speeches are pending before Sri P. R. Gupta, Judicial Officer, Fatehgarh, and they were taken up in the Central Jail, Fatehgarh, by the said Officer on 6-7-1954, the petitioner having, in the meantime, been transferred to the Central Jail from the District Jail. The petitioner then applied for time to move the High Court at Allahabad for the transfer of the cases, and the cases were adjourned to 19-7-1954. The present petition was made in this Court on 9-7-1954.

(27) The contention of the learned counsel for the petitioner is that S. 3 of the impugned Act is inconsistent with the provisions of Art. 19 (1) (a) of the Constitution and has, therefore, become void since the date of the coming into force of the Constitution. The argument of the learned counsel is that S. 3 of the impugned Act directly interferes with the freedom of speech guaranteed to

the petitioner under Art. 19 (1) (a) of the Constitution, and the restrictions placed by S. 3 of the impugned Act on this freedom are not justified by the provisions of Art. 19 (2) of the Constitution, inasmuch as the actions made punishable by the section do not interfere with public order or the security of the State, nor do they amount to an incitement to commit any offence.

It is further urged that, in any case, the restrictions placed by the section are unreasonable. Section 3 of the impugned Act is not thus saved by the provisions of Cl. (2) of Art. 19 of the Constitution. Another point was also urged at the time of the arguments, though it was not taken in the petition, and that point was that the petitioner's detention was illegal under Art. 22, as he was not produced before any Magistrate within a period of 24 hours of his arrest. The learned Advocate General of U. P., who appeared for the State Government, controverted the above points raised by the petitioner s counsel, and further urged that this case was fully covered by the decision of their Lordships of the Supreme Court in the case of AIR 1950 SC 27 (B).

(28) These are the points that arise for consideration in this petition, but before proceeding to deal with them, a short history of the Act and the relevant provisions contained in S. 3, may be mentioned. The Act was passed in 1932 during the period of the British regime when the non-cooperation movement was in progress. Initially, the Act was to remain in force for one year, but its life was extended from time to time till in the year 1940 the U. P. Legislature deleted sub-s. (3) of S. 1 of the Act, which limited the duration of the Act, with the result that the Act became a permanent enactment as a result of the deletion of the said sub-section. This was done by S. 2 of U. P. Act 12 of 1940. Only Ss. 1 and 2 of the Act were to remain in force all the time, but the remaining sections were to come into force only when the State Government, by notifications in the official Gazette, extended all or any of the remaining provisions to any district or to any part of a district in the Uttar Pradesh.

In April 1954, the State Government applied the provisions of this Act to the districts of Mainpuri and Mirzapur, and in June 1954, it applied them, by means of a notification, to 31 other districts including the district of Farrukhabad. The relevant provisions of the Act, therefore, partake of the nature of an emergency measure to be applied only, and for the period that the State Government thought fit to apply them. Section 2 of the impugned Act defined the word "liability" as meaning

> "land revenue or any sum recoverable as arrears of land revenue or any tax, rate, cess or other due or amount payable to Government or to any local authority, or rent of agricultural land or anything recoverable as arrears of or along with such rent."

The other important section is S. 3, the validity of which is to be determined in this case. It may be quoted in full.

> "3. 'Punishment for instigation to the non-payment of a liability': Whoever, by words either spoken or written, or by signs or by visible representations, or otherwise, instigates, expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250/-, or with both".

Section 4 of the Act permits a person to whom an arrear of liability is due to apply in writing to the Collector to realise it, and the Collector is bound to realise it if he was satisfied that the amount was due. The realisation is to be made as an arrear of land revenue in accordance with the law applicable to the recovery of such arrears. Section 6 provides for punishment for participation in a mock funeral ceremony, and S. 7 gives certain powers to control suspected persons; but we have nothing to do with either S. 6 or S. 7 or the following sections, excepting S. 11, which makes offences under this Act cognizable offences.

(29) Rates for supplying water are determined under the rules framed under the provisions of Part V of the Northern India Canal and Drainage Act, 8 of 1873, and S. 45 of this Act provides that any sum, lawfully due under this Part and certified by the Divisional Canal Officer to be so due, shall be recovered by the Collector from the person liable for the same, as if it were an arrear of land revenue. It is not necessary to refer to any other provision of this Act, because no question has been raised as to the legality or the fixation of the actual rates or their enhancement.

(30) I propose first to consider the point raised by the learned Advocate General, which is to the effect that this case is covered by the decision in 'Gopalan's case (B)', already mentioned. The learned Advocate General's argument is that the decision in 'Gopalan's case (B)', is that if a person is deprived of his liberty by being confined to jail under some provision of law, then the validity of that provision is not to be considered with reference to the provisions of Article 19 of the Constitution at all, and the only relevant provisions in such cases are those mentioned in Articles 20, 21 and 22 of the Constitution. He says that when a citizen is confined to jail under a statute, it necessarily follows that he loses the rights guaranteed to him under Article 19. I am not prepared to accept the broad proposition advocated by the learned Advocate General.

(31) As I understand the decision in 'Gopalan's case (B)', it is to the effect that the validity of an enactment is to be judged with respect to the provisions of Art. 19, if the legislation directly attempts to control a citizen's freedom of speech. But if the freedoms, enumerated in Art. 19, are restricted indirectly as a result of the operation of legislation, authorising punitive or preventive detention, then the validity of the legislation is not to be judged with reference to Art. 19 but with reference to the Articles dealing with the subject of detention. If the legislation, permitting detention,

is in conformity with Arts. 20 to 22, the mere fact, that it indirectly affects the freedoms under Art. 19, will not make it a void legislation. So that the crucial point to be determined is what is the exact action which the impugned legislation hits at. If it is the curtailment of any of the freedoms guaranteed under Art. 19, then it has to be judged with reference to the provisions of that Article, but, on the other hand, if those freedoms are affected as an indirect result of a legislation, authorising punitive or preventive detention, then the provisions of Art. 19 are not to be taken into consideration. So that it is not every legislation, which permits punitive or preventive detention, which is immune from a consideration as to its validity by reference to the freedoms guaranteed under Art. 19. What has to be seen in every case is the actual action which the statute prohibits. In my opinion the law, as laid down in 'Gopalan's case (B)' is not that if a legislation directly interferes with freedom of speech and is not saved by the provisions of cl. (2) of Art. 19, then it should be held to be invalid, if it merely provides for the imposition of a fine by way of punishment; but that it would be valid if it provides for imprisonment instead of fine.

(32) In 'Gopalan's case (B)' their Lordships were considering the validity of certain provisions of the Preventive Detention Act, 4 of 1950. Section 3 of that Act provides that the Central or the State Government may make an order directing the detention of a person, if satisfied that it was necessary to do so in order to prevent him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or the security of the State, or the maintenance of public order or the maintenance of supplies or services essential to the community. Their Lordships upheld the validity of this section, even though cl. (2) of Art. 19, as it then stood, did not permit the placing of restrictions on freedom of speech for purposes merely of the maintenance of 'public order'. Their Lordships held that the section did not directly purport to curtail the freedoms guaranteed under Art. 19 of the Constitution, but was concerned with the subject of preventive detention, and it did not matter that as a result of detention the freedoms guaranteed under Art. 19 were also interfered with.

(33) 'Gopalan's case (B)' was considered in a subsequent case by the Supreme Court reported in AIR 1951 SC 270 (C), where an argument appears to have been made to the effect that the decision in 'Gopalan's case (B)' was to some extent affected by the later decisions of the same Court in the cases of AIR 1950 SC 129 (U), and AIR 1950 SC 124 (J). Their Lordships unhesitatingly repelled this contention and observed,

> "Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in Art. 19(1), and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct fundamental rights and made separate provisions in Art. 19 and Arts. 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged."

They then quoted a portion of the decision in 'Gopalan's case (B)' where it was said,

> "So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses (of Art. 19). If there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc. the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these subclauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life."

The cases relied upon by the petitioner's counsel in that case were distinguished on the ground that the legislations held to be invalid were legislations which authorised the imposition of a ban on the circulation of a newspaper or precensorship on the publication of a journal.

(34) A similar question of the invalidity of certain provisions of Abducted Persons (Recovery and Restoration) Act, 1949, came up for decision before a Full Bench of the East Punjab High Court in the case of — 'Ajaib Singh Lehna Singh v. State of Punjab', AIR 1952 Punj 309 (FB) (Y), and the learned Judges held that the relevant provisions of the said Act were valid as the freedoms guaranteed in sub-cls. (d), (e), (f) and (g) of cl. (1) of Art. 19 could be interfered with totally as the arrest and confinement were according to the procedure established by law, but they allowed the petition on a different ground. This case went up in appeal to the Supreme Court and their Lordships upheld the decision, — ('Vide State of Punjab v. Ajaib Singh', AIR 1953 SC 10 (Z)), though they did not agree with the interpretation put by the Punjab High Court on Art. 22 of the Constitution, with which we are not concerned in this case. While considering the point that the Act was inconsistent with the provisions of Art. 19(1)(d) and (e) and Art. 21, their Lordships of the Supreme Court held that the matter was concluded by the majority decision in 'Gopalan's case (B)' and the High Court had correctly negatived the contention.

(35) These were all cases where the main purpose of the impugned Acts was the detention of the petitioners, which incidentally deprived the petitioners of the freedoms enumerated in Art. 19 also.

(36) I now proceed to consider whether the actual act which the impugned section, namely, S. 3, U. P. Special Powers Act, prohibits is the freedom of speech guaranteed under Art. 19(1)(a) of the Constitution, or it is the stopping of every sort of instigation to the people not to pay the dues recoverable by the Government as arrears of land revenue. I have already quoted the provisions of the impugned section in full. What it actually prohibits is instigation to any person not to pay or to defer payment of any liability as defined in

S. 2. The prohibition extends to instigation, expressly or by implication, by words either spoken or written, or by signs or by visible representations or otherwise. It also makes punishable any act done with the intent or knowing it to be likely that any such instigation, referred to before, shall be communicated to any person or class of persons in any manner whatsoever. The punishment provided is an imprisonment up to six months or a fine of Rs. 250/- or both.

The clear object in framing the statute is that there should be no instigation by any means by any person to another not to pay the dues recoverable by the Government as arrears of land revenue. Not only written and spoken words have been made punishable but also signs and visible representations, and even other activities as also every act, which is likely to communicate the words, signs or visible representations to any other person. The object of the statute is to make instigations of every kind punishable, as the Government does not want interference in the recovery of its legal dues. The direct activity made punishable by this Act, in my opinion, is not the curtailment of any freedom of speech; and the validity of the Act, therefore, should not be judged with reference to Art. 19 but with reference to the provisions of Art. 22 of the Constitution.

(37) The provisions of the Preventive Detention Act of 1950 hit at every sort of activities prejudicial to defence of India, security of India, security of the State, or the maintenance of public order, or the maintenance of supplies. The making of speeches is also an act, and though S. 3 does not specifically permit detention with a view to preventing a speech, yet there is no doubt that the making of a speech is also an activity, and the apprehension that a speech would be made justifies the order of detention. Indeed, it is generally the speeches, more than positive acts, which are apprehended to bring about the undesirable results, and numerous detentions have been made simply because it was apprehended that prejudicial speeches would be delivered. The only difference between S. 3, Preventive Detention Act, and S. 3, Special Powers Act, is that the impugned section clearly mentions the making of a speech, whereas S. 3, Preventive Detention Act, includes it within the ambit of the expression "acting in any manner prejudicial to".

I do not think the decision in 'Gopalan's case (B)' would have been different if in S. 3(1)(a), Preventive Detention Act, the word "speaking" had also been added before or after the word "acting". The Preventive Detention Act is designed as much against improper speech as the impugned section and the mere omission of the word "speaking", in my opinion, does not materially alter the position. The subject of S. 3, Preventive Detention Act, was preventive detention, whereas the subject of the impugned section is punitive detention, and what the impugned section makes punishable is all manner of instigation; and if the expression "word spoken or written" had not been used in this section, the making of a speech would still have been an instigation and punishable by the section.

(38) In view of what I have stated above, I have come to the conclusion that the present case is governed by the decision in 'Gopalan's case (B)', and the validity of the impugned section is not to be considered with reference to the provisions of Art. 19 of the Constitution. The decision of this point is sufficient for disposing of this petition, but, as the matter is not free from doubt, I consider it desirable to deal with the other points also that arose in the case.

(39) I now come to the question that assuming that Art. 19 of the Constitution applies to the case, whether the impugned section is a permissible piece of legislation and in accordance with the provision of Art. 19, cl. (2). The clause was amended by S. 3 of the Constitution (First Amendment) Act of 1951. The amended clause now reads as follows:

> "(2) — Nothing in sub-cl. (a) of cl. (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

The learned Advocate General justified the impugned section as imposing a reasonable restriction in the interest of security of the State and public order. So that the only points that arise for consideration on this question are (1) whether the impugned section imposes reasonable restrictions, (2) whether they are in the interest of the security of the state, and (3) whether they are in the interest of public order. The impugned legislation can only be upheld if the answer to the first point, as well as to one or both of the other two, is in favour of the respondent. I propose to deal with points (2) and (3) first.

(40) The contention of the learned Advocate General was that this Act did not prohibit the making of speeches in general, or even a criticism of the taxes imposed by the Government or the laws promulgated by it. He said that the criticism could be as strong as the speaker liked and in any language he chose, and that it was permissible to preach that a particular piece of legislation or a particular tax was unjust and wholly improper. The impugned section does not prohibit any of these things, but what it does prohibit is the instigation to others not to pay their legal dues. He said that instigation like this is an instigation which has to be checked in the interest of the security of the State as well as of public order. His argument was that if taxes are not paid, the Government could not go on and there was bound to be a chaos in the State. Taxes form part "of the consolidated fund" of the State, and the security of the State depended on the maintenance of an adequate consolidated fund. So that it was in the interest of the security of the State itself that an instigation not to pay the just dues has to be stopped.

I do not agree with the Advocate General on this point. There is a very limited number of taxes, the complete non-payment of which can result in undermining the financial security of a State. The number of taxes and of other Government dues is very large and it cannot be said that the

non-payment of each one of these taxes or dues will result in financial unstability of the State. As argued by the petitioner, Dr. Ram Manohar Lohia, no movement of non-payment of taxes in general is ever likely to succeed, because the people, who pay most of those taxes, are not likely to be influenced by such a propaganda. An instigation not to pay a major tax or even the land revenue of the agricultural lands is also not likely to succeed to such an extent as to jeopardize the security of the State. As regards its financial condition instigations like these cannot be said to have as their natural consequence the effect of undermining the security of a State, nor can it be said to be its likely result. The possibility of the undermining of a State as a result of an instigation not to pay taxes is so remote that I do not think that the suppression of an acivity like this can be said to be in the interest of the security of the State. If cl. (2) of Art. 19 had not been amended, I do not think the impugned section could be said to be valid as a reasonable restriction to avoid undermining the security of the State. But the amended clause has now brought in the consideration of public order also and has justified the placing of restrictions on the freedom of speech in the interest of public order. I have come to the conclusion that the impugned section can be said to have been enacted "in the interest of" public order.

(41) The learned counsel for the petitioner argued that the impugned section made a mere instigation punishable, even though there may be no question of the commission of any act of violence or of breach of peace. A simple exhortation to persons not to pay Government dues has been made punishable, though there may be no question on any breach of peace resulting from this instigation. His contention was that "public order" merely meant the absence of breach of peace or acts of violence. The learned Advocate General, however, contended that "public order" was not merely the absence of breach of peace and acts of violence, but had a positive aspect as well. According to him, "public order" signified ordered society based on proper regulation and attempting to undermine ordered society was disturbing "public order". The expression "public order" is of a wide import. But no definition of the word appears to have been attempted, though instances of what acts amount to disturbance of public order are to be found in a number of cases.

The learned counsel for the petitioner drew our attention to same passages in the Stephen's Commentaries on the Laws of England, Vol. IV, page 126, Stephen's Digest of the Criminal Law, part II, and Blackstone's Commentaries, Vol. IV, Ch. XI, where offences against public order are mentioned; and he wanted to draw an inference that the expression "public order" was confined to acts which would amount to offences described as offences against public order in these different books. The inference drawn by the learned counsel however, does not appear to be justified, because these books were dealing with offences against public order and were not attempting to give any definition of the expression "public order" itself. They enumerated the acts, which were offences against public order, and dealt with those particular acts. The inference that everything, that fell outside the ambit of those acts, was not public order, does not appear to be justified. He also referred to the Defence of India Act, S. 2, and to the Defence of India Rules, Rr. 26 and 29, but here again no definition of the expression "public order" was meant to be given, and provision was sought to be made for certain activities which were considered to be prejudicial to the State.

(42) I may now come to the cases cited by the learned counsel for the petitioner. The first case cited by him was the case of AIR 1949 All 513 (FB) (A). In this case the validity of the U. P. Prevention of Black-Marketing (Temporary Powers) Act, 22 of 1949, was challenged, and the matter was referred to a Full Bench of this Court for decision. Section 3 of the above Act permitted the detention of a person up to a period of six months about whom the Provincial Government was satisfied that he habitually indulged in black-marketing. "Black-marketing" was defined to include disposing of or otherwise dealing in essential commodities with a view to making gain in a manner which may, directly or indirectly, defeat or tend to defeat the provisions of the U. P. Control of Supplies (Temporary Powers) Act of 1947, or the Essential Supplies (Temporary Powers) Act of 1946, or of any Order made under any of these two Acts.

The Constitution had not come into force on the date of the decision of this case, and the attack on the legality of the legislation was based on the absence of the legislative competence of the State Government to pass such a legislation. The learned Judges held that the Provincial Legislature was competent to enact the laws dealing with preventive detention for reasons connected with the maintenance of public order, and also to enact the laws concerning production, supply and distribution of goods. But they held that this last power of enacting laws for production, supply and distribution of goods did not also imply a power to direct detention as a preventive measure. They then considered whether this preventive detention could be said to be connected with the maintenance of public order, and they came to the conclusion that it was not so connected. They accordingly held that the preventive detention of a person indulging in black-marketing was not within the competence of the State Legislature.

Mr. Justice Waliullah was of the opinion that, even if there was some distant connection between black-marketing and public disorder, it could not be said that the detention was for reasons connected with the maintenance of public order. The expression "for reasons connected with", according to the learned Judge, meant "a real and genuine connection" between the maintenance of public order on the one hand and the subject of legislation, namely, black-marketing, on the other. Mr. Justice Wanchoo was also substantially of the same view, and he held,

> "The connection, to my mind, which is envisaged in item 1 of List II must be direct and clear as between cause and effect and not remote and doubtful like the one urged".

According to the learned Judge, "public order" implies absence of violence and an orderly state

of affairs in which citizens can peacefully pursue their normal vocations in life. This case went up in appeal to the Federal Court and the Federal Court upheld the decision of this Court, vide AIR 1950 F. C. 67 (R). The learned Judges of the Federal Court held,

"It is true that black-marketing in essential commodities may at times lead to a disturbance of public order, but so may, for example, the rash driving of an automobile or the sale of adulterated food-stuffs. Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot, in our opinion, fall within the purview of Entry 1 of List II".

(43) The case of —'Dilbagh Singh v. Emperor', AIR 1944 Lah 373 (Z1), does not appear to be very much in point, as the decision in that case was that the detention under R. 129 of the Defence of India Rules, with, the object that the police may have greater facilities for investigating into suspected offence, could not be said to be permissible under R. 129 of the Defence of India Rules.

(44) The case of AIR 1949 Pat 299 (S), is an authority for the proposition that a habitual thief could not be detained under the Bihar Maintenance of Public Order Act, 1947, because it could not be said that his actions were prejudicial to public safety and maintenance of public order. Habitual commission of theft, according to the learned Judges, did not disturb public order.

(45) In the case of —'State v. Ahmed Ali', AIR 1951 All 459 (Z2), it has been held by a learned single Judge of this Court that the spread of disaffection against a party Government could not be said to be a ground for inferring that the public order would not be maintained. It is the right of every citizen in a democratic Government to spread disaffection against a particular party Government; but the disaffection should not be so spread as to result in violence or to resort to other illegitimate course. I respectfully agree with the decision in this case, but the point that arises in the present case is very much different from the point that arose in the reported case.

(46) The two cases of the Supreme Court cited on this point are the cases of AIR 1950 SC 124 (J), and AIR 1950 SC 129 (U). These cases were decided before the amendment of Cl. (2) of Art. 19 of the Constitution, and the question as to what is the meaning of the expression "public order" did not directly arise in those cases for decision. But their Lordships have made certain observations which afford some guidance. "Public Order" has been described as

"an expression of wide connotation signifying that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted."

The expression "public safety" has been defined as ordinarily meaning security of the public or their freedom from danger, but the meaning of the expression must vary according to the context. I am not concerned here with the meaning of the expression "public safety".

(47) In the second case '(Brij Bhushan's case (U)' it has been observed,

"I think that "public order" may well be paraphrased in the context as public tranquillity and the words "public safety" and "public order" may be read as equivalent to security of the State and public tranquillity."

Here their Lordships were discussing the meaning of the expression "public order" with reference to context as used in the Act impugned before them, namely, the East Punjab Public Safety Act of 1949. Applying the meaning of the expression "public order" as expressed in the case of 'Romesh Thappar (J)', I think that an exhortation to the members of the public not to obey the laws in general or any particular law is likely to disturb the state of tranquillity prevailing among the members of the public, and the preaching of disobedience of a law or laws is meant to disturb that public tranquillity, of course, while referring to the law or laws, I mean those laws, which have been duly promulgated and are valid laws not inconsistent in any manner with the provisions of our Constitution. The criticism of a law or laws is one thing, because that may be with a view to have the laws changed and it is the very essence of democracy that every member of the public should have the right to propagate his views and to make all legitimate attempts to change a law or laws, which he considers improper or working a hardship on the public or any class of public. But exhortation to disobey duly promulgated and valid laws has a tendency of disturbing the state of tranquillity prevailing among the members of the public as a result of the regulations or laws enforced by the Government. The same is the position with respect to an exhortation not to pay taxes duly imposed or other legal dues recoverable by the State. That, to my mind, is the position keeping in view the meaning and significance of the expression "public order", as laid down in 'Romesh Thappar's case (J)', and the provisions of the impugned section would be justified as having been enacted "in the interest of" public order.

(48) In the present case, however, the position is still clear. What the impugned section makes punishable is an instigation not to pay the legal dues of the Government, which means the disobedience of the laws which have made those dues recoverable by the Government by the exercise of certain coercive process. This sort of instigation, in the circumstances at present prevailing in the country, is likely to lead even to breaches of peace and violence. The majority of persons to whom exhortation is made are likely to be uneducated people, who can easily be misled to take the law into their own hands and to resist the realisation of the legal dues by the public servants. This, in the ordinary course of things, is likely to lead to riots and breaches of public peace. An exhortation, therefore, in my opinion, to the members of the public to disobey the duly promulgated and valid laws, specially where those laws happen to authorise the public servants to realise the dues by coercive processes, is an act which can be classed as one subversive of public order.

Laws relating to property, including money, which lay down the process by which the pro-

perty is to be seized, or the money realised, are in the very nature of things likely to be looked upon as good or bad according to the angle of vision from which they are seen, and there has always been difference of opinion as regards the reasonableness or otherwise of such laws. An exhortation to the judgment-debtors in general to refuse to obey the decrees passed by the Courts would, to my mind, lead to public disorder, and the same is the position with respect to the recovery of legal dues by the officers of the Government. This has, in the past, led to riots and disturbances of public peace on a larger or small scale and, in my opinion, the natural result of such an exhortation is to disturb public tranquillity and help in creating riots. So applying even the narrower definition to the expression "public order", namely, the maintenance of public peace and tranquillity, I think that the making of an instigation in this respect penal is really in the interest of public order, and the legislation is justified under the amended provisions of Cl. (2) of Art. 19 of the Constitution.

(49) I now propose to consider the question whether the restriction imposed on the freedom of speech on a citizen by the impugned section is a reasonable one or not. The learned counsel for the petitioner argued that the possibility of the commission of riots and breaches of peace, as a result of the instigation not to pay the enhanced irrigation rates, is a very remote possibility and not a natural consequence of the instigation. As I have already stated, I do not agree with this contention of the learned counsel. The public dues are recovered by the Officers of the Government by having recourse to coercive processes and, if the members of the public acting upon the instigation decide not to pay the dues, the occurrence of riots is the natural and likely consequence of the instigation.

In support of his argument, the learned counsel for the petitioner referred to a number of American cases in which the well known rule of "clear and present danger" was held to be the rule by which the validity of a legislation was to be judged. He referred to six cases, namely, '(1924) 69 Law Ed 1138 (L)'; (1930) 75 Law Ed 1117 (H)'; (1936) 81 Law Ed 1066 (G)'; (1939) 84 Law Ed 1093 (I)'; (1941) 86 Law Ed 192 (P)'; (1948) 93 Law Ed 1131 (M)'.

(50) The law in America as regards the freedom of speech, as also on many other points, is different from the law laid down by our Constitution. The First and the Fourteenth Amendments of the American Constitution do not impose any restrictions on the freedom of speech, and the Courts, therefore, had to make their own rules as regards the reasonableness or the existence of that freedom, and as regards the limitations which could be imposed by the State in the exercise of its police powers. In our Constitution, the position is very different. The freedoms, as enumerated in Art. 19 (1), are made subject to the succeeding clauses of the same Article, and when judging the constitutionality of an Act the Courts in India have to judge those Acts according to the provisions of the Constitution itself. The observations made in some of these cases themselves do not really support the wide proposition urged by the learned counsel, namely, that the acts of disorder must be "immediate and necessary consequence" of the freedom sought to be curtailed. Whether the consequence of a particular act or speech is likely to disturb the public order is a matter which in the first instance, has to be left to the discretion of the Legislature, and there is a presumption that the restrictions imposed by the Legislature are reasonable ones because it is the members of the Legislature, who are the representatives of the people and who are expected to know better their reactions to particular actions or speeches. The issue of reasonableness is certainly justiciable and cases have happened in which Courts have held that the restrictions were not reasonable. But, as I have already said, there is a presumption in favour of the validity of a legislation on this point, and a restriction imposed by a legislation should be held by the Courts to be unreasonable only if, in spite of the presumption in favour of the legislation, the Court comes to the conclusion that the restriction contained in it is not a reasonable one. Even the cases cited by the learned counsel for the petitioner contain observations which support this view. In the first case referred to above, it has been held at p. 1147.

"The case is to be considered in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare; and that its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest."

And again

"And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweller's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration."

I think it can safely be said that a State cannot reasonably be required to postpone the adoption of measures until the utterances or instigations have led to actual disturbance of the public peace. It would be acting wisely and properly if it adopts measures which suppress the threatened danger. The quotations made above refer to acts which tend to overthrow the Government itself, but I think the principles laid down there apply equally to the cases of maintenance of public order. Some of these cases have laid down that full opportunity must be given to the citizen for political discussion, and indeed such an opportunity is essential to the security of the State. No exception can be taken to this proposition, and the State cannot be permitted to stop political discussion; but a clear instigation to disobey the laws, which legalise the recovery of certain State dues, transgresses the limit of political discussion.

(51) The learned Advocate-General drew our attention to the case of '(1949) 94 Law Ed 925 (N)'. In this case the Supreme Court has held that the rule of "clear and present danger" does not apply to every case, and it is the reason behind the rule that has to be seen while determining the constitutionality or otherwise of the statute than the rule itself. The American cases cited above are not very helpful, excepting that they illustrate the rule which is more or less universal that a person is held responsible for the natural consequences of his act and not those which may be far-fetched or too remote.

(52) As provided by sub-s. (2) of S. 1, S. 3 & the following sections of the U. P. Special Powers Act only come into force when the State Government decides to apply those provisions to a particular area or areas. The impugned section, therefore, comes into force only when the State Government thinks that there is an emergency and the provisions really partake of the nature of an emergency legislation. The section appears to have remained inoperative from 1940 till the month of April 1954, when its provisions were made applicable to two of the districts in this State, but subsequently in June 1954 it was considered desirable to extend the provisions to 31 other districts. Of course, it has been left to the State Government to decide as to the existence of an emergency, and the delegation of this power on the State Government cannot be said to be unconstitutional or invalid. The position, therefore, is that the impugned section has been brought into force in the case of an emergency, and this is an additional reason for holding that the provisions of the statute do not create an unreasonable restriction on the freedom of speech.

(53) In view of what I have stated above, I have come to the conclusion that the impugned section is a permissible piece of legislation and is protected by the provisions of Cl. (2) of Art. 19 of the Constitution.

(54) There is one part of the section which, in my opinion, may not be protected by the provisions of Cl. (2) of Art. 19. The definition of the word "liability" as given in S. 2, Special Powers Act, includes rent of agricultural land or anything recoverable as arrears of or along with such rent. Section 4 provides that any person to whom an arrear of liability is due may apply in writing to the Collector to realise it, and the Collector shall, after satisfying himself that the amount claimed is due, proceed to recover it as arrears of land revenue. Section 3 makes it punishable to instigate nonpayment of an amount like this as well. It is difficult to say that the State Government should first take upon itself to recover dues of a private individual and then make an instigation not to pay it penal, on the ground that this instigation is likely to lead to breaches of peace and disorder. I very much doubt whether this portion of the impugned section is a valid piece of legislation, but the question does not arise in this case and this part is severable from the rest of the section. It does not, therefore, affect the validity of the relevant portion of S. 3.

(55) I now come to the last point argued in the case, namely, that the detention of the petitioner was illegal inasmuch as the provisions of Cl. (2) of Art. 22 have not been followed, as the petitioner was not produced before a Magistrate within a period of 24 hours of his arrest. According to the facts stated in the counter affidavit, filed by the Station Officer, police station Kotwali, Farrukhabad, the petitioner was first arrested at the house of Lalla Babu, and the arrest was made by the Station Officer himself as the petitioner was supposed to be guilty of the commission of a cognizable offence. Soon after his arrest, however, within a few minutes, the City Magistrate of Farrukhabad also reached the spot along with the Sub-Divisional Magistrate of Kaimganj. The petitioner was then produced by the Station Officer, Kotwali, before the City Magistrate, who granted a remand for two days. The petitioner was then sent to the district jail, and on the 6th of July the Judicial Officer went to try him in the jail. There an application was made for the adjournment of the case, and the case was adjourned to the 19th of July.

The argument of the learned counsel is that, in the circumstances of this case, it must be taken to be proved that the arrest itself was directed by the City Magistrate and, therefore the production of the petitioner before the City Magistrate was not such a production as would bring it within the meaning of the expression as used in Cl. (2) of Art. 22 of the Constitution. In support of this submission, the learned counsel cited a recent Division Bench decision of this Court in 'AIR 1954 All 601 (A)'. What happened in this case was that the petitioners were in effect arrested by the City Magistrate and they were taken into custody under his orders and under his direct supervision. The City Magistrate then remanded the petitioners into jail custody and the order of remand was signed by him without scrutinising as to the legality and propriety of the procedure adopted by him. On these facts it was held that there was no proper production of the petitioners before a competent Magistrate within 24 hours of their arrest, and consequently the further detention in jail was illegal and unconstitutional.

This decision is binding upon us, and, assuming that it contains a correct exposition of law, I think the facts of the case before me are substantially different from the facts of the case before the Division Bench referred to above. In the instant case the facts appear to be that the petitioner was arrested without warrant by the Officer-in-charge Kotwali, and a few minutes after that the City Magistrate also reached the spot, and the Station Officer produced the petitioner before the City Magistrate who remanded the petitioner to custody. The essential difference between the two cases is that in the reported case it was the Magistrate who himself directed and supervised the arrest of the petitioners, whereas in the instant case the arrest was made by the Station Officer, authorised to arrest the petitioner, as being accused of a cognizable offence. He was then produced before the City Magistrate who granted a remand. The City Magistrate was not present at the time of the arrest and could not be said to have ordered or supervised the arrest. The decision in the Division Bench case, therefore, does not govern the instant case, and the facts proved in the case clearly show that the peti-

tioner was produced before a Magistrate well within the time mentioned in Cl. (2) of Art. 22 of the Constitution.

(56) After I had written my judgment, I had the benefit of reading the judgment of my learned brother Desai. Besides certain other matters, he has relied on one point which I consider it necessary to mention in my judgment as well. The view expressed by him is that the validity of the impugned section should be seen with reference to the date on which the Constitution came into force and according to him, on that date, in any case, it cannot be said that the impugned section was necessary in the interest of public order. I do not agree with this view and I am of the opinion that the impugned section was not inconsistent with Art. 19 of the Constitution, even on 26-1-1950. Though the impugned section was on the statute book, the State Government had not extended its application to any place in the State of Uttar Pradesh. It was to come into operation only if circumstances arose, which induced the State Government to apply the provisions of section to any local area in the State of Uttar Pradesh. While judging its validity the circumstance can be taken into consideration that this provision has always been in the nature of an emergency provision. If as an emergency provision it is valid today, it should also be taken to be valid on 26-1-1950, though no such emergency may then have been in existence as it has arisen in the last few months in this State. So far, however, I agree with my brother that, if the impugned section is held to be inconsistent with Art. 19 on the coming into force of the Constitution, then the legislation would continue to be void and must also be held to be void today.

(57) In the first of the two points, that we have decided to refer to a third Judge for his opinion, the main question, to my mind, is whether the impugned section is to be judged with reference to Art. 19 (1) (a) of the Constitution or not, and whether that consideration is shut out by the decision of their Lordships of the Supreme Court in 'Gopalan's case (B)'.

(58) For the reasons that I have mentioned above, I am of the opinion that this petition should be dismissed.

BY THE COURT:

(59) Since we differ on the following points, we refer the matter to the Hon'ble the Chief Justice for obtaining a third Judge's opinion on them:

(1) Was the provision of S. 3. U. P. Special Powers Act of 1932, making it penal for a person by spoken words to instigate a class of persons not to pay dues recoverable as arrears of land revenue, inconsistent with Art. 19 (1) (a) of the Constitution on 26-1-1950?

(2) If so, was it in the interests of public order? (The matter was then referred to a third Judge viz., Agarwala J., who delivered the following opinion):

AGARWALA J.:

(60) Dr. Ram Manohar Lohia was arrested for having committed an offence under S. 3, U. P. Special Powers Act (14 of 1932), in that he delivered two speeches, one at Kaimganj on 4-7-1954 and another at Farrukhabad at 8-30 P.M. on the same date. In these speeches he is alleged to have incited the cultivators not to pay enhanced irrigation rates to Government. He made an application to this Court under Art. 226 of the Constitution for the issue of a writ of 'habeas corpus' on the allegation, 'inter alia', that S. 3, U. P. Special Powers Act, under which he was arrested and detained was inconsistent with the provisions of Art. 19 of the Constitution and, therefore, void and inoperative. The application was heard by a Bench of two Judges of this Court. Desai, J., was of opinion that the application should be allowed while Chaturvedi, J., was of a contrary opinion. The points on which the learned Judges differed have been formulated as follows:

1. Was the provision of S. 3 of the U. P. Special Powers Act of 1932, making it penal for a person by spoken words to instigate a class of persons not to pay dues recoverable as arrears of land revenue, inconsistent with Art. 19(1)(a) of the Constitution on 26-1-1950?
2. If so, was it in the interests of public order?

On account of this difference of opinion the case has come to me for my opinion on the points above referred to.

(61) As the facts of the case have been given in the judgments of my learned brothers, it is not necessary for me to repeat them. I shall, therefore, straightaway deal with the points of law on which my learned brothers hold different views. But before I do so I consider it necessary to make certain general observations:

(62) Section 3, Special Powers Act, has created a new offence called "instigation to the non-payment of a liability". The section is as follows:

> "Section 3. 'Punishment for instigation to the non-payment of a liability'. Whoever, by words either spoken or written, or by signs or by visible representations, or otherwise, instigates, expressly or by implication, any person or class of persons not to pay or to defer payment of any liability, and whoever does any act, with intent or knowing it to be likely that any words, signs or visible representations containing such instigation shall thereby be communicated directly or indirectly to any person or class of persons, in any manner whatsoever, shall be punishable with imprisonment which may extend to six months, or with fine, extending to Rs. 250/-, or with both."

(63) Section 2 of the Act defines 'liability'. It means

> "land revenue or any sum recoverable as arrears of land revenue or any tax, rates, cess or other due or amount payable to Government or to any local authority or rent of agricultural land or anything recoverable as arrears of or along with such rent."

In short S. 3 makes it penal for a person to instigate another person or class of persons not to pay or defer payment of any amount payable to Government or local authority or the payment of agricultural rent to a Zemindar. It is important to remember that while instigation not to pay or defer payment of the above dues has been made an offence, the non-payment or deferring payment of such dues is not an offence at all. Thus though a person who does not make

payment of a liability or defers payment thereof is not guilty of any offence, yet this Act makes a person who instigates another not to pay or defer payment of any liability guilty of a crime.

(64) This Act was passed in 1932 during the British rule and was temporary, but after the Congress Government had resigned in the Provinces and the Governor's autocratic rule was introduced under S. 93, Government of India Act, 1935, it was made permanent in 1940 and since then it has continued to exist on the Statute Book. On 26-1-1950, India became a Sovereign Republic under a new Constitution which guaranteed to the citizens of India several freedoms. One of such freedoms is the right to "freedom of speech and expression" (Art. 19(1)(a)). This freedom means that every citizen of India has, subject to certain limitations, an absolute right to 'say' anything he likes, good, bad or indifferent, right or wrong, palatable or unpalatable to the Government.

(65) The reason why such a wide freedom of thought and expression should be available to the citizens of modern progressive societies has been well put by Bury in his "History of Freedom of Thought":

"If the history of civilization has any lesson to teach, it is this: there is one supreme condition of mental and moral progress which it is completely within the power of man himself to secure, and that is perfect liberty of thought and discussion. The establishment of this liberty may be considered the most valuable achievement of modern civilization, and as a condition of social progress it should be deemed fundamental. The considerations of permanent utility on which it rests must outweigh any calculations of present advantage which from time to time might be thought to demand its violation.'

(66) Any law curtailing this absolute freedom would be void, because every law which contravenes the rights guaranteed by the Constitution is void as declared by Art. 13. But an absolute freedom to say anything one would like to say, may lead to evils which may not be in the interests of the State as a whole. The interests of the State are, therefore, secured as against the freedom of the individual by laying down the limitations under which the freedom may be exercised. These limitations are mentioned in Cl. (2) of Art. 19, and are in respect of seven matters.

(a) Security of State;
(b) friendly relations with foreign States;
(c) public order;
(d) decency or morality;
(e) contempt of Court;
(f) defamation;
(g) incitement to an offence.

In the present case we are mainly concerned with "public order". If there be any law placing reasonable restrictions on the otherwise absolute right of free speech and expression, in respect of or in the interest of the above seven subjects, then such law cannot be said to be void.

(67) These restrictions being in the nature of exceptions to the general rule of the absoluteness of freedom of speech and expression are to be directly construed. Moreover since the exceptions to the absolute freedom of speech and thought are specifically and expressly laid down in the Constitution, it is clear that there can be no other exceptions than those which are so specifically and expressly mentioned. If the liberty of a citizen is curtailed by any law then it must be shown that the law falls within the four corners of these exceptions and it must also be shown that the restrictions are reasonable.

(68) The first question that has been referred to me is based upon the contention that Art. 19 (1) (a) does not apply to a punitive detention under S. 3, Special Powers Act, at all. The argument is based upon certain observations of the Supreme Court in two cases: AIR 1950 SC 27 (B) and AIR 1951 SC 270 (C). In Gopalan's case (B), A. K. Gopalan had been detained under S. 3 (1), Preventive Detention Act (4 of 1950). On behalf of Gopalan his detention was challenged, 'inter alia', upon the ground that his detention prevented him from exercising the freedom guaranteed under Art. 19 of the Constitution and that therefore, the section of that Act under which he was detained was unconstitutional. This argument was rejected by the Supreme Court. Kania J., observed:

"The Article (19(1)(a)) has to be read without any preconceived notions. So read, it clearly means that the legislation to be examined must be directly in respect of one of the rights mentioned in the sub-clauses. If there is a legislation directly attempting to control a citizen's freedom of speech or expression or his right to assemble peaceably and without arms etc., the question whether that legislation is saved by the relevant saving clause of Art. 19 will arise. If, however, the legislation is not directly in respect of any of these subjects but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of the sub-clauses of Art. 19 is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenu's life."

The observations of the majority of the other Judges were in a similar strain. Patanjali Sastri J. (as he then was) observed:

"Where, as a penalty for committing a crime or otherwise, the citizen is lawfully deprived of his freedom, there could no longer be any question of his exercising or enforcing the rights referred to in Cl. (1) (of Art. 19). Deprivation of personal liberty in such a situation is not, in my opinion, within the purview of Art. 19 at all but is dealt with by the succeeding Arts. 20 and 21. In other words, Art. 19 guarantees to the citizens the enjoyment of certain civil liberties 'while they are free', while Arts. 20 to 22 secure to all persons—citizens and non-citizens—certain constitutional guarantees in regard to punishment and prevention of crime."

It is not necessary to quote the observations of the other learned Judges. It will be noticed that the learned Judges of the Supreme Court were meeting the argument that was advanced on behalf of Gopalan that he was deprived of

the liberty guaranteed to every citizen under Art. 19 'as a result of' the detention under the Preventive Detention Act. No question was raised in that case whether the Preventive Detention Act itself was void on the ground that it restrained the freedom of speech and expression or of other rights mentioned in Art. 19 before a person was detained.

If the same argument is advanced in connection with punitive detention, namely that punitive detention is bad because by reason of that detention a person is not free to exercise the rights conferred by Art. 19, then also the argument will have to be rejected. I do not read the observations of the Supreme Court to mean that if the complaint is that a person is not free to exercise the rights guaranteed to him under Art. 19 and a restraint is placed upon the exercise of those rights and because of the violation of those restraints he is detained punitively, then also Art. 19(1)(a) will have no application to his case.

A little reflection will show that such an argument would lead to a complete negation of the freedom guaranteed under Art. 19. The easiest thing for the legislature to do would be to make a law making it an offence to exercise any of the rights mentioned in Art. 19 and then to say, 'Because he is being detained for breach of the law so made, Art. 19(1)(a) will have no application'. I do not think the learned Judges of the Supreme Court ever intended to lay down such a proposition. It was urged that this is exactly what they have said in the later case, AIR 1951 SC 270 (C). I do not think that any such conclusion can be drawn from the observations made in that case.

(69) Ram Singh was arrested by the order of the District Magistrate, Delhi, under S. 3, Preventive Detention Act, 1950, under an order reciting that he was to be detained "with a view to the maintenance of public order in Delhi." In the grounds of detention communicated to him, however, reference was made to certain speeches which were said to have been made by him or were likely to be made in future, speeches which were likely to excite disaffection between Hindus and Muslims, and thereby to affect the maintenance of public order in Delhi.

The case at first came before the High Court of East Punjab. The argument on behalf of Ramsingh was that he was being detained because he wanted to exercise his right of freedom of speech and expression. This argument was rejected by the East Punjab High Court but it was observed that there was a certain anomaly which was supposed to have arisen on account of the Supreme Court's decision in two other cases, AIR 1950 SC 129 (U), AIR 1950 SC 124 (J) and that this anomaly could be removed only by the Supreme Court. When the matter came before the Supreme Court, it was observed that there was no such anomaly. After quoting the observations of Kania C. J., in Gopalan's case (B), Patanjali Sastri, J., observed:

> "It follows that the petitioners now before us are governed by the decision in 'Gopalan's case (B), notwithstanding that the petitioner's right under Art. 19(1)(a) is prejudiced 'as a result of his detention under the Act'."

Here, again, therefore, their Lordships were repelling the plea to the effect that the exercise of the rights guaranteed under Art. 19 were being curtailed 'because of, or as a result of, the detention'. No doubt, there is an observation in the judgment to the following effect:

> "It was decided by a majority of five to one (in Gopalan's case) that a law which authorises deprivation of personal liberty did not fall within the purview of Art. 19 and its validity was not to be judged by the criteria indicated in that Article but depended on its compliance with the requirements of Arts. 21 and 22, and as S. 3 satisfied those requirements, it was constitutional."

It was urged by the Advocate General on the basis of this observation in the judgment that wherever a person was deprived of his liberty by reason either of preventive detention or punitive detention, then in all those cases he cannot raise the plea that the Act under which he was detained contravened Art. 19 of the Constitution. As I have already stated, this is not a conclusion that has to be drawn from what their Lordships observed in that case. They were all the time considering the question of abridgment or curtailment of the rights guaranteed under Art. 19 'as a result of punitive or preventive detention'.

They were not considering the question which falls for consideration in this case before us, that where an Act directly curtails the right of freedom of speech and as a result of the violation of the provisions of which a person is punitively detained, whether in such a case he can rely upon the rights to the freedoms guaranteed to him by Art. 19. In my judgment, while Art. 19(1) is not contravened when curtailment of the freedom mentioned therein is brought about 'as a result of' detention preventive or punitive under laws otherwise valid, (and it may be further said that while in the case of preventive detention, Art. 19 (1) is not contravened at all (as pointed out in — 'Brij Bhushan's case (U))), Art. 19 (1) is contravened when punitive detention is effected 'as a result of' the exercise of those freedoms. In the present case Dr. Lohia's complaint is not that Art. 19(1)(a) has been contravened because he has been detained; his complaint is that the said Article is contravened because the impugned Act made it unlawful for him to exercise the freedom of speech and expression guaranteed to him.

(70) It was then urged that S. 3, Special Powers Act, does not directly deal with the subject of freedom of speech and expression but that it deals with a certain kind of instigation, namely instigation to refuse to pay or defer payment of a liability of the kind mentioned in S. 2 of the Act. It was urged that the fact that the instigation was to be done by means of speech or other kind of expression was merely incidental and the main object of the Act was to prevent an 'act' of instigation and that just as under the Preventive Detention Act, which was held valid by the Supreme Court, a person could be detained if he was considered to be likely to do an act which threatened the security of the State or public order, so also S. 3 of the impugned Act must be considered to be valid.

In my judgment this is not a correct reading of the effect of S. 3, Special Powers Act. There can be no doubt to my mind that the direct attack in S. 3, Special Powers Act, is on the right of freedom of speech and expression. 'To instigate' means to goad or urge forward; to set on; to provoke; to incite. How are all these actions to be done except by means of speech or some other mode of expression? No other mode has been suggested to me on behalf of the State. The object of the legislation is, therefore, clearly one to restrain a particular kind of speech or expression, namely a speech or expression which incites or provokes or urges a person, or class of persons, to do a certain thing or not to do a certain thing mentioned in the section. I think, therefore, that S. 3 of the impugned Act is a legislation directly dealing with the freedom of speech and expression and prejudicing the right guaranteed under the Constitution, and as such its validity must be considered with reference to Cl. (2) of that Article. I would, therefore, answer the first question referred to me in the affirmative.

(71) This leads me to consider whether the section in question is a restraint upon the right of speech and expression in the interests of 'public order'. Sub-clause (2) of Art. 19 justifies reasonable restraint on the right of freedom of speech & expression on several grounds. Before my learned brothers before whom the case was argued in the first instance it was urged that the restraint imposed by S. 3, Special Powers Act, was in the interests of the 'security of the State'. Both the learned Judges were of opinion that this contention was not sound. The argument was, however, repeated before me. From the form of the second question I take it that I was not called upon to answer this argument, but I allowed the learned Advocate General to deal with it and I have no hesitation in saying that I agree with the view of my learned brothers on this point. It is not necessary for me to elaborate the reasons for this view because they have already dealt with it in detail in their judgments. I would, therefore, proceed to consider whether the impugned section imposes a restriction on the right of freedom of speech and expression guaranteed under Art. 19 (1) (a) in the 'interest of public order'.

(72) 'Public order' has not been defined in any statute, but we have the pronouncement of the highest authority in the land as to what it really means and connotes. In AIR 1950 SC 124 (J), Patanjali Sastri, J. (as he then was) observed:

> "Now, 'public order' is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted."

The learned Judge was dealing with the question whether 'public safety & 'public order' were comprised' within the expression 'security of the State'. It may be recalled that cl. (2) of Art. 19, before its amendment by the Constitution First Amendment Act, 1951, did not protect restraints on the rights conferred under Article 19(1)(a) on the ground that they were in the interests of 'public order' though the restraints could be imposed on the ground that the 'security of the State' was threatened. His Lordship differentiated 'security of the State' from 'public order' and held that 'security of the State' referred to serious threats to public peace and tranquillity, while 'public order' under the various clauses of Art. 19 referred to 'less serious threats to public peace and tranquillity'.

> "The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, more or less roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of purely local significance, treating for this purpose differences in degree as if they were differences in kind."

There can be little doubt that 'public order' was taken by his Lordship in — 'Romesh Thappar's case (J)' as something intimately connected with peace and tranquillity. It was urged by the learned Advocate General that in the definition of public order, the words "as a result of the internal regulations enforced by the Government which they have instituted" every kind of regulation was intended to be included. It was urged that 'public order' need not necessarily connote a state of peace and tranquillity but that it also embraces within its scope a state of society in which the laws in force are observed. I do not think that this was what was intended to be conveyed when the expression 'internal regulations' was used. From the observations made in the case it must be held that by 'internal regulations' was meant internal regulations relating to peace and tranquillity.

The use of the expression 'public order' in legislative enactments and by learned writers on the subject, clearly shows that the expression is used in connection with a 'state of peace and tranquillity' and that a law 'in the interests of public order' has reference to a violent disturbance of public peace and tranquillity. In the Penal Code, for instance, Chap. VIII deals with 'offences against public tranquillity' and defines the offences of 'unlawful assembly', 'rioting', 'promoting enmity between classes' and 'affray'. All these are offences which disturb or tend to disturb public peace and tranquillity. In Stephen's History of Criminal Law of England, Vol. 2, the learned author divides all activity against public tranquillity under two heads: one consisting of offences in which tranquillity of a civilised society is disturbed by actual force or at least by the show and threat of it, and the other in which no actual force is either employed or displayed but in which steps are taken tending to cause it. In his Commentaries on the Laws of England, 21st Edn., Vol. 4, the learned author includes in crimes against 'public order' the offences of treason, official secrets, counterfeit coins, unlawful meetings, affray, forcible criminal trespass, sedition and defamation.

(73) It was urged that no one can have the freedom to incite disobedience of laws whether it leads to violence or not, and every such incitement must be held to be a threat to 'public order'. In this connection my attention was invited to a passage in the 'Selected Essays on Constitutional Law', Vol. 2, p. 1050, to the following effect:

"Judge Hand places outside the limits of free speech one who counsels or advises otherwise to violate existing laws. It is true, he says, that any discussion designed to show that existing laws are mistaken in means or unjust in policy may result in their violation, but if one stops short of urging upon others that it is their duty or their interest to resist the law, he should not be held to have attempted to cause illegal conduct."

The case in which these observations were made has not been placed before me and I am unable, therefore, to say in what circumstances the learned Judge was led to make these observations. I cannot, however, imagine that incitement to the breach of every kind of law whether it involved violence or threat to public peace or not was intended by the learned Judge when he spoke of violation of existing laws.

(74) It was said that in order that a democracy should run successfully it is essential that its citizens should obey the laws duly promulgated by the State. I agree that the observance of the rules of law by all is one of the basic conditions of the successful working of a democracy. The Rule of Law in which the law is obeyed not only by the officers and servants of the State but by all its citizens is a sine-qua-non of all democracies as indeed of all civilized societies. No responsible person or party in a democracy would wantonly incite the people to disobedience of laws duly promulgated. But occasions may be imagined when thoroughly honest men of the highest integrity may consider it their conscientious duty to advise people to disobey an unjust law non-violently and to disobey it themselves.

(75) Socrates, who was charged for "corrupting the youth", i.e., inciting the younger generation to break the laws of the land and paid with his life for his freedom of thought and speech, said at his trial:

"Men of Athens, I honour and love you; but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy, exhorting anyone whom I meet .... For know that this is the command of God; and I believe that no greater good has ever happened in the State than my service to God .... If you think that by killing men you can prevent someone from censuring your evil lives, you are mistaken .... That is not a way of escape which is either possible or honourable; the easiest and the noblest way is not to be disabling others, but to be improving yourselves."

(76) Thoreau in advising Civil Disobedience to unjust laws said:

"Law never made men a whit more just; and by means of their respect for it, even the well disposed are daily made the agents of injustice. A common and natural result of an undue respect for law is that you may see a file of soldiers, Colonel, Captain, Corporal pirates, powder-monkeys and all marching in admirable order over hill and dale to the wars, against their wills, nay, against their common sense and consciences, which makes it very steep marching indeed, and produces a palpitation of the heart."

(77) Gandhi in his written statement before the Hunter Committee, (October 1919) explained the philosophy of Satyagraha thus:

"That law-breaker breaks the law surreptitiously and tries to avoid the penalty; not so that civil resister. He ever obeys the laws of the State to which he belongs, not out of fear of the sanctions, but because he considers them to be good for the welfare of society. But there come occasions, generally rare when he considers certain laws to be so unjust as to render obedience to them a dishonour. He then openly and civilly breaks them and quietly suffers the penalty for their breach. And in order to register his protest against the action of the law-givers, it is open to him to withdraw his co-operation from the State by disobeying such other laws whose breach does not involve moral turpitude."

(78) But though a man will be punished for his disobedience of the laws it is not necessary that the law should punish in every case those who incite such disobedience. The vital difference between actual disobedience and incitement to disobedience is that the latter is an exercise of the right of freedom of speech and expression which can be curtailed only if it falls within the ambit of Cl. (2) of Art. 19.

(79) In my opinion our Constitution safeguards to every citizen of India the freedom to preach non-violent disobedience to civil laws, not being laws mentioned in Cl. (2) of Art. 19.

(80) If the contention of the learned Advocate-General that an incitement to breach of every kind of laws is likely to lead to a breach of public order were true, it would hardly have been necessary for the fathers of the Constitution to single out in Cl. (2) of Art. 19, laws relating to seven matters only including 'incitement of offences'. Indeed the reference to "incitement to an offence" clearly shows that an incitement to a breach of every civil law is not necessarily contemplated in Cl. (2).

(81) In order to decide whether a particular law restraining the freedom of speech of inciting disobedience to a law is in the interest of public order or not, two things have to be remembered; first, that incitement to a breach of every law does not necessarily lead to its breach and even if it leads to its breach it does not necessarily result in public disorder; and second that the connection between the impugned law and the threat to public peace and tranquillity must be clear and proximate and not far-fetched or problematic. The first proposition was very clearly expressed by Harold J. Laski in his 'Liberty in the Modern State':

"It is said that ideas are explosive and dangerous. To allow them such unfettered freedom is, in fact, to invite disorder. But, to this position, there are at least two final answers. It is impossible to draw a line round dangerous ideas, and any attempt at their definition involves monstrous folly. If views, moreover, which imply possible disorder are able to disturb the foundations of the State, there is

something supremely wrong with the governance of that State. For disorder is not a habit of mankind. We cling so eagerly to accustomed ways that, as even Burke insisted, popular violence is always the outcome of a deep popular sense of wrong. The common man can only be persuaded to outbreak, granted his general habits, when the Government of the State has lost its hold upon his affection; and that loss is always the reflection of a profound moral cause.....Almost always freedom of speech results in a mitigation which renders disorder unnecessary; almost always, also, prohibition of that freedom merely makes the agitation more dangerous because it drives it underground.....No Government is entitled to assume that disorder is imminent: the proof must be offered to an independent authority. And the proof so offered must be evidence that the utterance to which it takes exception was, at the time and in the circumstances in which it was made, definitely calculated to result in a breach of the peace."

The second proposition has been laid down by the Supreme Court in AIR 1950 FC 67 (R) confirming a Full Bench decision of this Court AIR 1949 All 513 (FB) (Q). In that case the question was whether black-marketing in special commodities can be in respect of the maintenance of public order. The Supreme Court observed that

"It is true that black-marketing in essential commodities may at times lead to a disturbance of public order, but so may, for example, the rash driving of an automobile or the sale of adulterated foodstuffs. Activities such as these are so remote in the chain of relation to the maintenance of public order that preventive detention on account of them cannot fall within the purview of legislative authority. The connection between the legislation and the object of the legislation must be real and proximate, not far-fetched or problematic."

(82) Instances in which disobedience of laws was considered not to constitute a threat to public order are numerous. The instance of black-marketing in essential commodities has already been quoted. In AIR 1949 Pat 299 (S), it was held that the remaining at large of a habitual criminal convicted or suspected or committing thefts in running goods trains was not an act prejudicial to the maintenance of public order. In AIR 1944 Lah 373 (Z1), the activity of certain contractors in making large claims and receiving payment for work which they had never done and of cheating the Government on a large scale was held not to constitute a threat to public order. In (1939) 310 US 88 (I) a statute forbidding loitering or picketing at the scene of a labour dispute was considered to be in violation of the freedom of speech and expression guaranteed by the Constitution.

In — 'Sodhi Shamsher Singh v. State of Pepsu', AIR 1954 SC 276 (Z3) a person was alleged to have published and distributed pamphlets which were couched in the most filthy and obscene language and amounted to a vitriolic attack upon the character and integrity of the Chief Justice of PEPSU who was accused of gross partiality and communal bias. It was held by the Supreme Court that the orders of detention should be held to be illegal and must be set aside as the publication or distribution of the pamphlets could not have any rational connection with the maintenance of law and order in the State or prevention of acts leading to disorder or disturbance of public tranquillity. It cannot, in my opinion, be laid down as a general proposition that an incitement to the breach of any kind of law would have a proximate and clear connection with the disturbance of public order.

(83) We may now consider whether the incitement mentioned in S. 3, Special Powers Act, has a clear and proximate connection with public order. Now, S. 3 prohibits an incitement "not to pay, or to defer payment of, any liability". As mentioned already the incitement in the present case was with reference to the payment of the rates for the use of canal water. The non-payment of such rates which have been prescribed under rules made under the Northern India Canal and Drainage Act, 1873, has not been made an offence. If the payment is not made, it is recovered by the Collector as arrears of land revenue. Prima facie, the non-payment has no connection with public order, public order being considered in the sense which I have already discussed, namely the maintenance of public peace and tranquillity.

But it is urged by the learned Advocate-General that incitement to the non-payment of dues such as are mentioned in the Special Powers Act may be acted upon, which action would compel the Government to use coercive process for their realisation, which process would be resented by the defaulters, which resentment would lead to resistance to the coercive process, which would result in violence and, therefore, in the disturbance of public order. To my mind, there are here too many presumptions which are not warranted. Remembering what Laski said in the passage already quoted, and remembering what the Supreme Court held in the black-marketing case ('Rex v. Basdeva (R)') already noted, it may be stated that it is more than probable that barring extreme cases, the incitement to non-payment will not be obeyed, and even if it is obeyed will not lead to violence, and that in any case the connection between the incitement and public order is too far-fetched and problematic rather than clear and proximate. That a wide-spread agitation for non-payment of taxes and other dues mentioned in the Special Powers Act may sometimes lead to a disturbance of public order may be admitted. But what may happen in extreme cases is not the true test of the validity or constitutionality of a piece of legislation. The question is whether the impugned legislation covers acts which are innocent in themselves or which have no proximate connection with the disturbance of public order. If the impugned legislation covers such acts, the legislation would be bad even though it also covers acts which in extreme cases may lead to disturbance of public order unless the two kinds of acts can be separated.

Let us suppose that the instigator were to clearly say that the payment of the liability may be refused or deferred, but that there should be no

resistance to the coercive process of recovery or the enforcement of the liability. To my mind, such instigation cannot reasonably be said to threaten public order. The impugned section does cover such cases. Again, it can hardly be said that if one individual instigates another individual not to pay certain dues or to defer payment of a certain liability when there is no general campaign of non-payment and there is no incitement to a general disobedience of laws, there will be a threat to public order. Such instigation is also covered by the provisions of the impugned section, and therefore the section is unconstitutional because as it stands, it is not possible to make it applicable to those extreme cases alone in which there may be a threat to public peace and tranquillity. It may be that in the present case, Dr. Lohia delivered the speeches to which objection has been taken, in connection with a wide-spread agitation carried on by the party of which he is the General Secretary and in that case his action might be legitimately considered to be a threat to public peace and tranquillity. But that is immaterial. The validity of an enactment is to be judged with reference to the activities it prohibits or restrains and not with reference to the actions of the accused.

(84) But it was urged that though these actions may be covered by the impugned section, the Act was never intended to be applied to such cases and in this connection reference was made to the provisions of S. 1 of the Act. Section 1 gives a discretion to the State Government to extend the other provisions of the Act by notification in the official gazette to any district or to any part of a district in the Uttar Pradesh. It was urged that this discretion shows that the Act was not intended to be applied to individual cases when there was no general campaign of non-payment of liabilities. What the intention of the Legislature was can be judged only by what is stated in the Act itself or in the statement of objects and reasons. It does not appear from the Act itself or from the statement of objects and reasons that the Act was intended to be applied only to such extreme cases. A similar argument was advanced before the Supreme Court in — 'Romesh Thappar's case (J)', but it was repelled by the majority of the Judges, and Patanjali Sastri J. (as he then was) delivering the judgment of the majority observed:

> "It was said that an enactment which provided for drastic remedies like preventive detention and ban on newspapers must be taken to relate to matters affecting the security of the State rather than trivial offences like rash driving or an affray. But whatever ends the impugned Act may have been intended to subserve, and whatever aims its framers may have had in view, its application and scope cannot, in the absence of limiting words in the Statute itself, be restricted to those aggravated forms of prejudicial activity which are calculated to endanger the security of the State. Nor is there any guarantee that those authorised to exercise the powers under the Act will in using them discriminate between those who act prejudicially to the security of the State and those who do not."

We have to substitute the words 'public order' in place of 'security of the State' to make these observations fully applicable to the case in hand. To the same effect were the observations of Mahajan J. (as he then was) in AIR 1951 SC 118 (K). Observed his Lordship:

> "The law cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right."

(85) But it was urged that in a case of this kind you must have regard to the opinion of the Legislature and when the Legislature thinks that an activity attempted to be prohibited by it is calculated to endanger public order, that opinion must be respected by the Courts. Undoubtedly, the Courts lean in favour of the validity of a legislative enactment and would strain every nerve, if that were legally possible, to hold that that enactment was valid rather than that it was invalid. But this principle can be applied only when the Courts are in a position to judge that this was indeed the intention of the Legislature. In the present case it is impossible to say that in enacting the Special Powers Act the Legislature considered that the activity which it sought to prevent was not in the interests of public order.

The U. P. Special Powers Act (14 of 1932) was enacted when the Government of India Act, 1919, was in force. The sphere of legislative activity of the local Legislatures was not carved out under that Act as was done under the Government of India Act, 1935, and the local Legislature could make laws subject to the confirmation of the Governor-General on any subject relating to 'peace' and 'good Government.' These terms include the whole legislative field including matters not connected with public order. When the Act was made permanent in 1940 by the Governor in exercise of his powers under S. 93, Government of India Act, 1935, it was nowhere stated that the Governor considered the instigation to defer payment of liabilities or the refusal to payment of liabilities as a threat to public order. The matter covered by the enactment clearly falls under the various entries in List 2 of the Seventh Schedule of the Government of India Act, 1935. Entry 39 dealing with land revenue, Entries 40 to 54 dealing with taxes, rates etc., Entry 13 dealing with local authority, and Entries 20 and 21 dealing with agricultural rent would cover the entire legislation. It is, therefore, difficult to say that the Governor considered the Act to be in the interests of public order.

A feeble argument was addressed on the basis of the Act being adapted by the President by the Adaptation of Laws Order, 1950, under Art. 372 of the Constitution. Article 372 continues in force the existing laws but it clearly provides that such continuance shall be subject to the other provisions of the Constitution. The mere fact that the impugned Act has been adapted by the President does not, therefore, mean that we are not to consider its validity with reference to the other provisions of the Constitution. The only adaptation that was made in the Act was a

formal one; instead of 'the Provincial Government' the words 'State Government' were substituted. This was done simply to bring the language of the Act in conformity with the terminology of the Constitution. A formal adaptation like this could hardly be said to involve a recognition by the President that he considered the Act to be otherwise valid or that the adaptation made by him showed that he considered that the prohibition contained in S. 3 of the Act was in the interests of public order. I do not, therefore, consider that in the present case there is before us the opinion of the Legislature as regards the Act being in the interests of public order.

(86) On behalf of the petitioner it was urged that a clear and present danger test should be applied to cases like the present as has been the practice of the American Courts. In the view that I have expressed above it is not necessary for me to enter into any detailed discussion of this question. I have expressed my view on the point in delivering the judgment of a Bench of this Court in connection with a contempt case (see — 'Lakhan Singh v. Balbir Singh', AIR 1953 All 342 (Z4)).

(87) Lastly, the learned Advocate-General urged that the impugned legislation was in the interests of morality. This was not urged before the Bench and the questions referred to me do not involve a consideration of the point. I, therefore, refrain from entering into a discussion of the matter beyond saying that in my judgment there can be no question of the impugned legislation having any proximate connection with morality. Instances in which great men of all ages have considered certain laws to be unjust are not wanting. The prohibition contained in S. 3 applies to payment of certain liabilities. These liabilities may or may not be considered to be just. If they are not considered to be just, though wrongly not so considered I cannot say that those who think like this and instigate people not to make these payments considered by them to be unjust are in any manner acting against morality. Morality and law are different conceptions. They cannot be equated. In my opinion the answer to the second question must be in the negative.

(88) My answers to the questions referred to me, therefore, are:

Question No. 1: The provision of S. 3, U. P. Special Powers Act, 1932, making it penal for a person by spoken words to instigate a class of persons not to pay dues recoverable as arrears of land revenue, was inconsistent with Art. 19(1)(a) of the Constitution on 26-1-1950.

Question No. 2: The restrictions imposed by S. 3, U. P. Special Powers Act, 1932, were not in the interests of public order.

(89) Let these answers be returned to the Judges making the reference.

FINAL ORDER

M. L. CHATURVEDI J.:

(90) We differed on two points of law in this petition and referred them to a third Judge. The third Judge has now given his opinion and he has answered both the questions in favour of the petitioner. The result is that this petition must be allowed. We consequently allow the petition, hold that the petitioner's detention is illegal and we release him forthwith. The petitioner shall be entitled to receive from the respondents a sum of Rs. 500/- as costs of this petition.

(91) We certify that the case involves substantial questions of law as to the interpretation of the Constitution.

K.S.B. Petition allowed.

(S) A.I.R. 1955 ALLAHABAD 223 (Vol. 42, C.N. 69)

DESAI AND ROY JJ. (12-10-1954)

Mt. Phool Kuer, Appellant v. Manohar Mal and another, Respondents.

Ex. First Appeal No. 89 of 1950, against decree of Civil Judge, Agra, D/- 13-2-1950.

(a) **Civil P. C. (1908), S. 47 — Question of compensation payable by judgment-debtor in possession — AIR 1933 Lah 1618; AIR 1917 Mad 79; AIR 1937 Mad 879, Dissented from.**

When a decree directs possession to be delivered over a property, it intends that possession should be delivered over it in the same condition in which it was on the date of the decree. It follows that if the condition of the property is altered to the prejudice of the decree-holder by the time possession is delivered to him in execution, the decree is not fully satisfied, and whether the condition is altered or not to the prejudice of the decree-holder and to what extent, if at all, he should be compensated are questions relating to the satisfaction of the decree within the meaning of S. 47. Case law discussed. (Para 4)

Anno: C. P. C., S. 47 N. 71a.

(b) Civil P. C. (1908), S. 100, O. 41, R. 1 — Question of fact.

Question whether property was damaged after the decree for possession — Held that question was essentially one of fact and could not be allowed to be raised for the first time in appeal. AIR 1946 PC 97, Foll. (Para 8)

Anno: C. P. C., S. 100 N. 55; O. 41, R. 1 N. 12.

CASES REFERRED: Paras

(A) (V10) AIR 1923 Bom 391: 73 Ind Cas 443 5, 6

(B) (V12) AIR 1925 Bom 385: 89 Ind Cas 205 5

(C) (V11) AIR 1924 Pat 362: 73 Ind Cas 359 5

(D) (V20) AIR 1933 Mad 825: 57 Mad 49 5, 6

(E) (V22) AIR 1935 Mad 280: 156 Ind Cas 440 5, 6

(F) (V20) AIR 1933 Lah 168: 145 Ind Cas 117 6

(G) (V4) AIR 1917 Mad 79(1): 33 Ind Cas 520 6

(H) (V24) AIR 1937 Mad 879: 176 Ind Cas 920 6

(I) (V39) AIR 1952 Mad 59: 1951-2 Mad LJ 399 6

(J) (V33) AIR 1946 PC 97: ILR (1946) Bom 694 (PC) 8

Ambika Prasad, for Appellant; J. Swarup, for Respondents.

DESAI J.:

This is an appeal from an order passed by a Civil Judge, Agra, directing the appellant-judgment-debtor to pay Rs. 5,425/- to the respondents-decree-holders. The appeal arises in the following circumstances:

(2) In 1936 the respondents' mother, Srimati Pem Kuer, instituted a suit for possession over property including two houses, one situated in village Semra and the other in village Kheria; the suit was decreed with costs by this Court on appeal on 26-10-1943. On 16-11-1943, she applied for execution of the decree through delivery of possession over the property. The appellant wanted to file an appeal against the decree to the Privy Council and on her furnishing security for the due performance of the decree under O. 45, R. 13, Civil P. C., this Court stayed execution of the decree on 3-1-1944. In August, 1947, the security furnished by the appellant was found to be insufficient. On 20-8-1947, Pem Kuer applied for execution of the decree stating that the appellant was not going to furnish security and alleging that she (appellant) was damaging the property. Pem Kuer alleged that the damage already caused to the house in Kheria was of Rs. 1,865/- and that done to the house in Semra was of Rs. 4,000/-. She, therefore, claimed not only possession over the houses but also damages of Rs. 5,865/-.

She requested the executing court to appoint an Amin to assess the damage done to the houses and to deliver possession over them at the spot. The lower court appointed an Amin to assess the damage and deliver possession. On 17-9-1947, Pem Kuer applied under S. 47, Civil P. C., stating that the appellant had deposited some amount of money as security with the court, that part of it was attached in execution of the decree for costs in her favour and that after passing a formal order for Rs. 5,865/-, if deemed necessary, the balance of the deposited amount be attached and paid to her and that the appellant be ordered to pay up the balance of the amount of damages.

While the matter was pending Pem Kuer died and the respondents, who are her sons, became her legal representatives. The Amin submitted his report stating that both the houses were damaged and that the damage to the Kheria house was of Rs. 1,425/- and that to the other house was of Rs. 4,000/-. The appellant objected to the application of Pem Kuer and the Amin's report on the grounds that she had not caused any damage to the houses, that they had not been repaired for the last thirty years, that if they were found in ruined or dilapidated condition that was due to natural causes, that she had not removed any fittings from the houses and that she herself was entitled to recover a sum of money from the respondents who had taken possession of her property which was in the houses at the time when the respondents obtained delivery of possession over them.

(3) The lower court held that the claim of the respondents was covered by S. 47, Civil P. C., that the two houses were damaged by the appellant, that the respondents were entitled to recover Rs. 1,425/- on account of the damage to one house and Rs. 4,000/- on account of the damage to the other and that the claim made by the appellant was not maintainable under S. 47. Accordingly it passed the order under appeal.

(4) The first question that arises is whether it was open to the lower court to enter into the question of the damage done by the appellant to the houses in dispute in execution proceedings under S. 47, Civil P. C. Under that section all questions relating to the execution, discharge or satisfaction of a decree must be determined by the court executing the decree and not by a separate suit. The allegations of the respondents are that after the decree was passed in their favour for possession over the houses, the appellant-judgment-debtor damaged them and that consequently they are entitled to be compensated for the damage. There is no question of the execution of the decree; the decree has been executed by delivery of possession over the houses.

The contention of the respondents comes to this that though they have obtained possession over the houses, their decree is not completely satisfied because the houses at the time of the delivery of possession were not in the condition in which they were at the time when the decree was passed and that unless they are paid a certain sum of money, by spending which the houses can be restored to the condition in which they were at the time of the passing of the decree, the decree cannot be said to be fully satisfied. There can be no doubt that when a decree directs possession to be delivered over a property, it intends that possession should be delivered over it in the same condition in which it was on the date of the decree. It follows that if the condition of the property is altered to the prejudice of the decree-holder by the time possession is delivered to him in execution, the decree is not fully satisfied, and whether the condition is altered or not to the prejudice of the decree-holder and to what extent, if at all, he should be compensated are questions relating to the satisfaction of the decree within the meaning of S. 47, Civil P. C.

(5) In — 'Hari Shridhar v. Sakharam', AIR 1923 Bom 391 (A) Macleod, C. J. and Crump, J. stated at p. 392

> "The appellant is entitled under the decree to the property of which possession was directed to be given to him. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether defendants are liable to make good the loss."

In — 'Bai Lalbu v. Mohanlal', AIR 1925 Bom 385 (B) Macleod, C. J. and Coyajee, J. reiterated the law and stated:

> "The question is really whether a successful party can be said to get possession of what was directed to be given to him by the decree, if the party in possession deliberately has caused damage to the property."

The same law was laid down by Dawson Miller, C. J. and Jwala Prasad, J. in 'Mahadeo Prasad Sahu v. Gajadhar Prasad Sahu', AIR 1924 Pat 362 (C). They proceeded on the basis that the decree having once been passed the judgment-

debtor was bound under its terms to hand over the property as it then existed and that if before doing so he damaged it he acted in breach of the obligation and was bound to compensate the decree-holder. In 'Dhanarajagerji v. Parthasarathy' AIR 1933 Mad 825 (D), a Bench of the Madras High Court followed — 'Hari Shridhar v. Sakharam (A),' and — Bai Lalbu v. Mohanlal (B)'. Beasley, C. J. and King J. followed 'Dhanarajagerji v. Parthasarathy (D)', in — 'Varadaraja Ayyar v. Parameswara Ayyar' AIR 1935 Mad 280 (E), and observed that an executing court cannot refer the decree-holder, who complains that the property at the time of his obtaining possession over it, was not in the same state in which it was at the time of the decree and had deteriorated, to file a regular suit to recover damages for the deterioration.

(6) A contrary view was taken in some Lahore and Madras cases. In —'Ghulam Ali v. Sultan Muhammad Khan' AIR 1933 Lah 168 (F), Tapp, J. thought that whether such a question relates to the execution, discharge or satisfaction of a decree was not free from doubt and was inclined to think that if a decree-holder complained that the property had been damaged by the judgment-debtor after the passing of the decree, his remedy was to file a suit and not to claim compensation in execution. But he did not decide the matter definitely. His observation, therefore, was nothing but 'obiter'. In—'Ramu Shettithi v. Maniappu Shettithi', AIR 1917 Mad 79 (1) (G),' Sadasiva Aiyer and Moore, JJ. observed that:

> "as regards damages for the defendants, alleged negligence in having allowed the decreed house to be burnt down, that is not a matter to be dealt with in execution of the decree."

No reasons are stated in support of the view; nor are the facts given. It is not known when the house was burnt down, whether before, or after the passing of the decree. Moreover, it was a case of negligence and not of deliberate or malicious damage.

There is no doubt about the liability when the damage is deliberate or malicious, but when the damage is said to be the result of negligence, there arises the serious question whether the negligence was actionable. The case was not followed by the Division Benches in the cases of — 'Dhanarajagerji (D), and Varadaraja Ayyar (E), but was approved of by Varadachariar, J. in — 'Gangamma v. Mahabala Bhatta' AIR 1937 Mad 879 (H), though the learned Judge actually did not record a dissent from the cases of 'Dhanarajagerji (D)', and 'Hari Shridhar (A)', and confirmed the dismissal of the suit for damages on account of waste committed by the judgment-debtor after the passing of the decree and before the delivery of possession. Therefore, what the learned Judge observed was no better than 'obiter dictum'.

'Kunhikoye Thangal v. Ahmad Kutty' AIR 1952 Mad 59 (I), was also referred to us, but it did not lay down that a decree-holder cannot recover in execution compensation for damage done to the property between the date of the decree and the date of the delivery of possession. It was stated in that case that attempt to restrain acts of waste is not a matter governed by S. 47, Civil P. C. It appears that the decree was not put into execution in that case and therefore the question whether the matter is governed by S. 47 of the Code did not arise. Moreover, there was no reference to the previous decisions of the court. We do not consider that the decision in that case militates against what we have said.

(7) Once the execution court finds that the property at the time of the delivery was not in the same state in which it should have been under the decree, it must hold that the decree is not fully satisfied by the mere delivery of possession. It is under an obligation to give full satisfaction to the decree-holder; therefore it must compensate him so that he can put the property in the same state in which he should have got it. It means that it is for the executing court to recover money from the judgment-debtor and pay it to the decree-holder by way of compensation. It can also direct the judgment-debtor to put the property in the condition in which it should have been, but this may cause further disputes and the better alternative is to assess the damage done to the property and to compensate the decree-holder fully. Since the judgment-debtor himself would have spent the same amount in restoring the property to its pre-decretal condition, he does not stand to suffer by the adoption of this alternative. The decree-holder paid court-fee on the full valuation of the property when he sued for possession and is entitled, on his claim being proved, to receive the property in the condition in which it was at the time of the suit without any further payment in the form of court-fee or otherwise.

If the property suffers damage during the pendency of the suit at the hands of the defendant, the plaintiff can amend the plaint and claim damages in addition to possession of the property; in that event he would be entitled to get possession of the property in the condition in which it would be at the date of the decree. Since he has already paid court-fee for receiving possession of the property, he should not be required to pay another court-fee, even if temporarily (to be recovered from the defendant along with other costs in the event of the suit being decreed) by being asked to file another suit for damages. We confirm the finding of the lower court that the respondents' claim was covered by S. 47, Civil P. C.

(8) It was argued that it was not proved satisfactorily that the houses were damaged after the decree for possession. The question was not raised at all in the pleadings in the lower court. It was definitely alleged by the respondents that the appellant damaged the houses after the passing of the decree; what the appellant denied was that she damaged them and not that she damaged them after the passing of the decree. The sole question before the trial court, therefore, was whether the appellant damaged the houses or not. The appellant did not plead even in the alternative that she had damaged them before the passing of the decree and that the respondents should have claimed damages in the suit itself. We, therefore, cannot permit the appellant to raise the question, which is essentially of fact, for the first time in appeal. We are supported by — 'Shankar-

lal Narayandas v. New Mofussil Co. Ltd.', AIR 1946 PC 97 (J).

(9) Now we come to the question of the amount of damages. The respondents have produced no evidence whatsoever to prove that the Semra house was damaged by the appellant. We find it strange that they could not produce a single witness to prove that the appellant or her servants or agents demolished the house and removed its material. Surely the acts of demolition and removing the material of a house could not have been done secretly. The Amin had not seen the house in its original condition. When he saw it, he found it in a demolished condition. Naturally he could not say how it fell down, whether through human agency or through natural causes and admitted the fact in his report.

There is evidence of a witness to the fact that he saw some material being removed to the appellant's village Sista, but that evidence does not prove that either the house was damaged by the appellant or that the material was of that house. He did not see from where the material was brought and to which place it was taken. We are surprised that the lower court without any evidence accepted the respondent's claim for as much as Rs. 4,000 for the damage to the Semra house. On the meagre evidence that is on the record the claim could not have been accepted for any amount. Our surprise becomes greater when we take notice of the fact that the respondents themselves valued the Semra house at Rs. 200. Surely a house worth Rs. 200 could not have suffered a damage of Rs. 4,000.

(10) The evidence regarding the damage to the other house in Kheria is better. The Amin has found that a 'kotha' of the house was deliberately pulled down and did not fall down on account of lack of repairs. That the 'kotha' is in a ruined condition is accepted by the appellant. Her case, as put in cross-examination to the respondents' witnesses, was that it had been constructed temporarily on the occasion of a marriage in the family. The Amin found that it was not a temporary construction. Chunni Lal, a witness for the respondents, deposed that the appellant left occupation of the house seven or eight days before the delivery of possession and that though he did not see the actual demolition, he saw the material being removed to Sista. There is no evidence that the 'kotha' fell down on account of natural causes, barring the statement of the solitary witness of the appellant, Misri Lal. He stated that the 'kotha' was built temporarily in 1942-43 with puccka bricks and that there must be accounts of the expenditure, but no accounts were produced. We are not prepared to rely upon his interested testimony.

We are satisfied from the evidence that the 'kotha' was a permanent construction and that it was pulled down by the appellant. As regards the amount of damages we find that the house was valued at Rs. 500 in the plaint. It may be that prices of houses have increased after the institution of the suit, but we do not know to what extent they have increased. Moreover, against the increase must be set off the depreciation in the condition of the house in the period between the date of the institution of the suit and the date of the delivery of possession. There are no data on the record on account of which we can give effect to the general increase in prices of houses and to the depreciation in the condition of the house and we cannot act arbitrarily without any data. The Amin's estimate of the damage must necessarily be a very rough one and based principally upon hearsay. Not having seen the house in its pre-decretal condition he could not assess the damage without acting upon what he heard from the respondents and others.

In the circumstances not much reliance can be placed upon his estimate. We do not think we would be justified in allowing more than Rs. 200 to the respondents for the damage of the Kheria house. We see no force in the contention of the appellant that as she claimed title to the house as a widow of the family as against Pem Kuer who claimed it as a sister and was contemplating an appeal to the Privy Council against the decree, she would not have damaged the houses.

(11) We partly allow the appeal, confirm the lower court's finding that the appellant must pay damages to the respondents in execution and reduce the amount of the damages from Rs. 5,425 to Rs. 200. As the main controversy in the lower court was about the application of S. 47, Civil P. C., to the claim and not so much about the amount of the damages, as the lower court's decision on it is upheld by us and as the respondents are allowed by us some damages, we consider that it would be better to allow the costs of both the courts to be borne by the parties and declare so. The stay order is discharged.

D.H.Z. Appeal partly allowed.

(S) **AIR 1955 ALLAHABAD 226 (Vol. 42, C.N. 70)**

MALIK C. J. AND GURTU J. (24-9-1954)

Hira Lal and others, Appellants v. Mst. Champa and others, Respondents.

Second Appeal No. 900 of 1951, against decree of 2nd Civil J., Kanpur, D/- 3-4-1951.

(a) Civil P. C. (1908), S. 104(2), O. 21, Rr. 85, 90, 92 — Objection under O. 21, R. 85.

As an objection that the provisions of O. 21, R. 85 had not been complied with is not an objection relating to the publication and conduct of the sale, O. 21, Rr. 90 and 92 will not apply to it and S. 104(2) will not bar a second appeal. AIR 1922 All 200 (FB), Foll. (Para 3)

Anno: C. P. C., S. 104, N. 21; O. 21, R. 85, N. 1; R. 90, N. 15, 23; R. 92, N. 13.

(b) Civil P. C. (1908), O. 21, R. 85 — Handing over of cheque to auctioneers.

A comparison of rules 84 and 85 will make it clear that while the deposit of 25 per cent. on the amount of the purchase-money has to be made to the officer or other person conducting the sale, the balance of the purchase-money has to be paid by the purchaser into Court. The handing over of the cheque, therefore, to the auctioneers is not payment into Court, nor could it be said that the handing

over of the cheque is a deposit of the balance of the purchase-money. The provisions of O. 21, R. 85 are not complied with in such a case. (Para 4)

Anno: C. P. C., O. 21, R. 85, N. 2.

(c) Civil P. C. (1908), O. 21, R. 86 — Scope.

The discretion is confined to the forfeiture and not to the re-sale of the property. The rest of the rule remains mandatory, and wherever a deposit has not been made within the time allowed the Court has no option but to re-sell the property under R. 86. Case law discussed. (Paras 5, 7)

Anno: C. P. C., O. 21, R. 86, N. 1.

(d) Limitation Act (1908), Arts. 166, 181 — Application to set aside void sale.

Article 166 applies to an application to set aside a sale in execution of a decree. That article does not apply to a case where it is alleged that there was no sale and the law itself provides that on a default having been made, the defaulting purchaser shall forfeit all claims to the property and the property shall have to be resold.

Even in a case where the sale is void, if an application is made to have it set aside, the provisions of Art. 181 would apply, that being the residuary article. There is however a difference between an application to set aside an order confirming a void sale to which Art. 181 might apply, and a case where the sale has not yet been confirmed and the notice of the Court is drawn to certain facts, of which the Court is bound to take cognizance, before passing an order confirming a sale.

The sale had been confirmed by the executing Court on 15-7-1941. On 7-10-1949, the High Court had set aside the order of confirmation and had directed the lower Court to consider the objection under O. 21, R. 90 of Civil P. C. On the disposal of those objections, the Court had, therefore, to pass a fresh order of confirmation of the sale. If on that date the Court knew that the provisions of R. 85 of O. 21 had not been complied with, and under R. 86 the property had to be resold, it could not ignore the provisions of the Code and confirm the sale on the ground that neither the decree-holder, nor the judgment-debtor had made an application within time. If certain facts came to its knowledge, no matter whether on an application filed by the judgment-debtors or 'suo motu', the Court could not shut its eyes to them and to the breach of the provisions of R. 85 and pass an order confirming the sale in disregard of the provisions of R. 86 of O. 21. AIR 1924 Mad 431 (FB); AIR 1934 All 314, Rel. on. (Paras 12, 14, 15)

Anno: Limitation Act, Art. 166, N. 2.

CASES REFERRED: Paras

(A) (V9) AIR 1922 All 200: 44 All 266 (FB) 2
(B) ('75-77) 1 All 181 (FB) 2
(C) (V22) AIR 1935 All 243: 57 All 658 7, 11
(D) ('29) Ex S. A. No. 1393 of 1928, D/- 18-4-1929 (All) 7
(E) (V30) AIR 1943 All 282: ILR (1943) All 580 7
(F) (V19) AIR 1932 Cal 126: 59 Cal 117 8
(G) (V10) AIR 1923 Mad 48: 69 Ind Cas 1001 9
(H) (V18) AIR 1931 Lah 15: 122 Ind Cas 561 10
(I) (V25) AIR 1938 Lah 198: ILR (1938) Lah 97 11
(J) (V11) AIR 1924 Mad 431: 47 Mad 288 (FB) 12
(K) (V21) AIR 1934 All 314: 151 Ind Cas 244 13

N. P. Asthana, for Appellants; S. N. Sahai, for Respondents.

MALIK C. J.:

This case has had a chequered history. One Badri Prasad had obtained a decree against Smt. Champa, Ram Kishen and Gaya Prasad. Gaya Prasad being a lunatic and Ram Kishen being a minor, they were sued under the guardianship of Smt. Champa, wife of Gaya Prasad. The suit was decreed and in execution of the decree, a house fetching a rent of Rs. 25/- per mensem was sold at auction on 28-8-1940. The highest bid of Rs. 2,425/- was of the appellants, Hira Lal and two others. The property was sold through a firm of auctioneers and not through the court Amin. The auction-purchasers deposited 25 per cent. on the amount of the purchase-money with the auctioneers appointed by the court. On 11-9-1940, they gave a cheque for the balance to the same auctioneers. The auctioneers, however, did not deposit the amount in court till 14-9-1940. On 5-9-1940, the judgment-debtors filed certain objections under O. 21, R. 90, Civil P. C. It was alleged that the property had been sold for a grossly inadequate price and the house was worth at least Rs. 12,000/- to Rs. 15,000/-.

It was also alleged that there were other irregularities in the publication and the conduct of the sale. These objections were dismissed by the executing court on 25-1-1941 and the sale was confirmed. The auction-purchasers filed an appeal which was dismissed on 15-7-1941 by the lower appellate court. There was an execution second appeal filed in this Court which was allowed on 7-10-1949. The order dated 25-1-1941 was set aside and the case was sent back to the trial court for consideration of the objection under O. 21, R. 90, Civil P. C.

On 19-11-1949 the judgment-debtors made an application that they came to know on 16-11-1949, while inspecting the record, that the auction-purchasers had not deposited the balance of the purchase-money within 15 days of the auction sale as required under O. 21, R. 85 of the Code and submitted that this objection could not be taken on 5-9-1940 when the previous objections were filed but the objection could be urged even without a former written application and they, therefore, prayed that the sale be set aside and this objection may be considered along with the other objections which had already been filed in court. On 24-2-1950, the lower court considered the objections of the judgment-debtors and as regards the applications dated 19-11-1949, the learned Munsif held that it should have been filed within 30 days under Art. 166, Limitation Act, that it was barred by time and it could not, therefore, be taken into consideration.

As regards the other objections contained in the application of 5-9-1940, the learned Judge was of the opinion that the house was not worth more

than Rs. 4,000/- at the time when it was sold and it could not, therefore, be said that the price of Rs. 2,425/- which it fetched was grossly inadequate. The other pleas of irregularity in the publication and conduct of the sale, it was held, were not proved and the application was dismissed on 24-2-1950. The judgment-debtors appealed. The lower appellate court did not go into the objections contained in the application of 5-9-1940 but held that the balance of the sale consideration not having been paid within 15 days and the provisions of O. 21, R. 85 being mandatory, there was no sale which could be now confirmed and allowed the appeal and set aside the order of the trial court. Against this order dated 3-4-1951, this second appeal has been filed.

(2) A preliminary objection was taken by learned counsel for the judgment-debtor respondents that no second appeal lies. Learned counsel has relied on the provisions of S. 104, sub-s. (2) of the Code. Section 104(2) is to the following effect:

> "No appeal shall lie from any order passed in appeal under this section."

The appeal before the lower appellate court, it is urged, was under O. 43, R. 1(j) of the Code. Learned counsel has developed this argument further and has pointed out that the trial court refused to entertain the application of the 19-11-1949, on the ground that it was barred by limitation and the order appealed against was passed under O. 21, R. 92, dismissing the application dated 5-9-1940, filed under O. 21, R. 90, and no second appeal would, therefore, lie by reason of the provisions of S. 104(2) of the Code. The lower appellate court, however, did not consider the objections under O. 21, R. 90 and allowed the appeal on the ground that the sale consideration was not deposited within 15 days as required by O. 21, R. 85.

An objection under O. 21, R. 85 has been held to be not an objection relating to the publication and conduct of the sale. The point is concluded by the decision of a Full Bench of this Court in — 'Sita Ram v. Janki Ram', AIR 1922 All 200 (A). Learned counsel has to admit that in the appeal that he filed before the lower appellate court, he raised both the objections again and the lower appellate court gave no decision on the first group of objections which fell under O. 21, R. 90, and decided the appeal on the other objection that the sale consideration not having been deposited within the time allowed, there was no sale which could be confirmed by the learned Judge. In the case of 'AIR 1922 All 200 (A)' the Full Bench quoted with approval the earlier decision of this Court in — 'Ram Dial v. Ram Das', 1 All 181 (B) which was under the Civil Procedure Code of 1859, as amended by Act 23 of 1861.

The portion quoted in the judgment reads as follows:

> "The judgment-debtor and (if his claim be not satisfied out of the proceeds of the re-sale) the original decree-holder stand in the position of decree-holders who have obtained judgment against the defaulting purchaser for damages occasioned by his default. The defaulting purchaser stands in the position of a judgment-debtor against whom a decree for such damages has been passed. They are parties to the proceeding which is substituted for the suit..... and the rule relating to appeals must be applied, 'mutatis mutandis', equally with any other of the rules governing executions of decrees."

The Full Bench then proceeded as follows:

> "In effect the view taken was that the adjudication, in a case like the present, between the judgment-debtor and the defaulting purchaser, amounts to a decree and that appeals lie under the provisions governing regular appeals from decrees. The position does not seem to be altered by any changes which have since been made in the law; if anything, the case in favour of the maintainability of an appeal is made a little stronger by the definition of the word 'decree' in the Code of 1908....."

The facts of that case were that the property had been sold but the person who had made the highest bid failed to deposit 25 per cent. of the purchase-money as required under O. 21, R. 84 of the Code with the result that the property was directed to be re-sold and on re-sale there being a big deficiency in the price fetched, proceedings were taken to realise the balance from the previous auction-purchaser under the provisions of O. 21, R. 86 of the Code. It was held by the learned Judges that the order of the lower court amounted to a decree and an appeal lay as an appeal from a decree.

(3) If an objection, that the provisions of O. 21, R. 85 of the Code had not been complied with, is not an objection relating to the publication and conduct of the sale, O. 21, Rr. 90 and 92, will not apply to it and S. 104 (2) of the Code will not bar a second appeal.

(4) Coming now to the merits of the case, learned counsel for the appellants has urged that there was substantial compliance with the provisions of O. 21, R. 85, inasmuch as the cheque was handed over to the auctioneers within 15 days of the date of the sale. A comparison of Rr. 84 and 85 will make it clear that while the deposit of 25 per cent. on the amount of the purchase-money has to be made to the officer or other person conducting the sale, the balance of the purchase-money has to be paid by the purchaser into court. The handing over of the cheque, therefore, to the auctioneers was not payment into court, nor could it be said that the handing over of the cheque was a deposit of the balance of the purchase-money. We are, therefore, satisfied that the provisions of O. 21, R. 85, were not complied with.

(5) The question then arises whether non-compliance with the provisions of R. 85, will make the sale a nullity. On the face of it, the rule appears to be too harsh and technical. But an examination of the authorities makes it clear that R. 85 has been interpreted strictly and wherever a deposit has not been made within the time allowed, it has been held that the court has no option but to re-sell the property under R. 86. Under the previous Code of 1882, on default of payment of the balance of the sale price within the period mentioned in R. 85, the deposit was forfeited to the Government. If one-fourth of the purchase-

money was forfeited to the Government and the Court had no option in the matter, the property had to be re-sold and the previous sale could not be confirmed. The Act of 1908 has now given a discretion to the Court and it is for the Court to decide whether the amount shall or shall not be forfeited to the Government. The rest of the rule remains mandatory and has continued to be interpreted in the same way.

The rule provides that:

"The property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold".

(6) In a case where the decree-holder and the judgment-debtor agree that it was not necessary to put up the property to auction again and that the property be transferred to the defaulting auction-purchaser and that is done, the sale has been treated as a 're-sale' of the property and not as a confirmation of the previous auction-sale.

(7) In — 'Nawal Kishore vs. Buttu Mal', AIR 1935 All 243 (C), default had been made by the auction purchaser in paying into court the full amount of the purchase-money within the time allowed under O. 21, R. 85. After the expiry of the period, the auction-purchaser obtained the permission of the court to deposit the balance of the purchase money which he did on 27-7-1931, i.e., long after the 15 days had expired. This matter was brought to the notice of the learned Judge in the lower court but he dismissed the objection and confirmed the sale. This Court held in appeal that

"rule 85 requires that the full amount of the purchase-money shall be paid by the purchaser into court before the court closes on the 15th day from the sale of the property. That R. 86, also requires that in default of payment within the period mentioned in the last preceding rule, the deposit may, if the court thinks fit, after defraying the expenditure, be forfeited to Government and the property shall be re-sold".

and held that the discretion was confined to the forfeiture and not to the re-sale of the property. The appeal was allowed and the lower court was directed to re-sell the property.

The learned Judges relied on an unreported decision of this Court in —'Lala Lachmi Narain v. Chattar Singh,' E. S. A. No. 1393 of 1928 (All) (D), decided by Sen and Niamat Ullah, JJ. They had held

"It is left to the discretion of the court either to direct or not to direct the forfeiture of the deposit but the rest of the rule namely that in all cases of deficiency of deposit the property shall be resold has been maintained and that the said rule is imperative".

The same view was taken by a learned single Judge in —'Haji Inam Ullah v. Mohammad Idris', AIR 1943 All 282 (E), and it was held that O. 21, R. 86, laid a duty upon the Court to resell the property if the purchase-money had not been deposited in full within the period prescribed by R. 85, and the performance of this duty is quite irrespective of any application being made by any party to the proceedings.

(8) In —'Kalipada Mukerji v. Basanta Kumar', AIR 1932 Cal 126 (F), the judgment-debtor had agreed that the property be not re-sold and that it be sold to the auction-purchaser even though he had not deposited the rest of the purchase-money within 15 days. The learned Judges held that:

"Section 148 of the Code would not authorise the Court to enlarge the period because the period is fixed by the statute and is not fixed or granted by the Court. But the effect of the consent, in our opinion, is to waive the irregularity in the procedure, and the proper view in our judgment to take of the transaction is to hold that the old sale was equivalent to a resale".

(9) In —'Subramanyan Nambudri Karnavan v. V. K. V. Kammathi', AIR 1923 Mad (48) (G), Spencer and Ramesam, JJ. took the view that where the decree-holder, the auction-purchaser and the judgment-debtor are all agreed that the property be not re-sold and it be transferred to the auction-purchaser, the transaction amounted, in effect, to a "re-sale" of the property. It was held that the sale would not be a nullity and it would be deemed that the parties concerned had waived the irregularity.

(10) The facts in —'Nathu Mal v. Malawa Mal', AIR 1931 Lah 15 (H), were entirely different and that case is distinguishable. There the balance of the purchase-money was tendered in court within the time but the court directed the auction-purchaser not to deposit the money and the money was deposited within an extended period allowed by the court. The full amount having been tendered within time, it could be treated as payment into court.

(11) In —'A. R. Davar v. Jhinda Ram', AIR 1938 Lah 198 (I), it was held that the failure to deposit 75 per cent. of the sale price within a fortnight as required by O. 21, R. 85, could not be said to be an irregularity in publishing or conducting the sale within the meaning of O. 21, R. 90, that the Court had no jurisdiction to extend that time beyond 15 days allowed under R. 85 and the learned Judges agreed with the decision of the Court in AIR 1935 All 243 (C).

(12) The next point raised by learned counsel for the appellants is a question of limitation. It is urged that the application dated 19-11-1949, could be filed within 30 days, if Art. 166, Limitation Act, applied or, within three years, if Art. 181, applied. In either case, it was said that the application was barred by limitation. Article 166, applies to an application to set aside a sale in execution of a decree. That article does not apply to a case of this kind where it is alleged that there was no sale and the law itself provides that on a default having been made, the defaulting purchaser shall forfeit all claim to the property and the property shall have to be re-sold.

Learned counsel has not insisted on the application of Art. 166 and has relied on Art. 181, which is the residuary article. The argument is supported by reference to a Full Bench decision of the Madras High Court in — 'Rajagopala Aiyar v. Ramanujachariyar', AIR 1924 Mad 431 (J). In that case, the sale was held to be invalid as

notice of the sale had not been issued to the third defendant in accordance with the provisions of O. 21, R. 22 of the Code. It was held that the third defendant had a vested interest in the property and the omission to give notice to him rendered the sale void. Then the question arose about the period of limitation applicable to an application by the defendant third party to have the sale set aside on the ground that it was void. The learned Judges were of the opinion that not Art. 166 but Art. 181, the residuary article, would apply and the application was held to be within time.

(13) The same view was taken by Young and Rachhpal Singh JJ., in — 'Narotam Das v. Bhagwan Dass', AIR 1934 All 314 (K). In that case, the sale had been held by the civil court, while the Collector alone was authorised to sell the property. The sale was held to be void and an application to set it aside was said to be governed not by the provisions of Art. 166 but by the provisions of Art. 181. In this case also, the application was made within three years.

(14) There is therefore, some authority for the view that even in a case where the sale is void if an application is made to have it set aside, the provisions of Art. 181, Limitation Act, would apply, that being the residuary article.

(15) The position in this case is, however, slightly different. Here the sale had been confirmed by the executing court on 15-7-1941. On 7-10-1949, the High Court had set aside the order of confirmation and had directed the lower court to consider the objection under O. 21, R. 90 of the Code. On the disposal of those objections, the court had, therefore, to pass a fresh order of confirmation of the sale. If on that date the court knew that the provisions of R. 85 of O. 21 had not been complied with, and under R. 86 the property had to be resold, it could not ignore the provisions of the Code and confirm the sale on the ground that neither the decree-holder, nor the judgment-debtors had made an application within time. There is a difference between an application to set aside an order confirming a void sale to which Art. 181 might apply, and a case where the sale has not yet been confirmed and the notice of the court is drawn to certain facts, of which the court is bound to take cognizance, before passing an order confirming a sale.

After the High Court had set aside the order of confirmation on 7-10-1949, the court had to reconsider the question whether the sale should or should not be confirmed & if certain facts came to its knowledge, no matter whether on an application filed by the judgment-debtors or 'suo motu', the court could not shut its eyes to them & to the breach of the provisions of R. 85 and pass an order confirming the sale in disregard of the provisions of R. 86 of O. 21.

(16) The result, therefore, is that the lower court appears to have taken a correct view and we dismiss this appeal with costs.

D.H.Z. Appeal dismissed.

AIR 1955 ALLAHABAD 230 (Vol. 42, C.N. 71)

(LUCKNOW BENCH) KIDWAI J. (4-1-1954)

Ram Nath Complainant-Applicant v. Manna and another, Accused-Opposite Party.

Criminal Revn. Applns. Nos. 18 and 19 of 1953, against order of Civil and S. J.; Barabanki, D/-18-11-1952.

Penal Code (1860), Ss. 34, 325, 323 — Common intention — Proof of.

The common intention that has to be proved under S. 34, I. P. C., is the common intention to commit the crime that is actually complained of.

Thus in a complaint against two accused for causing grievous hurt, if there is no evidence as to who was responsible for causing the hurt, the Magistrate has to find that there was a common intention on behalf of the two accused persons to cause grievous hurt to the complainant and if, on considering the circumstances of the case, he does not find such an intention established, obviously he would not be justified in convicting either of them under S. 325 read with S. 34, I. P. C. The only offence that can be made out would be one under S. 323, I. P. C. AIR 1945 PC 118, Rel. on; AIR 1951 All 21 (FB), Ref. (Para 6)

Anno: I. P. C. S. 34 N. 1.

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 21: 52 Cri LJ 131 (FB) 5

(B) (V32) AIR 1945 PC 118: 46 Cri LJ 689 (PC) 6

S. S. Chaudhari and B. L. Kaul, for Applicant; S. L. Suri, for Opposite Party.

ORDER : These are two connected revision applications, one being under the Code of Criminal Procedure and the other under Art. 227 of the Constitution, directed against the order of Mr. K. Ray, Extra Magistrate, Barabanki, holding that he had no jurisdiction to proceed with the case and directing that it be sent to the Panchayati Adalat of Narauli for disposal.

(2) The facts which gave rise to these applications are that Ram Nath, against whom the opposite parties are stated to have a long-standing grievance with regard to a grove, was waylaid at about 11-00 a.m. in the fields of his village while proceeding to Razaganj Bazar and beaten with lathis. Two grievous injuries were caused, one of them being fracture of the little finger of the left hand and the other being a similar fracture of the index finger of the right hand. Altogether Ram Nath received 10 injuries and he was examined by the Medical Officer in charge of the dispensary at Rudauli on the same day. He was taken on a cot to police station Bhelsar where he lodged the first information report at 6.05 p.m. naming the two opposite parties as his assailants.

(3) Evidence on behalf of the prosecution was recorded and a charge was framed under S. 325, I P. C. Thereafter the prosecution witnesses were again cross-examined and some formal witneses were produced. The accused also produced

three witnesses in defence. Arguments were heard and eventually the learned Magistrate passed a very short order in which he held that there was no convincing proof as to which of the two accused persons was responsible for causing grievous hurt to the complainant. He also found that there was no sufficient ground for holding that the two accused persons had a common intention of causing grievous hurt. On these findings the learned Magistrate was bound under S. 56, U. P. Panchayat Raj Act, to transfer the case to the Panchayati Adalat since his findings led to the conclusion that neither of the two persons could be convicted under S. 325 but that any offence that may have been made out was one under S. 323, I. P. C.

(4) The complainant went up in revision but the learned Sessions Judge of Barabanki dismissed the application on the ground that since the matter was pending before the Panchayat Adalat, he had no jurisdiction to interfere. These two applications have, therefore, been filed in this Court and I have heard the learned counsel at some length.

(5) I do not desire to say anything about the oral evidence since I have not gone into that evidence and for purposes of this application it must be accepted on the basis of the decision of the Magistrate that there is no convincing proof as to which of the two accused was responsible for causing grievous hurt. It was, however, contended that by application of S. 34, I. P. C., both of the accused persons could be convicted under S. 325, I. P. C. Reliance was placed upon a decision of a Full Bench of this Court in — 'State v. Saidu Khan', AIR 1951 All 21 (A). In that case the learned Judges laid down a proposition that a person could be convicted under S. 304 read with S. 34 if the facts and the circumstances of the case establish that he had a common intention or that he had a knowledge of the natural consequences of the acts of his companions in assaulting a person with lathis. Each of the three learned Judges who composed the Bench makes it clear in his judgment that the application of S. 34 depends upon the facts established in a case. This view is of undoubted validity and cannot be disputed. It has been followed in subsequent decisions also but it is not necessary to refer to them.

(6) On the other hand we must not lose sight of the fact that it has been laid down in — 'Mahbub Shah v. Emperor', AIR 1945 PC 118 at p. 121 (B), that the common intention that has to be proved is the common intention to commit the crime that is actually complained of. It was, therefore, necessary in this case for the Magistrate to find that there was a common intention on behalf of the two accused persons to cause grievous hurt to the complainant and if, on considering the circumstances of the case, he does not find such an intention established obviously he would not be justified in convicting either of them under S. 325 read with S. 34, I. P. C. In this view of the matter there was no alternative but to transfer case to the Panchayati Adalat.

(7) This does not mean that it is not open to the complainant to move the Sub-Divisional Magistrate to quash the jurisdiction of the Panchayati Adalat nor does it mean that it is not open to the Panchayati Adalat, if it considers the offence to be so serious as to require a punishment greater than that which the Adalat can impose, to make a report to that effect to the Sub-Divisional Magistrate. On the face of it the order must be upheld.

(8) The learned Magistrate was quite right in not entering into a discussion of the evidence on the merits because in view of the order that he was passing, an appraisement of the same evidence has still to be done by the Panchayat Adalat and it might have prejudiced one of the parties before that Adalat if the Magistrate had given his detailed reasons. Both the applications are dismissed. Since these applications are dismissed, criminal miscellaneous application No. 33 of 53 is also dismissed and the interim order for stay dated 19-1-1953 is vacated.

D.R.R. Applications dismissed.

(S) AIR 1955 ALLAHABAD 231 (Vol. 42, C.N. 72)

ASTHANA J. (16-8-1954)

Hannu, Applicant v. The State, Opposite Party.

Criminal Revn. No. 1161 of 1954, against order of S. J., Jhansi, D/- 30-7-1954.

Public Gambling Act (1867), S. 5 — Search warrant — Delegation of power to search — Applicability of S. 79, Cr. P. C. — AIR 1948 Lah 81, Dissent. from — (Criminal P. C. (1898), S. 79).

Where there is no inconsistency between the provisions of the Criminal P. C. and the U. P. Gambling Act or where the Gambling Act is silent the provisions of the Code of Criminal Procedure will be applicable to the proceedings under the Gambling Act. Thus, the provisions of S. 79, Cr. P. C., are applicable to a search under the Gambling Act. And according to this provision the officer who has been nominated to make a search can delegate his powers to another Sub-Inspector for that purpose. 30 All 60 — AIR 1920 All 150, Foll. AIR 1948 Lah 81, Dissent. from. (Para 2)

Anno: Pub. Gambl. Act, S. 5 N. 2; Cr. P. C., S. 79 N. 2.

CASES REFERRED: Paras

(A) ('03) 30 All 60: 7 Cri LJ 19 2

(B) (V7) AIR 1920 All 150: 42 All 385: 21 Cri LJ 737 2

(C) (V35) AIR 1948 Lah 81: 49 Cri LJ 150 2

S. N. Dwivedi, for Applicant; A. G. A., for Opposite Party.

ORDER : This is an application in revision by one Hannu who has been convicted under S. 332, I. P. C., and S. 3, U. P. Gambling Act and has been sentenced to six months rigorous imprisonment under S. 332, Penal Code, and to a fine of Rs. 150/- under S. 3, Gambling Act.

(2) It was contended on behalf of the applicant that the Sub-Inspector who entered the house for search was not competent to do so as he had not been authorised under S. 5, U. P. Gambling Act. It appears from a perusal of the judgments of the lower Courts that the Superintendent of Police had authorised the Station Officer, Jhansi, under S. 5, Gambling Act, to enter the house of the applicant in order to make the search as he was satisfied that the house in question was used as a gaming house, that the warrant which was directed to the Station Officer was not executed by him personally but was endorsed by him in the name of another Sub-Inspector and it was that Sub-Inspector in whose name the warrant was endorsed who entered the house along with some constables and other persons to make the search, and that while the search was being made the applicant assaulted one of the constables who was making the search and inflicted injuries on him.

This question was also argued before the lower appellate Court and that Court relying on a decision of this Court reported in — 'Emperor v. Kashi Nath', 30 All 60 (A), found that the contention had no force and the Station Officer to whom the warrant was originally directed was competent to endorse it in favour of another Sub-Inspector and the Sub-Inspector in whose favour the endorsement was made was competent to make the search of the house and, therefore, there was no illegality in the search. This decision was followed later on by this Court in — 'Mahadeo v. Emperor', AIR 1920 All 150 (B). It was held in '30 All 60 (A)', that the provisions of S. 79, Criminal P. C., were applicable to a search under the Gambling Act and according to this provision the officer who had been nominated to make a search could delegate his powers to another Sub-Inspector for that purpose.

Learned counsel for the applicant relied on a decision of the Lahore High Court reported in — 'Kundan Lal v. Emperor', AIR 1948 Lah 81 (C). In this case the above decision of the Allahabad High Court was considered but was not accepted as correct. The view of the Lahore High Court is that the provisions of the Code of Criminal Procedure were not applicable to a search made under the Gambling Act and therefore a warrant which was required under S. 5, Gambling Act, to be executed by a particular police officer could not be executed by another police officer of the same rank as it could not be endorsed in favour of such officer. I have not been able to find anything in the Gambling Act which excludes the applicability of the provisions of the Code of Criminal Procedure to the searches made under the Gambling Act.

There is no doubt that where there are specific provisions in the Gambling Act which are inconsistent with the provisions of the Criminal P. C., than provisions of the Gambling Act have got to be followed but where there is no inconsistency between the two provisions or where the Gambling Act is silent the provisions of the Code of Criminal Procedure will be applicable to the proceedings under the Gambling Act. I am inclined to follow the two decisions of the Allahabad High Court in preference to the Lahore decision. I am not satisfied that the lower Courts in view of the above decision of the Allahabad High Court committed any mistake in arriving at the decision given by them.

(3) There is no force in the present application. It is therefore rejected.

V.S.B. Application rejected.

(S) A.I.R. 1955 ALLAHABAD 232 (Vol. 42, C.N. 73)

FULL BENCH

MALIK C. J.., DESAI AND MUKERJI JJ.

(15-11-1954)

Sundar Singh and others, Applicants v. The State, Opposite Party.

Criminal Revn. Nos. 27 and 239 of 1953, against order of S. J., Hamirpur, D/- 16-9-1952.

(a) Penal Code (1860), Ss. 147, 149, 323, 71 — Separate convictions under S. 147 and S. 323 read with S. 149 — Separate sentences — Legality — Scope of S. 71, I.P.C.—1952 All LJ 392: AIR 1953 All 315: 1953 Cri LJ 711, Overruled.

Per Malik C. J. and Mukerji J. (Desai J. dissenting): Where an unlawful assembly has used force or violence, it becomes guilty of rioting under S. 146 and can be convicted and punished under S. 147, I. P. C. If, however, as a result of the use of that force or violence simply hurt is caused, every member of the unlawful assembly can also be convicted and sentenced under S. 323 read with S. 149, I.P.C. Where therefore the accused are charged with an offence under S. 147 and an offence under S. 323 read with S. 149, provided the offences are proved, the accused can be convicted under both the Ss. 147 and 323/149 and also can be sentenced separately under the two sections.

An offence under S. 147 need have no ingredient which is common to S. 323, nor for an offence under S. 323 there need be any ingredient which constitutes an offence under S. 147. There can, therefore, be no doubt that both are separate offences for which separate convictions and separate sentences can be awarded. (Paras 5, 6)

The contention that an unlawful assembly will be deemed to be guilty of rioting only when it has exercised force or violence and if only one blow has been given then by that one blow both an offence under S. 147 and an offence under S. 323 were completed and, therefore, the limit under S. 71 will apply and the offender cannot be punished with a more severe punishment than the Court which tries him can award for any one of such offences, cannot be accepted. As soon as force or violence is used the offence of rioting is complete. If the blow has resulted in hurt, then the further offence under S. 323 would also have been committed. No difference can, therefore, be made between a case where one blow is given by a member of an unlawful assembly and a case where more than one blow is given by a member thereof, and the restrictions given in S. 71 will not apply to such a case. (Para 7)

Per Desai J.: "I respectfully differ from their opinion that the punishment that can be inflicted on a member of an unlawful assembly for the offence of Ss. 147 and 323, I. P. C., is in no circumstance subject to the restrictions imposed by the second or third part of S. 71 and that it is irrelevant to consider whether only one blow was given by a member of an unlawful assembly or more than one."

(Para 12)

"I agree that an offence of S. 147 can be committed even if an offence of S. 323 is not committed and vice versa. It does not, however, follow that the punishments for the two offences can never be governed by the third part of S. 71. If an offence of S. 147 is committed without an offence of S. 323 being committed at the same time and subsequently an offence of S. 323 is committed the punishments for the two will certainly not be governed by S. 71; for example where two blows are dealt. But if an offence of S. 147 is committed just because a member commits an offence of S. 323, the position is altered completely."

(Para 12)

"I regret I cannot agree that a single act with a definite beginning and a definite end and impelled by a single impulse can be split up into two acts like this. I have no doubt that there is only one act done when one blow is given." Case law referred; 1952 All LJ 392: AIR 1953 All 315: 1953 Cri LJ 711, Overruled.

(Para 13)

Anno: I. P. C., S. 147 N. 3; S. 149 N. 11, 13; S. 71 N. 1, 5.

(b) Penal Code (1860), S. 149 — Scope — Does not create new offence.

Section 149 does not create a new offence but makes a member of an unlawful assembly vicariously liable for offences committed by others in furtherance of the common object.

(Para 2)

Anno: I. P. C., S. 149 N. 1.

(c) Penal Code (1860), S. 146 — Force or violence — Meaning — (Words and Phrases).

While the word 'force' has been defined in S. 349, the word 'violence' has not been defined in the Code. "Violence" must, therefore, be understood in its ordinary sense. "Violence" is a word of wider import than 'force' and includes force used against inanimate objects also.

(Para 3)

Anno: I. P. C., S. 146 N. 2.

CASES REFERRED: Paras

(A) (V39) AIR 1952 All 92: 1951 All WR (HC) 597 1
(B) (V40) AIR 1953 All 315: 1952 All LJ 392: 1953 Cri LJ 711 1, 31
(C) ('13) 40 Cal 367: 13 Cri LJ 821 4
(D) (V40) AIR 1953 All 510: 1953 Cri LJ 1222 12, 13, 17, 34
(E) (V41) AIR 1954 All 80: 1953 All LJ 534: 1954 Cri LJ 96 12, 32
(F) (V15) AIR 1928 Mad 18 (1): 28 Cri LJ 982 13
(G) ('87) 9 All 645: 1887 All WN 149 16
(H) (V12) AIR 1925 PC 1: 52 Ind App 40: 26 Cri LJ 431 (PC) 16, 26, 27
(I) ('89) 16 Cal 442 (FB) 27
(J) (V26) AIR 1939 Oudh 91: 40 Cri LJ 217 27
(K) ('88) 10 All 58: 1887 All WN 274 28
(L) (1931) 76 Law Ed 306: 284 US 299 30
(M) (V27) AIR 1940 Nag 120: 41 Cri LJ 360 31

Jagdish Sahai, for Applicants; Govt. Advocate and Shri Ram, Dy. Govt. Advocate, for Opposite Party.

MALIK C. J.:

I have read the judgment of my brother Mukerji. Criminal Revision No. 27 of 1953 came up before my brother Brij Mohan Lall. He referred the case to a Bench as the question had been frequently mooted before him whether if X is found to be a member of an unlawful assembly which assembly has committed an offence punishable under Section 323, he could be convicted and sentenced both under S. 147 and S. 323/149, Penal Code, if it had transpired that the prosecution had failed to prove that X himself caused the hurt with his own hands. There was a decision of my brother Brij Mohan Lall J. in — 'Tiny v. State', AIR 1952 All 92 (A), where it was held that X could be so convicted, while there was a later decision by my brother Kidwai J. in — 'Abdur Rashid Khan v. The State', AIR 1953 All 315 (B) where he had taken a contrary view. The case came up before Mr. Justice Agarwala and myself and for the reasons given in the referring order we thought it necessary that the case should go before a Full Bench. Criminal Revision No. 239 of 1953 was connected with it as the same question of law arose in that case also. Since both these cases were referred by me to a Full Bench I would like to state briefly my opinion on the questions of law raised.

(2) I agree with my brother Mukerji that S. 149, Penal Code, does not create a new offence but makes a member of an unlawful assembly vicariously liable for offences committed by others in furtherance of the common object.

(3) As my learned brother has pointed out 'force' is defined in S. 349, Penal Code, but every force used against a human being need not necessarily result in 'hurt'. 'Hurt' is defined in S. 319 as 'bodily pain, disease or infirmity' caused to a person. In S. 146 two words have been used, 'force' or 'violence', and the section provides that

"Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

While the word 'force' has been defined in S. 349, the word 'violence' has not been defined in the Code. 'Violence' must, therefore, be understood in its ordinary sense. 'Violence' is a word of wider import than 'force' and includes force used against inanimate objects also. In Morray's New English Dictionary, Vol. X, the meaning given to the word is "To compel or constrain; to force (a person) to or from a place, etc., or to do something, by violence".

(4) In — 'Samaruddin v. Emperor', 40 Cal 367 (C), it was held that:

"The word 'violence' in S. 146, Penal Code, is not restricted to force used against persons only,

but extends also to force against inanimate objects."

(5) Where, therefore, an unlawful assembly has used force or violence, it becomes guilty of rioting under S. 146 and can be convicted and punished under S. 147, Penal Code. If, however, as a result of the use of that force or violence simple hurt is caused, every member of the unlawful assembly can also be convicted and sentenced under S. 323 read with S. 149, Penal Code. It is not necessary that an unlawful assembly should have caused 'hurt' to enable it to be held guilty of rioting and for a conviction under S. 323 it is not necessary that there should be an unlawful assembly or that unlawful assembly should be guilty of rioting.

(6) There can, therefore, be no doubt that where the accused are charged with an offence under S. 147 and an offence under S. 323 read with S. 149, provided the offences are proved, the accused can be convicted under both the sections, 147 and 323/149. There can also be no doubt that they can be sentenced separately under the two sections. The question arises whether the separate sentences are subject to any of the restrictions contained in S. 71, Penal Code. Section 71 is as follows:

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

ILLUSTRATIONS

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y."

This section deals with the limit of punishment and the first part deals with a case like the one given in the Illustration. The second part deals with a case where anything done can fall under the definition of two separate offences, and the third with a case where out of several acts committed some constitute one offence but all taken together a different offence. I have already said that an offence under S. 147 need have no ingredient which is common to S. 323, nor for an offence under S. 323 there need be any ingredient which constitutes an offence under S. 147. There can, therefore, be no doubt that both are separate offences for which separate convictions and separate sentences can be awarded.

(7) It has been urged that an unlawful assembly will be deemed to be guilty of rioting only when it has exercised force or violence and if only one blow has been given then by that one blow both an offence under Section 147 and an offence under S. 323 were completed and, therefore, the limit under S. 71 will apply and the offender cannot be punished with a more severe punishment than the Court which tries him can award for any one of such offences. I find it difficult to accept this argument, for to constitute an unlawful assembly it is not necessary that the blow should have caused any hurt. As soon as force or violence is used the offence of rioting is complete. If the blow has resulted in hurt, then the further offence under S. 323 would also have been committed. I do not, therefore, think that any difference can be made between a case where one blow is given by a member of an unlawful assembly and a case where more than one blow is given by a member thereof. In my view, the restrictions given in S. 71 will not apply to such a case.

(8) The case for the prosecution is that several blows were given, but even if it were not so, I would hold that in a case where only one blow was given by a member of an unlawful assembly, which had caused simple or grievous hurt, every member of the assembly makes himself liable under S. 147 or S. 148, according to the nature of the weapon used, and under S. 323, or S. 325 or any other section, according to the injury caused.

(9) In Criminal Revision No. 239 of 1953, the accused were convicted under S. 147 and S. 323 read with S. 149, Penal Code, and were awarded a fine of Rs. 30/- and Rs. 20/- each under each section respectively. In Criminal Revision No. 27 of 1953, some of the accused were convicted and sentenced under S. 148 and S. 326 read with S. 149 and certain others under S. 147 and S. 326 read with S. 149, Penal Code, and were awarded varying sentences. To my mind, the convictions and sentences were perfectly legal.

(10) I would, therefore, dismiss both these revisions.

DESAI J.:

(11) I have had the advantage of reading the judgments of the Hon'ble Chief Justice and Mukerji, J., and concur in the orders proposed in the two revisions.

(12) I agree with my learned brothers that the first part of S. 71, Penal Code, deals with a case similar to that given in illustration (a) to the section, that S. 149 does not create any offence (inasmuch as it requires no act to be done for imposition of the penalty prescribed by it but imposes the penalty for an offence committed

by another member), that as regards the question to what extent a member of an unlawful assembly can be separately punished for the offences of Ss. 147 and 323 read with S. 149 it is immaterial whether he himself caused the hurt or another member of the unlawful assembly and that not only can a member of an unlawful assembly be convicted under both the sections but also he can be separately punished for them. But I respectfully differ from their opinion that the punishment that can be inflicted on a member of an unlawful assembly for the offences of Ss. 147 and 323, I.P.C., is in no circumstance subject to the restrictions imposed by the second or third part of S. 71 and that it is irrelevant to consider whether only one blow was given by a member of an unlawful assembly or more than one.

I have given my views on the question in detail in — 'Behari v. The State', AIR 1953 All 510 (D) referred to by my brother Mukerji in his judgment. I took pains to point out the distinction between a case in which one blow is given and another in which more than one blow is given and stated that in the former case the punishment for the two offences is subject to restrictions imposed by part 3 of S. 71 and the total of the punishments for the two offences cannot be more severe than that for either of them, while in the latter case, the punishment is not subject to any such restrictions and the maximum punishments prescribed in the Penal Code can be inflicted for the two offences. My brother Mukerji thinks that I held that if one blow is given, separate punishments for the two offences cannot be inflicted; I am afraid there has been some misunderstanding because I think I clearly said that separate punishments can be given, though they must be subject to the restrictions imposed by part 2 or 3 of S. 71.

I further agree with my learned brothers that force or violence is something less than hurt and that there may be force or violence which does not amount to hurt. I agree with Mukerji, J. that under parts 2 and 3 of S. 71 the total of the punishments that can be inflicted for the two offences may extend upto the higher of the two maximum punishments prescribed for them and that to this extent — 'Gopal Das v. State', AIR 1954 All 80 (E), was wrongly decided and should be overruled.

Finally I agree with the Hon'ble Chief Justice that an offence of S. 147 can be committed even if an offence of S. 323 is not committed and vice versa. It does not, however, follow that the punishments for the two offences can never be governed by the third part of S. 71. If an offence of S. 147 is committed without an offence of S. 323 being committed at the same time and subsequently an offence of S. 323 is committed the punishments for the two will certainly not be governed by S. 71; for example where two blows are dealt. But if an offence of S. 147 is committed just because a member commits an offence of S. 323, the position is altered completely. The third part of S. 71 has regard to the actual acts done, and not to mere definitions of the two offences; its applicability depends on the actual acts done (i.e. whether one of them constitutes one offence, and their combination a different offence) & not on the definitions of the two offences (i. e. whether the definition of one includes the whole or part of the other definition).

(13) The basis of the view of my learned brothers that even when only one blow is given by a member of an unlawful assembly, all the members can be punished for the two offences (of Ss. 147 and 323, I. P. C.) without any regard to the provisions of S. 71, i.e. to the extent of the total of the maximum punishments prescribed for them under the Penal Code, is that an act of giving a blow consists of two parts, one of the preliminary act of aiming a blow and making a movement for delivering it and the other of actually striking the body of the victim and thereby causing pain. The argument is that as soon as a blow is aimed at the victim and some movement is made for delivering it, force or violence is used and the offence of S. 147 is completed and that when the blow lands on the victim's body so that he feels pain, a further or additional offence of S. 323 is committed, that the two offences are distinct and that maximum punishments can be inflicted for both of them on all the members of the unlawful assembly. I regret I cannot agree that a single act with a definite beginning and a definite end and impelled by a single impulse can be split up into two acts like this. I have no doubt that there is only one act done when one blow is given.

The question that we are considering has given rise to a great controversy and has been answered in at least five different ways by different authorities. At one extreme there are authorities laying down that there can be no separate convictions even for the two offences; at the other there are authorities laying down that separate and cumulative punishments can be inflicted for the two offences, even exceeding the maximum prescribed for either if more than one blow is given. In AIR 1953 All 510 (D) (supra) I have taken the latter view. Between the two extremes lie the views that separate convictions can be recorded but separate punishments cannot be inflicted, that separate punishments also can be inflicted but cannot be made cumulative and that separate and cumulative punishments can be inflicted but not exceeding the maximum prescribed for either unless the accused has personally committed the offence of S. 323. I do not think any authority has gone as far as my learned brothers except probably Wallace, J., in — 'Anthony Udaiyan v. Royappudayar', AIR 1928 Mad 13 (1) (F).

If a single act impelled by one impulse is split up into parts there is no limit to which one may go. If any act of dealing a blow can be split up into two parts, one of making a movement to deliver the blow and the other of actually touching the body of the victim, it can also be split up into as many acts of movement as there are moments in the duration of the act, in other words in an infinite number of acts. If an offender is liable to be punished for the two parts (into which the act of dealing one blow is split up) as if they created two distinct offences, on pushing the rule to its logical conclusion he would become liable to be convicted for an infinite number of offences.

Every act which amounts to an offence is necessarily preceded by an attempt; no act can be done without an attempt to do it. To attempt to commit an offence is itself an offence. Generally an attempt is punished under S. 511, Penal Code, but the Code makes special provisions for an attempt to commit certain offences. For example an attempt to cause hurt is punished as an assault under S. 352, I. P. C. When a person deals a blow, he first aims a blow and makes a movement to deliver it; so long as the blow is not actually delivered he has committed an assault or an attempt to cause hurt. As soon as the blow is delivered, the offence of causing hurt is committed. I have not come across a single authority laying down that a person should, or even can, be punished separately without regard to the provisions of S. 71 for committing an offence and also for attempting to commit it. It has never been held so far that when a person is punished under S. 323 he should also be punished under S. 352. I use the word "should" because whether a person can be convicted and punished or not is a matter of law and not of discretion. If an offence is proved, the accused must be convicted and must be punished; the Court has no option. I cannot agree that separate punishments can be given for these two offences.

An offence cannot possibly be committed unless an attempt is first made and the legislature itself has created a separate offence of an attempt to commit an offence; it follows that the legislature did not contemplate at all that when an offence is committed, the offender should be liable to be punished not only for the offence but also for attempting to commit it. An attempt to commit an offence is punished only when it fails and the offence is not committed. If the offence is committed, the attempt merges in the offence and attempting and committing an offence are treated as just one act for which there can be just one punishment. In fixing the punishment for an offence the legislature must have taken into account the attempt without which the offence could not possibly be committed. Even if an offender is convicted and separately punished for committing an offence and for attempting to commit it, the total of the punishments cannot exceed the punishment for the offence; the third part of S. 71 would bar it. It follows that the third part of S. 71 would bar a more severe punishment for the offences of Ss. 147 and 323 than that for S. 147 or S. 323.

Just as one cannot inflict the maximum punishment for the offence of S. 323 and the maximum punishment for the attempt to commit it, so also one cannot inflict the maximum punishment for the offence of S. 323 and the maximum punishment for that of S. 147. When an offender plunges a knife into the chest of another, he ruptures his skin, then breaks ribs and then pierces the heart and puts it out of action; he commits in order of time the offences of Ss. 324, 326 and 302, as at the moment of rupturing the skin he commits the offence of S. 324, when he drives the knife deeper into the body and fractures ribs, he commits that of S. 326 and when he drives it still deeper and extinguishes the life he commits that of S. 302. It cannot be contended that he can be convicted and given the maximum sentences for the three offences.

If his act cannot be divided into those three acts for which separate and maximum punishments can be inflicted, I do not understand how an act of delivering a blow can be divided into two parts for which separate and maximum punishments can be inflicted. The dealing of a blow is, and must be treated as, one indivisible act for which only one punishment can be inflicted. By that act the offences of Ss. 147 and 323 simultaneously come into existence, and the punishment for them would be governed by part 3, if not part 2 of S. 71. The act of delivering a blow is punishable under S. 323. When it is combined with the other act of being a member of an unlawful assembly, the offence of S. 147 is committed by the combination; the offender cannot be given more severe punishment for them than he can be given for either. When a second blow is delivered, the position is materially altered; the second blow is punishable only under S. 323 because the offence of rioting has already been committed by the infliction of the first blow. In the present cases more than one blow was given; moreover the total of the punishments inflicted on any of the applicants did not exceed the maximum for either of the offences. Therefore, the sentences were legal.

(14) I agree that the applications be dismissed.

MUKERJI J.:

(15) These two cases have been referred to a Full Bench by Division Bench because of the divergence of judicial opinion on the question of law that arose for decision in the two cases. The question which has been referred for decision is

> "whether an accused who has been convicted of any offence punishable under the Penal Code with the aid of S. 149 of the Code can also be convicted and sentenced separately for an offence punishable under S. 147 of the same Code?"

(16) The first divergence of opinion on this question was noticeable in this Court when Straight and Brodhurst, JJ. differed with each other. The result of that difference of opinion was a reference to a Full Bench, but the Full Bench did not effectively decide that question. A decision, however, was directly given in the case of — 'Queen Empress v. Bisheshar', 9 All 645 (G) by Sir John Edge C. J. and Brodhurst, J. According to their view it was possible to sustain not only two separate convictions, one under some section of the Penal Code read with S. 149 of the same Code and another under S. 147 of the Penal Code but also to award separate sentences for the seperate convictions. This view was followed consistently, so far as this Court was concerned, and also in Oudh. After the decision of their Lordships of the Judicial Committee of the Privy Council in — 'Barendra Kumar Ghosh v. King-Emperor', AIR 1925 PC 1 (H), however, a doubt appears to have been entertained by certain Judges in regard to the correctness of the view expressed by Sir John Edge, C. J. and Brodhurst, J. This doubt appears to have arisen because of the view expressed by the Privy Council, while discussing the scope of S. 34, I. P C., and while pointing out

the difference that they saw in the scope of Ss. 34 and 149, I. P. C. Having been a view expressed by no less an authority than that of the Privy Council the Courts in India treated it with the respect it deserved and some Courts even attempted to utilize it for the purpose of giving a particular meaning to S. 149 of the Penal Code.

(17) There has been, therefore, a good deal of difference of judicial opinion on this question between the High Courts in India. The Calcutta High Court has taken a view contrary to that which has prevailed in this Court. The High Courts of Madras and Nagpur also subscribed to the same view as obtained in the Calcutta High Court. There is, therefore, a large volume of case law which can be cited in support of one or the other view. One of the members of this Bench, namely, Desai, J. collected a large number of these decisions and analysed their respective reasonings in a recent decision of his in AIR 1953 All 510 (D). It does not, therefore, appear to me to be necessary to consider all the decisions which were cited before Desai, J. and have been considered by him nor even all those that were cited before us at the Bar during the course of the arguments. Most of these decisions follow a common reasoning. It is, in my view, necessary only to notice some of the decisions in order to appreciate the respective reasonings found in support of the respective points of view.

Before actually considering these decisions I consider it appropriate to focus attention on the relevant provisions of the Code. Section 149, I. P. C., is in these words:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

(18) The object of the section is obvious, namely to fasten constructive liability on all the members of an unlawful assembly for the acts of any one of that assembly. Section 141 of the Code defines an "unlawful assembly" as an assembly of five or more persons who assemble with the common object of doing any of the five unlawful acts catalogued in the section. An unlawful assembly is said to commit riot whenever "force" or "violence" is used by that assembly or by any member thereof, in prosecution of the common object of such assembly, and every member of such assembly is made liable for that use of force or violence under the provisions of S. 146, Penal Code. Section 147, I. P. C., prescribes the punishment for rioting. A member of an unlawful assembly becomes guilty of rioting, when he uses "force" or "violence" or when any other member of the assembly uses such force or violence. The words "use of force or violence" have a different connotation and mean a different thing than causing "hurt", either simple or grievous, to any one, although hurt may be the result of "the use of force or violence", for "force" or "violence" is always a precursor of "hurt".

(19) "Hurt" has been defined in S. 319 of the Penal Code as follows:

> "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

By S. 320, Penal Code, "grievous hurt" has been defined to include eight types of injury to the human body. A man is said to use "force" when

> "he causes motion, change of motion, or cessation or motion to that other, or if he causes to any substance such motion or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling"

— provided of course he does what has been stated above through some act of his. This would be apparent from the words of S. 349, I. P. C. The word "violence" has the same basic element as has the word "force". A person is said to be violent when he is impetuous and unrestrained in his action. It is clear that "hurt" can be caused only to the human body, while violence may be used against inanimate objects also. All "hurts" are preceded by force or violence and are the result of force or violence; though therefrom it does not follow that by using force or violence one necessarily causes any hurt.

(20) The offence punishable under S. 146, Penal Code, is complete the moment there is use of force or violence by any member of the unlawful assembly whether such force or violence results in any hurt or not. The nature of the hurt determines the penalty, i. e. if it is simple hurt then the penalty incurred is the one provided for by S. 323, Penal Code, if it is grievous hurt then the penalty incurred is the one provided for by S. 325, if it is death then the penalty provided for is, according to the circumstances of the case, either under S. 304 or 302, Penal Code. The vicarious responsibility of the members of an unlawful assembly may extend not only to cases where only force or violence, apart from hurt, is caused, but also to those cases where the result of force or violence is hurt and this part of the responsibility is taken account of by S. 149, I.P.C.

There is a basic difference between the liability incurred by a member of an unlawful assembly under S. 143, Penal Code, and the one that is incurred by him under S. 149, Penal Code. The framers of the Code made provision for all contingencies which could arise out of any unruly human conduct. They covered the entire field of punishment for "violence" a human activity by a collection of human beings by enacting Ss. 146 and 149. If one is not careful to see the distinction that underlies the two sections then one would be apt to think that the two sections really overlap which, of course, is not the case.

(21) Every offence, i.e., a separate offence, has a distinct punishment prescribed for it. There are, however, certain exceptions whereby a series of successive offences have to be treated as "one offence" for the purposes of punishment; apart from this rule, or exception, a man is answerable & punishable for each offence that he commits. A man who sets upon another with a lathi and

beats him with it by delivering successive blows is, strictly speaking, guilty of so many separate offences as the blows that he delivers.

(22) If a man causes simple hurt by one blow and grievous hurt by another, then he can be convicted but not punished both under Ss. 323 and 325, I.P.C. Section 235, Criminal P. C., makes provision for the trial of a person for more offences than one when such offences are committed during the course of the "same transaction", though at the same time a man may be tried for acts constituting one offence as also constituting another offence when combined together. Subsection (4) of this section, however, says :

"Nothing contained in this section shall affect the Indian Penal Code, Section 71."

Section 71, Penal Code, is in these words: (After quoting the section, the judgment proceeds as under:)

This section provides two illustrations. Illustration (a) is worded thus:

"A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating."

This illustration, to my mind, clearly indicates the scope and the true meaning of the first part of S. 71. The meaning of the important word in that section, namely, the word "parts" has got to be understood in the light of this illustration, otherwise, there is likely to be, as unfortunately there has been, a complete misunderstanding of the meaning which the Legislature intended for that word, or the sense in which that word was used by the Legislature in that section.

(23) The second illustration, namely, illustration (b) is in these words:

"But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y."

This illustration further clarifies the position, for it makes it clear that when an offence is committed by an individual as against two separate persons, though, broadly speaking, both the offences may have been committed during the course of one transaction, he is made liable for the assualt on both the individuals. It is important to note that the first part of S. 71, I.P.C., really deals with a case in which the whole of the act is punishable under the same section or under allied sections, namely, where a series of offences partake of the same nature. This part of the section, to my mind, does not deal with a case where a part of man's action constitutes one kind of offence and another part of his action, though committed in a sequence in the course of one transaction, falls under another section, not allied.

The second part of S. 71 of the Code makes provision for a contingency when the same act constitutes more offences than one.

The third part deals with a case where several acts, one or some of which by itself or themselves, constitute one offence and the totality of the acts constitute a different offence.

(24) The rule of law contained in this section is, that, in such contingencies as stated above the offender is not to be punished with a more severe punishment than could be awarded to him for any one of such offences. The prohibition is against punishing a man more than once for the same act or the same combination of acts.

(25) The first part of S. 71, broadly speaking, provides or limits punishment for such offences as are triable under Ss. 234 and 235, Criminal P. C., while the second part provides for those cases which are triable under S. 235(2), Criminal P. C. The third part provides for the punishment of such offences as are triable under S. 235(2) of the same Code.

(26) In the appeal out of which this reference to the Full Bench has arisen, Nandan and eight others were convicted by a Magistrate of Hamirpur. Some of the appellants were convicted under Ss. 146 and 326 read with S. 149, I. P. C. while the others were convicted under Ss. 147 and 326 read with S. 149, I.P.C., and they were awarded separate sentences for their separate convictions. The argument that was made was that the appellants could not be separately sentenced both under S. 147 or 148 and under S. 326 read with S. 149, I.P.C. The argument was that the offence under S. 147, I.P.C.. was really made up of two parts and a part of such offence fell under S. 149, I.P.C. The fallacy in the argument lies in the assumption that S. 149 is an offence which is made up of two parts, one of such parts going to make up an offence punishable under S. 147, I.P.C. Section 149 does not create or make any 'particular' offence nor does it provide for any 'particular' punishment for any such offence. It is possible, however, in a sense to say that S. 149 creates an offence; but it creates an offence only in notional sense, inasmuch as it enlarges the scope of all such offences which may be committed by individuals and makes the others liable vicariously with that member of an unlawful assembly who committed the offence actually in prosecution of the common object of that assembly. The view expressed by their Lordships of the Judicial Committee in the case of AIR 1925 PC 1 (H) in the following words:

"Section 149, however, is certainly not otiose for in any case it creates a specific offence and deals with the punishment of that offence alone."

can, to my mind, not to be interpreted to mean that S. 149 creates a specific separate offence or prescribes a punishment in the manner in which punishment is provided for say, by S. 323, I.P.C. for an offence of the nature mentioned in S. 321, I.P.C. Section 149 creates an offence only in the sense that it enlarges the scope of an offence and it deals with punishment in the sense that it authorizes the court to punish a man even though he himself had not actually committed that offence.

(27) Reliance was placed strongly by counsel for the applicants on the Full Bench decision of

the Calcutta High Court in — 'Nilmony Poddar v. Queen Empress', 16 Cal 442 (FB) (I). This was a Full Bench, composed of five Judges including the Chief Justice of the Court. Four out of the five Judges took the view that separate sentences under S. 148 and under S. 324 read with S. 149 were not justified by virtue of the provisions of S. 71, Penal Code. The argument of the majority of the Judges forming the Full Bench was based on the view that the offence under S. 324/149 was made up of two parts, the first of those two parts being itself an offence which fell within the scope of S. 148, I.P.C. Tottenham, J., however, took the view that the offence of S. 324/149 was not an offence made up of two parts any of which parts was in itself an offence. The offence with which they were concerned in that case, namely, the offence under S. 324, was not an offence which was made up of any parts. By the application of the provisions of S. 149 the liability for that particular offence was enlarged. It was not as though by the use of S. 149 a new and a separate offence from that punishable under S. 324 was created.

It is, in my view, wrong to think that there is such a thing as a "composite offence" which is made up by the application of S. 149 to the facts and circumstances of any particular transaction. Section 149 does not define or punish any specific offence although it does, in a sense, make an offence or more appropriately enlarge the scope of offences, punishable under the Code. Tottenham, J. expressed the view that he would have agreed with the majority view if he could persuade himself to hold that S. 149 defined and made punishable any specific offence. This view of Tottenham, J. was attacked on the ground that their Lordships of the Judicial Committee of the Privy Council in the case of — 'Barendra Kumar Ghose (H)', have since expressed a contrary view to what had been expressed by Tottenham, J. The scope of the decision in — 'Barendra Kumar Ghose (H)', has already been noticed earlier and I only need say here that their Lordships of the Privy Council never intended to and in fact never did lay down that S. 149 created any specific separate offence. To the same effect was the view expressed in — 'Raghubar v. King Emperor', AIR 1939 Oudh 91 at pp. 93-94 (J) by Yorke, J. when he said that their Lordships of the Judicial Committee did not mean to lay down that S. 149, Penal Code, made a distinct and separate offence from the substantive offence which was committed by a member of the unlawful assembly and for which other members of the assembly were constructively held guilty under the provisions of S. 149, Penal Code.

(28) The actual perpetrator while continuing as a member of an unlawful assembly is, without doubt, punishable both for rioting and for the further offence that he commits. No apparent reason appears to me to distinguish his case from that of the other members of the assembly if the law enjoins that the other members would be liable to the same extent as the perpetrator himself and no good reason, therefore, appears to me why every member of the unlawful assembly should not be punishable in the same manner in which the man who perpetrates the act is punishable. The rule of law is that a man must be convicted of all the offences which he is proved to have committed during the course of any particular transaction. This was stressed by Mahmood, J. in — 'Queen Empress v. Wazir Jan', 10 All 58 (K), where he said that the use of the word "shall" in the various sections of the Code indicates the imperative mandate of the Legislature that persons guilty of those offences are to be punished, a direction of law which is in keeping with the general principles of jurisprudence.

Mahmood, J. pointed out that there was a section in the Code, namely, S. 71, which governed the entire Code inasmuch as it regulated the limit of punishment in certain cases. He also pointed out that the rule laid down in S. 71 was not a rule of adjective law or procedure, but was a rule of substantive law regulating the measure of punishment and, therefore, it did not affect the question of conviction, which related to the province of procedure. If more than one offence had been committed then the individual was bound to be convicted for all those offences even though in awarding punishment the provisions of S. 71, Penal Code, had to be kept in view. According to Mahmood, J. the conflict that had arisen out of the various decisions on this matter was due to the fact that a confusion had been created between the rules of law regulating the conviction and the rules which regulated the measure of punishment. Mahmood, J. further pointed out 'at p. 67' that he was not aware of any rule of law that an offence when charged and proved against the accused was to result either in a verdict of not guilty or to remain unpunished, whether such an offence is or is not accompanied by another offence, and whether such latter offence does or does not overlap or include the former.

(29) As has been pointed out, S. 71, I.P.C., regulates the province of punishment. It has nothing to say in regard to the convictions to which a person may be liable for acts which he has committed. Section 71, I.P.C., further does not take away the right of punishment inflictable for the various offences committed. The first part of that section only limits the amount of punishment awardable by courts under certain circumstances.

(30) Wharton in his Criminal Law has pointed out that when a single impulse causes an offence then a single indictment lies no matter how long the action of that single impulse may continue, but if successive impulses are separately given, even though all unite in swelling a common stream of action, then separate indictments would lie. The test, therefore, is whether individual acts fall within the prohibition of S. 71 or the whole course of action constitutes the offence; if the former, then each act is punishable separately, if the latter then there can be but one penalty. As was pointed out by Mr. Justice Sutherland in — 'Harry Blockburger v. United States', (1931) 76 Law Ed 306 (L), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences, or only one, is whether each provision requires proof of another fact which the other does

not: to wit, whether there was only force or violence or whether there was further "hurt" caused as a result of that force or violence.

(31) Before parting with this case it is necessary to point to two decisions, one in AIR 1953 All 315 (B), wherein Kidwai, J. held that separate sentences under Ss. 147 and 323 read with S. 149, I.P.C., are illegal. In this case Kidwai, J. relied on the case of — 'Baldeo Singh v. Emperor', AIR 1940 Nag 120 (M). He did not refer to any of the previous decisions of either this Court or of the Oudh Chief Court. For the reasons that I have given above I must, though with respect, say that this case does not lay down good law.

(32) Another case which has to be noticed is the decision in AIR 1954 All 80 (E). This case was not cited before us for the obvious reason that the decision was not available in the law reports at the time when the case was argued before us. In this case Dayal and Asthana, JJ. have held that the scope of S. 71, Penal Code, was that when there was a charge against a person both under S. 409, Penal Code, and under S. 5(1)(c) of Act 2 of 1947, the offender had to be punished within the "lower limit" provided for either of the two offences. With respect, I have to say that this view is not in consonance with the true meaning of S. 71, Penal Code. Section 71 of the Code provides that:

> "where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished....."

then "the offender" cannot be punished "with a more severe punishment" than the Court which tries him could award for any one of such offences. This language, to my mind, does not lend itself to the interpretation which has been given to it in the aforementioned case. The section does not refer to "punishment within the lower limit". It only says that the offender cannot be "punished more severely" than is permissible for any one of the offences with which he is charged. He can be given the higher punishment in respect of the two charges provided the higher punishment could have been inflicted by the Court trying the offender.

(33) It has been pointed out already that the use of "force" or "violence" is necessary to constitute the offence of rioting though it may fall short of causing bodily pain. If however, more force is used, or further force is used which does cause bodily pain, then a further offence than rioting also comes into being, and that offence is the offence of causing "hurt". Where five or more persons form an unlawful assembly, then each of them becomes guilty under S. 143, Penal Code. If in furtherance of the common object of the unlawful assembly one of its members uses force or violence, and that use of force and violence falls short of causing "hurt", then all the members of the assembly are punishable under S. 147, I.P.C., but if the force and violence which they use causes "hurt", then another offence also is committed by the members of the unlawful assembly and in respect of that offence they come within the purview of S. 149, I.P.C., and become liable to punishment in accordance with the nature of the hurt caused. The nature of the weapon used will also make a difference to the nature of the offence committed, if a sharp-edged or a dangerous weapon is used for causing the hurt, then the punishment awardable would be one under S. 148 instead of S. 147, I.P.C., the other offence which comes into being under the "enlarging" or "enabling" S. 149, in respect of all the members of the unlawful assembly, is one out of that group of sections which make particular offences, in accordance with the nature of the "hurt" caused to the human body.

(34) My brother Desai, J. expressed the view in AIR 1953 All 510 (D) that if only one blow is dealt by a member of the unlawful assembly, then the Court cannot award separate sentences, because in such a case the restriction imposed by S. 71 would apply. In my opinion that is not so, because the giving of a blow is not necessary for making the offence punishable under S. 147, I. P. C. In the case before us, on the allegation of the prosecution, an allegation which has been accepted by the Courts below, several blows were delivered so that, strictly speaking, this question did not arise for consideration in this case, but even if it did I would have no hesitation, on the reasoning which has commended itself to me and which I have set down earlier, in holding that every member of the unlawful assembly would be equally guilty and would be punishable under either S. 147 or 148, I. P. C., as also under any of the other sections of the Code providing punishment for injury to the human body. Section 71 would have no application. The giving of the blow, I may point out further, does not, sort of, simultaneously make the giver of the blow punishable under Ss. 147 and 323, I. P. C. The result following from the blow makes the offence punishable under either section 323 or the other sections of the Code, while it is the preceding separate act of using force and violence, an act which in law must be clearly viewed as a separate act, makes for the punishment prescribed under S. 147, I. P. C.

(35) The two revisions which were before us were Revision No. 27 of 1953 and Revision No. 239 of 1953. In Revision No. 27 of 1953 some of the accused were convicted and sentenced under S. 148 and S. 326, read with S. 149, Penal Code, while the others were convicted and sentenced under S. 147 and S. 326, read with S. 149, Penal Code, and were awarded varying sentences. In Revision No. 239 of 1953 the accused were convicted and sentenced under S. 147 and S. 323 read with S. 149, Penal Code, and were awarded sentences of fine of Rs. 30 /- and Rs. 20 /-, respectively, under each section. In view of what I have stated earlier, I am of opinion that the convictions and sentences of all the applicants in the two aforementioned revisions were legal. In the result, I would dismiss both the revisions.

BY THE COURT:

(36) For the reasons given in our judgment we are of opinion that these revisions should stand dismissed. We, therefore, dismiss the revisions.

D.R.R. Revisions dismissed.

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FULL BENCH

MALIK C. J., AGARWALA AND V. BHARGAVA JJ. (14-9-1954)

Mt. Aziz Jahan Begam, Defendant-Appellant v. Sardar Singh and others, Plaintiffs-Respondents. Sabir Husain, Pro forma, Respondent.*

Second Appeal No. 706 of 1946, against Order of Civil Judge, Agra, D/- 12-5-1945.

(a) Civil P. C. (1908), O. 21, R. 63 — Order refusing to investigate — 1938 All LJ 940: AIR 1938 All 542: 178 Ind Cas 66, Overruled.

There seems to be no reason for excluding an order under R. 58 summarily dismissing an application from the scope of the words "the party against whom an order is made". Thus an order summarily rejecting an objection under O. 21, R. 58 on the ground that it had been designedly or unnecessarily delayed is an order contemplated under O. 21, R. 63.

(Per Agarwala J.): "Left to myself I would have held that the defence in the present case was not barred by O. 21, R. 63, but all the decisions on this point in cases in which the objection has been expressly dismissed or rejected under O. 21, R. 58 are all unanimous in laying down that such an order is covered by O. 21, R. 63, and my Lord the Chief Justice and my brother Bhargava, J., are also of the same opinion. I, therefore, consider it unnecessary to differ from them. But I must make it clear that the present decision is not intended to cover cases in which no order of dismissal has been made under O. 21, R. 58. but the proper order which should be made under that rule has been made. For instance, an order merely saying that "the claim will not be investigated because it has been unnecessarily and designedly delayed", or simply saying "file" or orders to similar effect will not be held to be conclusive". 1938 All LJ 940: AIR 1938 All 542: 178 Ind Cas 66, Overruled. (Paras 8, 25)

Anno: C. P. C., O. 21 R. 63 N. 5.

(b) Civil P. C. (1908), O. 21, R. 63 — Question of title — Conclusiveness.

The contention that under R. 63 the decision must be confined to the question who was in possession on the date of the objection and the order is conclusive only to this extent that if no suit is brought within one year the party against whom the order was made cannot claim that he was in possession of the property but the question of title is not affected at all is not correct. Whether the Court has dismissed the objection summarily, or on the ground that the objector was not in possession, or on the ground that the objector had no title to the property will have no effect on the finality of the order. If the order is against the objector and he has to file a suit under O. 21, R. 63, he can only succeed in defeating the claim of the decree-holder to proceed against the property and have it sold in satisfaction of his decree by proving his own title to the property and by establishing that the judgment-debtor had no saleable interest in it.

The mere proof that the plaintiff was in possession on the date of the attachment, even though he was in possession as a rank trespasser, would not avail in defeating the claim of the decree-holder to attach and sell up the right, title and interest of the judgment-debtor if the judgment-debtor had a saleable interest in the property. The words, therefore, 'subject to the result of such suit, if any, the order shall be conclusive' must mean that if a suit was not filed then the relief which the objector could have obtained in a suit under O. 21, R. 63 to defeat the decree-holder's claim would no longer be available to him. AIR 1945 Pat 485 — AIR 1924 Cal 744, Rel. on. (Paras 11, 13)

Anno: C. P. C., O. 21 R. 63 N. 13, 16, 18.

(c) Civil P. C. (1908), O. 21, R. 63 — Bar of defence.

It cannot be said that though the party may have no right to file a suit because of the provisions of O. 21, R. 63 he can raise that point by way of defence. 1 All 381 (FB), Rel. on. (Para 14)

Anno: C. P. C., O. 21 R. 63 N. 13.

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(F) (V32) AIR 1945 Pat 485: 24 Pat 408 11
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(L) ('68) 9 Suth WR 327 20
(M) (V4) AIR 1917 PC 201: 45 Cal 442 (PC) 20
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(O) ('89) 12 Mad 500 20
(P) ('85) 1885 All WN 171 20
(Q) (V29) AIR 1942 All 410: ILR (1942) All 624 20
(R) ('06) 30 Bom 395: 8 Bom LR 296 20
(S) ('80) 5 Cal 246: 4 Cal LR 443 20
(T) ('12) 9 All LJ 67 20
(U) (V10) AIR 1923 Lah 150 (2): 73 Ind Cas 705 20
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(X) (V29) AIR 1942 Mad 41: ILR (1942) Mad 336 (FB) 24
(Y) (V21) AIR 1934 Pat 511: 13 Pat 765 24
(Z) (V24) AIR 1937 Nag 170: ILR (1938) Nag 276 24
(Z1) (V10) AIR 1923 Mad 295: 72 Ind Cas 857 24

Gopalbehari, for Appellant; S. B. L. Gaur, for Respondents.

MALIK C. J.:

This is a second appeal filed on behalf of the defendant. The plaintiff-respondent had obtain-

ed a money decree against one Sabir Husain. After the passing of the decree, and probably after the application for execution had been filed, on 23-3-1932, Sabir Husain transferred the property now in dispute in the name of his wife, the appellant, for payment of her dower debt. On 8-3-1932, the property was attached by the decree-holder. On 9-4-1932, the appellant filed an objection, under O. 21, R. 58, Civil P. C. She claimed that her husband had sold the property to her in lieu of her dower debt, that she was the owner in possession of the property and that her husband had no interest in the property which could be attached or sold in execution of the money-decree. This objection was, however, rejected on 12-4-1932, and the learned Munsif passed the following order :

"This is an objection by Mst. Aziz Jahan Begum under O. 21, R. 58, Civil P. C. The attachment was made on 8-3-1932. The present objection was lodged on 9-4-1932. It has been unnecessarily and designedly delayed. It is summarily rejected."

After the rejection of the objection under O. 21, R. 58 the decree-holder proceeded with the execution of the decree and on certain dates in the year 1933 the property was sold in two lots. The decree-holder purchased the property and on 22-11-1933, he was delivered formal possession. On 23-2-1944, the decree-holder auction purchaser filed the suit, out of which this appeal has arisen, for possession of the property and for mesne profits. The suit was resisted on several grounds and five issues were framed by the trial court which were as follows :

"1. Whether this court had no jurisdiction to attach the property in suit?

2. Whether the defence is barred under O. 21, R. 63, C. P. C.?

3. Whether defendant 1 was in possession of the properties in suit from before the execution of the sale in lieu of dowers? If so its effect?

4. To what mesne profits, if any, are the plaintiffs entitled?

5. To what relief, if any, are the plaintiffs entitled?

The first issue was decided in plaintiff's favour and the court also decided issues Nos. 4 and 5. The issue No. 3 was, however, left undecided as on issue No. 2 the court came to the conclusion that the defence was barred by the provisions of O. 21, R. 63, Civil P. C.

(2) The defendant filed an appeal and the lower appellate court agreed with the decision of the trial court and dismissed the appeal.

(3) When the case came up for hearing before a learned single Judge he referred it to a Division Bench and, by reason of certain observations in a Division Bench ruling of this Court in — 'Kanhaiya Lal v. Banke Behari', AIR 1938 All 542 (A), the case was referred to a Full Bench for decision.

(4) The points raised by learned counsel for the appellant are, firstly, that the order rejecting the application on the ground that the objection was designedly or unnecessarily delayed was not an order contemplated by O. 21, R. 63, C. P. C., and, therefore, it is not conclusive; and, secondly, that even if it be deemed to be conclusive, it only determines the question of possession of the judgment-debtor on the date of the attachment and it does not debar the defendant from pleading her title on the basis of the sale deed.

(5) As regards the first point learned counsel has not been able to cite before us a single decision in his favour and has only relied on the observations in Kanhaiya Lal's case (A), mentioned above. The answer to the first point raised by learned counsel will depend upon the interpretation of O. 21, R. 63 of the Code. Provisions of O. 21, Rr. 58 to 63 and analogous provisions in the previous Acts were introduced with the object of expeditious decision of disputed claims made against attachment and sale of immovable property so that execution proceedings should not be long delayed. In — 'Sardhari Lal v. Ambika Pershad', 15 Ind App 123 (PC) (B), their Lordships of the Judicial Committee pointed out that :

"The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him."

In the Civil Procedure Code of 1859 (Act 8 of 1859) there were two sections dealing with objections to attachment of property and investigation of the claim of the objector. In S. 247 there was a provision that no such investigation shall be made if it appeared that the making of the claim or objection was designedly and unnecessarily delayed, with a view to obstruct the ends of justice. Section 246 provided that :

"In the event of any claim being preferred to, or objection offered against, the sale of lands or any other immoveable or moveable property which may have been attached in execution of a decree or under any order for attachment passed before judgment, as not liable to be sold in execution of a decree against the defendant, the Court shall, subject to the proviso contained in the next succeeding Section, proceed to investigate the same with the like powers as if the claimant had been originally made a defendant to the suit, and also with such powers as regards the summoning of the original defendant as are contained in S. 220."

It is not necessary to quote the rest of the section but at the end of the section there was a provision that :

"The order which may be passed by the Court under 'this section' shall not be subject to appeal, but the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order."

Finality therefore attached to an order under S. 246 and not to an order under S. 247 which gave the court power to summarily dismiss an objection on the ground that it was designedly or unnecessarily delayed with a view to obstruct the ends of justice. Section 246 provided that an order disallowing the objection was not subject to appeal but the claimant was left the right to establish his claim by a regular suit within a period of one year from the date of the order under S. 246. If an objection was, however, summarily rejected under S. 247 it was open to the objector to file a suit within the ordinary period of limitation and not within the restricted period of one year.

(6) In the Act of 1877 (10 of 1877) these provisions were re-drafted. Sections that are relevant for our purposes are Ss. 278 to 283. Section 278 is more or less analogous to our O. 21, R. 58 and it was in this section that a provision was made that no investigation shall be made where the Court considered that the claim or objection was designedly or unnecessarily delayed. Section 283, which is analogous to O. 21, R. 63, provided that:

> "The party against whom an order under S. 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive."

This section having confined the conclusiveness to an order under Ss. 280, 281 and 282 a summary dismissal under S. 278 was not covered by this section.

(7) It is not necessary to refer to the provisions of Act 14 of 1882, which more, or less, reproduced the sections of the earlier Act relating to this matter. The relevant sections of the Code of 1882 are Ss. 278 to 283. What is noticeable, however, is that up to the year 1908 when the present Code was enacted finality was attached to orders under Ss. 280, 281 and 282 and not to an order summarily dismissing an objection under S. 278. In the Code of 1908 the language of O. 21, R. 63, which replaced S. 283 of the old Code, was materially altered and it is now as follows :

> "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Rule 63 does not confine the conclusiveness to an order under R. 60, 61 or 62 of O. 21, but it says that when an objection is made the party against whom an order is made shall be precluded from setting up a claim to the property unless he had filed a suit to establish the right which he had claimed. In the Act of 1859 the period of limitation was prescribed in the Code itself and that was of one year, but now the period of one year's limitation for a suit under O. 21, R. 63 is prescribed under Art. 11, Limitation Act of 1908.

(8) Coming now to the case before us, there can be no doubt that an objection was preferred to the attachment of the property by the appellant and that objection was dismissed. There seems to be no reason for excluding an order under R. 58 summarily dismissing an application from the scope of the words "the party against whom an order is made". There can be no doubt that the order was against the party who had preferred the objection. When the Legislature amended the language of O. 21, R. 63 and omitted the words in the previous Acts which confined the conclusiveness to an order after investigation it must be assumed that it was done with the deliberate object of widening its scope.

This view has been taken by every High Court in India and learned counsel has not cited a single case in his favour except certain observations which amount to 'obiter' in a Division Bench ruling of this Court in AIR 1938 All 542 (A). The judgment was delivered by Bennet, Acting Chief Justice. The decision went in favour of the defendant-appellant so that the suit filed by the plaintiffs was dismissed. Though there were no materials on the record to show that there were any objections filed under O. 21, R. 58 and the case had been fought out on the ground that the objector was a party to the decree and the objection was under S. 47, Civil P. C., and the order was therefore binding on the parties, the learned Judges expressed an opinion that even if the objection was under O. 21 R. 58 the order could not be deemed to be an order under R. 62 to which finality could attach under R. 63. With great respect to the learned Judges the reasoning does not appear to me to be at all clear, nor is it possible to ascertain what exactly they intended to lay down.

No reference was, however, made to a previous decision — '(Durga Das v. Gori Mal)', AIR 1928 All 327 (C), by Mr. Justice Bennet himself who delivered the judgment of the Bench. In 'Durga Das' case (C)', Mr. Justice Bennet sitting with Mr. Justice King had held that if an objection to an attachment was dismissed under the proviso to R. 58 of O. 21, on the ground that the objection was intentionally or unnecessarily delayed a suit to contest that order must be filed within a year. The same view was taken by a Bench of this Court in — 'Gobardhan Das v. Makundi Lal', AIR 1923 All 435 (D) which is the earliest case on the point that had been cited by learned counsel. The facts of that case were exactly similar to the facts of the case before us. An objection was filed to the attachment of the property. That objection was dismissed on the ground that it was filed too late. This was interpreted as an order under the proviso to R. 58 of O. 21 and the learned Judges referred to the change in the language. Order 21, R. 63 of the Code of 1908 does not lay down that an order under R. 60, 61 or 62 will only be conclusive, while S. 283 of the Code of 1882 had provided that orders under Ss. 280, 281 and 282 (which corresponded with Rr. 60, 61 and 62 of the new Code) will be conclusive if no suit was brought within one year. The change in the language has clearly had the effect of widening the scope of R. 63.

Learned Judges followed a decision of a Full Bench of the Madras High Court in — 'Venkataratnam v. Ranganayakamma', AIR 1919 Mad 738 (FB) (E). There are decisions of the Calcutta,

Bombay, Rangoon, Patna and Lahore High Courts all against the appellant. It is not necessary to refer to them. The consensus of opinion is in favour of the respondents and against the appellant. And I must, therefore, hold that an order summarily rejecting an objection under O. 21, R. 58 on the ground that it had been designedly or unnecessarily delayed is an order contemplated under O. 21, R. 63.

(9) Taking up the next question learned counsel has drawn our attention to the provisions of Rr. 60, 61 and 62 of O. 21 and has urged that all these rules indicate that the Court has to investigate not the question of title but the question of possession and if the executing court finds that the objector is in possession of the property, even though he may have no right to it and may be a rank trespasser, the objection must be allowed. Learned counsel has, therefore, urged that finality should attach only to the question of possession and not to the question of title.

(10) As I have already said the provisions of O. 21 Rr. 58 to 63 entitled the executing court to make a summary enquiry so that the execution proceedings may not be unnecessarily delayed it being left to the parties concerned to have their rights determined by way of a regular suit, the only difference being that if an objection was filed under R. 58 then the period of limitation was cut down to one year. The executing court was not expected to go into an elaborate discussion as regards title, especially as no finality attached to the order beyond what is contained in O. 21 R. 63 and it was left to the parties within the short period of limitation to have the matter re-agitated before a proper court. The language of the various provisions of the Code, however, do not indicate that the investigation made by the executing court is necessarily confined merely to the question of possession.

If a property is sought to be attached and a person claims to be in possession of it under a 'bona fide' claim of title, the court has to be satisfied that he has such a 'bona fide' claim. If the court decides in favour of the objector, the decree-holder or the judgment-debtor will have to file a suit under O. 21, R. 63 to establish his claim that the judgment-debtor has a saleable interest in the property. In my opinion, learned counsel has gone too far in his submissions that even if the court found that the objector had no bona fide claim to the property merely on the basis of his wrongful possession the court would decide in his favour. The language of O. 21, R. 59 read with the subsequent rules indicates that both the question of interest claimed as also the question of possession of the property can be raised and can be investigated by the executing court.

Rule 59 provides that:

"The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached."

(11) The claim or objection to be investigated under R. 60 is set out in R. 58 as follows:

".....any property attached in execution of a decree.....is not liable to such attachment...."

and the property will not be liable to attachment if the judgment-debtor has no saleable interest in it. What property is liable to attachment is mentioned in S. 60 of the Code and that section does not provide that property in which a judgment-debtor has a saleable interest cannot be attached or sold merely because the judgment-debtor is not in possession or because a trespasser is in wrongful possession of the property. Whether a judgment-debtor is or is not in possession of the property, if he has a saleable interest therein, such interest can be sold. Proceedings under Rr. 60, 61 and 62 being more or less of a summary nature, they deal mainly with possession but a claim of an objector on the basis of possession can be allowed only if he is in possession under a 'bona fide' claim of title. If the objector is in possession of the property, 'prima facie' it would be assumed that he has a right to such possession but if it is established that the objector is not in possession under a 'bona fide' claim of title and the judgment-debtor has a saleable interest in the property then there appears to be no good reason why that saleable interest should not be attached and sold.

I am inclined, therefore, to agree with the decision of a Bench of the Patna High Court in — 'Premsukh Das v. Satyanarain Singh', AIR 1945 Pat 485 (F), and the observations made by Rankin C. J. in — 'Najimunnessa Bibi v. Nacharaddin Sardar', AIR 1924 Cal 744 (E), that it was impossible to separate altogether the question of possession and of title. The argument of learned counsel therefore that under R. 63 the decision must be confined to the question who was in possession on the date of the objection and the order is conclusive only to this extent that if no suit is brought within one year the party against whom the order was made cannot claim that he was in possession of the property but the question of title is not affected at all, does not appeal to me.

(12) In execution of a decree when a decree-holder seeks to attach the property on the ground that his judgment-debtor has a saleable interest in it the person objecting to the attachment cannot merely claim to be in possession of the property; he has to assert if he wants to save the property that the judgment-debtor has no saleable interest in the property and though the proceedings under O. 21, Rr. 58 to 63 being summary proceedings the court may not enter into an elaborate enquiry into the question of title the court will have to be 'prima facie' satisfied that the person objecting to the attachment and sale was in possession under a 'bona fide' claim.

(13) Whether the court has dismissed the objection summarily, or on the ground that the objector was not in possession, or on the ground that the objector had no title to the property will have no effect on the finality of the order. Order 21, R. 63 provides that on a dismissal of a claim or an objection the person against whom the order is made has a right to institute a suit to establish his claim to the property and subject to the result of such suit, if any, the order shall be conclusive. If the order is against the objector and he has to file a suit under O. 21, R. 63 he can

only succeed in defeating the claim of the decree-holder to proceed against the property and have it sold in satisfaction of his decree by proving his own title to the property and by establishing that the judgment-debtor had no saleable interest in it.

The mere proof that the plaintiff was in possession on the date of the attachment, even though he was in possession as a rank trespasser, would not avail in defeating the claim of the decree-holder to attach and sell up the right, title and interest of the judgment-debtor if the judgment-debtor had a saleable interest in the property. The words therefore 'subject to the result of such suit, if any, the order shall be conclusive' must mean that if a suit was not filed then the relief which the objector could have obtained in a suit under O. 21, R. 63 to defeat the decree-holder's claim would no longer be available to him.

(14) A point was raised, though not developed by learned counsel that though the appellant may have no right to file a suit because of the provisions of O. 21, R. 63 he can raise that point by way of defence. This matter, however, is concluded by a larger Full Bench of this Court in — 'Badri Prasad v. Muhammad Yusuf', 1 All 381 (FB) (H). In that case the auction-purchaser, having purchased the property and having failed to get actual delivery of possession from the executing court, filed a suit for possession and the objector, whose objection had been dismissed but who had not filed a suit, pleaded in defence that he was the owner of the property and the plaintiff had no right to get possession, it was held that such a plea was barred by the provisions of S. 283 of the Code.

(15) There is no force in this appeal and it is dismissed with costs.

AGARWALA J.:

(16) This is a defendant's second appeal and arises out of an action brought by the plaintiff-respondent for possession over certain property and for mesne profits. The facts are simple. The plaintiff-respondent had a money decree against one Sabir Hussain. Sabir Hussain owned the property in dispute and transferred it to his wife, the defendant-appellant by means of a sale deed dated 23-2-1932. On 8-3-1932, the plaintiff-respondent got this property attached in execution of his decree on the assumption that this was Sabir Husain's property. On 9-4-1932 the defendant-appellant filed an objection under O. 21, R. 58, Civil P. C., claiming that her husband had sold the property to her in lieu of her dower debt and had put her in possession of the same and that her husband had no subsisting interest in the property which could be attached or sold in execution of the money decree. The execution court refused to go into the merits of her claim on the ground that the objection was "unnecessarily and designedly delayed". On this ground the objection was "summarily rejected".

No investigation having been made by the execution court into the merits of the objection, the defendant-appellant did not pursue the matter any further. The decree-holder proceeded with the execution proceedings and in the year 1933 the property was sold in two lots, the decree-holder himself being the purchaser. Formal delivery of possession was made to him on 22-11-1933. He does not appear to have done anything for over eight years. Thereafter he applied to the revenue court for mutation of his name in the revenue records but his prayer was rejected on 20-8-1943, as he was found not to be in possession of the property and as the defendant-respondent, whose name was entered in the revenue papers, was found to be in possession. On 23-2-1944, he filed the suit which has given rise to this appeal for possession over the property and mesne profits as already stated.

(17) The plaintiff-respondent alleged that the sale-deed in favour of the defendant-appellant was fictitious and fraudulent and that the defendant was debarred from putting forward her claim to the ownership of the property because of R. 63 of O. 21, C. P. C. The defence was that the defendant-appellant was in possession of the property and that the sale-deed was in lieu of the dower debt and was a perfectly genuine, valid transaction and that R. 63 of O. 21 did not bar her defence. The court did not go into the question as to who was in possession and whether the sale-deed was fictitious or genuine, because it held that the defendant was debarred from raising these pleas by virtue of O. 21, R. 63 Civil P. C. The defendant-appellant filed an appeal to the lower appellate court, but the appeal was dismissed. The defendant-appellant then filed the present second appeal, and the main question in the case is whether O. 21, R. 63 barred the defence.

(18) If a property belonging to a third person is attached in execution of a decree that person is not bound to come to court and raise and objection before the execution court. He is at liberty to keep quiet and resist the delivery of possession over the property when the auction-purchaser proceeds to take possession over it. The Civil Procedure Code, however, provides a simple, expeditious and summary procedure for the investigation of claims of third parties. They may take advantage of it or they may not. If they do not take advantage of it, they lose nothing. This summary procedure is described in Rr. 58 to 63 of O. 21. These rules are headed as "Investigation of Claims and Objections". Rule 58 provides that where any claim is preferred or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection in the same manner as if the objector or claimant were a party to the suit. The duty to investigate is mandatory. But there is a proviso to this rule which provides that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed." Rule 58, therefore, merely empowers the Court to investigate a claim and in certain circumstances to refuse to do the same.

It is worthy of note that the rule nowhere lays down that the claim shall be 'dismissed' on the ground of the delay in preferring it. Then R. 59 provides for the production of evidence by the

claimant. Rules 60, 61 and 62 contemplate three different kinds of orders; R. 60 provides for allowing of the objection after investigation and the release of property from attachment; R. 61 provides for disallowing of the claim to the attached property after investigation. Where the claimant is a mortgagee of or charge-holder over the attached property, R. 62 empowers the court to continue the attachment subject to such mortgage or charge when the mortgagee or charge-holder is not in possession. Then follows R. 63 which reads as follows:

> "Where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

(19) As already observed, R. 58 does not contemplate any order against the claimant on the merits of his claim but only directs the court not to make an investigation where it considers that the claim and objection has been designedly or unnecessarily delayed. An order on the merits of the claim is passed only under Rr. 60, 61 and 62. It seems to me that R. 63 embraces orders passed on the merits of a claim and cannot possibly refer to orders which have not been passed on the merits. The key words in the rule are "the order shall be conclusive" 'Conclusive' of what? Obviously of "what it decides". The decision must necessarily have reference to "the right" which a party "claims to the property in dispute" because it is for the establishment of that right that a suit has to be brought if the order is to be questioned. It is urged that an order refusing to investigate a claim on the ground that it was delayed is also "against a party" and is, therefore, 'conclusive' against him. But if it is to be 'conclusive' it can be only with reference to what it decides and as it merely decides that there was delay in preferring the claim, the conclusiveness of the order can attach only to that fact. How can there be any 'conclusiveness' in respect of the merits of the claim which were not even gone into?

(20) The doctrine of conclusiveness of judgments is well known. So far as suits are concerned, it is embodied in S. 11, Civil P. C., but that section is not exhaustive of the application of the doctrine. The doctrine is applicable to proceedings other than suits as well. But to whatever proceedings it may be applied its basic and essential condition is that there must have been a 'Judicium'. That is, hearing and final decision upon the point in controversy. "Res Judicata," said Lord Romilly in — 'Jenkins v. Robertson', (1867) 1 SC & Div. 117 (I)

> "by its very words, means a matter upon which the court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. In my opinion res judicata signifies that the court has after argument and consideration, come to a decision on a contested matter."

"What we have to be satisfied of," said Scoltland, C. J., in — 'Udaiya Tevar v. Katama Nachiyar', 2 Mad HCR 131 at p. 140 (J)

> "is that the ground of legal right, upon which the plaintiff sues, was a point raised and opened for decision in the former suits, and that it was finally dealt with by the judgment and decree."

"It is not enough," said Sir Richard Couch, C. J., in delivering the judgment of the Calcutta High Court in — 'Pursun Gopal v. Poornanund Mullick', 21 Suth WR 272 (K), "that the former suit has been heard and determined." The cause of action must have been heard and determined." In — 'Shokhee Bewa v. Mehdee Mundul', 9 Suth WR 327 (L), Seton Karr and Dwarkanath Mitter, JJ., held that the former suit not having been tried on the merits, the subsequent suit cannot be said to be on a cause of action heard and determined in a former suit. Dr. Bigelow, citing a considerable number of American cases, in his book on Estoppel says,

> "If the decision was rendered upon a mere motion or a summary application or if the cause was dismissed upon some preliminary ground, as upon a plea in abatement, e. g., because the wrong forum or mode of suit had been resorted to, for want of jurisdiction, defect in the pleadings, misjoinder non-joinder, non-appearance of the plaintiff, or the like, the parties are at liberty to raise the main issue again in any other form they choose".

Thus it has been held that an order dismissing a claim as premature, or on account of defect in the frame of the suit — Abdullah Ashgar Ali Khan v. Ganesh Das', AIR 1917 PC 201 (M), or because it was not properly presented — 'Saira Bibi v. Chandrapal Singh', AIR 1928 Oudh 503 (N), or for want of previous notice — 'Ramireddi v. Subba Reddi', 12 Mad 500 (O), or for non-joinder of parties — 'Salig Ram v. Tirbhawan Pathak', 1885 All WN 171 (P), or for default, or on the ground of limitation — 'Har Swarup v. Anand Sarup', AIR 1942 All 410 (Q); — 'Minalal Shadiram v. Kharsetji', 30 Bom 395 (R); — 'Brindabun Chunder v. Dhununjay', 5 Cal 246 (S); — 'Baldeo Singh v. Hira Lal', 9 All LJ 67 (T); — 'Shanchi Khan v. Karam Chand', AIR 1923 Lah 150 (2) (U) and — 'Gokal Chand v. Niadar Mal', AIR 1916 Lah 229 (V), is not 'conclusive' upon the merits of the claim. As limitation affects the plaintiff's right of suit it merely bars the right to sue and does not bar a defence. The dismissal of an objection under O. 21, R. 58 on the ground that it was delayed could not be put on a better footing than a dismissal on the ground of limitation. There is no sufficient reason to think that the doctrine of conclusiveness as embodied in R. 63 of O. 21, embraces within its scope an order which is not at all on the merits but is an order of dismissal of a claim on the ground of delay in preferring it.

(21) Rule 63 makes the order covered by it if it is not challenged in a suit filed within the period of limitation of one year as much conclusive as in the matter of suits, S. 11 makes the decision of a court conclusive between the parties unless it is set aside on appeal or revision by a higher court. It is immaterial that in one case the trial is in a regular way while in the other it is sum-

mary. The result is the same in both cases. If the provisions of R. 63 are for the protection of the claimant or the objector who has succeeded in summary proceedings or investigation against the decree-holder it must also be that in order that the rule may protect the decree-holder against a subsequent claim by the claimant or the objector, the decree-holder must have 'succeeded' in the summary investigation. Where the decree-holder has not been called upon to answer a claim and the claim has not been investigated at all, it cannot be said that R. 63 is intended to protect either the decree-holder or the auction-purchaser against any subsequent claim by the same claimant or the objector.

(22) The history of the law on the subject also shows that under the Civil Procedure Codes of 1859, 1877, and 1882, it was only a decision on the merits that was made 'conclusive' subject to the result of a suit. The argument advanced in support of the opposite view is based solely upon the change of language in R. 63 as compared to its corresponding S. 283 in the Code of 1882. Section 283 ran as follows:

"The party against whom an order under Ss. 280, 281, 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Sections 280, 281 and 282 corresponded respectively to Rr. 60, 61, and 62 of O. 21 of the present Code. Under the present Code the language has been changed and the provisions corresponding to Ss. 280. 281 and 282 have not been mentioned. The change in the language of the rule has been taken by the Courts to denote a change in the law itself. But a change in the language is not always an indication of the change in the law.

As Maxwell has observed in his book on Interpretation of Statutes 9th Ed., at p. 326:

"But, just as the presumption that the same meaning is intended for the same expression in every part of an Act is as we have seen, not of much weight, so the presumption of a change of intention from a change of language (of no great weight in the construction of any documents) seems entitled to less weight in the construction of a statute than in any other case, for the variation is sometimes to be accounted for by a mere desire to avoid the repeated use of the same words, sometimes by the circumstance that the Act has been compiled from different sources, and sometimes by the alterations and additions from various hands which Acts undergo in their progress through Parliament."

.....It may be questioned whether too much importance has not sometimes been attached to a variation of language."

(23) It appears to me that the change in the language was not intended to alter the law, and that the same idea was expressed in a different language possibly because it was considered to be better. I am inclined to the view that the words in R. 63 "the party against whom an order is made" should not be read divorced from the context in which they occur. An order which is against a party within the meaning of R. 63 is made conclusive as to the right which he claims to the property in dispute. It follows, therefore, that the order contemplated in R. 63 must be one which can be conclusive as to the right which the party claims to the property in dispute. It will be against all principle of common sense and justice and of established doctrine of conclusiveness of judgments and orders to hold that an order which is not made on the merits of a claim at all but refuses to decide it is still conclusive upon the merits of the claim.

(24) It has certainly been held, and there is no dispute about it, that it is not every order of dismissal of a claim that willl be conclusive, even under O. 21, R. 63. For instance, an order of refusal to entertain a claim for want of jurisdiction has been held not to be conclusive within the meaning of O. 21, R. 63,—'Ningauda Girimallappa v. Nabisaheb Abalal', AIR 1942 Bom 263 (W), —'Cannanaore Bank Ltd. v. Pattarkandy Arayanveettil Madhabi', AIR 1942 Mad 41 (FB) (X), —'Mukhram Pande v. Arjun Missir', AIR 1934 Pat 511 (Y), —'Chetanlal v. Lalji', AIR 1937 Nag 170 (Z), so also an order dispensing with the investigations and directing a claim to be noted on a sale proclamation, — 'Kachinamthodi Parambil v. Chekkutti', AIR 1923 Mad 295 (Z1), an order dismissing the petition after directions for stopping sale and refusing to investigate claim, AIR 1942 Mad 41 (FB)(X), an order dismissing the petition without prejudice to claimant, AIR 1942 Mad 41 (FB)(X), have been held not to be conclusive against the claimant.

(25) Left to myself I would have held that the defence in the present case was not barred by O. 21, R. 63, but all the decisions (except in the case of AIR 1928 All 327 (C)) (sic) on this point in cases in which the objection has been expressly dismissed or rejected under O. 21, R. 58 are all unanimous in laying down that such an order is covered by O. 21, R. 63, and my Lord the Chief Justice and my brother Bhargava, J. are also of the same opinion. I, therefore, consider it unnecessary to differ from them. But I must make it clear that the present decision is not intended to cover cases in which no order of dismissal has been made under O. 21, R. 58, but the proper order which should be made under that rule has been made. For instance an order merely saying that "the claim will not be investigated because it has been unnecessarily and designedly delayed", or simply saying "file" or orders to similar effect will not be held to be conclusive.

Indeed it is the duty of the Courts dealing with objections under O. 21, R. 58 not to pass orders of dismissal at all. It would be erroneous to think that when the court does not propose to investigate a claim it must necessarily pass an order of dismissal on the ground that without that order the application has not been completely disposed of. An application is disposed of not only by an order of dismissal or allowing it but by some such order as has been mentioned above. Nothing remains to be done after the orders to the above effect have been passed.

(26) On the second point raised by learned counsel for the appellant I am in agreement with

the view expressed by my Lord the Chief Justice. Once an order is conclusive under O. 21, R. 63, it is conclusive not only with regard to the factum of possession on the date of attachment but also with regard to the right of the decree-holder to attach and sell the property.

(27) I, therefore, agree to the order though not without considerable hesitation.

V. BHARGAVA J.:

(28) I was prepared to agree entirely with the judgment delivered by my Lord the Chief Justice but, in view of the judgment delivered by my brother Agarwala, J., I would like to add a few words.

(29) It appears to me that the procedure provided in Rr. 58 to 62 of O. 21, Civil P. C., has been prescribed for the protection of a claimant who may find that property not liable to attachment and sale in the debts of the judgment-debtor is being seized under the processes of the courts. The rules leave open to him his usual remedy of filing a regular suit if he chooses not to appear before the execution court. It is only when he exercises his option of taking advantage of the remedy provided in these rules and voluntarily files his claim or objection that the provisions of these rules come into force. Once he appears before the execution court with his claim or objection, that claim or objection has to be dealt with by the court. Rule 58 directs the court to make a summary investigation of the claim or objection, treating the claimant or objector as if he were a party to the suit but the proviso gives the discretion not to make the investigation if the claim or objection is designedly or unnecessarily delayed. Rules 59 to 62 lay down the procedure to be followed in the investigation and the nature of the order to be passed by the court on such investigation.

Upto this stage the parties to the proceedings are the decree-holder, the judgment-debtor and the claimant or the objector. But even between these parties the order of the court allowing or rejecting the claim or objection has not been given the force of an order operating as 'res judicata'. The reason obviously is that the investigation is expected to be summary and not a decision after a proper trial as in a regular suit. The provisions of R. 63 are, however, essentially for the protection of the auction-purchaser against subsequent claims by the same claimant or objector, and for the protection of the claimant or objector who has succeeded in summary proceedings of investigation, against future claims by the decree-holder or the judgment-debtor except to the limited extent of the dispute being taken to court by a regular civil suit within the period of limitation of one year. It is clear that the rules are framed with the object that, once a claimant or objector has voluntarily chosen to submit his claim or objection to the execution court, the auction purchaser should not be left in uncertainty about the title to the property purchased by him for the longer period of limitation prescribed under the Limitation Act, and similarly the claimant or objector having succeeded should not be subjected to further litigation at the instance of the decree-holder or the judgment-debtor during that longer period.

When such protection is granted by the legislature, no question arises of applying the principles of 'res judicata'. This protection is granted in view of the fact that an outsider, who may not have been concerned at the earlier stages of the suit or execution proceedings and comes into the picture by purchasing the property sold by the court, needs some assurance of title in order to give a proper bid which he can do only if his position does not remain uncertain for a long time. The scheme of the rules is to limit the right of once again moving the courts to the short period of one year in such cases. The rules do not purport to take away any such right by applying the principles of 'res judicata'. No question of applicability of the principles of 'res judicata' thus arises and there does not appear to be any unfairness in giving the order of the execution court finality so as to prevent the claimant or objector from again putting the right purchased by the auction-purchaser in jeopardy after having failed to do so within the time allowed by R. 63.

The execution court proceeds to sell the property and the auction purchaser purchases it on the basis of its being liable to attachment and sale in execution of the decree against the judgment-debtor after the claim or objection has been dismissed either under the proviso to R. 58 because it was designedly or unnecessarily delayed or on merits after investigating the claim, and consequently R. 63 gives finality to all such orders after the lapse of a year.

(30) I would also like to express my views on the proper form of the order that should be passed by a court when it refuses to investigate a claim or objection under the proviso to O. 21, R. 58. Whenever an application is presented before a court, the court must pass a final order on it either allowing or rejecting or dismissing the application or partly allowing and partly dismissing it. It would not be proper discharge of duties by a court if it does not pass any order which finally disposes of that application. On the same principle, when an objection or a claim is preferred under O. 21, R. 58, the court must pass an order which finally disposes of that claim or objection. A mere note by the court that, under the proviso, the court refuses to investigate the claim or objection does not dispose of it. Refusal to investigate is only a matter of procedure. After the refusal has been recorded, the court has yet to dispose of the claim or objection and must therefore proceed to pass an order rejecting it. The court cannot leave the objection pending after merely saying that the claim or objection is not to be investigated. Consequently, whenever the provisions of the proviso to O. 21, R. 58 are applied and the claim or objection is rejected, there will invariably be an order and in such cases that is the order referred to in O. 21, R. 63 so that the claimant or objector, if he desires to do so, must institute his suit within the period of one year from the date of that order.

(31) For these reasons I agree with my Lord the Chief Justice and concur in the judgment delivered by him.

(32) BY THE COURT : There is no force in this appeal and it is dismissed with costs.

D.H.Z. Appeal dismissed.

(S) A.I.R. 1955 ALLAHABAD 249 (Vol. 42, C.N. 75)

FULL BENCH

MALIK C. J., DESAI AND MUKERJI J.

(12-10-1954)

Mata Bhikh and another, Applicant v. Baij Nath, Opposite Party.

Criminal Misc. Case No. 2126 of 1951, decided by Full Bench on order of reference made by Raghubar Dayal J., D/- 23-11-1951.

(a) U. P. Panchayat Raj Act (26 of 1947), S. 55 — Jurisdiction of Magistrate.

A Magistrate has jurisdiction to try a case only if it is not within the cognisance of a panchayati adalat; so before a Magistrate can assume jurisdiction of a case it must be shown to him that a panchayati adalat has no jurisdiction over it. The law is not that before a panchayati adalat assumes jurisdiction it must be shown that a Magistrate had no jurisdiction over it.

(Para 11)

(b) Constitution of India, Art. 227 — "All Courts and Tribunals" — (U. P. Panchayat Raj Act (26 of 1947), S. 49).

Where admittedly the Bench of the Panchayati Adalat which tried the case was constituted in contravention of the provisions of S. 49, U. P. Panchayat Raj Act, inasmuch as it included only one instead of two members of the Gaon Sabha of the village in which both the complainant and the accused resided:

Held, that the constitution of the Bench was illegal, that the illegality committed could not be waived and that the order of the panchayati adalat could not be quashed under Art. 227 of the Constitution. (S) AIR 1955 All 113 (FB), Followed. (Para 14)

Anno: Constn. of Ind., Art. 227 N. 4.

CASES REFERRED : Paras

(A) (V38) (S) AIR 1955 All 113: 1955 Cri LJ 296: (Misc. Case No. 1974 of 1951, All.) (FB) 5, 6, 14

(B) (V41) AIR 1954 SC 215: 1954 SCR 565 (SC) 6

(C) (V41) AIR 1954 SC 440: ILR (1954) Mys 235 (SC) 6

S. C. Khare, for Applicant; R. B. Misra and V. K. S. Chaudhary, for Opposite Party.

ORDER OF REFERENCE

RAGHUBAR DAYAL J.:

This is an application under Art. 227 of the Constitution. The two applicants were convicted by the Panchayati Adalat of village Anua of offences under Ss. 426 and 323, I. P. C. Their revision against that order was rejected by the Sub-Divisional Magistrate as he did not find that any miscarriage of justice had taken place.

(2) It appears that the bench of the Panchayati Adalat which decided this case consisted of seven panches, including Naraindhar, the President of the Adalat. It is contended for the applicants that S. 49, U. P. Panchayat Raj Act, authorises the Sarpanch to form a Bench of five panches from the panel for the trial of every case, and as this Bench consisted of more than five panches, it was not properly constituted and, therefore, had no jurisdiction to decide this case.

(3) It was also contended that the Panches included only one Panch from village Khem Patti, in which village both the complainant and the accused resided, while it should have included two panches from this village in view of subs. (2) of S. 49 of the Act.

(4) I am of opinion that this case should be decided by a larger Bench so that it be authoritatively laid down as to in what circumstances this court should exercise its power of superintendence under Art. 227 of the Constitution and to what extent the non-compliance with the provisions of S. 49 of the Act affects the jurisdiction of the Bench to try the case. The questions are of general importance in view of the large number of cases decided by Panchayati Adalats, whose Panches have not had much experience of the technicalities of law and have not the benefit of the help of lawyers. I, therefore, order that the case be laid before a larger Bench.

OPINION OF FULL BENCH

MALIK C. J.:

(5) In this case the decision of the Panchayati Adalat was attacked on two grounds, firstly that the decision was given by as many as six Panches, and secondly that there was only one Panch from the Gaon Sabha Khama Patti in which both the complainant and the accused reside. The first point has not been made out and it need not, therefore, be considered. As regards the second point, I have already expressed my opinion in — 'Bhagirthi v. State', (S) AIR 1955 All 113 (A) which was put up along with it at the time of hearing.

(6) The learned single Judge has also asked for a decision of the question, in what circumstances a High Court should exercise its power of superintendence under Art. 227 of the Constitution. I have already indicated my views in (S) AIR 1955 All 113 (A) and in view of the decisions of the Supreme Court in — 'Waryam Singh v. Amarnath', AIR 1954 SC 215 (B), and in — 'T. C. Basappa v. T. Nagappa', AIR 1954 SC 440 (C), it is not necessary for me to say anything more.

(7) I agree that this writ application should be dismissed.

B. MUKERJI J.:

(7a) I agree and have nothing to add.

DESAI J.:

(8) This is an application under Art. 227 of the Constitution for the quashing of the appli-

cants' conviction under Ss. 323 and 426, I. P. C., by a panchayati adalat.

The applicants were prosecuted by Baij Nath before the panchayati adalat for the offences of Ss. 426 and 323, I. P. C. The Sarpanch of the panchayati adalat constituted a Bench to try the case. While the case was pending there, the applicants applied to the Sub-Divisional Magistrate, presumably under S. 85, Panchayat Raj Act, for cancellation of the jurisdiction of the panchayati adalat over the case. The Sub-Divisional Magistrate stayed further proceedings before the Bench during the pendency of the application. Subsequently the application was rejected and the proceedings were resumed by the Bench.

The applicants did not appear before it on resumption of the proceedings and the Bench acting ex parte against them convicted them. The applicants went up in revision against the order of the panchayati adalat under S. 85 of the Act. The Sub-Divisional Magistrate finding that no miscarriage of justice had been done by the panchayati adalat refused to set aside the order of conviction and dismissed the application.

(9) In the present application the applicants contended (1) that the Bench was constituted in contravention of the provisions of S. 49 of the Act inasmuch as it consisted of six panches and included only one panch from the Gaon Sabha Khama Patti and Raja Ram Kuswaha panch being related to the opposite party was disqualified to be a member of the Bench (2) that no notice of the resumption of the proceedings after the dismissal of the application by the Sub-Divisional Magistrate was given by the panchayati adalat to the applicants and the ex parte proceedings against them were illegal and (3) that in the absence of any valuation of the loss said to have been suffered by the opposite party the panchayati adalat had no jurisdiction to try the offence under S. 426, I. P. C.

(10) The opposite party filed a counter-affidavit admitting that the applicants and the opposite party both are residents of Khama Patti but denying that S. 49 requires two panches from the Gaon Sabha of Khama Patti to be included in the Bench, denying that Raja Ram Kuswaha was a member of the Bench, alleging that the panchayati adalat had issued fresh notices to the applicants informing them of the date on which the proceedings were to be resumed and contending that the applicants did not avail themselves of the remedy of getting the ex parte proceedings set aside under S. 79(2) and that if there was any defect in the constitution of the Bench an objection about it should have been raised by the applicants before the Bench itself.

The application came up for disposal before our brother Raghubar Dayal who referred it to a Bench for an authoritative decision of the questions (1) in what circumstances a High Court should exercise its powers of superintendence under Art. 227 of the Constitution and (2) to what extent non-compliance with the provisions of S. 49, Panchayat Raj Act, affects the jurisdiction of the Bench to try the case, which questions are of general importance.

(11) Shri S. C. Khare did not press before us the contentions that the ex parte proceedings were invalid or that the panchayati adalat had no jurisdiction to try the case because it was not known what was the extent of the damage suffered by the opposite party. There is also no force in the contentions. If the Bench informed the applicants of the date fixed for the hearing of the case, as alleged in the counter-affidavit, it did everything that it was required to do and the applicants themselves are to blame if they did not appear before it. So long as it was not alleged by the opposite party that he suffered damage of more than Rs. 50/- the panchayati adalat could try the case.

The law is that a Magistrate has jurisdiction to try a case only if it is not within the cognisance of a panchayati adalat; so before a Magistrate can assume jurisdiction of a case it must be shown to him that a panchayati adalat has no jurisdiction over it. The law is not that before a panchayati adalat assumes jurisdiction it must be shown that a Magistrate had no jurisdiction over it.

(12) The allegation of the applicants that the Bench consisted of six panches is denied by the opposite party. The records of the panchayati adalat is lost. It is, therefore, not possible for us to ascertain whether the Bench consisted of six panches or five. The applicants founded their allegation only on the copy of the order of the panchayati adalat which is signed by Narain Dhar Sarpanch, Bhawani Prasad and Panna Lal panches, four other persons including Ram Raj Kuswaha and Baij Nath opposite party. It is not known who were the four persons, whether they were panches or agents of the parties. We cannot assume without any data that they were panches. The applicants have thus failed to establish that the Bench included six panches. The question what would be the effect of there being more than five panches in a Bench does not arise.

(13) Since it is denied, and is not established, that Ram Raj Kuswaha was a panch of the Bench, his being related to the opposite party is absolutely immaterial and of no consequence.

(14) There remains the objection that the Bench included only one panch from the Gaon Sabha of Khama Patti from where both the parties hail. There is no dispute about this fact. For the reasons stated by me in (S) AIR 1955 All 113 (FB) (A), I consider that the constitution of the Bench was illegal, that the illegality committed could not be, and was not, waived and that the order of the panchayati adalat cannot be quashed under Art. 227 of the Constitution. The application should, therefore, be dismissed.

BY THE COURT:

(15) The application is dismissed. Having regard to the facts of the case, we make no order about the costs.

M.K.S. Petition dismissed.

A.I.R. 1955 ALLAHABAD 251 (Vol. 42, C.N. 76)

LUCKNOW BENCH — BRIJ MOHAN LALL AND RANDHIR SINGH JJ. (24-11-1954)

Sri Niwas, Petitioner v. Election Tribunal at Lucknow and others, Opposite Parties.

Civil Misc. Appln. (O. J.) No. 56 of 1954.

(a) Constitution of India, Art. 226 — Order allowing amendment of election petition — Amendment of clerical nature — Interference — (Civil P. C. (1908), S. 151).

It is always inherent in a Court or Tribunal which has the power to decide a case, to order rectification of clerical or accidental errors and omissions. If a Court or Tribunal has the right to amend such mistakes, the merits of the application for amendment cannot be gone into in a petition for writ. A Court or Tribunal which is entitled to pass a correct order may also pass an incorrect order but that would not be a ground for invoking the jurisdiction of the High Court by a petition for writ. Hence, where an Election Tribunal allows an amendment of an election petition on the ground that the amendment is of a clerical nature, the High Court will not interfere with the exercise of discretion. (Para 4)

Anno: Const. of India, Arts. 32 and 226, N. 2.

(b) Civil P. C. (1908), O. 11, Rr. 12 and 14 — Scope — Application for production of document — Prior application for discovery not always necessary.

A plain reading of O. 11, R. 14 clearly shows that R. 14 is not subject in all cases to R. 12. If a party knows that another party has in his possession specified documents which are material or relevant, an application can always be made under O. 11, R. 14 for the production of such documents. In such a case a prior application for discovery under R. 12 is not necessary. (Para 4)

Anno: C. P. C., O. 11, R. 14 N. 1.

(c) Constitution of India, Art. 226 — Laches.

Where the petition for writ was filed after more than two months of the impugned order and in the meanwhile as many as 158 witnesses had been examined before the Election Tribunal it was held that the petition was unduly delayed so as to disentitle the petitioner to any relief. (Para 5)

Anno: Const. of India, Arts. 32 and 226 N. 25.

CASE REFERRED: Para

(A) (V10) AIR 1923 Pat 337: 76 Ind Cas 991 5

Hargovind Dayal Srivastava, for Applicant; H. N. Misra, Bishun Singh (for No. 5), H. N. Misra, Bishun Singh and Khushwaqt Rai (for Nos. 6, 8 to 10), for Opposite Parties.

RANDHIR SINGH J.:

This petition for a writ of certiorari, prohibition or any other appropriate writ is directed against the Election Tribunal of Lucknow and the members thereof and also some other persons.

(2) It appears that in the bye-election to the U. P. Legislative Assembly, Budaun North Constituency, the petitioner was elected a member of the U. P. Legislative Assembly. An election petition was thereafter instituted before the Election Tribunal for the setting aside of the election on various grounds mentioned in the application made before the Tribunal. After the application came up for hearing, the petitioner made an application for the amendment of the lists and paragraph 4(a) of the election petition. The main ground on which amendment was asked for was that some matters had been left vague and some particulars had not been given. The Election Tribunal ordered the petitioner to furnish better particulars and to make his allegations definite in certain matters and the petition for amendment which followed was allowed. The effect of the amendment was that paragraph 4(a) of the election petition was ordered to be amended by the addition of the words "by respondent No. 1 and his agents and workers mentioned in list A", after the words "to vote" in the second line of para. 4 and before the words "on the ground of". There were certain other amendments which were ordered to be made in the lists appended to the election petition.

(3) The application for amendment was opposed on behalf of Pandit Sri Niwas, the successful candidate, on the ground that the amendment could not be made under the provisions of the Representation of the People Act but this contention of Sri Niwas was not allowed and the amendment was ordered on 16-2-1954. On 26-4-1954, Sri Niwas then presented this petition asking for the issue of a writ of certiorari and certain other reliefs mentioned in the petition for writ.

(4) The first point which has been raised on behalf of the petitioner is that there was no provision in the Representation of the People Act under which a person could be allowed to amend his petition for setting aside an election and the Tribunal was not competent to allow an amendment of the petition. With regard to the amendment of the lists, it is conceded that it was open to the Tribunal to make an order for the amendment of the lists or to call for further and better particulars under S. 83, sub-cl. (3) of the Representation of the People Act.

The only point, therefore, for consideration is whether the order of the Tribunal allowing the amendment of paragraph 4(a) of the petition before the Election Tribunal was an order passed without jurisdiction or in excess of its jurisdiction. A number of cases have been cited for and against the contention that such a power of amendment does not vest in the Tribunal but we feel that the question which is before us can be decided on a comparatively simple point. It is always inherent in a Court or Tribunal which has the power to decide a case, to order rectification of clerical or accidental errors and omissions.

In the present case the ground on which paragraph 4(a) of the application before the Tribunal was allowed to be amended was that it was a clerical mistake. The Tribunal has remarked that a perusal of the petition shows that the words now sought to be incorporated in paragraph 4(a) were only left out by mistake and

that it was the intention of Sri Asrar Ahmad to plead all that he had mentioned in paragraph 4(a) with reference to the respondent. Under these circumstances the Tribunal thought that the words which were sought to be incorporated by the amendment were only left out by mistake. If a Court or Tribunal has the right to amend such mistakes, the merits of the application for amendment cannot be gone into in a petition for writ.

A Court or Tribunal which is entitled to pass a correct order may also pass an incorrect order but that would not be a ground for invoking the jurisdiction of this Court by a petition for writ. It cannot be disputed that a Court or a Tribunal has an inherent right to order amendments of a clerical nature to be made and if the Tribunal has thought fit to treat this case also as one of a clerical mistake, there appears to be no good ground for interfering with the discretion exercised by the Tribunal. Even on merits we find no justification for coming to the conclusion that the order of amendment made by the Tribunal was not a correct order.

(5) Another point taken up on behalf of the applicant in this writ petition is that the Tribunal did not exercise a proper jurisdiction in granting the application of Sri Asrar Ahmad for the summoning and production of certain documents in the possession of the petitioner. Section 92(c), Representation of the People Act, expressly provides for compelling the production of documents. It has been argued that O. 11, R. 14, C. P. C., under which the order for production of documents was made by the Tribunal could not come into play unless an application for discovery had been made under O. 11, R. 12. A plain reading of O. 11, R. 14 clearly shows that R. 14 is not subject in all cases to R. 12. Learned counsel has relied on a ruling of the Patna High Court in — 'Baidyanath v. Bholanath Roy', AIR 1923 Pat 337 (A).

The facts of this reported case were different. In it it appears that an application had been made praying that the opposite party in that suit be directed to produce his account books relating to a particular colliery and it was held that such an application could only follow an earlier application made under O. 11, R. 12, Evidently the application referred to in this reported case which was made under O. 11, R. 14 was in the nature of an application for discovery and for production both combined in the same application and it was held that such an application could only be made after a discovery had been made. This ruling has, therefore, no application to the facts of the present case. If a party knows that another party has in his possession specified documents which are material or relevant, an application can always be made under O. 11, R. 14 for the production of such documents. There is, therefore, no merit in the contention that the order passed by the Tribunal was not in exercise of powers vested in it. No other point has been pressed in arguments.

(6) Learned counsel for the opposite party has also pointed out that this petition for writ was made after considerable delay inasmuch as the order challenged was passed on 16-2-1954 and the petition for writ was made on 26-4-1954. Ordinarily perhaps delay of two months may not have been held to be unwarranted but in this particular case we find that 158 witnesses had been examined before the Election Tribunal after the order dated 16-2-1954 had been passed but the petition for writ was not presented till 26-4-1954. We, therefore, feel that the petition was also made with undue delay. There is thus no merit in this petition for writ and it is dismissed with costs to the opposite parties. We assess the costs at Rs. 150/-. Since the petition has been dismissed, no orders are called for in Civil Miscellaneous Applications Nos. 867 and 984 of 1954.

K.S.B. Petition dismissed.

(S) **A.I.R. 1955 ALLAHABAD 252 (Vol. 42, C.N. 77)**

MALIK C. J. AND GURTU J. (2-4-1954)

Daulat Ram Singh, Applicant v. Swami Dayal and another, Opposite Parties.

Supreme Court Appeal No. 23 of 1952, for leave to appeal to the Supreme Court against order of remand passed by this Court, D/- 4-2-1952.

Constitution of India, Art. 133 — 'Final order' — Remand order if final order.

Unless a remand order finally determines the rights of the parties and the case is sent back to the lower Court only to work out the details in accordance with the decision of the Court it cannot be said to be a final order.

Thus, where a suit for declaration was dismissed on the ground of res judicata but on appeal the High Court set aside that finding and remanded the case for decision according to law after recording findings on other issues:

Held that the order of remand did not finally dispose of the rights of the parties and, in the circumstances, certificate for leave to appeal to Supreme Court could not be granted. AIR 1933 PC 58; AIR 1950 FC 83; (1891) 1 QB 734, Relied on. (Paras 4, 5)

Anno: Const. of India, Art. 133 N. 8.

CASES REFERRED: Paras

(A) (V20) AIR 1933 PC 58: 11 Rang 58 (PC) 4
(B) (V37) AIR 1950 FC 83: 1949 FCR 849 (FC) 4
(C) (1891) 1 QB 734: 60 LJQB 624 4

J. B. Johari, for Appellant; Dr. N. P. Asthana, for Opposite Parties.

MALIK C. J.:

This is an application for leave to appeal to the Supreme Court under Art. 133 of the Constitution against an order of remand passed by this Court on 4-2-1952.

(2) The case had rather a chequered history as would appear from the following facts. On 13-3-1931, one Ganga Sahai filed a suit No. 7 of 1931, in the Court of the Subordinate Judge, Kanpur, for a declaration that Daulat Ram was not the son and heir of his brother Raj Kumar. During the pendency of that suit, Ganga Sahai died on 24-4-1932. Ganga Sahai had left two daughters,

Amrawati and Indrawati, who, on 15-7-1932, applied that their names be substituted in place of the name of Ganga Sahai deceased. Another application was, however, filed on 11-7-1932, by Swami Dayal, son of Indrawati who claimed that Ganga Sahai had left a will and under that will he was the sole legatee and was thus entitled to inherit all the right, title and interest of Ganga Sahai in the property in suit. On 19-10-1932, the learned Subordinate Judge dismissed the application of Swami Dayal but granted the application of the daughters Amrawati and Indrawati.

Swami Dayal thereupon filed a suit, No. 6 of 1934, and in that suit he impleaded Amrawati and Indrawati, as also the Collector of Kanpur as Manager, Court of Wards, Estate of Daulat Ram Singh minor. The relief claimed in the suit was as follows:

"(a) That it be declared that by virtue of the will dated 24-4-1932, executed by Chaudhari Ganga Sahai, the plaintiff is the sole legatee and the sole legal representative of Chaudhari Ganga Sahai, as far as the properties comprised in suit No. 7 of 1931 in the Court of Second Subordinate Judge, Kanpur, are concerned.

(b) Costs of the suit be awarded to the plaintiff from defendant No. 1, or any other defendant who may contest this suit. (Defendant No. 1 was Amrawati who had contested Swami Dayal's case.)

(c) Any other relief that may be necessary be given to the plaintiff."

(3) The suit was valued at Rs. 5,73,938/6/10. It was contested by Amrawati who raised a plea that the order dated 19-10-1932, passed in suit No. 7 of 1931, had become final and operated as res judicata. This issue was tried as a preliminary issue, and the learned Subordinate Judge found in favour of the contesting defendant and dismissed the suit with costs on 21-5-1934. The other issues in the case were not gone into. A First Appeal, No. 423 of 1934, was filed in this Court in which the following order was passed by Chaudhri Niamatullah and Alsop JJ. on 1-10-1935:

"We have heard counsel on both sides and are of opinion that this is a fit case in which the appellant should be required to furnish security for the costs of the respondents incurred in the lower Court and likely to be incurred in this Court. The estimated costs of the respondent's costs in the two Courts is Rs. 5800/-. We direct the appellant to furnish within three months security for Rs. 5,800/-."

On failure of the appellant to furnish the required security the appeal was dismissed on 1-5-1936 by Harries and Smith JJ.

On 9-4-1945, an application was filed by Dr. Narayan Prasad Asthana and Mr. Shambhu Prasad in this Court, Miscellaneous Case No. 167 of 1945, for setting aside the order of dismissal passed on 1-5-1936. On 27-8-1945, Mr. Shambhu Prasad filed an application for condonation of the delay. These two applications were heard by a Bench of this Court consisting of Mr. Justice Sinha and Mr. Justice Dayal on 12-9-1946, and the application was granted and the previous order of 1-5-1936 was set aside. Then an application was filed on 10-1-1947, for review of this order, and that application failed on 3-3-1947.

Thereafter the appeal came up before a Bench of this Court and the Bench disagreed with the lower Court that the order of 19-10-1932 operated as res judicata. The finding on the point was set aside and the case remanded to the lower Court for decision according to law after recording findings on the other issues.

(4) The valuation of the suit is well above the required figure and the valuation of the proposed appeal to the Supreme Court is also well in excess of Rs. 20,000/-, and this Court has set aside the order of the lower Court, but on behalf of the respondent Dr. Asthana has raised an objection that the order of remand is not a final order within the meaning of Art. 133 of the Constitution and leave cannot, therefore, be granted.

Learned counsel has relied on two decisions, one of the Privy Council, and the other of the Federal Court. In — 'V. M. Abdul Rahman v. D. K. Cassim and Sons', AIR 1933 PC 58 (A) their Lordships of the Judicial Committee pointed out that though a decision on a question of jurisdiction of the Court may be a decision on a very important and even a vital question of law, yet, if it left the suit alive and provided for its trial in its ordinary way, it could not be said to be a final order and no appeal lay to the Privy Council. Their Lordships have pointed out in a number of cases that unless a remand order finally determines the rights of the parties and the case was sent back to the lower Court only to work out the details in accordance with the decision of the Court, it could not be said to be a final order. In this connection reference may be made to the observations of Fazal Ali J. in — 'Moolji Jaitha & Co. v. Khandesh Spinning & Weaving Mills Co., Ltd.', AIR 1950 FC 83 at p. 93 (B). His Lordship pointed out that,

"the expression 'final order' means an order which finally determines the points in dispute and brings the case to an end, the test of finality being whether the order finally disposes of the rights of the parties and not whether the order decides an important or even a vital issue in the case."

His Lordship quoted with approval the observations of Lord Esher, Master of Rolls, in — 'Salaman v. Warner', (1891) 1 QB 734 (C), where he had observed:

"If their decision, whichever way it is given will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules, it is final. On the other hand, if their decision, if given in one way will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final but interlocutory."

(5) The order of remand in this case does not in that sense finally dispose of the rights of the parties and, in the circumstances, we cannot certify that the appellant has a right to appeal to the Supreme Court. We think that it is, however, a fit case in which the parties should bear their own costs.

H.G.P. Application rejected.

(S) A.I.R. 1955 ALLAHABAD 254 (Vol. 42, C.N. 78)

LUCKNOW BENCH — KIDWAI J. (15-12-1954)

Rohan Singh, Defendant-Appellant v. Badri Prasad, Plaintiff-Respondent.

Second Appeals Nos. 566 and 568 of 1948, against decree of Civil Judge, Hardoi, D/- 7-9-1948.

Limitation Act (1908), Art. 181 — Preliminary mortgage decree — Provision for payment in instalments with default clause — Default committed — Final decree — (Civil P. C. (1908), O. 34, R. 5) — AIR 1950 Bom 188 (FB), Dissented from.

Where a preliminary mortgage decree for sale provides that the decretal amount shall be paid in certain instalments and that default of payment of any instalment shall entitle the plaintiff to put the property mortgaged to sale and default is committed, in such a case, the final decree would be for the instalments which fell due within three years of the date of the application for final decree. AIR 1938 Oudh 112 and AIR 1945 All 161, Foll. AIR 1946 All 360, Distinguished, AIR 1950 Bom 188 (FB), Dissented from. (Para 3)

Anno: Lim. Act, Art. 181 N. 4 Pt. 10.

CASES REFERRED: Paras

(A) (V25) AIR 1938 Oudh 112: 173 Ind Cas 956 3

(B) (V32) AIR 1945 All 161: ILR (1945) All 277 3

(C) (V33) AIR 1946 All 360: ILR (1946) All All 570 4

(D) (V37) AIR 1950 Bom 188: ILR (1951) Bom 65 (FB) 5

R. N. Shukla and Rajiva Narain Shukla, for Appellant; M. K. Seth, for Respondent.

JUDGMENT: On 31-3-1939 a preliminary mortgage decree was passed in favour of Badri Prasad against Rohan Singh. The decree provided that the amount due was Rs. 637/11/- and then directed

> "the amount thus determined shall be paid into Court in eight equal six monthly instalments with interest at 3¼ per cent. per annum from the date of the suit till realisation. Default of payment of any instalments shall entitle the plaintiff to put the property mortgaged to sale."

No instalment was paid but on 12-9-1944 a sum of Rs. 10/- was paid and endorsed on the back of the decree. On 13-9-1944 the decree-holder intimated receipt of payment to the Court. On 10-9-1947 the decree-holder applied for preparation of a final decree on the basis of the preliminary decree. It may be noted that the preliminary decree had been amended by an order, dated 5-7-1941 but neither party raised any question of limitation depending upon this amendment in the course of these appeals.

(2) The learned Munsif rejected the objections of the judgment-debtor on the question of limitation and directed that a final decree be prepared for the entire amount of the money calculated in accordance with the preliminary decree. Rohan Singh preferred an appeal and the Civil Judge of Hardoi modified the preliminary decree passed by the trial Court. He held that the application for a final decree in so far as it related to the instalments falling due more than three years before 13-9-1944 was barred by time and they could not be included in the final decree. He accordingly directed a final decree to be passed in respect of the last four instalments. i.e., the instalments falling due on 10-10-1941 and subsequent dates. Both parties have come up in appeal.

(3) It is contended on behalf of Rohan Singh that it ought to have been held that the whole decretal amount fell due on the failure to pay any three instalments and the right to apply for a final decree arose as soon as there was a failure to pay three instalments with the result that the right to apply for a final decree became barred after the expiry of three years from 1-10-1940. On the other hand it was contended on behalf of Badri Prasad that the decree allowed a choice to the decree-holder either to sell the property on default of three instalments or to wait till a later period before applying for a final decree. In the present case the decision of both these points is covered by a decision of a Bench of the Chief Court of Oudh reported in — 'Ram Dutta v. Mahpal Singh', AIR 1938 Oudh 112 (A), in which it was laid down, after a consideration of the law on the subject including a Full Bench decision of the Allahabad High Court, a Privy Council decision and certain earlier decisions of the Oudh Chief Court that in such a case the final decree would be for the instalments which fell due within three years of the date of the application. This case was followed by a Single Judge of the Allahabad High Court reported in — 'Buttan Singh v. Sakal Raj Singh', AIR 1945 All 161 (B).

(4) It is true that a different view has been taken by a Bench of the erstwhile Allahabad High Court reported in — 'Mt. Bhagwati v. Sant Lal', AIR 1946 All 360 (C), but that case makes it clear that the decree in that particular case specifically directed that on default of three instalments the whole of the amount would become due. Their Lordships considered that these words were imperative and were inconsistent with any option having been given to the plaintiff unlike the situation that would have been created, had the words used in the decree been "the creditor would be entitled to" or "the creditor would have the power to recover". In the present case the decree uses the words quoted above and there is no imperative provision in the decree that the entire decretal amount shall fall due. This case, therefore, is not on all fours with the appeals before me.

(5) Reliance was also placed upon a Full Bench decision of the Bombay High Court reported in — 'Chuni Lal Motiram v. Shivram Naguji', AIR 1950 Bom 188 (D). That case related to execution of a decree, and although the same principles would be followed if the matter fell under Art. 181, Limitation Act, nevertheless there was a difference between the decrees in the two cases, and in that particular case the learned Judges of the Bombay High Court without any reference to the two cases, one of Oudh and one of Allahabad, to which I have referred, came to the conclusion that limitation for the execution of the decree began to run from the date that the decree-holder first acquired the right to apply

and that he could not wait till a later period before he applied. I have said that the two decisions of the predecessor Courts fully cover the point before me and I am bound by these decisions, one of which is a Bench decision. With all respect, therefore, to the learned Judges of the Bombay High Court I cannot accept their view in preference to the view of the Oudh Chief Court and the erstwhile Allahabad High Court. Having regard to the two cases to which I have referred both these appeals fail and are dismissed with costs.

V.R.B. Appeals dismissed.

(S) A.I.R. 1955 ALLAHABAD 255 (Vol. 42, C.N. 79)

LUCKNOW BENCH — RANDHIR SINGH J.
(6-12-1954)

Mirza Mehdi Husain, Appellant v. Sikandar Nawab and others, Respondents.

Second Appeal No. 440 of 1948, against decree of Dist. J., Lucknow, D/- 24-5-1948.

Transfer of Property Act (1882), Ss. 123 and 129 — Gift by a Muhammadan — Property subject to usufructuary mortgage — Gift by deed — Validity — (Muhammadan Law — Gift) — 23 Bom 682; 6 Bom 650, Dissented from.

A distinction has to be made between a gift of the entire property and a gift of a parcel of it. A property which is made the subject of an usufructuary mortgage is split up into two parcels, the equity of redemption and the mortgagee rights. The equity of redemption is as much property as mortgagee rights in the mortgage and there is no bar to a person owning only the equity of redemption, to make a valid gift of the same. The requirements of Muhammedan Law in the matter of a valid gift will be complied with sufficiently if the donor does all that lies in his power to complete a transfer of the proprietary rights and such rights of possession as he has over that property in favour of the donee. All that is required in such cases is to deliver to the donee such possession as the donor himself has and as the donor has no tangible physical possession an unequivocal declaration would be a sufficient delivery of possession. (Para 2)

Failure to tell the mortgagee that the donee would thereafter be the mortgagor and the omission to remove his name from Municipal records are not the circumstances to hold that the donor had not done all which he could possibly do to transfer possession to donee. (Para 2)

It is true that any conduct of the donor immediately before or after the gift deed may be taken into consideration in judging his intention. But the conduct of the donor exhibited seven years after the gift deed cannot be taken into consideration in arriving at a conclusion about his intention at the time when he made the gift. No subsequent change in the mind of the donor can affect a valid and completed transaction made by him earlier. 23 Bom 682 — 6 Bom 650, Dissented from. (Para 4)

Anno: T. P. Act, S. 123, N. 4; S. 129 N. 5.

CASES REFERRED: Paras

(A) ('99) 23 Bom 682: 1 Bom LR 177 2

(B) ('81-82) 6 Bom 650 2

Niamatullah, Mohd. Ayub, S. H. Rizvi and Inayat Ullah, for Appellant; Anant Prasad Nigam (for No. 1); Akhtar Husain, Ramapat Ram and S. M. Haider (for No. 2) and B. K. Mathur (for No. 4), for Respondents.

JUDGMENT: This is a defendant's second appeal arising out of a suit for partition. The plaintiff claiming to have purchased a half share in the house in dispute sued for the partition of his share of the house. Sikandar Nawab defendant No. 1 claimed a half share in the house under a gift deed executed by Kazim Ali who was admittedly the owner of the house before it passed to the plaintiff or to the defendant.

There was yet another defendant and he was defendant No. 2 Mehdi Husain, who claimed to be the owner of the entire house having purchased it in execution of a money decree held by him against Kazim Ali, the owner of the house. The suit was contested by both the defendants. Sikandar Nawab claimed to be the owner of half of the house under a gift deed executed by Kazim Ali on 24-7-1937, while defendant No. 2, Mehdi Husain contended that he was the owner of the entire house and the gift deed obtained by defendant No. 1 was invalid. Various other defences, which are not material for the disposal of this appeal, were also raised by the defendants.

The trial Court, however, found that the gift deed obtained by Sikandar Nawab, defendant No. 1, was not a valid gift and, as such, he had no share in the house, and as the plaintiff was found to be the owner of half of the house, the suit for partition was decreed against both the defendants. Sikandar Nawab then went up in appeal to the District Judge and the learned District Judge allowed the appeal. He found the gift in favour of Sikandar Nawab to be a valid gift and, as such, he was held to be the owner of half of the house. Mehdi Husain, who was mainly affected by this finding of the lower appellate Court, has now come up in second appeal.

(2) The only point which arises for determination in this appeal is whether the gift made by Kazim Ali in favour of Sikandar Nawab on 24-7-1937, was a valid gift and the ground on which the validity of the gift is challenged is that a gift of property, which is the subject of an usufructuary mortgage, could not be made by the execution of a deed and that the donor should have done all that lay in his power to transfer possession of the property to the donee in order to make the gift valid.

The Bombay High Court took the view that if a property is subject to an usufructuary mortgage a gift of such a property could not be made at all; vide — 'Ismal v. Ramji', 23 Bom 682 (A) and — 'Mohinuddin v. Manchershah', 6 Bom 650 (B). The main ground on which this view was taken by the Bombay High Court was that in order to make a valid gift, delivery of possession is essential and in the case of an usufructuary

mortgage, the property being in the possession of the mortgagee, no delivery of possession was possible and, as such, a valid gift of such property could not be made.

The other High Courts, including our own High Court, however, did not accept the view taken by the Bombay High Court. A property which is made the subject of an usufructuary mortgage is split up into two parcels, the equity of redemption and the mortgagee rights. With great respect to the learned Judges of the Bombay High Court who have taken the view that a mortgaged property cannot be made the subject of a gift, it may be pointed out that a distinction has to be made between a gift of the entire property and a gift of a parcel of it. The equity of redemption is as much property as mortgagee rights in the mortgage and there seems to be no bar to a person owning only the equity of redemption, to make a valid gift of the same. The requirements of Mohammedan Law in the matter of a valid gift will be complied with sufficiently if the donor does all that lies in his power to complete a transfer of the proprietary rights and such rights of possession as he has over that property in favour of the donee.

Mr. Amir Ali in his admirable book on Mohammedan Law has discussed this point on pages 66 to 68, Fourth Edition, of his book, and is of opinion that the view taken by the Bombay High Court was not the correct view and that it is possible for a person owning only the equity of redemption to make a valid transfer of it by gift. All that is required in such cases is to deliver to the donee such possession as the donor himself had and as the donor had no tangible physical possession an unequivocal declaration would be a sufficient delivery of possession.

It has been argued on behalf of Mehdi Husain that the donor Kazim Ali ought to have told the mortgagee after he had made the gift that the donee would thereafter be the mortgagor and that he should have got his name removed from the Municipal registers. If a gift is made by an oral declaration perhaps such a course of conduct may make the declaration more effectual, but if a gift deed has been made by a written and registered document, the information given to the mortgagee by word of mouth that the mortgagor had divested himself of his right would not add to the value of the declaration. Names of owners of houses in Municipal records are entered for fiscal purposes only, that is, for the realisation of taxes. It is more of a liability than a right which is created by the mutation of a name in the Municipal registers. Learned Counsel for the appellant has argued on the basis of some rulings that mutation of names in the revenue records were held to be necessary to evidence transfer of possession.

Mutation in revenue records in respect of agricultural property stands on a different footing. If a person's name is not mutated in the mutation records he does not acquire any right to sue for recovery of rent against tenants in the revenue Courts. No such disability attaches to a person whose name does not appear in the Municipal registers. It would be difficult, therefore, to rely on this circumstance alone for holding that Kazim Ali had not done all which he could possibly do to transfer possession.

(3) It has further been argued that the intention of the donor could be inferred from some of his subsequent acts also. In the security bond which Kazim Ali furnished in connection with his application for the setting aside of an ex parte decree on 29-9-1943, he mentioned the whole of the house as his own property. Again in July, 1945, he made an application for the redemption of the mortgage under S. 12, Agriculturists' Relief Act, and in this application also no mention of the gift made in favour of his son was made. With regard to the application for redemption it is open to a co-mortgagor also to make an application for redemption and the omission to make a mention of the co-mortgagor would not necessarily show that Kazim Ali denied that the gift in respect of a half of the property was not acceptable to him.

(4) The gift was made in 1937 and any conduct of the donor immediately before or after the gift deed may perhaps have been taken into consideration in judging his intention. But the conduct of the donor exhibited seven years after the gift deed cannot be taken into consideration in arriving at a conclusion about his intention at the time when he made the gift in 1937. There may be a deliberate attempt on behalf of the donor, if he had parted with the property, to repudiate the transaction even after a valid gift had been made. No subsequent change in the mind of the donor can affect a valid and completed transaction made by him earlier. Moreover, the security bond hypothecating the whole of the house may have been made only to play a fraud upon the Court with no clear intention of repudiating the gift, and it cannot therefore, be said that Kazim Ali meant to repudiate the gift made by him in 1937.

What has to be seen in this case is whether Kazim Ali had parted with half of the house by making a gift in favour of his son and if the gift had become a completed transaction at that time. Kazim Ali having done all that lay in his power to transfer possession of his interest in a half of the house to the donee, the gift became complete in 1937. In the agreement of sale which Kazim Ali made with Syed Mohammad Akbar on 12-12-1945, he expressly mentioned the gift made by him in favour of his son who was a minor, and if Kazim Ali had, at any time, any intention to repudiate or revoke the gift he would not have mentioned the gift in his agreement for sale of the house on 12-12-1945. The view taken by the lower appellate Court that the gift in favour of Sikandar Nawab was a valid gift was therefore correct and the contention raised by the learned Counsel for the appellant cannot be accepted.

(5) No other point arises for determination in this appeal. The appeal is dismissed with costs to the respondent Sikandar Nawab Mirza.

(6) Leave to file a special appeal has been asked for and is granted.

(7) Stay order, dated 4-5-1949, is vacated.

H.G.P. Appeal dismissed.

A.I.R. 1955 ALLAHABAD 257 (Vol. 42, C.N. 80)

LUCKNOW BENCH — BEG J. (23-4-1954)

Maqsood Khan, Appellant v. State, through Mohd. Raza Khan and others, Opposite Party.

Criminal Reference No. 13 of 1954, from order of S. J., Rae-Bareli, D/- 2-12-1953.

Criminal P. C. (1898), Ss. 145(4) and 555 — Final order — Form of — Duty of Magistrate.

The provisions of S. 145(4) are mandatory and it is the imperative duty of the Magistrate to write such an order as to make it appear to the revisional Court that he has made a genuine attempt to comply with the provisions of law in this regard. (Para 2)

An order under S. 145 consists of two portions. In the first portion the Magistrate refers to the evidence of the parties, considers the evidence and decides which of the parties was in his opinion in possession of the property in dispute on the relevant date. All this is done under S. 145(4). Having done it, the Magistrate if he has been able to come to a definite conclusion as to which party was in possession, declares that the said party should be allowed to remain in possession until evicted in due course by a Court of law. This is what may be termed as the operative or declaratory portion of the order and is recorded under S. 145(6). The form No. 22, in Sch. V refers only to the terms in which the latter portion of the order is to be clothed and not the former. (Para 3)

The fact that the Legislature has prescribed a form under S. 555 of the Code of Criminal Procedure has not the effect of overriding the express provisions of law laid down in S. 145 (4). (Para 3)

Where the Magistrate concerned appears merely to have acted as an automaton and to have simply filled up the blanks in Form No. 22 given in Sch. 5 and passed the final order without applying his mind either to the evidence or to the facts and circumstances of the case and at any rate the order does not show that he had made an attempt to comply with the requirements of law the order is defective and cannot be sustained. (Para 2)

Anno: Cr. P. C., S. 145 N. 51, 55; S. 555 N. 3.

Kalbe Mustafa, for Appellant; Mohd. Husain, for Opposite Party.

ORDER: This is a reference by the learned Sessions Judge, Rae Bareli recommending that an order passed by Sri V. P. Sharma, S. D. M., Rae Bareli under S. 145 of the Code of Criminal Procedure should be set aside.

It would appear that one Maqsood Khan made an application on 20-2-1952 under S. 145 of the Code of Criminal Procedure on the allegations that he was in possession of plots Nos. 6091, 1430, 1631, 1761, 1438, 650, 1795, 332, 436 and 565 situate in tahsil Mahrajgang district Rae Bareli, that he held a patta of these plots, that he had deposited the Bhumidhari dues in respect of the said plots and that the opposite parties were turbulent persons who had forcibly cut down the 'sarson' crop grown by the applicant. The opposite parties in this application were Mohammad Raza Khan and 9 others.

The applicant Maqsood Khan is the son of Ishaq Khan and the grandson of one Dildar Khan. Mohammad Raza Khan one of the opposite parties is a brother of Ishaq Khan who is another son of Dildar Khan.

After the usual preliminary order was passed under S. 145, sub-cl. (1) of the Code of Criminal Procedure, the Magistrate entered on the enquiry as to the possession of the property. He called for the written statements of the parties, recorded the evidence produced by both the parties and on 28-8-1953 he passed the final order in the case.

This order runs as follows:

"It appearing to me, from the report of S. O. Mahrajgang dated 24-5-1952 that a dispute likely to induce a breach of peace, existed between Maqsood Khan resident of village Rastamau on one side and Mohd. Raza Khan and nine others all residents of village Rastamau on the other concerning certain plots of land detailed in the application situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said land, and being satisfied by due enquiry had thereupon, without reference to the merits of the claim of either of the said parties to the legal right of possession, that the claim of actual possession by Mohd. Raza Khan opposite party is true;

I do decide and declare that he is in possession of the said plots of land and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his possession in the meantime.

Given under my hand and seal of the Court this 28th day of August, 1953."

The above is a reproduction of the entire final order passed by the Magistrate in the said case. Dissatisfied with this order Maqsood Khan the applicant went up in revision before the learned Sessions Judge, Rae Bareli, who has referred the case to this Court with the above mentioned recommendation.

(2) Having heard the learned counsel for the parties, I am of opinion that this reference must be accepted.

A comparison of the above order with the Form No. 22 given in schedule 5 of the Code of Criminal Procedure shows that in this case the Magistrate has done nothing except copying out the stereotyped form prescribed in schedule 5 for passing a declaratory order under S. 145 of the Code of Criminal Procedure.

Section 145, sub-cl. 4 of the Code of Criminal Procedure lays down the procedure to be followed by the Magistrate after passing the preliminary order. Section 145, sub-cl. 4 provides as follows:

"The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dis-

pute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

(The two provisos appended to the sub-section are not relevant for the purposes of the present discussion and are, therefore, omitted).

The main point to remember in connection with the above provision of law is that the Magistrate is not only required to receive all the evidence produced by the parties but also to 'consider the effect of such evidence' and after taking such further evidence, if any, which he thinks necessary, he is further required if possible, to "decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

A perusal of the order of the Magistrate mentioned above & the manner in which he proceeded to write his order shows that the Magistrate concerned has not tried to comply with the above mentioned requirements of this sub-clause. There is nothing in his order to indicate that he applied his mind to the case with a view to consider the effect of evidence produced in the case. In fact, the order makes no reference to any evidence whatsoever.

The fact is that a good amount of evidence was produced by both the parties. Four witnesses were produced by the applicant Maqsood Khan. In addition to it a lease deed as well as a gift deed in his favour executed by Dildar Khan on 11-9-1951 and 17-10-1951, respectively were produced in the case. A Khetauni of the year 1358F. showing the name of Dildar Khan as 'sir' holder was also produced on behalf of Maqsood Khan. On the other hand, on behalf of Mohammad Raza Khan and others 4 witnesses were produced. A khasra of the year 1359 F. showing the name of Mohammad Raza Khan in possession of the property in dispute was also produced.

In addition two judgments of the Panchayati Adalat which show that the transfers made by Dildar in favour of Maqsood Khan were fictitious and that the Panchayat had refused to make mutation of the property in favour of Maqsood Khan on that ground, were also produced. The order of the Magistrate is conspicuous by the absence of any reference to any of the pieces of evidence mentioned above.

I am of opinion that the provisions of S. 145, sub-cl. 4 in this regard are mandatory and it is the imperative duty of the Magistrate to write such an order as to make it appear to the revisional court that he has made a genuine attempt to comply with the provisions of law in this regard. In this case the Magistrate concerned appears merely to have acted as an automaton. He appears to have simply filled up the blanks in the form and passed the final order without applying his mind either to the evidence or to the facts and circumstances of the case. At any rate the order does not show that he had made an attempt to comply with the requirements of law.

(3) On behalf of the opposite parties Mohammad Raza Khan and others my attention has been invited to S. 555 of the Criminal P. C. which provides as follows:

"Subject to the power conferred by S. 544 and by Art. 227 of the Constitution the forms set forth in the fifth schedule with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient."

Relying on this section it is argued that once the Magistrate has used the form of the nature prescribed in Sch. 5, he should be deemed to have complied with the requirements of the law and the order cannot be assailed on the ground of non-compliance with S. 145, sub-cl. 4.

It is as if the form prescribes a magical formula whose repetition in writing has the effect of making the order immune from all criticism and liberating the court from all shackles imposed upon it by the provisions of S. 145(4).

To my mind, the effect of putting this interpretation would be disastrous. In some cases under S. 145 voluminous evidence — both oral and documentary — is adduced by parties. If this view of law is accepted, it will be open to the Magistrate to disregard all evidence, and, by merely filling up the prescribed form, secure for his order, however perverse and unreasonable, an exemption from all scrutiny and criticism by the higher court. A result so unfortunate should be avoided at all costs.

In my opinion an order under S. 145 of the Code of Criminal Procedure consists of two portions. In the first portion the Magistrate refers to the evidence of the parties, considers the evidence and decides which of the parties was in his opinion in possession of the property in dispute on the relevant date. All this is done under S. 145(4) of the Criminal Procedure Code. Having done it, the Magistrate if he has been able to come to a definite conclusion as to which party was in possession, declares that the said party should be allowed to remain in possession until evicted in due course by a court of law. This is what may be termed as the operative or declaratory portion of the order and is recorded under S. 145(6) of the Code of Criminal Procedure. The form in question, namely Form No. 22, in Sch. V refers only to the terms in which the latter portion of the order is to be clothed and not the former. This is borne out by the heading of the form itself which would show that it relates to the portion "declaring the party to retain possession of the land in dispute".

In any case, I am of opinion that the fact that the Legislature has prescribed a form under S. 555 of the Code of Criminal Procedure has not the effect of over-riding the express provisions of law laid down in S. 145(4) of the Code of Criminal Procedure. It is significant that the form also refers to the "grounds duly recorded" by the Magistrate. These words are omitted from the final order, hence the order impugned fails to comply even with the meagre requirements of the prescribed form and cannot be said to be a com-

plete enunciation of the prescribed formula for which such potent effects are claimed. The order in question, in my opinion is defective and cannot be sustained.

(4) It may be mentioned that the recommendation of the learned Sessions Judge is that

"the order be set aside and that the applicant (Maqsood Khan) be ordered to put in possession of the plots, or, in the alternative, the case be remanded to the S. D. M. Maharajganj for decision after considering the evidence produced by the parties."

Having heard the parties at length I think that it is preferable to accept the second alternative. The Magistrate concerned should not be influenced in any way by any expression of opinion on the merits of the case by the higher Court.

(5) I accordingly set aside the order of the Magistrate and remand the case to Sub-Divisional Magistrate Maharajganj for a fresh decision of it after considering the evidence produced by the parties.

R.G.D. Case remanded.

A.I.R. 1955 ALLAHABAD 259 (Vol. 42, C.N. 81)

LUCKNOW BENCH — MALIK C. J. (12-3-1954)

Sm. Narain Devi, Appellant v. Hakim Mohd. Amin and another, Respondents.

Second Appeal Nos. 219 and 220 of 1950, against decree of Addl. Civil J., (Judge Small Causes) Lucknow, D/- 17-5-1950.

(a) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947, as amended by Act 44 of 1948), S. 3 — Grounds of permission to file suit. AIR 1954 All 587; AIR 1949 Oudh 11, Dissented from.

The District Magistrate is not confined to any of the grounds (a) to (f) of S. 3 (1) and if the District Magistrate had granted permission to file a suit the landlord could institute a suit for ejection even though none of the grounds (a) to (f) existed. Once the District Magistrate had given the permission in accordance with the provisions of S. 3, the landlord is restored to the same position as he would have been if the U. P. Control of Rent and Eviction Act, 1947 had not been passed so far as question of ejectment of the tenant was concerned, that is, he would have the right to eject the tenant if he had given notice to quit in accordance with the provisions of Section 106 of the Transfer of Property Act and there was no valid agreement between him and the tenant restricting his right to eject. Case Law Rel. on. (Paras 5, 6)

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 5 (2) — Limit of enhancement of rent.

The maximum limit to which the rent can be enhanced is the reasonable annual rent. The landlord cannot go beyond it, but there is nothing to prevent him from enhancing the rent to a figure less than the reasonable annual rent. The limit has been placed at the reasonable annual rent but the landlord can enhance the rent from time to time upto the maximum rent allowable under the Act. There is nothing in S. 5 (2) to justify the conclusion that the plaintiff must be deemed to have exhausted her remedy, once she had enhanced the rent, and she could not subsequently make further enhancement even if the enhancement did not exceed the reasonable annual rent. (Para 8)

CASES REFERRED: Paras

(A) (V36) AIR 1949 Oudh 11: 1948 Oudh WN 237 5

(B) (V39) AIR 1952 All 584: 1952 All LJ 3 5

(C) (V39) AIR 1952 All 624: 1951 All LJ 616 5

(D) (V39) AIR 1952 All 699: 1952 All LJ 274 5

(E) (V39) AIR 1952 All 819: 1952 RD (HC) 79 5

(F) (V39) AIR 1952 All 859: 1952 All LJ 278 5

(G) (V41) AIR 1954 All 587: 1954 All WR 210 5

Gobind Behari Lal, for Appellant; Kesri Bir Prasad and I. A. Abbasi (for No. 1), for Respondents.

JUDGMENT: The plaintiff purchased a house situate at Lucknow on 13-1-1945. Hakim Abdul Hasib was a tenant of this house and had been paying rent at the rate of Rs. 65/- plus the Municipal taxes to the vendor. After the purchase, Hakim Abdul Hasib paid rent to the plaintiff.

(2) On 15-10-1946 the plaintiff gave a notice under Section 5 (2), U. P. Control of Rent and Eviction Act, that the rent was enhanced and it would be payable at the rate of Rs. 81/4/- per month. The defendant agreed to pay the rent at the enhanced rate.

(3) In 1947 the plaintiff made an application to the District Magistrate for permission to file a suit for ejectment of the defendant. On 11-8-1947 permission was granted, but with respect to only a portion of the house. The plaintiff thereupon made a fresh application and wanted permission to eject the defendant from the whole house. On 20-3-1948 permission was granted in these terms:

"I, therefore, hold that the applicant should by mutual agreement or some other ways be able to adjust with this present tenant and pull on until a suitable accommodation is available to the tenant. I allow 3 months' time to find out accommodation after which the applicant will be at liberty to take ejectment proceedings for vacation of the whole house."

The suit for ejectment was filed on 16-12-1948. The plaintiff had also claimed arrears of rent from September 1946.

(4) The trial Court decreed the suit for ejectment and granted a decree for arrears of rent, but reduced the amount claimed by the plaintiff. The plaintiff and the defendant both filed appeals in the lower appellate Court. The lower appellate Court, however, dismissed the plaintiff's appeal and allowed the defendant's appeal with the result that the whole suit failed and was dismissed. These

two second appeals were thereafter filed by the plaintiff in this Court.

(5) Two points have been raised. Firstly whether the plaintiff could rely on the permission granted on 20-3-1948 or was it necessary for her to further prove that one of the grounds given in Section 3, Cls. (a) to (f) existed before she could obtain a decree? The lower appellate Court held that the District Magistrate could grant permission only if one of the grounds mentioned in Cls. (a) to (f), U. P. Control of Rent and Eviction Act (Act III of 1947), existed. This view had been taken by a learned single Judge of this Court in — 'Bhagat Singh Bugga and Co. v. Mrs. Gangotri Devi', AIR 1949 Oudh, 11 (A), but it has been dissented from in a series of decisions of this Court. I need only mention some of the recent cases on the point: — 'Raj Narain v. Sita Ram', AIR 1952 All 584 (B); — 'Ghanshyamdas Bagat and another v. Gulab Chand AIR 1952 All 624 (C), judgment of Shankar Saran and Bind Basni Prasad JJ. — Karam Chand Thapar and Bros. Ltd., v. Dr. Vijay Anand', AIR 1952 All 699 (D), judgment of Bind Basni Prasad and Gurtu JJ., — 'R. N. Seth v. Girja Shankar Srivastava', AIR 1952 All 819 (E), judgment of Harish Chandra and Chandiramani JJ., and — 'Mannu Lal v. Chakradhar', (AIR 1952 All 859 (F)), judgment of Agarwala J. and myself.

As a matter of fact the legislature had intervened and had by subsequent amendment (U. P. Act XLIV of 1948, S. 10) made it clear that the District Magistrate was not confined to any of the grounds (a) to (f) of Section 3 (1) and if the District Magistrate had granted permission to file a suit the landlord could institute a suit for ejectment even though none of the grounds (a) to (f) existed. In view of these decisions and the provisions of Section 10 of the Amending Act a recent single Judge decision of in — 'Nan v. Zamindar', AIR 1954 All 587 (G), cannot be followed. The view taken by the lower appellate Court was, therefore, wrong and must be set aside. The plaintiff having obtained permission from the District Magistrate, as required by Section 3 of the Act, a suit for ejectment on her behalf did lie.

(6) I may mention here, what I have said in a number of cases, that S. 3, was enacted for the protection of tenants due to dearth of accommodation in the cities. The legislature considered that if any of the grounds (a) to (f) existed a landlord should be in a position to eject the tenant. If however grounds (a) to (f) did not exist, there might be a variety of other grounds which would justify a landlord for wanting a tenant to vacate the premises and the District Magistrate was therefore authorised to consider whether it was a fit case where the landlord should be allowed to file a suit for ejectment. Once the District Magistrate had given the permission in accordance with the provisions of Section 3, the landlord is restored to the same position as he would have been if the U. P. Control of Rent and Eviction Act, 1947, had not been passed so far as question of ejectment of the tenant was concerned, that is, he would have the right to eject the tenant if he had given notice to quit in accordance with the provisions of Section 106 of the Transfer of Property Act (Act 4 of 1882) and there was no valid agreement between him and the tenant restricting his right to eject. None of these two pleas had been raised and the plaintiff was entitled to a decree for ejectment.

(7) Coming to the question of arrears of rent, the lower Courts have held that from October 1936 the defendant was liable to pay rent at the rate of Rs. 81/4, as he had agreed to pay rent at that rate. On 29-3-1948, however, the plaintiff had given another notice of enhancement on the gorund that he was entitled to reasonable rent which in accordance with the provisions of S. 2 (f) was Rs. 88/12/-. The trial Court gave a decree for arrears of rent at the enhanced rate of Rs. 88/12/- from April 1948. The lower appellate Court was, however, of the opinion that a notice of enhancement of rent under Section 5, sub-section (2) can be given only once and, once the rent has been enhanced by notice, no further enhancement of rent is possible.

(8) Section 5 (2) of the Act provides that

> "when the rent for any such accommodation has not been agreed upon or where in the case of tenancies continuing from October 1, 1946, the landlord wishes to enhance the rent agreed upon, he may, by notice in writing, fix the annual rent at, or enhance it to, an amount not exceeding the reasonable annual rent....."

The maximum limit to which the rent can be enhanced is, therefore the reasonable annual rent. What is the reasonable annual rent is defined in Section 2 (f). The reasonable annual rent is the upper limit. The landlord cannot go beyond it, but there is nothing to prevent him from enhancing the rent to a figure less than the reasonable annual rent. If the interpretation given by the lower appellate Court is accepted then the landlord will have to enhance the rent to its maximum limit, as he would not get a second opportunity to enhance the rent. On 15-10-1946, the landlord had enhanced the rent to Rs. 81/4/- which was less than the reasonable annual rent. By a notice dated the 29-3-1948, the landlord enhanced the rent to Rs. 88/12/- which was the reasonable annual rent.

I see nothing in the section which required a landlord to enhance the rent to its maximum limit at the first instance at the risk of losing the right for ever of further enhancement. The Act, it must be remembered, was passed for the benefit of tenants and the legislature could not have intended to make it necessary for a landlord to enhance the rent to the maximum limit. The limit has been placed at the reasonable annual rent but the landlord can enhance the rent from time to time upto the maximum rent allowable under the Act. I do not, therefore, find anything in S. 5 (2) to justify the conclusion that the plaintiff must be deemed to have exhausted her remedy, once she had enhanced the rent, and she could not subsequently make further enhancement even if the enhancement did not exceed the reasonable annual rent.

(9) The result, therefore, is that this appeal is allowed with costs throughout. The decree of the lower appellate Court is set aside and the decree of the trial court is restored.

D.H.Z. Appeal allowed.

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LUCKNOW BENCH—KIDWAI AND H. S. CHATURVEDI JJ. (13-10-1954)

Kunwar Man Singh and another, Defendants-Appellants v. Lal Dharam Moorat Singh and another, Plaintiffs-Respondents.

First Appeal No. 63 of 1947, against decree of Civil Judge, Pratapgarh, D/- 30-4-1947.

(a) Oudh Estates Act (I of 1869), S. 3 — Essentials for application of S. 3.

In order to bring property held by a Taluqdar within the scope of S. 3, Oudh Estates Act, 1869, it must be established either (a) that the summary settlement of the property had been made within the prescribed dates with the Taluqdar or (b) that a sanad has been granted to him before the passing of the Act. It is only if either of these conditions is fulfilled that full proprietary rights will accrue in (a) the property entered in the qabuliat executed at the time of the summary settlement; and (b) in the property which may be decreed to him by a court engaged in effecting the first regular settlement. 9 Ind Cas 83 (Oudh), Rel. on. (Para 22)

(b) Oudh Estates Act (I of 1869), S. 10 — Presumption under S. 10 — Its extent.

By reason of the entry in the lists prepared under S. 8 there is a conclusive presumption that the persons named therein are "such Taluqdars". According to S. 10 of the Act the entry in the lists is a conclusive evidence not only of the fact that the person whose name is so entered is a taluqdar within the meaning of the Act but also of the fact that he is a taluqdar possessed of the estate. This is the significance which must be attached to the word "such" which precedes "taluqdar" in the last line of S. 10. The succession to that estate is thereafter to be regulated by the rule of primogeniture. AIR 1928 Oudh 307 (312), Foll. (Paras 29, 30)

(c) Civil P. C. (1908), O. 23, R. 3 — Award pending suit — Adjustment or compromise — (Arbitration Act (1940), S. 47).

An award following a reference to arbitration without the intervention of any Court, although two litigations were then pending, may be accepted as an adjustment of the suit or may be approached as if it were a compromise. (Para 42)

Anno: Civil P. C., O. 23, R. 3 N. 9 Pt. 22; Arbn. Act, S. 47 N. 1.

(d) Civil P. C. (1908), O. 23, R. 3 — Valid compromise or award — Title prior to compromise or award — (Arbitration Act (1940), S. 47).

As between parties to a compromise or an award or persons claiming under rival parties the title of each party prior to the award or compromise cannot be set up so as to defeat a title acquired under the compromise or award. If persons bind themselves by any valid contract supported by consideration they cannot resile from that contract. This is also true of an adjustment of rival claims to property, whether the adjustment is by way of compromise or through the intervention of arbitrators. (Para 43)

This does not, however, mean that when the nature of the title of a person whose possession is being enquired into as between persons claiming under him, title prior to the compromise must be ignored as non-existent. And if an award is treated on the same footing as a decree of a court the position is no different since it is well recognized that a decree does not create but only recognizes a pre-existing title and gives relief on its basis. Case law Ref. (Paras 44, 45)

(e) Oudh Estates Act (I of 1869), Ss. 14 (as amended by Act 3 of 1910) and 3 — Widow claiming as legatee of taluqdar — S. 14 applies — Estate is governed by rule of primogeniture.

Where the widow of a taluqdar claimed title under the will of her husband, her title will be considered to be the title as a legatee of her husband. And as S. 14 of the Oudh Estate Act, 1869 as amended by Act III of 1910 (which amendment is retrospective) covers the case of a bequest to a widow, the estate in her hands will be governed by that Act. And if the widow gifts away the estate to a male agnate of the taluqdar who might, in the absence of other nearer heirs, have succeeded to the estate, the donee will be covered by S. 13-A (2) and the amended S. 14 (b) of the Act will keep the property within the Act in his hands. The succession to the estate will, therefore, under S. 3 of the Act, be by the rule of primogeniture. (Paras 53, 54, 58, 59)

CASES REFERRED: Paras

(A) ('09) 9 Ind Cas 83 (Oudh) 22
(B) (V15) AIR 1928 Oudh 307: 5 Oudh WN 299 30, 50
(C) ('77-78) 5 Ind App 1: 3 Sar 763 (PC) 30
(D) (V18) AIR 1931 PC 24: 8 Oudh WN 258 (PC) 30, 50
(E) ('11) 38 Ind App 87: 33 All 356 (PC) 47, 53
(F) ('68) 3 Agra HCR 82 47, 48
(G) (V12) AIR 1925 Oudh 709: 2 Oudh WN 816 48
(H) ('74) 1 Ind App 157: 13 Beng LR 312 (PC) 48
(I) (V16) AIR 1929 Oudh 97: 6 Oudh WN 1251 49
(J) (V19) AIR 1932 PC 13: 8 Oudh WN 1378 (PC) 49
(K) (V10) AIR 1923 Oudh 185: 26 Oudh Cas 133 52
(L) (V15) AIR 1928 PC 202: 55 Ind App 303 (PC) 52
(M) ('04) 31 Ind App 132: 26 All 393 (PC) 52

Niamatullah and Uma Shankar, for Appellants; Hyder Husain, for Respondents 1 and 2.

KIDWAI J.:

Raja Chetpal Singh was the owner of the Noorpur estate (commonly called the Chetpalgarh estate). His name was entered in respect of the said estate at Nos. 274 and 88 respectively of lists I and III prepared under S. 8, Oudh Estates Act (I of 1869). On 5-6-1891, Chetpal Singh made a gift of certain items of property to Rani Dilraj Kuer. Raja Chetpal Singh had an only son Inderpal Singh who died issueless on 23-12-1894. Thereafter on 24-6-1895, Chetpal Singh executed a will

bequesting his property, movable and immovable to his wife, Rani Dilraj Kuer. This will Ex. A-4, provided for the eventuality of there being an after-born son or of the testator adopting a son and it made due provision also for the testator's mother and his widowed daughter-in-law.

(2) On 6-2-1901 Raja Chetpal Singh died and Rani Dilraj Kuer applied for mutation of names to be effected in her favour. Her application was opposed by Raghunandan Singh, on behalf of his son Bhagwati Prasad Singh who, he claimed, had been adopted by Raja Chetpal Singh and he set up a deed purporting to be a deed of adoption dated 1-2-1901 and registered on 4th February. The Deputy Commissioner of Partapgarh granted the application of Rani Dilraj Kuer and, by his order dated 6-4-1901, he ordered mutation of names to be effected in favour of Rani Dilraj Kuer.

(3) In September 1901, for some reasons, Rani Dilraj Kuer instituted a suit against Bhagwati Prasad Singh, under the guardianship of Raghunandan Singh, for a declaration that Bhagwati Prasad Singh was not the adopted son of Raja Chetpal Singh and that the alleged deed of adoption was invalid. The Subordinate Judge dismissed the suit on 27-5-1903, and Rani Dilraj Kuer appealed but her appeal was also dismissed by a Bench of the Court of the Judicial Commissioner of Oudh by its judgment dated 14-10-1904. Thereafter on 17-12-1904 the Judicial Commissioners granted Rani Dilraj Kuer leave to appeal to the Privy Council.

(4) In the meanwhile Bhagwati Prasad Singh had, through his next friend, instituted a suit against Rani Dilraj Kuer for possession of all the property left by Chetpal Singh. This suit was stayed pending the decision of the Privy Council appeal. On 12-2-1907, the parties to the litigation referred all their disputes to arbitration and appointed the Advocates for the parties. Bahua Ishwari Dayal and Ram Chandra arbitrators, undertaking to abide by the unanimous decision of the arbitrators whatever it was (vide Ex. A-9).

(5) The arbitrators gave their award on 14-3-1907. By this award the Chetpalgarh estate was divided between the two claimants and Rani Dilraj Kuer obtained the villages mentioned in list A attached to the plaint of the present suit, six other villages being given to Bhagwati Prasad Singh. Both parties to the reference accepted the award. The rights created by it and the manner in which it is to be construed will be considered hereafter.

(6) An application was made to the Subordinate Judge in whose court Bhagwati Prasad's suit was pending to decide the suit in terms of the award. He refused to accede to this prayer on the ground that the reference had been made without the intervention of the court. Thereupon an application in revision was filed in the court of the Judicial Commissioner of Oudh. On 30-5-1907 the Judicial Commissioner held that the reference to arbitration and the award amounted to an adjustment of the suit and directed that effect be given to it. It was accordingly incorporated in the Judicial Commissioner's decree allowing the revision.

(7) A fresh chapter now begins, and in order to elucidate the facts of the case it is necessary to give a short pedigree.

TH. HITKARAN SINGH (D. 26.3-1925)
|
Bhairon Din Singh (D. 26-1-1917)
|
| | |
Kuar Man Singh (B. 24-6-1904) (Defendant No. 1) | Lal Dharam Moorat Singh (B. 10-7-1908) (Plaintiff No. 1). | Ram Pratap Singh (B. 6-.1-1912) (D. 26-2-1918)
|
Lalit Raj Kumari Debi (Defendant No. 2) | Lal Bishwamoorat Singh (B. 22-4-1932) (Plaintiff No. 2)

(8) On 28-7-1907 Rani Dilraj Kuer gifted the entire property in suit to Bhairo Din Singh mentioned in the above pedigree. On the death of Bhairo Din in 1917 all his sons were minors and mutation was effected on 19-4-1917 in favour of the eldest of them, Kr. Man Singh only. A suit was brought against Man Singh and his grandfather by Bhagwati Prasad Singh claiming possession of the property on the ground that the compromise (evidenced by the reference to arbitration and the award) was against the interests of the minor, was legally defective and was not binding on the minor. This suit was dismissed on 28-10-1919 and on 4-9-1920 the Court of Wards assumed charge of the estate purporting to do so on behalf of Man Singh who was declared a ward.

(9) The estate was released by the Court of Wards on 25-11-1929. Proceedings were initiated on 8-1-1931 by Man Singh to have the property in list A of the plaint brought under the Oudh Settled Estates Act. After the necessary preliminaries had been gone through, Kr. Man Singh, on 5-11-1931, executed a deed declaring that the villages owned by him mentioned in the deed were to be subject thereforward to the provisions of the Oudh Settled Estates Act. This declaration was registered and published in the Gazette.

(10) On 24-6-1938 the Government permitted Kr. Man Singh to revoke the declaration with regard to village Mandhata and thereafter on 20-10-1944 Man Singh made a gift of this village to his daughter Lalit Raj Kumari Debi, defendant No. 2, and delivered possession to her.

(11) On 5-7-1946 the suit out of which this appeal arises, was instituted by Lal Dharam Moorat Singh and his son Lal Bishwamoorat Singh, for a declaration to the effect that the plaintiffs were the owners of a half share in the property specified in lists A and B attached to the plaint.

(12) The case made in the plaint was a very simple one. It was asserted that Dilraj Kuer was the absolute owner of the property under an award: that she gifted the property in list A to Bhairon Din Singh and the property in list B to Hitkaran Singh who thereby became absolute owners that on the death of Bhairon Din Singh and Hitkaran Singh, plaintiff No. 1 and defendant No. 1 became entitled to the properties in lists A and B as members of a joint Hindu family: that the name of Man Singh was entered in the Government papers as head and karta of the joint

family: that it was only when Man Singh made a gift of village Mandhata to his daughter that the plaintiffs realised that he was asserting his exclusive title: and that Man Singh was asked to get the plaintiffs' names also entered in the revenue papers but he refused to get this done. Hence the declaratory suit was filed.

(13) The two defendants filed similar written statements. They gave the history of the property and set up a pedigree connecting Bhairon Din Singh with Chetpal Singh as a male agnate. They admitted that the property in list B attached to the plaint was non-Taluqdari property and that the plaintiffs had a share in it but they asserted that the property in list A was Taluqdari property and that on the death of Bhairon Din Singh it descended solely to Man Singh as the eldest son. They further claimed that if there was any defect in the title of defendant No. 1 it had been cured by adverse possession for over 12 years and because the plaintiffs were estopped from claiming any portion of the estate after a declaration under the Oudh Settled Estates Act had been made to the knowledge of plaintiff No. 1 and without any objections having been filed within the time permitted by law. In any event a 'jethansi' right according to which the eldest son got double the share of each of the younger sons was set up and it was alleged that the plaintiff was not in possession of any portion of the property in list A and so a suit for a mere declaration in respect of that property did not lie.

(14) In their replication the plaintiffs reasserted their original pleas: denied the pedigree set up by the defendants: denied that Raja Chetpal Singh got a primogeniture or that any portion of the property was Taluqdari and asserted that, in any case, the property in the hands of Bhairon Din Singh was non-Taluqdari. In paragraph 47 it was stated:

"Even supposing for any reason it be held that the property in suit or any portion thereof was subject to Act I of 1869, still on account of the fact that the assets of Raja Chetpal Singh had been divided in two shares by means of award and Rani Dilraj Kuer got all rights of ownership with right of transfer and subsequently the said Rani Dilraj Kuer by means of deed of gift and will relied upon by the defendant No. 1 transferred it in favour of Th. Hitkaran Singh and Kr. Bhairon Din Singh, the property in suit did not remain subject to the Act 1 of 1869 but became subject to Mitakshara Law of the Hindus for all purposes such as inheritance etc."

(15) It was also asserted that there had been no ouster and that the proceedings under the Oudh Settled Estates Act were invalid and did not affect the plaintiffs' rights.

(16) Upon the pleadings of the parties the trial Court raised the following 13 issues:

1. Whether or not the property in suit is "estate" under the Oudh Estates Act.
2. Does there exist a custom of 'jethansi' in the family of the parties as alleged?
3. Is there a tribal custom of 'jethansi' amongst the Sombansi Thakurs?
4. Was the property in suit not validly settled under U. P. Act 5 of 1917 (the Oudh Settled Estates Act)?
5. Is the property in suit the joint property of plaintiffs and defendant No. 1?
6. What is the effect of the deed of will of 1895, the deed of gift of 1899 and the award of 1907?
7. Is the gift deed dated 20-10-1944 operative and binding on the plaintiffs?
8. (a) Is the pedigree filed by defendant No. 1 correct?
   (b) If so, its effect? or
   (c) Was Kuer Bhairon Din Singh a blood relation of Raja Chetpal Singh even if the pedigree by defendant No. 1 be not held strictly proved?
9. Does S. 42, Specific Relief Act, bar this suit?
10. Are the plaintiffs estopped from suing as alleged in paras 32 and 37 of defendant No. 1's written statement?
11. Has defendant No. 1 completed his title to the property by adverse possession?
12. Is the plaintiffs' suit time-barred?
13. To what relief are the plaintiffs entitled?"

(17) The learned Civil Judge found:

(1) That no summary settlement of the Government Revenue was made with Raja Chetpal Singh of any villages between the 1-4-1858, and 10-10-1859.

(2) That as a matter of fact no sanad of any kind was granted to Raja Chetpal Singh.

(3) That the villages mentioned in list A attached to the plaint were settled at the first regular settlement with Chetpal Singh.

(4) That it must be presumed by reason for Ss. 3 and 10 of Act 1 of 1869 that Raja Chetpal Singh was granted a primogeniture sanad in respect of the Nurpur estate and that all the 10 villages included in list A are a part of that estate.

(5) That the will executed by Raja Chetpal Singh in favour of Rani Dilraj Kuer was revoked by the deed of adoption dated 1-2-1901 and did not confer any title upon the Rani.

(6) That even if Rani Dilraj Kuer had any title under the will, it ceased to exist after the award.

(7) That the only title which Rani Dilraj Kuer had to the property in list A was the award of the arbitrator and this could not be deemed to be a transfer to her from a Taluqdar and so the property in her hands was not governed by Act 1 of 1869.

(8) That the pedigree set up by the defendants is proved.

(9) That since the property in the hands of Rani Dilraj Kuer was not governed by Act 1 of 1869, it was not governed by that Act in the hands of Bhairon Din Singh.

(10) That the plaintiffs and defendant No. 1 were members of a joint Hindu family and cosharers in the entire property in suit.

(11) That the transfer of village Mandhata in favour of defendant No. 2 is valid only to the extent of the share of defendant No. 1.

(12) That under a family and a tribal custom applicable to the parties, the eldest son inherits twice as much as each of the other sons.

(13) That the properties in suit were not validly settled under the Oudh Settled Estates Act.

(14) That there is no estoppel.

(15) That defendant No. 1 did not perfect his title by adverse possession and

(16) That the suit is not barred by the Specific Relief Act since the plaintiffs are in possession as cosharers.

(18) On these findings the trial Court decreed the suit and granted a declaration that the plaintiffs are owners of a 6/16 share in the entire property in lists A and B. except the house in the southern portion of the last item of properties in list B.

(19) The defendants have appealed and their learned Advocate, relying upon the findings so far as they are in his favour has contended:

(1) That as between the parties to the award the award may be conclusive as to title but in order to determine the nature of the property in a contest between persons both of whom claim under the same party title prior to the award must be considered:

(2) That the property in the hands of Rani Dilraj Kuer continued to be governed by the Oudh Estates Act since her title must be deemed to be a title as legattee of Raja Chetpal Singh.

(3) That since the property in the hands of Dilraj Kuer continued to be Taluqdari & the pedigree set up by the defendants is proved the property in the hands of Bhairon Din Singh was also Taluqdari and consequently, on his death, his eldest son alone succeeded: and

(4) That in any case there had been an ouster of the plaintiffs by the defendant No. 1 and so their title such, as it was, came to an end.

(20) On the other hand the learned counsel for the plaintiffs-respondents contended:

(1) That the villages entered in list A, except Noorpur, were not governed by the Oudh Estates Act even in the hands of Raja Chetpal Singh, since they did not fall within the definition of "estate" given in that Act.

(2) That, at any rate, Rani Dilraj Kuer was not a legatee governed by Section 14 of the Act and so the property in her hands ceased to be governed by Act 1 of 1869.

(3) That the will in favour of Rani Dilraj Kuer has been revoked by the deed of adoption dated 1-2-1901 and consequently it created no title in her:

(4) That, in any case, the gift by Rani Dilraj Kuer to Bhairon Din Singh took the estate out of the Act:

(5) That there was neither ouster nor adverse possession by defendant No. 1.

(21) The first question that has to be determined is whether the property in list A when it was in the hands of Chetpal Singh was governed by the Oudh Estates Act. This depends upon the interpretation to be placed upon Ss. 3, 8 and 10 of the Act. Section 3 is as follows:

"3. Every taluqdar with whom a summary settlement of the Government revenue was made between the 1st day of April, 1858 and the 10th day of October, 1859, or to whom before the passing of this Act and subsequently to the 1st day of April, 1858, a taluqdari sanad has been granted,

shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or kabuliyat executed by such taluqdar when such settlement was made,

or which may have been or may be decreed to him by the Court or an officer engaged in making the first regular settlement of the Province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed."

(22) In order to bring property held by a Taluqdar within the scope of this section it must be established either (a) that the summary settlement of the property had been made within the prescribed dates with the Taluqdar, or (b) that a sanad has been granted to him 'before' the passing of the Act. It is only if either of these conditions is fulfilled that full proprietary rights will accrue in (a) the property entered in the Qabuliat executed at the time of the summary settlement: and (b) in the property which may be decreed to him by a court engaged in effecting the first regular settlement. This is also the view taken in — 'Janki Prasad Singh v. Dwarka Prasad Singh', 9 Ind Cas 83 (Oudh) (A).

(23) It has, therefore, first of all to be ascertained whether any summary settlement was made in respect of any village with Chetpal Singh. For this purpose it is necessary to enquire into the history of the property and the only evidence that there exists from which the history may be traced is the report of the settlement Commissioner Ext. A2. It appears from Ext. A2 that the villages entered in list A of the plaint and the other villages in the possession of Chetpal Singh originally formed part of Taluq Tirwal and had been at one time separated from that Taluqa. On the crucial question as to whether they were settled at the summary settlement with Chetpal Singh, however, it throws no light. Taluqa Tirwal itself, having been confiscated from Gulab Singh, great-uncle of Chetpal Singh, was granted to Ajit Singh, a cadet of the family, and he is stated to have held 20 villages, which were held as muafi from the King, on behalf of Chetpal Singh who was then only 11 years old.

(24) Later a dispute arose as to whether they were settled as a part of Taluqa Tirwal with Ajit Singh or kept separate. The Commissioner stated the rival claims and reported that they were not part of Taluqa Tirwal. There is, however, nothing in this report to show that they were settled either with Chetpal Singh or with any one else on his behalf. No copy of summary settlement qabuliat either of these villages or of Taluqa Tir-

wal has been filed nor had any copies of the wajib-ul-arzes of these villages been produced by either party. This evidence is quite inconclusive and does not prove that the relevant summary settlement was made with Chetpal or that it was made with some one else.

(25) As to the grant of the Sanad there is definite evidence on the record to show that no Sanad had been granted to Chetpal Singh before Act 1 of 1869 was passed and became law. Ext. 5 is a Rubkar of the Deputy Commissioner of Pratapgarh dated 16-3-1869 at the time when the lists required under Section 8 of the Act 1 of 1869 to be prepared were in the course of preparation. It appears from this document that till the 16-3-1869 i. e., till after the enactment of Act 1 of 1869 no Sanad of any kind had been granted to Chetpal Singh.

(26) An examination of the evidence, therefore, discloses that there is no material upon which it could be found as a fact that either of the two essential conditions stated in S. 3 of Act 1 of 1869 have been fulfilled. This does not, however, conclude the matter since we have still to consider the question of the effect of the presumption arising under Section 10 by reason of the entry of Chetpal Singh in the lists prepared under S. 8.

(27) Section 8 directs the preparation of six lists of Taluqdars. The first of these is "a list of all persons who are to be considered Taluqdars within the meaning of the Act." The third is thus described.

> "Third. A list of the taluqdars, not included in the second of such lists to whom sanads have been or may be given or made by the British Government up to the date fixed for the closing of such lists declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture;"

(28) Section 10 is as follows:

> "10. No persons shall be considered taluqdars or grantees within the meaning of this Act, other than the persons named in such original or supplementary lists as aforesaid. The courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees".

(29) Thus by reason of the entry in the lists prepared under S. 8 there is a conclusive presumption that the persons named therein are "such Taluqdars". In the present case it must accordingly be presumed that Chetpal Singh was Taluqdar of the 'estate' of Noorpur in respect of which he had obtained a sanad declaring that the succession to that estate was thereafter to be regulated by the rule of primogeniture.

(30) The effect of the presumption was thus stated in — L. Harihar Pratap Baksh Singh v. Bisheshar Bakhsh Singh', AIR 1928 Oudh 307 at p. 312 (B) of the report:

> "According to section 10 of the Act the entry is conclusive evidence not only of the fact that Sitla Baksh Singh was a taluqdar within the meaning of the Act but also of the fact that he was a taluqdar possessed of the estate of Gangwal in the district of Bahraich. This is the significance which must be attached to the word "such" which precedes "taluqdar" in the last line of S. 10. This word connotes all the legal characteristics of a taluqdar whose name finds place in list 1 of the lists prepared under the Act. "Estate" is defined in the Act as "the Taluqa or immoveable property acquired or held by a taluqdar ..... in the manner mentioned in section 3" of the Act. It follows that the estate of Gangwal possessed by Raja Sitla Bikhsh Singh was held by him in the manner mentioned in section 3 of the Act. It was so held by their Lordships of the Judicial Committee in the case of — 'Brij Indar Bahadur v. Janki Koer', 5 Ind App 1 (PC) (C) (penultimate paragraph at p. 12).
>
> If the above reasoning is correct, the only matter which requires to be proved is as to what immoveable property constitutes the estate of Gangwal".

When the case went up in appeal, this view was not challenged before the Judicial Committee in — 'Jadunath Kuer v. Bisheshar Baksh', AIR 1931 PC 24 (D).

(31) In the same way, in the present case what has to be ascertained is what villages constitute the estate of Noorpur. In that case the wajib-ul-arz provided the evidence in the present case it is provided by the Khewats and Qabuliats executed at the first Regular Settlement — Exts. A73 to A89 (which relate to the villages in list A attached to the plaint). Out of these documents the Khewats Exts. A-72, A-74, A-76, A-78, A-82, A-84, A-86 and A-88, refer to the villages to which they relate as forming part of "Ilaqua Noorpur".

(32) It must accordingly be held that all the villages entered in list A attached to the plaint formed part of the "estate" of Noorpur which, in the hands of Chetpal Singh, was governed by Act 1 of 1869.

(33) It has next to be ascertained whether it continued to be so governed even in the hands of Rani Dilraj Kuer. In order to determine this it has to be ascertained whether the Rani was a 'legatee' of Chetpal Singh to whom the provisions of Section 14 of Act 1 of 1869 applied or whether she took under a title which made S. 15 of the Act applicable and thus removed the estate from the operation of the Act.

(34) The learned Civil Judge has taken the view that the property in the hands of Rani Dilraj Kuer was not governed by the Act for two reasons: (a) that the will in her favour was revoked by the will in favour of Bhagwati Prasad Singh; and (b) that her title was title under the award and the effect of this was to create a new title without regard to any pre-existing title. Since the award was not a transfer and, in any case not a transfer from a taluqdar, the provisions of S. 14 of Act 1 of 1869 did not apply to it.

(35) The learned counsel for the respondent has urged one more ground for holding that the property in the hands of Dilraj Kuar ceased to be governed by Act 1 of 1869 and that depends upon a construction of the words

> "to a person who would have succeeded according to the provisions of this Act to the estate or a portion thereof if the transferor or testator

had died without having made the transfer and intestate"

used in S. 14 of the Act. We shall consider the meaning of those words in due course.

(36) The first objection to the decision of the learned Civil Judge in respect of the will in favour of Dilraj Kuar is that there was no plea that that will had been revoked in spite of a specific assertion by the defendants that Rani Dilraj Kuar held the property under the will of her husband. The only plea that was taken by the plaintiffs in this connection was that set out in paragraph 47 of their replication which has already been quoted (vide paragraph 14 above). It was, therefore, not open to the learned Civil Judge to go into the question of the revocation of the will of Rani Dilraj Kuar.

(37) The document upon which the learned Civil Judge relies as revoking the will in favour of Rani Dilraj Kuar is the document said to have been executed by Chetapal Singh five days before his death and registered only two days earlier. The original document has not been produced but only a certified copy is forthcoming and this is Ex. 61 on the record. Though the learned Civil Judge could not raise a presumption as to the genuineness of the document when only a copy had been produced, he could rely, as he did, on the earlier litigation and hold the document to be proved to have been executed by Chetapal Singh.

Having regard to the date on which the document was executed, strong proof was, however, required to show that its executant possessed a sound disposing mind. The learned Civil Judge did not direct himself to this aspect of the matter. No doubt for proof of this also he relied upon the judgment of the earlier case. Since both the parties to the present litigation, claim title under the same party to the earlier litigation the judgments do not operate as res judicata. They can only be relied upon as occasions on which the document had been accepted as valid but much of the evidentiary value of this fact is lost because a Privy Council appeal was still pending and it was during the pendency of that appeal that the parties referred their dispute to arbitration and the award was given.

(38) The learned counsel for the respondents met the objections raised to the course adopted by the learned Civil Judge by urging that a person who relies upon a will must prove that it is the last will of the testator and that consequently he has to displace or disprove any document which is later in date and has testamentary effect. The mere production of a subsequent document without setting it up as a will or deed of revocation does not cast upon the propounder of a will the burden of proving the negative. When no one even asserts that the document was the conscious act of a testator possessed of a sound disposing mind the propounder of the earlier document cannot be called upon to establish that the executant, when he executed the document, did not possess a sound disposing mind.

(39) In the present case while the will in favour of Dilraj Kuar makes due provision for all the persons who had, or might eventually have, claims against the testator, the deed of adoption, although it mentions the testator's two wives, makes no provision either for them or his widowed daughter-in-law. It provides that if the testator had a son by natural generation, the adopted son would not get the estate. It makes no provision for him in that eventuality. The alleged adopted son was only twenty months old and yet no directions are given for his upbringing. The alleged legatee under the deed of adoption was the son of the testator's 'general agent' and the earlier will is not mentioned at all. In these circumstances a considerable doubt attaches to the subsequent deed and it cannot be said that the will in favour of Rani Dilraj Kuar is proved to have been revoked.

(40) It may also be pointed out that the last stage in the earlier litigation between Dilraj Kuar and Bhagwati Prasad was the award of Babus Ishwari Prasad and Ram Chandra. This award did not negative the will in favour of Dilraj Kuar. It stated in paragraph 1:

"After this decision.....the decision of the questions of law and fact as to whether Bhagwati Prasad Singh is the adopted son of Raja Chetpal Singh under Hindu law or Act I of 1869 or whether the will dated the 24th June, 1895, and the deed of gift dated the 5th June, 1899, executed by Raja Chetpal Singh in favour of the Rani have been cancelled or not seems immaterial and we are not adjudicating upon those points because the rights of the parties so far as they relate to the disputed property left by Raja Chetpal Singh have been finally and once for all decided by us. For the purpose of ownership and inheritance respecting the shares which have been given to the parties in the property in suit under this award it will be considered 'as if Bhagwati Prasad had no relationship whatever with Raja Chetpal Singh'."

(41) At other places in paragraph 1 it was clearly stated that Bhagwati Prasad was in all respects to be treated as continuing to belong to his natural family: the members of Raja Chetpal Singh's family would have no right of succession in the property awarded to Bhagwati Prasad nor would Bhagwati Prasad have any right to any inheritance in the family of Chetpal Singh. Further in para. 6 of the award the arbitrators endeavoured to wipe out altogether the effect of the adverse decision given against Rani Dilraj Kuar in the declaratory suit filed by her. In view of this award the learned Civil Judge clearly erred in holding the deed of adoption to be proved as a deed revoking the will in favour of Dilraj Kuar solely on the basis of the judgments which preceded the award and were in a large measure nullified by it.

(42) In the view which we take of the award, however, a decision of this question is immaterial. The award followed a reference to arbitration without the intervention of any Court, although two litigations were then pending. After it had been given it was accepted by the parties and was signed on their behalf in token of their acceptance. It was accepted by the Judicial Commissioners as an adjustment of the suit that was

then pending. It was not seriously contested that awards, and more specially this award, do not stand on a footing different to compromises. This award must also be approached as if it was a compromise.

(43) The approach of the learned Civil Judge is not a proper approach. He has held that the award terminated all earlier title and he has relied upon certain decisions in support of his view. He has, however, not studied those decisions with care. All that those decisions lay down is that as between parties to a compromise or an award or persons claiming under rival parties the title of each party prior to the award or compromise cannot be set up so as to defeat a title acquired under the compromise or award. The proposition cannot be disputed and is obvious. If persons bind themselves by any valid contract supported by consideration they cannot resile from that contract. This is also true of an adjustment of rival claims to property, whether the adjustment is by way of compromise or through the intervention of arbitrators.

(44) This does not, however, mean that when the nature of the title of a person whose possession is being enquired into as between persons claiming under him, title prior to the compromise must be ignored as non-existent. If such a view were accepted then in every case of disputed succession where the parties instead of proceeding through Courts of law arrive at an adjustment their original title will cease and they will have a new title arising out of the adjustment only. This proposition has only to be stated to be rejected.

(45) If an award is treated on the same footing as a decree of a Court in the present case it was incorporated in a decree the position is no different since it is well recognized that a decree does not create but only recognizes a pre-existing title and gives relief on its basis.

(46) There are many decisions of the Courts in India and of the Privy Council which provide a guide in determining how an award is to be approached when the title of a party in possession of property under it is being enquired into and they are all consistent. It is only necessary to go into a few.

(47) In — 'Lala Khunni Lal v. Gobind Krishna Narain', 38 Ind App 87 (PC) (E) their Lordships say at p. 102:

> "The real nature of the compromise is well expressed in a judgment of the High Court of the North West Provinces in 1868 in the suit of Mewa Kunwar against her sister Chhatar Kunwar's husband. The learned Judges say as follows: 'The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others 'as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, than the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement' (—'Lalla Oudh Beharee Lall v. Mewa Koonwar', 3 Agra HCR 82 at p. 84 (F))."

(48) In — 'Ameer Mirza Beg v. Udit Pershad', AIR 1925 Oudh 709 (G) the learned Judges say at page 711:

> "That a settlement of controversy between two persons may amount to a transfer from one to the other may be conceded but the settlement of the 12th July 1909 is clearly not of that nature. We think that the view taken by the learned Judges of the High Court of the N.W.P. who decided the case of 3 Agra HCR 82 (F) is peculiarly applicable to the settlement with which we are concerned. It is as follows:
>
> The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively; it was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement.
>
> In delivering the judgment of their Lordships of the Privy Council in the case of — 'Rani Mewa Kuwar v. Rani Hulas Kuwar', 1 Ind App 157 (PC) (H), the Right Honourable Sir Montague E. Smith said 'The compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is'."

(49) In the Shish Mahal case, — 'Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam', AIR 1929 Oudh 97 (I) a similar contention was raised since there had been a compromise between the heirs of a deceased taluqdar by which their rights were determined. The learned Judges repelled the contention and at p. 103 of the report, they say that the effect of the compromise only was that the heir had succeeded and obtained possession: that his relatives disputed his title and on receipt of consideration had withdrawn their opposition thus leaving the original title of the heir-at-law as successor under S. 22 of Act 1 of 1869 unaffected. On appeal their Lordships of the Privy Council upheld the view in — 'Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam', AIR 1932 PC 13 (J). At p. 16 of the report they said that

> "it is impossible to regard the compromises as being in any way the root of Baqar Ali's title....."

(50) The same reasoning was adopted in 'the Gangwal's case' in AIR 1928 Oudh 307 (B) upheld by the Judicial Committee in AIR 1931 PC 24 (D).

(51) The last two were cases arising under the Oudh Estates Act and it was held that, in spite of the fact that on the death of the taluqdar there were disputes which were settled by compromise between the rival claimants the property in the hands of the person in possession under

the compromise was still governed by Act 1 of 1869.

(52) As against these cases Mr. Hyder Husain relied upon the decision of the Judicial Commissioner's Court and the Privy Council in the Bilwal case — vide — 'Zarif-un-Nisa v. Shafiq uz-Zaman', AIR 1923 Oudh 185 (K) and — 'Zarif-un-Nisa v. Shafiq-uz-Zaman', AIR 1928 PC 202 (L) respectively. In that case the widow of the last taluqdar set up title under a will. On the other hand the brother of the taluqdar claimed title both under the will and by succession under S. 22 of Act 1 of 1869. The dispute was referred to arbitration and before the arbitrator the parties accepted the will and requested the arbitrator to interpret it. The arbitrator gave his award which, though challenged was upheld by the Privy Council. Parties entered into possession of the properties allotted to them by this award.

After the death of the widow, the brother's son and grandson challenged the title of the widow's legatees. It was held that one party to an award could not challenge the title not only of the other party but also of the successors of the other party. Further it was held that the property in the hands of the widow was not governed by the Act but this was so held because under S. 22 the brother was a preferential heir to the widow. Consequently in view of the decision in — 'Thakurain Balraj Kunwar v. Rae Jagatpal Singh', 31 Ind App 132 (PC) (M), the widow was not

> "a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate"

and S. 14 did not apply to keep the property in her possession within the Act. Since many rights had been acquired before 1910 when the amending Act 3 of 1910 was passed retrospective effect could not be given to amended S. 14 of the Act and the property remained out of the Act.

(53) It is clear from the proceedings which led up to the award which have been detailed in an earlier part of the judgment that Rani Dilraj Kuar always claimed title under the will of her husband. In accordance with the principle approved by their Lordships of the Judicial Committee in 38 Ind App 87 at p. 102 (PC) (E) her title will be considered to be the title as a legatee of her husband. The question as to whether she is a legatee within the meaning of S. 14 has now to be considered.

(54) Mr. Hyder Husain's contention was that a widow does not succeed under S. 22 of the Act to an estate or to a portion thereof but only to an interest therein and that consequently a bequest to her did not fall within the scope of the words of S. 14 of the Act quoted earlier (vide para. 35). However interesting this argument might be we are not called upon to decide it because S. 14 of Act 1 of 1869 as amended by Act 3 of 1910 undoubtedly covers the case of a bequest to a widow.

(55) Amended S. 14(b) provides that if the legatee is one of the persons mentioned in S. 13A, cls. (1) and (2) the estate will continue to be governed by the Act. Section 13A, Cl. 1(a) relates to bequests to "a person who would have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate." Rani Dilraj Kuar would at least have succeeded to an interest in the Chatpalgarh estate if her husband had died intestate. She is, therefore, a person who comes within the operation of amended section 14.

(56) Section 21 of Act 3 of 1910 gives retrospective operation to the provisions of Ss. 7 and 8 of that Act. Section 14 of Act 1 of 1869 was amended by S. 7 of Act 3 of 1910 and consequently it has retrospective operation. The only limitation on its retrospective operation is that:

> "Nothing contained in the said sections..... shall be deemed to vest in or confer upon any person any right or title to any estate or portion thereof, or any interest therein which at the commencement of this Act, vested in any other person who would have been entitled to retain the same if this Act had not been passed."

(57) At the time when the amending Act came into operation the property was vested in Bhairon Din Singh. Giving the amendment retrospective operation would not deprive him of any right. Consequently the case would not fall under the exception to S. 21 of Act 3.

(58) It was contended that the effect of giving retrospective operation to amended S. 14 would be to alter the line of succession. The chance of an heir apparent succeeding is not a vested right but merely an expectancy. By changing the line of succession no vested rights are divested. Moreover the whole object of the amending Act was to alter the line of succession so as to restore succession under Act 1 of 1869 for the personal law in many cases in which the Act had ceased to be operative. Thus this contention also fails and the estate in the hands of Dilraj Kuar must be held to have been governed by Act 1 of 1869.

(59) The last step in this contention is to determine whether the property in the hands of Bhairon Din Singh was still governed by Act 1 of 1869. The pedigree set up by the defendants has been held established. It has not been challenged in appeal. It shows that Bhairon Din Singh was a male agnate of Raja Chetpal Singh. He might, therefore, in the absence of other nearer heirs have succeeded to the estate of Nurpur. He was accordingly covered by cl. (2) of S. 13A and amended S. 14(b) of the Act will keep the property within the Act in his hands. Thus the villages entered in list A attached to the plaint being still governed by Act 1 of 1869 in the hands of Bhairon Din Singh descended, on his death to his eldest son, Kuar Man Singh alone succeeded.

(60) The above decision is sufficient to dispose of the appeal. One more contention has, however, been raised upon which we think it proper to give our finding briefly and this is the plea of ouster. Since the suit fails on the question of title no question of ouster arises. If, however, it had been found that Lal Dharam Moorat Singh was also a cosharer, the fact that mutation was made in the name of Man Singh alone on the death of his father or that the Court of Wards

took possession of the estate in the name of Man Singh alone would not indicate any ouster. Dharam Moorat Singh was a minor and in spite of mutation being in the name of his elder brother and the Court of Wards being in possession on his behalf, he was also deriving benefit from the estate and was being maintained by it. Further Kuar Man Singh himself admits as D. W. 9 that the income of the taluqdari and non-taluqdari property was kept in one and out of it money was paid to the defendants for their daily expenses.

(61) The position after the declaration of the property as settled estate was different and it is immaterial whether the declaration that the property would thenceforward be held under the provisions of the Oudh Settled Estates Act is valid or not. Only such property can be declared to be subject to the Act as is held in absolute right by the declarant without any cosharer. Thus when Man Singh applied in January for permission to settle the villages included in list A attached to the plaint, he clearly indicated that he was the sole and exclusive owner of them and that no one else was a cosharer in them or had any right in them. Thereafter, permission having been granted, Man Singh executed a declaration as required by the Act to the effect that his property would thereafter be held subject to the provisions of the Act.

Plaintiff No. 1 admits that he was aware of these proceedings but he thought that they did not affect his rights. Exhibit A/1 also shows that he accepted an account which showed expenditure of money in this connection. The explanation that he gives for having formed this idea is absurd and incredible. The fact that he still had to be maintained by his brother even after this is immaterial because, according to Indian ways of life, customs and traditions, it was the duty of the elder brother to maintain out of his own property his penniless younger brother. This would not create or keep alive any right in the younger brother when a clear assertion had been made and a solemn declaration had been executed to his knowledge that the elder brother claimed the property exclusively as his. The present suit was not instituted till 5-7-1946, i.e., about fifteen years later. All title which plaintiff No. 1 might have possessed accordingly came to an end.

(62) In 1937 two sale deeds were executed on the 12th April and 9th December (Exs A/60 and A/61) respectively which also indicate that at that time plaintiff No. 1 accepted the position that his elder brother was the sole owner and he was merely a guzaredar, that is to say that he was aware that there had been an ouster and he took no steps to assert his rights within twelve years of the ouster. On this ground also the plaintiff's suit with regard to the property in list A is liable to be dismissed.

(63) The result is that this appeal is allowed and the decree of the lower Court is modified to this extent that the suit is dismissed with regard to the property in list A but the decree in respect of the property in list B is maintained in the form in which it has been given. Since the appellants always admitted the right of the plaintiffs in the property in list B, they will get their full costs of both the Courts from the plaintiffs. C. M. Appln. No. 217 of 1954 is dismissed.

V.S.B.

Appeal allowed.

(S) AIR 1955 ALLAHABAD 269 (Vol. 42, C. N. 83)

FULL BENCH

MALIK C. J., AGARWALA AND SAHAI JJ.

(17-12-1954)

Pramesh Chandra Gupta and others, Applicants v. The Registrar, High Court of Judicature at Allahabad and others, Opposite Parties.

Civil Misc. No. 472 of 1954.

(a) Bar Councils Act (1926), S. 1(3) — Notification under, issued in 1928 — Application of Ss. 3 to 16 to Amalgamated High Court — 'Indian Law' — Meaning — (U. P. High Courts (Amalgamation) Order (1948), Paras 8, 17(c)) — (General Clauses Act (1897), S. 3(27a)) — (Words and Phrases) — (U. P. General Clauses Act (1 of 1904), S. 3 (29)) — (1954 All LJ 477: AIR 1954 All 728: 1954 Cri LJ 1485 and 1954 All LJ 400: AIR 1954 All 735: 1954 Cri LJ 1498, Overruled.)

The phrase "Indian Law" as mentioned in para. 17(c) of the Amalgamation Order includes not only an Act of the Legislature, but also all rules, bye-laws and orders or notifications made thereunder vide S. 3(29), General Clauses Act. The word "order" in that section would include a 'notification' because a notification is nothing but an order. AIR 1953 SC 318, Rel. on. (Para 11)

As the notification made under S. 1(3), Bar Councils Act in 1928 is an 'Indian Law' within Para 17(c) of the Amalgamation Order, it would apply to the new High Court with such modifications as would be necessary in the nature of things and circumstances. Thus the notification would apply to the new High Court as from the date the new High Court came into existence and the appointed date in connection with the new High Court would be the date of the coming into existence of the new High Court. (Para 11)

Consequently Ss. 3 to 16, Bar Councils Act, are already applicable to the new High Court and no new notification by the State Government is required and hence the new High Court can proceed to bring into existence a new Bar Council. The result is that the Bar Councils Act in its entirety applies to the new High Court, and the old rules as to enrolment of Advocates which were made for the old Courts are still in force by virtue of Para. 8 of the Amalgamation Order. 1954 All LJ 477: AIR 1954 All 728: 1954 Cri LJ 1485 and 1954 All LJ 400: AIR 1954 All 735: 1954 Cri LJ 1498, Overruled. (Paras 11, 15)

(b) Bar Councils Act (1926), S. 3 — Bar Council constituted for High Courts before amalgamation — Dissolution of — Effect of Amalgamation Order.

It is true that Bar Councils Act does not contain any provision for the dissolution of a Bar Council created under the Act, but from the very fact that the Bar Council is

constituted for a particular High Court, it follows necessarily that when the High Court itself ceases to exist, the Bar Council must also come to an end. It may continue to exist, as it is a body corporate, only for winding up its affairs after the High Court for which it is constituted ceases to exist, but obviously it cannot carry out any function connected with the High Court which has ceased to exist. (Para 14)

(c) Bar Councils Act (1926), S. 8 — Enrolment of Advocates — Non-existence of Bar Council — Effect — (Letters Patent (Allahabad) (1866), Paras, 7, 8 — (U. P. High Courts (Amalgamation) Order (1948), Para. 8).

The jurisdiction to enrol is one thing and the procedure to be followed for making the enrolment is quite different. The power of the Court to enrol advocates, conferred upon the old Court at Allahabad under Paras. 7 and 8, Letters Patent and preserved to the new Court by Para. 8 of the Amalgamation Order, is not dependent upon the observance of the rules and procedure for its exercise. The rules are merely directory and the jurisdiction of the Bar Council is merely advisory. It cannot be said that if the aforesaid procedure is not followed, the order of enrolment by the Court is rendered nugatory. (Para 16)

Further, even if the rules are mandatory they are not conditions precedent to the exercise of jurisdiction by the Court, and since it is impossible to comply with them because there is no Bar Council in existence, their performance can be dispensed with in considering the applications for enrolment. Case law referred. (Paras 17, 21)

On the other hand, if it is assumed that Ss. 3 to 16, Bar Councils Act, do not apply to the new High Court, the power of the new High Court for enrolment of advocates becomes unfettered by any rules made under that Act and the applications can be considered by the High Court without reference to the Bar Council at all. (Para 22)

Held that in either view of the matter and in the special circumstances of the case, the applications for enrolment may be considered by the High Court without reference to the Bar Council. (Para 23)

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 728: 1954 All LJ 477: 1954 Cri LJ 1485 2, 9, 12, 13

(B) (V41) AIR 1954 All 735: 1954 All LJ 400: 1954 Cri LJ 1498 2, 13

(C) (V40) AIR 1953 SC 318: 1953 Cri LJ 1241 (SC) 11

(D) (V4) AIR 1917 PC 142: 1917 AC 170 (PC) 18

(E) (1885) 15 QB 88: 19 LJMC 209 19

(F) (V36) AIR 1949 All 511: 1949 All LJ 1 20

S.C. Khare, T. N. Sapru and Yashoda Nandan, for Applicants, K. L. Misra, for Opposite Parties.

AGARWALA J.:

This is an application by fifteen Law Graduates who has attended the chambers of senior Advocates authorized to give them training for the purpose of enrolment as Advocates of this Court for more than a year, praying that this Court may be pleased to accept their applications for enrolment as Advocates, and admit them to the roll of Advocates of this Court authorising them to practice in this court and in the courts subordinate thereto. It is alleged that the applicants approached the Registrar of the High Court to accept their applications for enrolment as Advocates of this Court but the Registrar informed them that such applications could not be entertained and that the applicants could not be enrolled as there was no Bar Council validly functioning in this State. The contention of the applicants is that this Court has power to enrol them as Advocates entitled to practise in this Court even in the absence of a Bar Council.

(2) The difficulty in respect of the applications for enrolment being considered on their merits has arisen on account of a decision of a Bench of this Court in — 'Durgeshwar Dayal Seth v. Secretary, Bar Council, Allahabad', AIR 1954 All 728 (A), to the effect that the 'ad hoc' Bar Council constituted for this Court under the Bar Councils Act, as amended by the Bar Councils (U. P. Amendment) Act, 1950, was an illegal body, as the said amending Act was ultra vires the State Legislature and the notification issued by the State Government under the amended Bar Councils Act applying Ss. 3 to 16 of the Act to this High Court was consequently void and of no effect. The Bench further observed that the old Bar Councils have not been abolished and that till they are abolished a new Bar Council for this High Court which is a new High Court cannot be brought into existence and that Ss. 3 to 16, Bar Councils Act of 1926 can be applied to this Court only when a fresh notification is issued by the State Government under S. 1(3) of the Act. In a subsequent case reported in — 'Saroj Rawat v. Secretary, Bar Council, High Court, Allahabad', AIR 1954 All 735 (B), the same Bench held that the Bar Councils Act of 1926 could not apply to this High Court unless the State Government issued a fresh notification under Ss. 1(2) and 1(3) of the unamended Bar Councils Act of 1926. The matter at first came up for decision before a Bench of this Court consisting of Agarwala and Sahai JJ. and, as they were of opinion that some of the observations made by the Bench which decided the above noted two cases required reconsideration, the case was referred to this Full Bench.

(3) To understand the contentions of the parties and to pronounce an opinion on them, it is necessary to trace the history of the power of the High Court to enrol Advocates on its roll entitling them to practice in the Court.

(4) By a Letters Patent of 17-3-1866, a High Court of Judicature was established in the North Western Provinces on 1-6-1866, with its seat at Agra. In 1869 the High Court was shifted to Allahabad. On 11-3-1915 the Letters Patent of the North-Western Provinces High Court were amended and the name of the Court was changed into the High Court of Judicature at Allahabad. This Court had jurisdiction in the territories of the Province of Agra. The power to enrol Advocates entitling them to practise before the High Court was described in paras. 7 and 8, Letters

Patent. By para. 7 the Court was authorized and empowered in the following words:

". . . . To approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet and such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the Suitors of the Said High Court and to plead or to act or to plead and act for the said suitors according as the said High Court may by its rules and directions determine and subject to such rules and directions."

Para 8 provided:

". . . The said High Court of Judicature at Allahabad shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels and Attorneys at Law of the Said High Court and shall be empowered to remove or to suspend from practice on reasonable cause the said Advocate, Vakeels or Attorneys at Law."

This power was, by para. 35, Letters Patent, subject to the Legislative powers of the appropriate Legislature.

(5) For the province of Oudh, a Chief Court was established under Act IV of 1925 with its seat at Lucknow. The power to enrol Advocates was derived from the Legal Practitioners Act, 1879.

(6) In 1926, the Indian Bar Councils Act (Act 38 of 1926) came into force. By this Act the whole law relating to Advocates entitled to practise in the High Courts in India was consolidated. The Act in the first instance extended to the then High Court of Allahabad and certain other High Courts and under S. 1(2) it could be made applicable to such other High Courts as the Governor-General in Council may, by a notification in the official gazette, declare to be High Courts to which the Act applied. Sub-s. (3) of S. 1 of the Act provided that

"Section 1 and Ss. 2, 17, 18 and 19 shall come into force at once";

and that the Governor-General in Council may, by notification in the Gazette of India, direct that the other provisions of the Act or any provision thereof specified in the notification, shall come into force in respect of any High Court to which the Act applied on such date as he may by the notification appoint. A notification under sub-s. (2) of S. 1 applying the Act to the Oudh Chief Court was made on the 1-3-1928, and, a notification of the same date applied to that Court Ss. 3 to 16 also, so that all the sections of the Act applied to the Chief Court of Oudh as from 1-3-1928. As the High Court of Judicature at Allahabad was already mentioned in the original sub-s. (2) of S. 1, no notification under that section was required. A notification under sub-s. (3) of S. 1 of the Act was made by the Governor-General applying Ss. 3 to 16 of the Act to the High Court of Judicature at Allahabad as from the 1-6-1928. As an argument has been based upon the language of this notification, we may quote it here in full. It runs:

"In pursuance of sub-s. (3) of S. 1, Indian Bar Councils Act, 1926 (38 of 1926), the Governor General in Council is pleased to appoint the first day of June, 1928 as the date on which the provisions of the said Act not yet in operation shall come into force in respect of the High Court of Judicature at Allahabad." (Vide Gazette of India, dated April 7, 1928, Part I, p. 400).

Thereafter the Bar Councils for the two Courts at Allahabad and Lucknow came into existence according to the provisions of the Bar Councils Act and continued to function separately under the two Courts. Section 8(1), Bar Councils Act provided:

"No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act."

Sub-section (2) of S. 8 directed the High Court to prepare and maintain a roll of Advocates of the High Court in which shall be entered the names of

"(a) all persons who were entitled to practice in the High Court before the date on which the section came into force, and

(b) all other persons who were admitted to be Advocates of the High Court under the Act."

Under S. 9, the Bar Council was, with the previous sanction of the High Court, empowered to make rules to regulate the admission of persons as Advocates of the High Court, but there was a proviso to this to the effect that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion. Section 19(2) of the Act provided that—

"When Ss. 8 to 16 come into force in respect of any High Court of Judicature established by Letters Patent, this Act shall have effect in respect of such Court notwithstanding anything contained in such Letters Patent, and such Letters Patent shall, in so far as they are inconsistent with this Act or any rules made thereunder, be deemed to have repealed."

(7) Under the rules made under S. 9 of the Act, all applications for enrolment as Advocates had to be made to the High Court and were to be sanctioned or refused by the High Court, but it was provided, vide R. 1(4) that

"On receipt of the application the Registrar shall cause a notice of the said application to be served on the Secretary, Bar Council, together with a copy of the application, intimating that the application will be taken into consideration after fifteen days from the date of the service of the notice and whether the Bar Council has any objection to the granting of the application."

Sub-r. (5) of R. 1 provided that—

"If the Bar Council prefers any objection to the admission of the applicant, such objection shall be laid before the High Court for hearing in accordance with the provisions of S. 9, sub-s. 2(d), Bar Councils Act."

Sub-section (8) of rule 1 provided that—

"If the objection preferred by the Bar Council to the application is upheld, the application shall be deemed to have been refused."

It is obvious from the above rules that if the Bar Council failed to file any objections within the period of fifteen days, the Bar Council was not bound to be heard. Similar rules were made by the Bar Council of Oudh.

(8) This was the state of affairs in 1948 when the two Courts, at Allahabad and at Lucknow, were amalgamated by the United Provinces High Courts (Amalgation) Order, 1948, which was passed under the provisions of S. 229, Government of India Act of 1935. The new High Court under the Amalgamation Order came into existence on 26-7-1948. Para 3 of the Amalgamation Order provided that—

"As from the appointed day (namely, 26-7-1948) the High Court in Allahabad and the Chief Court in Oudh shall be amalgamated and shall constitute one High Court by the name of the High Court of Judicature at Allahabad."

Para 8(1) of the said Order provided that—

"The new High Court shall have the like powers to approve, admit, enrol, remove and suspend advocates and attorneys, and to make rules with respect to advocates and attorneys, in the whole of the United Provinces as are, under the law in force immediately, before the appointed day, exercisable by either of the existing High Courts."

Para 17(c) provided that—

"references in any Indian Law to either of the existing High Courts by whatever name shall unless the context otherwise requires, be construed as references to the new High Court."

One such Indian Law was the Bar Councils Act, and, therefore, the reference to the High Court of Judicature at Allahabad in S. 1(2), Bar Councils Act would be a reference to the new High Court of Judicature at Allahabad. This is not in dispute. But the question that has been contested at the Bar is whether the notification of the Governor-General in Council, dated 1-6-1928, already quoted, made under S. 1(3) can make the provisions of Ss. 3 to 16, Bar Councils Act applicable to the new High Court. We shall deal with this question later.

(9) In the Amalgamation Order, however, no provision was made with regard to the existing Bar Councils, one functioning at Allahabad and the other at Lucknow. The two Bar Councils, therefore, continued to act for some time till the term of office of the members of the Bar Councils expired. These members were to be elected for a term of three years. In the case of the Allahabad Bar Council their term expired in 1949. In the case of the Lucknow Bar Council, it had expired earlier. The State Government was advised that the old Bar Councils could be abolished and a new Bar Council established only by means of a fresh legislative enactment, and that a fresh notification applying Ss. 3 to 16, Bar Councils Act to the new High Court had to be made. Accordingly in 1950, after the new Constitution of India had come into force, the State Legislature enacted the Indian Bar Councils (Uttar Pradesh Amendment) Act, 1950 by which the original Bar Councils Act was amended in respect of the constitution of the Bar Council for the new High Court, the old Bar Councils were abolished and a new Bar Council was to be established by holding elections under the amended Act, and for the period that was to elapse before the duly elected new Bar Council came into existence, the Chief Justice of the new High Court was empowered to constitute an 'ad hoc' Bar Council.

The Uttar Pradesh Government issued a notification, under S. 1(3), Bar Councils Act as amended by the Indian Bar Councils (Uttar Pradesh Amendment) Act, 1950, on 24-5-1952, applying Ss. 3 to 16, Bar Councils Act as amended by the Indian Bar Councils (Uttar Pradesh Amendment) Act, to the new High Court. The Chief Justice constituted an 'ad hoc' Bar Council for the new High Court. A new roll of Advocates was prepared and some Advocates were freshly enrolled under the new rules framed under the Amended Act. The enrolment was stopped after the decision in AIR 1954 All 728 (A).

(10) Learned counsel for both sides have proceeded before us on the assumption that the decision of the Bench declaring that the Indian Bar Councils (Uttar Pradesh Amendment) Act was ultra vires and the notification issued by the State Government on 24-5-1952, under the amended Bar Councils Act applying Ss. 3 to 16 of the amended Bar Councils Act to the new High Court was void and of no effect. The position therefore now is that there is no legally constituted Bar Council for the new High Court in existence, and the question is whether the High Court has power to enrol Advocates in such a situation. We have first to consider whether Ss. 3 to 16, Bar Councils Act apply to the new High Court.

(11) It is clear from the Amalgamation Order that this High Court is a new High Court in spite of the fact that it bears the old name of the High Court of Judicature at Allahabad. The name could have been different, and the mere fact that it is the same, does not mean that it is the old High Court of Judicature at Allahabad. Nevertheless, the new High Court is not entirely unconnected with the old Courts. Paragraph 3 of the Amalgamation Order clearly states that the two old High Courts shall be 'amalgamated and shall constitute one High Court'; so that the new High Court is an amalgamation of the two old High Courts. The Judges of the two Courts were continued to function as Judges of the new High Court; the officers and servants of the two courts were to be the officers and servants of the new court; the jurisdiction of the new High Court was to the same extent as the jurisdiction of both the old Courts; the Advocates entitled to practice in the two old Courts were entitled to practice in the new High Court and the new High Court was to have the same powers of enrolling, approving, admitting, removing and suspending Advocates as the two old Courts had, and the practice and procedure of the new Court was to be the same as was in force in the old High Court at Allahabad.

The old rules and orders made by either of the existing High Courts continued in force and the proceedings pending before the old Courts were to be deemed to be transferred to the new High Court and were to continue as if they were proceedings instituted in the new High Court. It is,

therefore, obvious that the new High Court is a continuation of the two old Courts and the intention was that the law applicable to the old High Courts should continue to apply to the new High Court with such modifications as may be necessary in the circumstances.

One would, therefore think that the notification of the Governor-General in Council dated 1-6-1928 in respect of the old High Court of Judicature at Allahabad continued to apply to the new High Court. It may be observed that the phrase "Indian Law" as mentioned in para 17(c) of the Amalgamation Order includes not only an Act of the Legislature, but also all rules, bye-laws and orders or notifications made thereunder, vide S. 3(29), General Clauses Act. The word "order" in that section would include a notification; because a notification is nothing but an order. This view is fortified by a decision of the Supreme Court in — 'Dr. Ram Krishan v. State of Delhi', AIR 1953 SC 318 (C) in which a notification under the Bombay Excise Act was held to be included within the phrase 'Indian Law' by virtue of S. 3(29), General Clauses Act.

But it was urged that under S. 1(3), Bar Councils Act, a date has to be mentioned in the notification from which Ss. 3 to 16 of the Act are to apply to a Court and that the notification of 1928 fixing 1-6-1928 as the date, could not possibly apply to the new High Court which was not in existence on that date and for this reason the notification of the Governor-General already could not apply to the new High Court. This argument is falacious. If the notification made under the Indian Bar Councils Act is an 'Indian Law' (as has been held that it is), then the notification is to apply to the new High Court with such modifications as would be necessary in the nature of things and circumstances. The date, 1-6-1928, mentioned in the notification could obviously not apply to the new High Court, but as the intention underlying the Amalgamation Order was that the law applicable to the old Courts was to be continued in the altered circumstances and was to be applicable to the new High Court, it is clear that the notification would apply to the new High Court as from the date the new High Court came into existence and the appointed date in connection with the new High Court would consequently be the date of the coming into existence of the new High Court. Reasonable effect must be given to a provision of law which is deemed to be applicable to a new state of affairs, and this is the only way in which effect can be given to the said notification of the Governor General. We are, therefore, of opinion that Ss. 3 to 16, Bar Councils Act are already applicable to the new High Court and no new notification by the State Government is required and that consequently the new High Court can proceed to bring into existence a new Bar Council.

(12) In AIR 1954 All 728 (A) after holding that S. 1(2), Bar Councils Act applied to the new High Court by virtue of para 17(c) of the Amalgamation Order, the Bench (Desai and Mukerji JJ.) observed that—

"It has not the effect of conferring a power upon the new High Court to do afresh everything that the old High Court was empowered to do. There existed the Bar Councils at Allahabad and at Lucknow, and so long as they were not dissolved, another Bar Council could not be created. The principal Act did not contain any provision for the dissolution of a Bar Council. There cannot possibly be two Bar Councils for the same High Court under the Act. Therefore, even if it could be said that the clause empowered the new High Court to do over again all the acts that were to be done by the old High Court, the context requires that a new Bar Council cannot be created so long as the old Bar Councils exist."

(13) In AIR 1954 All 735 (B) the Bench observed :

"The amalgamated Court of Allahabad and Oudh is a new High Court and is not covered by the High Court to which reference has been made in S. 1(2), Bar Councils Act of 1926. If the amalgamated High Court is a new High Court, as indeed it is under the Amalgamation Order of 1948, then it is not one of the High Court's which has been specifically named in S. 1(2), Bar Councils Act and, therefore, if the Bar Councils Act is to be made applicable to this new High Court then a notification in respect thereof has to be issued by the State Government extending the provisions of the Bar Councils Act to it. Further, if the provisions of the Bar Councils Act mentioned in sub-s. (3) of S. 1 are to apply to this new High Court then the requisite notification has to be issued by the State Government and so long as these notifications do not issue, the provisions of the Bar Councils Act of 1926 cannot apply to the new High Court."

With respect, we are unable to agree with these observations. It appears that the Bench did not consider the effect of para 17(c) of the Amalgamation Order read with S. 3(29), General Clauses Act, and the notification of the Governor General in Council referred to above. The observation of the Bench in 'Saroj Rawat's case (B)' that S. 1 (2), Bar Councils Act did not apply to the new High Court is contrary to what the same Bench had held in the earlier case of 'D. D. Seth (A)'. Obviously it was under some misapprehension that the Bench made contradictory observations on this point in the two cases. Moreover it does not appear that the provisions of the Part B Laws Act, 1951 which makes S. 1(2), Bar Councils Act applicable to all High Courts in Parts A and B States, were brought to the notice of the Bench.

(14) We agree that there cannot possibly be two Bar Councils for the same High Court under the Act, but we respectfully disagree with the observation that so long as Bar Councils at Allahabad and Lucknow were not dissolved another Bar Council cannot be created. The old Bar Councils were created under S. 3, Bar Councils Act, which provided—

"(1) For every High Court a Bar Council shall be constituted in the manner hereinafter provided.

(2) Every Bar Council so constituted shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property, both movable and immovable,

and to contract, and shall by the name of the Bar Council of the High Court for which it has been constituted sue and be sued."

It is true that the Bar Councils Act does not contain any provision for the dissolution of a Bar Council created under the Act, but from the very fact that the Bar Council is constituted for a particular High Court, it follows necessarily that when the High Court itself ceases to exist, the Bar Council must also come to an end. It may continue to exist, as it is a body corporate, only for winding up its affairs after the High Court for which it is constituted ceases to exist, but obviously it cannot carry out any function connected with the High Court which has ceased to exist, and since the old Bar Council cannot act for the new High Court for which it is not constituted a new Bar Council must be brought into existence for the new High Court if Ss. 3 to 16, Bar Councils Act apply to the new High Court.

(15) We therefore hold that the Bar Councils Act in its entirety applies to the new High Court, and the old rules as to enrolment of Advocates which were made for the old Courts are still in force by virtue of para 8 of the Amalgamation Order.

(16) The next question is: can the applicants be enrolled when there is no Bar Council for the new High Court in existence? It will be observed that the old rules, which are still in force, contain provisions to the effect that all applications for enrolment shall be notified to the Bar Council which shall have a right to object to the enrolment and that such objections shall be heard by the court and then only will the applications for enrolment be decided. It has been contended by learned counsel for the applicants that these rules are merely directory and do not affect the power of the Court to enrol and that they merely prescribe a procedure which may or may not be followed by the Court.

It is further contended that even if these provisions are mandatory, they are not conditions precedent for the exercise of the Court's jurisdiction of enrolling Advocates, and, therefore, since by the non-existence of the Bar Council they cannot be given effect to or complied with, the Court has power to waive those rules and to enrol the applicants without complying with them.

We think that these contentions of the learned counsel are correct. The rules appear to us to be merely directory. It will be observed that the power to enrol Advocates is not conferred by these rules. That power was conferred upon the old Court at Allahabad under paras 7 and 8, Letters Patent and has been continued for the new High Court by para 8 of the Amalgamation Order. The jurisdiction to enrol is one thing and the procedure to be followed for making the enrolment is quite different. The power of the Court to enrol, as preserved to the new Court by para 8 of the Amalgamation Order is not dependent upon the observance of the rules and procedure for its exercise. From a consideration of the rules it is clear to us that the procedure prescribed for giving notice of the applications for enrolment to the Bar Council is merely directory. For, it is the Court which entertains the applications for enrolment; and it is the Court which makes the order of enrolment. The Bar Council may merely prefer an objection to the enrolment, but that may be accepted or may not be accepted by the Court. The jurisdiction of the Bar Council is merely advisory and it cannot be said that if the aforesaid procedure is not followed, the order of enrolment by the Court is rendered nugatory.

(17) We are further of opinion that even if the rules are mandatory they are not conditions precedent to the exercise of jurisdiction by the court, and since it is impossible to comply with them because there is no Bar Council in existence, their performance can be dispensed with. As has been observed in Maxwell on the Interpretations of Statutes, Edn. 10 at p. 385—

"Enactments which impose duties or conditions are, when these are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that 'lex non cogit ad impossibilia aut inutilia'. They are understood as dispensing with the performance of what is prescribed when performance of it is idle or impossible."

(18) In — 'Montreal Street Rly. Co. v. Normandin', AIR 1917 PC 142 (D), the Privy Council observed:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

(19) In — 'the Queen v. Justices of Leicestershire', (1885) 15 QB 88 (E) notice of an appeal was required to be served on the respondent, but it could not be served because of his death. It has held that the appeal could still be heard because the performance of the condition imposed by law had by the act of God become impossible of performance.

(20) On the same principle a Bench of this Court held — 'In the matter of refugee Advocates', AIR 1949 All 511 (F) that the requirement regarding the recommendation of the District Judge in proviso 7 to R. 1, made under S. 9, Bar Councils Act could be waived when it was not possible to get the recommendation of the District Judge.

(21) The enrolment of the applicants will not cause any real injustice to any body. On the other hand, injustice or inconvenience to them will be caused if their applications are not considered so long as a Bar Council does not come into existence. We are, therefore, of opinion that when the Bar Council is not in existence, the rules requiring reference to the Bar Council may be dispensed with in considering the applicants' applications for enrolment.

(22) If we were to assume that Ss. 3 to 16, Bar Councils Act do not apply to the new High Court, then the case for the applicants becomes stronger, because in that case the power of the High Court for enrolment of Advocates under para 8 of the Amalgamation Order read with paras 7 and 8,

Letters Patent is unfettered by any rules made under the Bar Councils Act and their applications can be considered by the High Court without reference to the Bar Council at all.

(23) In either view of the matter and in the special circumstances of this case, the applications for enrolment may be considered by this Court without reference to the Bar Council.

(24) We, therefore, allow this application and direct that the applicants' applications for enrolment as Advocates be considered by the Court on their merits.

D.R.R. Application allowed.

(S) A.I.R. 1955 ALLAHABAD 275 (Vol. 42, C.N. 84)

FULL BENCH

LUCKNOW BENCH — H. S. CHATURVEDI, RANDHIR SINGH AND MULLA JJ. (23-12-1954)

Om Prakash, Appellant v. The State, Complainant-Respondent.

Criminal Revn. No. 141 of 1951 and Criminal Misc. Applns, Nos. 454 of 1952 and 159 of 1953, against order of Addl. Sess. J., Sitapur, D/-4-6-1951.

(a) Prevention of Corruption Act (1947), S. 5(2) — Effect on S. 409, Criminal P. C. — (Criminal P. C. (1898), S. 409) — (General Clauses Act (1897), Ss. 6, 26) — (Interpretation of Statutes — Repeal — (Civil P. C. (1908), Pre.) — AIR 1952 Punj 89, Dissented from.

An offence under S. 5(1)(c), Prevention of Corruption Act, is almost identical with an offence under S. 409, I. P. C., when it is committed by a public servant. For all practical purposes they are one and the same offence. (Para 23)

Two laws under which the same act or omission is punishable can co-exist side by side. Where a new law makes an act punishable, which is already penal under an existing law and there is nothing in the latter enactment which either expresses or implies that the operation of the earlier law is excluded, an offender can be prosecuted and punished under either of the two enactments. The earlier law will not be put out of operation merely because there is some change in procedure or some difference in penalties. The effect of the new enactment is to add a remedy and not to repeal the former remedy. AIR 1952 Punj 89, Dissented from; Case law relied on. (Paras 24, 25)

The Prevention of Corruption Act has not expressly repealed any of the provisions of the Indian Penal Code. There is nothing in the Act from which a repeal by implication can be inferred. A repeal by implication can only be inferred if it is consistent with the object and purpose which necessitated the new enactment. But where it is in direct conflict with this object and purpose, it is impossible to infer such an intention. The Prevention of Corruption Act was intended to be only a supplementary measure and it did not repeal S. 409, I. P. C. by implication. Thus S. 5(2), Prevention of Corruption Act, does not 'pro tanto' repeal S. 409, I. P. C., and it is open to the State to prosecute a public servant for committing criminal breach of trust under S. 409, I. P. C. AIR 1954 SC 715, Foll. (Paras 20, 26, 28)

Anno: Gen. Cls. Act, S. 6 N. 1; S. 26 N. 1; C. P. C., Pre. N. 7.

(b) Constitution of India, Art. 14 — Discrimination — Prosecution of public servant under S. 409, Penal Code.

Every exercise of discretion is not an act of discrimination. It becomes an act of discrimination only when the person against whom that discretion is exercised faces certain appreciable disadvantages, which he would not have faced otherwise. All that Art. 14, Constitution of India, guarantees is a similarity of treatment and not identical treatment. The protection of equal law does not mean that all laws must be uniform and merely some difference in the two procedures will not amount to a denial of the equality of treatment. Where the act of discrimination consists only in using another law which is good and in force and which creates no added difficulties or hardships for an accused, it may be objectionable on other grounds, but it cannot be described as a discriminatory treatment within the meaning of Art. 14, Constitution of India. (Paras 29, 33)

If a public servant is prosecuted under S. 409, I. P. C., such prosecution does not amount to an act of discrimination within the meaning of Art. 14, Constitution of India, on the ground that it denies to him the equality before the laws or the equal protection before the laws. The procedure do not differ to such an extent that a prosecution under S. 409, I. P. C., rather than under S. 5(2), Prevention of Corruption Act, will deprive the accused of certain appreciable advantages and he will face certain handicaps in defending himself, which he would not have faced if he had been prosecuted under the Prevention of Corruption Act. There is a dissimilarity in procedure but the accused is not denied the benefit of a fair and normal trial under the general law. The difference between the two procedures is not of that character which should warrant a conclusion that the equality of law or the equal protection of laws is being denied to an accused, if he is prosecuted under the general law. AIR 1954 All 80, Approved. (Paras 20, 33)

Anno: Const. of India, Art. 14 N. 27, 42.

(c) Constitution of India, Art. 14 — Retrospective operation.

Proceedings under S. 409, Penal Code, against a public servant were started in 1949 and the Constitution came into force on 26-1-1950:

Held that these proceedings could not be challenged on the ground of discrimination, because retrospective effect cannot be given to the provisions of the Constitution. AIR 1953 SC 156, Foll. (Para 34)

Anno: Const. of India, Art. 14 N. 5.

(d) Penal Code (1860), S. 71 — Scope — 1953 All LJ 534: AIR 1954 All 80: 1954 Cri LJ 96, Overruled.

Section 71, I. P. C. is not applicable to a case where the charge is only under one offence. It also does not restrict the extent of punishment to the lower limit provided for either of the two offences. It merely protects an accused against the multiplicity of punishment and if his act falls within two or more separate definitions of any law in force, it limits the punishment to the maximum term which could be awarded to him for any single offence. Section 71, I. P. C. is not a bar to punishing a public servant under S. 409, I. P. C., to more than seven years, on the ground that for such conduct which could lead to a charge both under S. 409, I. P. C., and under S. 5(1)(c) of Act 2 of 1947, the offender will be punished within the lower limit provided for either of the two offences. 1953 All LJ 534: AIR 1954 All 80: 1954 Cri LJ 96, Overruled. (Para 35)

Anno: Penal Code, S. 71 N. 1, 2.

(e) Interpretation of Statutes — Interpretation removing inequality — (Civil P. C. (1908), Pre.).

If the words of a Statute are capable of being interpreted in two ways, one of which creates an inequity and the other removes it, the interpretation which removes the inequity should be preferred. Of course if the words are incapable of giving that meaning it cannot be imported. (Para 43)

Anno: C. P. C., Pre. N. 7.

(f) Prevention of Corruption Act (1947), S. 6 — Prosecution under S. 409, Penal Code — Previous sanction — (Penal Code (1860), S. 409) — (Interpretation of Statutes — Plain meaning) — (Civil P. C. (1908), Pre.).

Per majority, Mulla J. Contra: It is a well recognised principle that a statute should be interpreted according to the plain meaning of the words and should not be given a wider meaning than what the words would actually denote. (Para 11)

By omitting to mention S. 409 it is plain that the Legislature intended that the provision for sanction as laid down in S. 6, Prevention of Corruption Act did not apply to an offence punishable under S. 409, I. P. C. If the Legislature has not chosen to include S. 409 within the ambit of S. 6 of the Special Act, it is not competent for a Court to extend the meaning so as to include S. 409 which is not there. Thus the rule about sanction as laid down in S. 6, Prevention of Corruption Act has no application when a public servant is prosecuted under the general law for an offence under S. 409, I. P. C. AIR 1952 All 35, Approved; AIR 1954 Bom 549 (FB), Rel. on. (Paras 11, 12, 15, 44, 46)

Anno: Penal Code, S. 409 N. 1; C. P. C., Pre. N. 7.

CASES REFERRED: Paras

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(B) (V39) AIR 1952 All 35: 1952 Cri LJ 236: ILR (1954) 1 All 1 7, 15, 24, 45, 48
(C) (V41) AIR 1954 Bom 549: 1954 Cri LJ 1745 (FB) 15, 24
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Iqbal Ahmad, G. G. Chatterji, Babu Ram Gir and K. S. Varma, for Appellant; Addl. Govt. Advocate, for the State.

H.S. CHATURVEDI J.:

I have had the advantage of reading the judgment of my learned brother, Mulla J.

(2) Om Prakash, who has come up in revision, was a divisional accountant in the Sarda Canal, Sitapur section, and in that capacity he was entrusted with Government monies. On an inspection of the accounts by the Accounts Officer, it was discovered that certain sums of money amounting to Rs. 1,491/9/- had been embezzled by the applicant. He reported the matter to the officers of the canal department, who handed over the case to the police with the result that, after investigation, the applicant was prosecuted for offences under S. 409 and other sections of the Indian Penal Code. He was tried in the Court of Sri Abul Maqtadir, a Magistrate of the first class, Sitapur. At the trial, the applicant pleaded that he should have been prosecuted and tried for an offence under S. 5(1)(c), Prevention of Corruption Act (2 of 1947) and not under the general law. The other plea raised was that the applicant could not be prosecuted without previous sanction of the Accountant-General, and as no sanction had been obtained, it vitiated the trial. The defence plea found favour with the trial Court, who discharged the accused holding that the applicant should have been prosecuted under the Prevention of Corruption Act 2 of 1947, and that the trial under the general law was, therefore, improper. On behalf of the State the matter was taken up in revision and the learned Additional Sessions Judge who heard the revision held that the prosecution of the applicant under the provisions of S. 409, I. P. C., was quite valid. The result was that the Additional Sessions Judge directed the Magistrate to proceed with the enquiry of the case in accordance with law. Dissatisfied with the order, the applicant filed a revision to this Court. When the revision came up for hearing before a Division Bench of this Court, it decided to refer the case to a Full Bench in view of the importance of the questions involved in the case.

(3) The points that arise for consideration are three:

"(1) Whether S. 5(1)(c) of the Special Act 2 of 1947, 'pro tanto' repealed S. 409, I. P. C., in its application to public servants.

(2) Whether Art. 14 of the Constitution is infringed if the accused is tried under the general law.

(3) Whether the applicant could not be prosecuted for an offence under S. 409, I. P. C., without the previous sanction of the proper authority."

(4) The first question for determination is whether after the coming into force of the Prevention of Corruption Act of 1947, and so long as it was allowed to remain in force, S. 409, I. P. C., in so far as it related to offences by public servants stood repealed. Section 5(1)(c) is to the following effect:

"5(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty,—

(a) ....

(b) ....

(c)if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other persons so to do....."

The offence of criminal breach of trust as defined in S. 405 runs thus:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

The punishment for criminal breach of trust by a public servant is provided under S. 409, I. P. C.

(5) It would thus appear that the act of a public servant in dishonestly misappropriating or otherwise converting for his own use any property entrusted to him or under his control as a public servant or in allowing any other person so to do is an offence both under S. 5(1)(c) of Act 2 of 1947 and also under S. 409, I. P. C.

(6) An examination of the scheme of Act 2 of 1947 will show that if a public servant is prosecuted under S. 5(1)(c) of the Special Act, the maximum punishment that can be awarded is only seven years. The accused has the right to appear in the witness box, and he cannot be prosecuted without previous sanction of the authority concerned. If, however, a public servant is prosecuted under the general law, the maximum punishment provided in S. 409 is transportation for life. No sanction is necessary for his prosecution and he cannot examine himself as a witness when standing his trial under S. 409, I. P. C. It is argued that in view of the fact that certain privileges have been conferred on the accused by the special Act a repeal of the general Act has been brought about by implication. In support of this contention reliance has been placed upon a Divisional Bench case of the Punjab High Court, — 'State v. Gurcharan Singh', AIR 1952 Punj 89 (A). In that case Falshaw J. took the view that in view of the changes introduced by Act 2 of 1947, S. 5(1)(c) repealed 'pro tanto' S. 409, I. P. C. With great respect for the decision, I am unable to subscribe to the view enunciated in that decision.

If the Legislature intended to repeal S. 409, I. P. C. it would have expressly said so in the special Act itself but there is no indication to that effect. There must appear some strong reason to suggest that the previous enactment which has not been expressly repealed by the subsequent Act stands repealed by implication. In this connection one may usefully refer to S. 5, I. P. C. which provides that the provisions of the Code shall remain uneffected by any special or local law. That being so, if the intention of the Legislature was to substitute S. 5(1)(c) of Act 2 of 1947 in place of S. 409, I. P. C. in relation to public servants, one would expect a specific provision to that effect in the special Act itself. In the absence of any such express provision it would be difficult to read any repeal by implication. The mere fact that under the special Act the accused have been given certain privileges which are not available to him under the general law will hardly be any good reason for inferring repeal by implication.

The same act or omission may constitute an offence under one or more enactments. All that is required is that for the same act or omission a person shall not be prosecuted twice as laid down in S. 26, General Clauses Act of 1897, which runs as follows:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

In view of this provision in the General Clauses Act, if an act constitutes an offence under two or more separate enactments, then the only restriction imposed by S. 26, General Clauses Act is that a person cannot be punished twice for the same offence. In other words, if a person has been punished under the Penal Code for an act or omission, then for that very act or omission he cannot again be tried and punished under the special law. It is implicit in S. 26, General Clauses Act that the two separate enactments can exist side by side, although both of them make the same act punishable as an offence. With respect, I am unable to subscribe to the view enunciated in 'AIR 1952 Punj 89 (A)', that S. 5(1)(c) of Act 2 of 1947 repealed 'pro tanto' S. 409, I. P. C.

(7) The Punjab case has not been followed by other High Courts, and my learned brother Mulla J. has referred to those cases. Suffice it to say that we find ourselves in agreement with the view taken in — 'Bhup Narain v. State', AIR 1952 All 35 (B). We are, therefore, of opinion that S. 5(1)(c), Prevention of Corruption Act of 1947 had not the effect of repealing S. 409, I. P. C. in its application to public servants.

(8) Coming to the second question, the argument advanced by the learned counsel for the applicant was that if the prosecuting authorities are permitted to pick and choose and are given

the option of choosing whether they should prosecute a public servant under the Special Act 2 of 1947 or under the general law, then it would create discrimination in the same class of public servants, which is against the spirit of Art. 14, Constitution of India. The argument, though ingenious has little substance. Neither the general law nor the special law has been assailed on the ground that they are of a discriminatory character. So far as the two enactments are concerned, they are good and are not hit by Art. 14 of the Constitution. The so-called discrimination complained of arises because, owing to existence of two valid enactments, the option rests with the prosecution agency either to prosecute a public servant under S. 409, I. P. C. or under the Special Act 2 of 1947. If a public servant commits an offence of criminal breach of trust, he renders himself liable for prosecution either under S. 409, I. P. C. or under S. 5(1)(c) of the Special Act.

By virtue of S. 26, General Clauses Act, it becomes incumbent on the prosecution agency either to prosecute the public servant under the general law or under the special law. The police Officer of the State, whose duty it is to exercise his discretion may even say that the case should not be prosecuted at all. The decisions of the prosecuting agency in matters like these cannot be treated as discriminatory acts so as to attract the provisions of Art. 14 of the Constitution. If a case comes within the purview of either of the two Acts of the Legislature, and if the prosecution agency decides to prosecute a person under one of the Acts, his action will be quite proper and no exception can be taken to it on the ground that it is discriminatory. Any other view would create an anomalous position. A person prosecuted under the general law would say that he should have been prosecuted under the special law, and if a person is prosecuted under the sepcial law he would say that he should have been prosecuted under the general law. The prosecution of a person does not depend upon his wish or whim, but on what the officer in charge of the prosecution thinks proper to do when any particular illegal act or omission is covered by more than one enactment.

The discretion which a prosecuting officer is called upon to exercise is not an unguided discretion. He has to take into consideration the gravity of the offence and other matters, and if he finds that the facts disclose the commission of a serious offence for which the punishment provided under a Special Act is not sufficient, it is open to him to charge the accused under the general law where a more severe punishment is provided for the same kind of offence. Such exercise of a discretion will not contravene Art. 14. In my opinion, therefore, the prosecution of the applicant under general law is not hit by Art. 14 of the Constitution.

(9) The third question that arises for determination is:

"Whether the prosecution of the applicant under S. 409 is bad in law for want of previous sanction of the appropriate authority?"

(10) When a public servant is prosecuted for an offence under S. 409 he is governed by the rules of procedure as contained in the Criminal Procedure Code. It is conceded that the ordinary procedure does not require the obtaining of any sanction for the prosecution of a public servant under S. 409. Learned counsel for the applicant has, however, relied upon S. 6, Cl. (1) of the Special Act 2 of 1947 in support of his argument that a public servant cannot be prosecuted under S. 409, I. P. C., also without previous sanction. It is, therefore, necessary to set out Cl. (1) of S. 6 which runs thus:

"No Court shall take cognizance of an offence punishable under S. 161 or S. 165, I. P. C., or under sub-s. (2) of S. 5 of this Act, alleged to have been committed by a public servant except with the previous sanction etc."

(11) A plain reading of the words in the aforesaid section indicates clearly that a previous sanction is necessary only when a public servant is charged for an offence punishable under S. 161 or S. 165, I. P. C., or when he is placed for trial for an offence punishable under sub-s. (2) of S. 5, Prevention of Corruption Act. While mentioning Ss. 161 and 165, I. P. C., the Legislature could have easily incorporated S. 409, I. P. C., also in S. 6 but this was not done. It is, however, argued that S. 409 was not mentioned because the offence under S. 409 is the same as the offence under S. 5(1)(c), Prevention of Corruption Act. This argument does not appeal to me. If a person is prosecuted for an offence under S. 409, I. P. C., he is punishable under that section, if the offence is proved, and not under sub-s. (2) of S. 5, Prevention of Corruption Act. The words 'punishable under sub-s. (2) of S. 5' occurring in cl. (1) of S. 6, Prevention of Corruption Act do not mean or include an offence punishable under S. 409, I. P. C.

If a person is prosecuted under S. 409, he will be governed by the procedure prescribed in the Criminal Procedure Code which does not require the obtaining of previous sanction. The words 'punishable under sub-s. (2) of S. 5', Prevention of Corruption Act postulate a situation when a public servant is prosecuted for an offence of criminal misconduct falling within (a), (b), (c) and (d) of cl. (1) of S. 5 of the Special Act. It is only when a public servant is accused of any of these offences that his act becomes punishable under sub-s. (2) of S. 5 of Act 2 of 1947. I find no sufficient justification for importing into cl. (1) of S. 6 something which the Legislature did not expressly include in that section. By omitting to mention S. 409, it is plain that the Legislature intended that the provision for sanction as laid down in S. 6, Prevention of Corruption Act did not apply to an offence punishable under S. 409, I. P. C. If the Legislature has not chosen to include S. 409 within the ambit of S. 6 of the Special Act, it is not competent for a Court to extend the meaning so as to include S. 409 which is not there. It is a well recognised principle that a statute should be interpreted according to the plain meaning of the words and should not be given a wider meaning than what the words used would actually denote.

(12) The rule about sanction as laid down in S. 6, Prevention of Corruption Act has no application when a public servant is prosecuted under the general law for an offence under S. 409, I. P. C., which does not find place in that section. No question of any sanction arises in the case before us because the applicant is being prosecuted for an offence under S. 409, and the rules of Criminal Procedure do not require that a previous sanction of the appropriate authority is necessary.

(13) I am, therefore, of opinion that the revision application should be rejected and the order of the learned Sessions Judge should be upheld.

RANDHIR SINGH J.:

(14) I have had the benefit of reading the judgments of my learned brothers Hari Shankar and Mulla JJ. I entirely agree with the conclusions arrived at by my learned brothers on the first two points and I do not think I can make any useful contribution by discussing these points over again.

(15) With regard to the third point, i.e., whether the applicant could not be prosecuted for an offence under S. 409, I. P. C., without the previous sanction of the proper authority, it has been argued on behalf of the applicant that even though S. 409 was not mentioned along with Ss. 161 and 165, I. P. C., in S. 6, Prevention of Corruption Act (2 of 1947) the words "an offence punishable under S. 161 or S. 165, I. P. C., or under sub-s. (2) of S. 5 of this Act" show that the intention of the Legislature was that the sanction of the proper authority should be obtained for an offence under S. 409 also as the acts and omissions which constituted the offence under S. 409, I. P. C., were also punishable under S. 5(2), Prevention of Corruption Act. Any act or omission is 'per se' not an offence. It will be an offence only when it is made punishable by some law. If an act or omission is made punishable as an offence under two enactments, then the same act or omission is an offence under one enactment and also an offence under the other law.

If a person therefore has done an act which constitutes an offence under S. 409, I. P. C., and also an offence punishable under S. 5(2), Prevention of Corruption Act, it would not be correct to say that the offence under S. 409 is punishable under S. 5(2) or vice versa. It is only an offence under S. 409, I. P. C., which is punishable under S. 409, and only an offence under S. 5(2), Prevention of Corruption Act which is punishable under S. 5(2) of that Act. It would thus appear that an act is an offence only with reference to the particular section of a penal statute, but divorced from it, no act or omission could be called an offence. It would be difficult to call an act or omission an offence in general. A person is punishable under S. 5(2) only when he is charged with an offence under S. 5(2), Prevention of Corruption Act. If it is legitimately open to a prosecutor to prosecute a person under two laws for the same act or omission, and if he chooses to prosecute him under one law, the person so prosecuted cannot be convicted under the other law at the same time.

The words "punishable under S. 5(2), Prevention of Corruption Act" used in S. 6, Prevention of Corruption Act do not therefore imply that S. 6 was meant to cover an offence under S. 409 also. If that was the intention of the Legislature, S. 409, I. P. C., would also have been mentioned along with Ss. 161 and 165, I. P. C., in S. 6, Prevention of Corruption Act. This point arose for consideration before a Division Bench of this Court in AIR 1952 All 35 (B) and it was held that the provisions of the Prevention of Corruption Act were not intended to apply to sections not mentioned in S. 6, Prevention of Corruption Act. A similar view was taken in a Full Bench case of the Bombay High Court in — 'The State v. Sahibrao Govindrao', AIR 1954 Bom 549 (C).

The provisions of S. 6, Prevention of Corruption Act would not, therefore, be applicable to a prosecution under S. 409, I. P. C. A trial under S. 409, I. P. C., will be regulated by the procedure laid down in the Code of Criminal Procedure. It is only if a prosecution is launched under S. 5(2), Prevention of Corruption Act that the special procedure prescribed under that Act will have to be observed and the Court shall not take cognizance of that offence in the absence of sanction obtained from the proper authority. I agree with the views expressed, with respect if I may so, in the two cases referred to above, and am of opinion that the view taken by the learned Sessions Judge that no previous sanction was necessary was correct and I would dismiss the application for revision.

MULLA J.:

(16) Om Prakash, a Divisional Accountant of the Sarda Canal, Sitapur Section, was prosecuted under S. 409, I. P. C., for committing criminal breach of trust in respect of certain items of money, which were entrusted to him in his capacity as a public servant. The Magistrate, who tried him, came to the conclusion that the offence committed by the applicant fell under S. 5(1)(c), Prevention of Corruption Act (Act 2 of 1947) which is punishable under S. 5(2) and under S. 6 of the said Act a previous sanction of a proper authority was necessary for his prosecution, as he was a public servant. In the absence of such sanction, he held that he had no jurisdiction to proceed with the case and consequently he discharged the applicant.

(17) The State went up in revision against the order of discharge and the learned Sessions Judge set aside this order of discharge holding that the provisions of the Prevention of Corruption Act (Act 2 of 1947) did not repeal the general law as contained in the Indian Penal Code and it was open to the prosecuting authorities to proceed against the applicant either under S. 409, I. P. C. or S. 5(2), Prevention of Corruption Act. He further held that as no sanction was required under S. 409, I. P. C., the order of the Magistrate discharging the applicant was bad in law. He, therefore, directed the Magistrate to proceed with the inquiry and, if a case was made out against the applicant to commit him to the Court of Session.

(18) Om Prakash feeling aggrieved by the said order filed an application of criminal revision

against it. He prayed that the order of the Sessions Judge be set aside and the proceedings against him be quashed under S. 561A, Cr. P. C. He supplemented this application in revision by another criminal miscellaneous application later on in which he contended that the order of the Sessions Judge violated the provisions of Art. 14, Constitution of India, and prayed that this Court should withdraw the case against him under Art. 228, Constitution of India.

(19) These two applications of Om Prakash were heard by a Bench of this Court. After hearing the counsel for Om Prakash, the Bench came to the conclusion that the questions raised in the case were of great importance and, as they would crop up frequently, they should be considered by a bigger Bench. They consequently referred it to a Full Bench.

(20) We have to decide the following three questions in this case:

"1. Does S. 5(2), Prevention of Corruption Act (Act 2 of 1947) 'pro tanto' repeal S. 409, I. P. C. or is it open to the State to prosecute a public servant for committing criminal breach of trust under S. 409, I. P. C.?

2. If a public servant is prosecuted under S. 409, I. P. C., does such prosecution amount to an act of discrimination within the meaning of Art. 14, Constitution of India, as it denies to him the equality before the laws or the equal protection before the laws?

3. Can any Court take cognizance of an offence punishable under S. 409, I. P. C., when committed by a public servant without the previous sanction of the authority competent to remove such public servant from office or is it barred by S. 6, Prevention of Corruption Act (Act 2 of 1947)?"

QUESTION NO. 1.

(21) It was argued by the learned counsel for the applicant that the offence punishable under S. 409, I. P. C., when committed by a public servant is the same which is defined in S. 5(1)(c), Prevention of Corruption Act. He contended that the Prevention of Corruption Act was a self-contained enactment with its own procedure and penalties. It was enacted for dealing with a particular class of offenders, namely the public servants and, though the Legislature has not expressed itself explicitly a repeal of the general law relating to the said offence committed by public servants, can clearly be inferred by implication. Reliance was placed on a Bench decision of the Punjab High Court (AIR 1952 Punj 89 (A)).

(22) In deciding this question the first point that arises for decision is whether the offence punishable under S. 409, I. P. C., when committed by a public servant, is identical with the offence of criminal misconduct, as defined in S. 5(1)(c), Prevention of Corruption Act or not. Section 409, I. P. C., runs as follows:

"Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Criminal breach of trust is defined in S. 405, I. P. C. It reads as follows:

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing that mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

Section 5(1)(c), Prevention of Corruption Act (Act 2 of 1947), is as follows:

"A public servant is said to commit the offence of criminal misconduct in the discharge of his duty, if he dishonestly or fraudulently misappropriates or otherwise converts to his own use any property entrusted to him or under his control as a public servant or allows any other person so to do."

(23) From a perusal of these sections, we find that the definition of criminal breach of trust in S. 405, I. P. C., is a little wider than the definition of criminal misconduct in S. 5(1)(c), Prevention of Corruption Act, but this is due to the fact that when defining it in the Indian Penal Code, the authors of the Code had to frame a definition which would apply to all persons to whom an entrustment could be made in the normal transactions of life and they had not the public servants alone in their minds. Still there are two minor changes which theoretically make the scope of S. 5(1)(c), Prevention of Corruption Act, a little wider than criminal breach of trust, as defined in S. 405, I. P. C. The word "fraudulently" has been added to "dishonestly" and "wilfully suffers any other person" has been changed to "allows any other person".

The first addition, in our opinion, hardly makes any difference, but the second change is not absolutely negligible. It lightens the burden of proof for the prosecution in such a case. Still in spite of these changes an offence under S. 5(1)(c), Prevention of Corruption Act is almost identical with an offence under S. 409, I. P. C., when it is committed by a public servant. They are two circles, which not only enter into each other, but almost entirely cover each other. The masks may be slightly different, but the face behind the mask is the same. It is almost impossible to imagine an offence committed by a public servant, which would be punishable only under one of these sections and not under the other. We, therefore, find that for all practical purposes they are one and the same offence.

(24) It cannot be denied that the State has the right to make a certain act or conduct punishable under a new enactment, which is already penal under an existing law. It is, however, contended that when the State frames such a new law it "pro tanto" repeals the earlier law. This contention, when analysed, means this, that two

laws under which the same act or conduct is punishable cannot co-exist together. In support of this contention reliance is again placed on the Punjab decision quoted above. The learned Judges who gave that decision, relied on certain opinions expressed by Craies and Maxwell. These opinions were, however, given prior to the enactment of the English Interpretation Act of 1889. They are inconsistent with S. 33 of the said Act which reads as follows:

"Where an act or omission constitutes an offence under two or more acts, or both under an act and at Common Law, whether any such act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at Common Law, but shall not be liable to be punished twice for the same offence."

This section is similar to S. 26, General Clauses Act, which reads:

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

These two sections visualize that the same act may be punishable not only under two laws but even under a greater number of laws. If the contention of the applicant is sound, it would mean that S. 26, General Clauses Act, is a dead letter and can never be used. A number of other High Courts have disagreed with the view expressed in the Punjab decision cited above. They have given convincing reasons, which we need not repeat in coming to the conclusion that two laws under which the same act or omission is punishable can co-exist side by side. We approve these decisions. They are: 1. AIR 1952 All 35 (B); 2. — 'In re, Satya Narayana Murthi', AIR 1953 Mad 137 (D); 3. — 'Mahomed Ali v. State', AIR 1953 Cal 681 (E); 4. — Madho Prasad v. State', AIR 1953 Madh-B 139 (F); 5. — 'State v. Gulab Singh', AIR 1954 Raj 211 (G) and 6. AIR 1954 Bom 549 (FB) (C).

(25) In our opinion where a new law makes an act punishable, which is already penal under an existing law and there is nothing in the latter enactment, which either expresses or implies that the operation of the earlier law is excluded, an offender can be prosecuted and punished under either of the two enactments. The earlier law will not be put out of operation merely because their is some change in procedure or some difference in penalties. The effect of the new enactment is to add a remedy and not to repeal the former remedy.

(26) The Prevention of Corruption Act has not expressly repealed any of the provisions of the Indian Penal Code. Is there anything in the Act from which a repeal by implication can be inferred? It is contended that because the new law is self-contained and has been enacted to deal only with one particular class of offenders namely the public servants with its own procedure and punishment, it can be inferred that the Legislature intended to use only this law when an offence which was punishable under this Act was committed by a public servant. It is difficult to understand why the Legislature did not express itself clearly if such was its intention. Again a repeal by implication can only be inferred, if it is consistent with the object and purpose which necessitated the new enactment. But where it is in direct conflict with this object and purpose, it is impossible to infer such an intention.

The Prevention of Corruption Act is, what may be described as an Emergency Law. The emergency arose because bribery and corruption had become rampant in public services. This was a grave menace to healthy administration and effective measures were needed to root out this evil. The existing law was found insufficient to cope with the situation. The intention of the Legislature clearly was to arm the State with a more drastic remedy than the one which existed. Keeping this intention of the Legislature in mind, is it conceivable that they will make such provisions in the new enactment, which will soften instead of tightening the existing law and which will reduce the punishment instead of enhancing it? The preamble of the Prevention of Corruption Act clearly indicates that the intention was to take more effective measures against bribery and corruption, and yet, if the contention of the counsel for the applicant is sound, they not only made changes in the procedure to the advantage of the accused, but also reduced his punishment.

Under S. 5(2), Prevention of Corruption Act, the maximum punishment which can be awarded to a public servant for committing criminal misconduct, is seven years. Can it be possible that although an Emergency Law was being enacted against the public servants in order to deal more strictly with them, yet the Legislature wanted to treat them as their special favourites and while a banker, a merchant, a factor, a broker, an attorney or an agent may be sentenced to transportation for life for committing criminal breach of trust under Section 409, I P. C., a public servant who might have embezzled enormous sums, was liable to punishment only under S. 5(2), Prevention of Corruption Act, and could not be given a heavier sentence than 7 years. Did the Legislature think that the existing law took too grave a view of the offence of criminal breach of trust committed by a public servant and really it was a much lighter offence which stood on the same footing as a similar offence committed by a clerk or servant and which is punishable upto seven years only under S. 409, I. P. C.?

It cannot be doubted that criminal breach of trust is a major offence and when it is committed by a public servant, it assumes its gravest aspect. If the Legislature really intended that public servants should not be awarded a greater punishment than seven years, such an intention would not only be in conflict with their declared intention in the preamble of the Act, but defeats the very purpose which necessitated the new enactment. It would not only amount to an act of discrimination in favour of the public servants without any reasonable basis, but would also violate one of the basic principles of criminal justice, namely "The graver the offence, the higher should

he the punishment". It is unbelievable that on the one hand they considered the punishment for an offence under Ss. 161 and 165, I. P. C., inadequate and enhanced it, on the other hand, they found the punishment for criminal breach of trust committed by a public servant excessive and reduced it. But if the intention of the Legislature was not to repeal S. 409, I. P. C., all these questions and doubts are immediately set at rest and all these incongruities fade out. We are, therefore, of the opinion that the Prevention of Corruption Act was intended to be only a supplementary measure and there is no substance in the contention that it repealed S. 409, I. P. C., by implication.

(27) Perhaps, because these doubts were entertained, the Legislature made its intention clear in the Prevention of Corruption (Second Amendment) Act (Act 2 of 1952) by adding sub-cl. (4) to S. 5 of the original Act. It reads:

> "The provisions of this section shall be in addition to, and not in derogation of any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding, which might, apart from this section be instituted against him."

The Supreme Court has also maintained the conviction of a public servant under S. 409, I. P. C., which clearly shows that S. 409 does not stand repealed — ('Mangleshwari Prasad v. State of Bihar', AIR 1954 SC 715 (H)).

(28) Our answer to the first question is, therefore, in the negative and in our opinion it is open to the State to prosecute a public servant for committing criminal breach of trust under S. 409, I. P. C.

QUESTION NO. 2.

(29) As both the laws are good and in force, it naturally follows that the State in its discretion can use either of them. The question, therefore, arises that this option of choosing whether a prosecution should be under the general law or the special law offends against Art. 14 of the Constitution or not? Does it not give a discretionary power to the State which may at its sweet will be employed to the detriment of an accused person by discriminating amongst the same class of public servants and thus depriving him of the equality of treatment in like circumstances and conditions to which he is entitled? Firstly, the general law of the State cannot be ousted unless there is some indication, either expressed or implied, in the special law that it is repealed or modified, or there is some inherent conflict between any of its provisions and the principles and rights laid down in the Constitution of India. Secondly, in our opinion, the State cannot be completely divested of a right to exercise discretion.

Every exercise of discretion is not an act of discrimination. It becomes an act of discrimination only when the person against whom that discretion is exercised faces certain appreciable disadvantages, which he would not have faced otherwise. All that Art. 14 of the Constitution of India guarantees is a similarity of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform and merely some difference in the two procedures will not amount to a denial of the equality of treatment. The real test is whether the two procedures differ to such an extent that a prosecution under S. 409, I. P. C. will deprive the accused of certain appreciable advantages and he will face certain handicaps in defending himself, which he would not have faced if he had been prosecuted under the Prevention of Corruption Act.

(30) The learned counsel for the applicant has painted a very rosy picture of the advantages that are conferred on an accused person under the procedure laid down by the Prevention of Corruption Act. If his contention is to be accepted, it would mean that the Legislature, instead of passing a more effective measure against the public servants, really enacted the new law for the benefit of the public servants so that they may be protected against the rigours of the General Law. He has presented every change in the procedure in the garb of an advantage. He enumerated five of these advantages which are:

1. The maximum punishment under S. 409, I. P. C. is transportation for life, whereas the maximum punishment which can be awarded under S. 5(2), Prevention of Corruption Act is only seven years' rigorous imprisonment or fine. The accused is thus liable to a lesser penalty.
2. The accused will not be tried by a Magistrate but by an experienced Judge.
3. The investigation of the case will be conducted by a senior and responsible police officer and this will be a safeguard against questionable evidence being produced against him.
4. The accused will have a right to appear as a witness and give his statement on oath.
5. The accused cannot be prosecuted without the sanction of a proper authority and this would protect him against a vexatious and irresponsible prosecution.

(31) The moment these alleged advantages are analysed, they are found to be more hypothetical than real. Some of them instead of being an advantage, really turn out to be a disadvantage.

(32) Only two advantages stand out, namely the liability to a lesser punishment and the necessity of a previous sanction. The first advantage arises only if the general law is held to be repealed. Secondly a punishment is not a part of procedure, but only a penalty. Merely because the punishment is less, an accused secures no advantage in defending himself. It does not affect the course of the trial at all. Thirdly, even if it is an advantage it is not of that nature which will characterise the trial under the General Law as an act of discriminatory treatment. Where a certain act is punishable under more than one enactment the extent of punishment generally varies and the accused cannot claim as a right to be tried under that law under which only the lesser punishment can be inflicted upon him, and if it is not done he cannot raise the cry of discriminatory treatment.

Lastly, if it is held that it amounts to an act of discriminatory treatment, then it is not the General Law which will stand ousted, but the

Prevention of Corruption Act will itself become a piece of discriminatory legislation, because for the purpose of punishment it has created a classification, which is not based on any reasonable ground and it is not only in conflict with the object sought to be attained, but is against all principles of equity and justice.

(33) We now come to the last advantage, namely the necessity of a previous sanction. There can be no doubt that it is an appreciable advantage. In fact it is the only advantage in the new procedure laid down by the Prevention of Corruption Act. The question arises whether it amounts to such an advantage that a person, who is being prosecuted under the General Law, can legitimately complain that he is being denied the equality of law and a discriminatory treatment is being extended to him. In our opinion, this advantage is not of that nature and magnitude. It does not place the accused in a more advantageous position for defending himself and meeting the charge. Moreover, the question of discriminatory treatment cannot be decided by a stray advantage here and a stray disadvantage there. It is the overall picture that counts. We have to take the two procedures as a whole and not a particular provision of any procedure. This overall picture presents no marked features of an advantage in one and disadvantage in the other.

There is a dissimilarity in procedure but the accused is not denied the benefit of a fair and normal trial under the General Law. Where the act of discrimination consists only in using another law which is good and in force and which creates no added difficulties or hardships for an accused, it may be objectionable on other grounds, but it cannot be described as a discriminatory treatment within the meaning of Art. 14, Constitution of India. Moreover, if the interpretation of S. 6, Prevention of Corruption Act, which I will give under the third question, is correct, this disadvantage does not exist at all. We, therefore, find that the difference between the two procedures is not of that character which should warrant a conclusion that the equality of law or the equal protection of laws is being denied to an accused, if he is prosecuted under the General Law.

(34) There is another aspect, which makes Art. 14, Constitution of India inapplicable to the present case. Proceedings against the applicant were started in 1949 and the Constitution came into force on 26-1-1950. These proceedings, therefore, cannot be challenged on the ground of discrimination, because retrospective effect cannot be given to the provisions of the Constitution — ('Qasim Razvi v. State of Hyderabad', AIR 1953 SC 156 (I)).

(35) While dealing with this question, only one decision was cited before us, in which this point was raised and decided. That decision is reported in — 'Gopal Das v. State', AIR 1954 All 80 (J). In that case the learned Judges held that the prosecution of a public servant under S. 409, I. P. C. does not go against Art. 14, Constitution of India. We approve their decision, but with great respect to them, we are unable to accept their reasoning. In that case probably the question of sanction was not raised and they only discussed the difference of punishment. In their opinion the difference of punishment was immaterial in view of S. 71, I. P. C. They observed:

> "For such conduct which could lead to a charge both under S. 409, I. P. C. and under S. 5(1) (c) of Act II of 1947, the offender will be punished within the lower limit provided for either of the two offences."

We find it difficult to accept this interpretation of S. 71, I. P. C. The relevant portion of S. 71, I. P. C. reads as follows:

> "The offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences".

In our opinion S. 71, I. P. C. is not applicable to a case where the charge is only under one offence. It also does not restrict the extent of punishment to the lower limit provided for either of the two offences. It merely protects an accused against the multiplicity of punishment and if his act falls within two or more separate definitions of any law in force, it limits the punishment to the maximum term which could be awarded to him for any single offence. This means that if his conduct amount to an offence within the meaning of two different penal laws, one of which is punishable upto five years and the other is punishable upto seven years, he cannot be awarded a punishment of more than seven years, for then it would amount to punishing him twice over for the same offence. We, therefore, find that S. 71, I. P. C. is not a bar to punishing a public servant under S. 409, I. P. C. to more than seven years.

(36) Our answer to the second question is also in the negative.

QUESTION NO. 3.

(37) We have now to see, whether any rule of procedure laid down in the Prevention of Corruption Act affects or modifies any part of the procedure to be followed under the General Law or not. Normally the procedure laid down in a special law is meant to apply to the trial of offences under that enactment alone. But if there is a clear direction, express or implied, it can apply also to other existing procedures. Where the same act is an offence both under the General Law and the special law, and the special law containing a different procedure was enacted later, it is not improbable that the legislature should make some rule of the new procedure applicable to the existing procedure also. We have, therefore, to interpret S. 6, Prevention of Corruption Act to find out if it contains any such expressed or implied direction.

Section 6 reads as follows:

> "(1) No Court shall take cognizance of an offence punishable under S. 161 or S. 165, Indian Penal Code (XLV of 1860) or under Sub-s. (2) of S. 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,
>
> ....
>
> (c) in the case of any other person, of the authority competent to remove him from his office."

From a reading of this section, it is clear that an express direction is given that no Court shall take cognizance of an offence punishable under sub-s. (2) of S. 5, Prevention of Corruption Act, except with the previous sanction of a proper authority. There can be no doubt that an offence defined in S. 5(1)(c), Prevention of Corruption Act is punishable under sub-s. (2) of S. 5 of the said Act.

We have already held in the first part of this decision that an offence under S. 409, I. P. C. when committed by a public servant is the same offence which is defined in S. 5(1)(c) of this Act. Is it open to the prosecuting authorities to prosecute a public servant for an offence defined in S. 5(1)(c) and punishable under S. 5(2) without obtaining the necessary sanction, merely by giving it a different label? The answer depends upon the interpretation of the words "An offence punishable under sub-s. (2) of S. 5." Is their range limited to an offence prosecuted as "criminal misconduct" do they include the illegal acts or omissions defined and made punishable as "criminal misconduct", or if the legislature intended the first meaning, it could very easily have used the word 'prosecuted' in place of 'punishable'. The use of the word 'punishable' in my opinion extends their range and indicates that the second meaning was intended.

(38) In Halsbury's Laws of England, under the heading 'Principles of Criminal Liability' "Crime" is defined as follows:

> "A crime is an unlawful act or default, which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment."

In Criminal Procedure Code 'Offence' is defined in S. 4(o) as follows:

> "Offence means any act or omission made punishable by any law for the time being in force ....."

From these definitions, it appears that an unlawful act or omission is 'per se' punishable under one or more laws and the subsequent prosecution is merely a step to bring home this liability to the offender under any existing procedure. In other words, it is the illegal act or omission which is primarily punishable and the penal section of any particular statute is merely a name under which it is prosecuted before a court of law for that purpose. What is punishable is not the name given to it by any section of a penal statute, but the offence defined in that section.

The test that an offence is punishable under S. 5(2) is whether that act or omission has been made penal under any clause of S. 5(1) or not. Therefore, what is liable to be punished under it is the offence defined in any of the cls. (a), (b), (c) and (d) of S. 5(1). If an offender commits an illegal act or omission defined in S. 5(1)(c) he is liable to be punished under S. 5(2) and this liability cannot be affected merely because the State evades to prosecute him under that section.

(39) I could find only one decision in which the word 'punishable' is defined. It is an old Bench decision of the Allahabad High Court — ('Queen Empress v. Kandhaia', 7 All 67 (K)). Duthoit J. defined 'punishable' as follows:

> "Punishable must mean that the commission or omission of the act, the commission or omission of which is prohibited and renders the person who commit or omits it liable to the sanction of law, i.e. to punishment."

(40) Applying this definition to the present case it would mean that any commission or omission of an act which renders the person who commits or omits it liable to the sanction of law as embodied in S. 5(2) is punishable under S. 5(2), Prevention of Corruption Act.

(41) It cannot be disputed that the moment a public servant commits criminal breach of trust in respect of property entrusted to him in that capacity, he is liable to be prosecuted under section 5(2), Prevention of Corruption Act. Does he also become liable to be punished under S. 5(2) at the same time? Two answers can be given to this question:

1. If he is liable to be prosecuted under S. 5(2), it naturally follows that he is also liable to be punished under that section.
2. He is liable to be prosecuted under S. 5(2), but he would become liable to be punished under that section only if he is so prosecuted.

(42) The first answer would be correct, if the two liabilities are really parts of the same liability and arise simultaneously. The second answer would be correct, if they are two different liabilities, which follow each other and the second arises only after the first is incurred. I think that the first answer is correct, because in my opinion a liability to be prosecuted includes a liability to be punished. The two liabilities cannot be divorced and separated for the second liability is the necessary corollary of the first. One cannot exist without the other. It cannot be maintained that an offender is liable to be prosecuted for an offence but not liable to be punished for it. It is difficult for me to conceive that although the first liability arose immediately, the second would arise at a later stage. If a person wilfully kills another person, he immediately becomes liable to be prosecuted and punished under S. 302, I. P. C., even though the crime might not be traced and he may never be prosecuted.

Similarly, where an act or omission falls under the definition of more than one offence, the offender is liable to be prosecuted and punished under any of those offences as soon as the crime is committed. The moment a public servant commits criminal breach of trust, he is liable to be prosecuted and punished both under S. 409, I. P. C. and S. 5(2), Prevention of Corruption Act. Merely because he is also liable to be punished under S. 409, I. P. C. his liability to be punished under S. 5(2) is not kept in abeyance. In my opinion the language of S. 26, General Clauses Act is clear on this point. It visualizes the possibility of a person incurring the liability of being prosecuted and punished for two or more offences at the same time even before it is determined as to which offence will be charged against him. Surely this liability of being prosecuted and punished under S. 5(2), Prevention of Corruption

Act, which arose as soon as the offence was committed, will not disappear merely because subsequently a different label was given to that offence and the offender was tried under S. 409, I. P. C., for it is the offence which is punishable and not the label, which screens the offence.

The question which is to be answered is not whether an offence charged under S. 409, I. P. C. is punishable under S. 5(2), Prevention of Corruption Act or not. The question is whether the offence, which is defined in S. 5(1)(c), but for which the prosecution is launched under S. 409, I. P. C. is also punishable under S. 5(2) or not. In my opinion only one reply can be given to this question and that is in the affirmative. The same conclusion is reached if an answer is given to a question put from the opposite angle. The question is "Can it be said that an offence defined in S. 5(1)(c) is not punishable under S. 5 (2)? I think that the correct answer to this question is that it is punishable.

(43) Again, in my opinion if a distinct and significant meaning emerges from the language of a statute it cannot be ignored. Section 6 directs that no court shall take cognizance of an offence punishable under Sub-s. 2 of S. 5, Prevention of Corruption Act alleged to have been committed by a public servant. This sentence can be broken up in two parts;

No court shall take cognizance of

(a) An offence punishable under sub-s. 2 of S. 5,

(b) Alleged to have been committed by a public servant.

If these two parts are read together they give a distinct meaning. They lay down an equitable principle to be followed in the trial of public servants. They cannot be read together if "an offence punishable under S. 5(2)" means only an offence prosecuted under S. 5(2) for only a public servant can commit such an offence. The second part becomes unnecessary and meaningless.

But if an offence punishable under S. 5(2) means an offence defined in S. 5(1), the words of the second part become full of meaning. They lay down a rule that if an illegal act or omission has been made an offence under some other law which can be committed by others also but when committed by a public servant becomes punishable under S. 5(2) then the prosecution cannot be launched against him under the other penal statute unless the necessary sanction is obtained. I see no adequate reason why the two parts should not be read together and the second part should be read only with "an offence punishable under S. 161, I. P. C." and not with "an offence punishable under S. 5(2)." If that was the intention of the legislature, the second part would have found a place immediately after "An offence punishable under S. 161" in S. 6, Prevention of Corruption Act.

In my opinion if the words of a statute are capable of being interpreted in two ways, one of which creates an inequity and the other removes it, the interpretation which removes the inequity should be preferred. Of course if the words are incapable of giving that meaning it cannot be imported. I think the interpretation that I have given above is not an imposition on the words of S. 6.

(44) I, therefore, hold that an offence defined under S. 409, I. P. C. when committed by a public servant being the same offence as criminal misconduct defined in S. 5(1)(c), Prevention of Corruption Act, is an offence which is also punishable under S. 5(2) of the said Act. It naturally follows that S. 6, Prevention of Corruption Act will be a bar to the prosecution of a public servant under S. 409, I. P. C., if the necessary sanction is not there.

(45) The learned Additional Government Advocate contends that the language of S. 6, Prevention of Corruption Act clearly implies that it was not the intention of the legislature to insist on sanction in the case of a public servant under S. 409, I. P. C. He concedes that a prosecution cannot be launched against a public servant under Ss. 161 and 165, I. P. C. without a previous sanction but the very fact that these two sections are specifically mentioned in S. 6, Prevention of Corruption Act, while S. 409, I. P. C. is not mentioned, is according to him a conclusive proof that S. 6 was never meant to operate as a bar to the prosecution of a public servant under S. 409, I. P. C. without a previous sanction. He relies upon the observations of the learned Judges in two decisions — (AIR 1952 All 35 (B) and AIR 1954 Raj 211 (G)).

In the Allahabad decision the learned Judges observed as follows :

"We may also point out that S. 6, Prevention of Corruption Act provides that the rule as regards sanction shall apply to a case under S. 161 or 165, I. P. C. Neither S. 6 nor Ss. 4 and 7 make any mention of any other sections of the Penal Code and if the accused is therefore, not charged under S. 161 or 165, Penal Code, but under certain other sections of the Penal Code, it cannot be said that to these sections also the provisions of the Prevention of Corruption Act were intended to apply."

Similarly, in the Rajasthan decision the learned Judges observed as follows :

"Section 6, Prevention of Corruption Act which provides for sanction mentions Ss. 161 and 165, Penal Code but does not mention S. 409 specifically which shows that it was not the intention of the Legislature to insist on sanction in cases against public servants under S. 409. It is true that sanction was required by this section for offences under S. 5(2) and that included the offence defined in S. 5(1)(c) which is exactly the same as the offence under S. 409. Even so, if the option is in the prosecutor under S. 26, General Clauses Act to prosecute under either enactment, it is not open to the court to insist that the prosecution must be under that enactment which requires sanction, and that it will not proceed to try the case under that enactment which does not require sanction."

It appears from the two extracts quoted above that the opinion of the learned Judges, who gave these decisions was mainly influenced by the fact that while Ss. 161 and 165 are mentioned in

S. 6, Prevention of Corruption Act, it does not specifically mention S. 409. They seem to be of the opinion that if the legislature intended to bring S. 409 within the orbit of S. 6, there seems to be no reason why it did not include it amongst the offences specifically mentioned in that section. It escaped their consideration that there can be a good reason why Ss. 161 and 165 were mentioned and S. 409 was not mentioned. The offence of criminal misconduct as defined in S. 5(1), Prevention of Corruption Act does not include the offence defined in S. 161 or 165, I. P. C. but it fully includes an offence under S. 409 when committed by a public servant. It was therefore, not necessary to mention S. 409 specifically as it would have amounted to a mere repetition. The legislature did not want to make any invidious distinction between members of the same class, i.e. the public servants and it wanted to extend the same treatment to all of them.

It was, therefore, necessary to mention Ss. 161 and 165 specifically, for an offence under these sections is not punishable under S. 5(2), Prevention of Corruption Act. The offences defined in Ss. 5(1)(a) and 5(1)(b) are different from the offences defined in Ss. 161 and 165, I. P. C. It is only a person who accepts or obtains illegal gratification habitually and not a first offender who commits the offence of criminal misconduct. It was, therefore, necessary to specifically mention Ss. 161 and 165, I. P. C. in S. 6, Prevention of Corruption Act, if a uniform treatment was to be extended to all public servants. It is inconceivable that, while on the one hand the legislature was willing to extend the operation of S. 6, Prevention of Corruption Act to the procedure laid down under the General Law for the trial of such offences which do not come under the definition of criminal misconduct in order to remove a dissimilarity of treatment, yet on the other hand it would voluntarily create a dissimilarity of treatment by excluding from its operation an offence which is completely included in the definition of criminal misconduct and which is punishable under S. 5(2), Prevention of Corruption Act.

I cannot treat the rule of sanction as a mere rule of procedure. I regard it as a valuable protection given to a public servant against irresponsible prosecution. It is difficult for me to accept that the legislature intended that this rule should be broken with impunity and treated like a dead letter whenever the prosecuting authority elected to do so. I cannot believe that the legislature only pretended to give this protection to a public servant who was accused of committing criminal breach of trust and its real intention was that it should take away with the left hand what it has given from the right. It cannot be said that the legislature had any warmer feeling or softer corner in its heart for those public servants who accepted illegal gratification as compared to their more unfortunate brothers who committed criminal breach of trust. An offence under S. 409, I. P. C. is a far graver offence than one under section 161, I. P. C. or 165, I. P. C. The former is punishable upto transportation for life, while the maximum sentence that can be awarded under the latter sections is only three years. The latter offences are also bailable, so that the accused can never be handicapped in his defence by being confined in jail.

It is, therefore, difficult to understand that the protection of the rule of sanction should be given to public servants when they have to meet only a minor charge but they should be deprived of it when a much graver charge is levelled against them. In my opinion this could not have been the intention of the legislature.

(46) I am, therefore, of the opinion that because S. 409, I. P. C. is not mentioned in S. 6, Prevention of Corruption Act, it is not correct to infer that the legislature considered a previous sanction unnecessary if a public servant was to be prosecuted under S. 409, I. P. C. In fact the overall picture of the Prevention of Corruption Act shows that the legislature, while enacting the statute, had two clear objects in view. On the one hand it wanted that stronger measure should be adopted to check the growth of bribery and corruption and those public servants who were found guilty should be more severely punished. On the other hand it was anxious that the public servants should not be readily exposed to vexatious and frivolous accusations prompted by personal venom, but should be protected from ill-considered and irresponsible prosecutions. I find nothing repugnant in this dual intention of the legislature. It wanted to make the rules of the game more strict so that those gamesters who were stacking jokers and aces in their sleeves might be caught more easily but at the same time it wanted to give them a fair deal. In my view the Prevention of Corruption Act by itself is not discriminatory but if a sanction would be considered unnecessary under S. 409, I. P. C., this interpretation of S. 6 will give the prosecuting authorities a great latitude to evade and dodge the spirit of the enactment even though it may not make the statute itself discriminatory.

(47) That the salutary provisions of S. 6, Prevention of Corruption Act, will be evaded by the prosecuting authorities if they fail to secure a sanction from the proper authority was visualised by the learned Judge in AIR 1953 Madh-B 139 (F). He observed:

> "It is evident from S. 6 of the Act that a prosecution under S. 5(2) of the Act depends on the previous sanction of the competent authority. Where on the circumstances of a particular case the sanctioning authority has in its discretion refused to sanction the prosecution, the liability of the public servant to punishment under S. 409, I. P. C., still remains."

The learned Judge, however, instead of deprecating it as a flagrant evasion of the provisions of S. 6, Prevention of Corruption Act, came to the conclusion that it was not objectionable and that the prosecuting authorities can legally dodge this rule and prosecute a public servant under S. 409, I. P. C., if the sanctioning authority did not allow them to do so under S. 5(2), Prevention of Corruption Act. With great respect for the learned Judge, I think that it was to protect the public servants from this very danger that S. 6 was enacted.

(48) Dealing with this aspect, a learned Judge of the Allahabad High Court made the following observations in an unreported case — 'Kirpa Shankar Mathur v. State', Cri. Misc. No. 506 of 1951 (All) (L):

"(a) The learned counsel for the State contends that the applicant is not being prosecuted for the offence of criminal misconduct punishable under S. 5(2), Prevention of Corruption Act, but he is being prosecuted under S. 409, I. P. C., for which no sanction is needed. In other words he contends that where an offence falls under two different laws and sanction is necessary for prosecution in respect of one such offence but not in respect of the other, prosecution can be had in respect of the offence for which no sanction is necessary. In other words the prosecution can circumvent the law which requires the taking of previous permission by adopting the device of charging the accused with the offence for which sanction is not needed. In my opinion it is not open to the prosecution to adopt any such device."

(b) The applicant is guilty of an offence punishable under S. 409 and also of that punishable under S. 5(2), Prevention of Corruption Act. Since sanction was necessary in respect of the latter offence, but not in respect of the former one, the prosecution could not avoid taking the sanction by launching the prosecution under S. 409, I. P. C. The result, therefore, is that the prosecution under S. 409 also cannot be permitted to go on unless previous sanction is proved."

This decision was overruled by a Bench decision of the Allahabad High Court in AIR 1952 All 35 (B). With respect for the learned Judges who overruled this decision I find myself in complete agreement with the view expressed in Kirpa Shankar's case (L). This view finds strong support from the observations of the Chief Justice of India in —'Basir-ul-Huq v. State of West Bengal', AIR 1953 SC 293 (M); Mahajan C. J. observed:

"Though in our judgment S. 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the orbit of that section it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of the public servant is required.

In other words the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does upon the ground that such latter offence is a minor offence of the same character or by describing the offence as being one punishable under some other section of the Indian Penal Code though in truth and substance the offence falls in the category of sections mentioned in S. 195, Cr. P. C. Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of S. 195, prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it."

These observations apply as much to S. 6, Prevention of Corruption Act, as to S. 195, Cr. P. C.

(49) In the light of these observations, it cannot be doubted that the prosecution of a public servant under S. 409, I. P. C., without obtaining the necessary sanction amounts to a clear attempt at evading the rule of law laid down in S. 6, Prevention of Corruption Act and this cannot be permitted. The same view was taken by a Bench of the Bombay High Court in — 'Yashwant Dhondba Rao Chavan v. State', 7 A I Cr D (Bom) 555. The learned Judges observed:

"Where the facts contended by the prosecution fairly fell under a section which constituted an offence for which a person could not be prosecuted without a proper sanction, it would be the evasion of the salutary provision of the law to proceed under a section, the charge under which did not require a sanction."

"In our view the facts alleged against the petitioner by the prosecution can be said to fall fairly within the definition of the offence under S. 5(2), Prevention of Corruption Act, which charge would require a prior sanction. Therefore, we are of the view that the commitment of the petitioner is so far as it relates to the charge under S. 409, I. P. C., would be bad."

(50) I agree with this view and from this approach to the question also I reach the same conclusion that cognizance of an offence under S. 409, I. P. C., when committed by a public servant cannot be taken by any Court except with the previous sanction of a competent authority.

(51) My answer to the third question also is in the negative, as in my opinion the prosecution of a public servant under S. 409, I. P. C., without the necessary sanction is barred by S. 6, Prevention of Corruption Act.

(52) In view of the answers given by me to the three questions discussed above, I hold that the Magistrate was right in not taking cognizance of an offence under S. 409, I. P. C., against the applicant without a proper sanction. I uphold his order of discharge in respect of an offence under S. 409, I. P. C., but from the order of the Magistrate it appears that the prosecution has also led evidence to prove that the applicant committed an offence under S. 477-A, I. P. C. also. The Magistrate has not considered this aspect of the case at all. An offence under S. 477-A, I. P. C., does not require any sanction. If the evidence warrants that a charge should be framed against the applicant under S. 477-A, I. P. C., the Magistrate should proceed to do so. If he frames the charge and in his discretion feels that he can award an adequate punishment, he should try it himself. If, on the other hand, he comes to the opinion that he cannot award an adequate sentence, he should commit the case to the Court of Session.

(53) BY COURT: In view of the opinion of the majority the revision is dismissed. Leave to appeal is granted.

D.H.Z. Revision dismissed, leave to appeal granted.

(S) A.I.R. 1955 ALLAHABAD 288 (Vol. 42, C.N. 85)

FULL BENCH

(LUCKNOW BENCH—MALIK C. J., KIDWAI, BEG, MUKERJI, H. S. CHATURVEDI, MEHROTRA AND SAHAI JJ. (22-12-1954)

Ganga Bakhsh Singh and others, Defendants-Appellants v. Madho Singh and others, Plaintiffs-Respondents.

S. C. A. No. 308 of 1944, against order of Civil J., Hardoi, D/- 24-7-1944.

(a) Hindu Law — Widow — Gift — Consent of reversioner — Validity — AIR 1929 Oudh 185 — AIR 1932 Oudh 90 — AIR 1939 Oudh 145, Not Foll.

A reversioner who has given his consent to a gift made by a Hindu widow of a part of her husband's property cannot claim that property on the death of the widow, the succession having opened in his favour. The law in Avadh is not different from the law laid down in Allahabad, Bombay, Madras and Calcutta. In a matter of this kind it is desirable that all the High Courts in India should speak with a common voice and lay down the same law on the ground of 'stare decisis'. Case law discussed. AIR 1923 All 387 (FB), approved. Observations in AIR 1929 Oudh 185 and AIR 1932 Oudh 90, held obiter; AIR 1939 Oudh 145, held of doubtful validity. (Para 22)

(b) Transfer of Property Act (1882), S. 43 — Applicability to gift.

Section 43 partly reproduces the doctrine of what is commonly known in England as a grant feeding the estoppel shorn of some of its technicalities but it applies only to a case where a transfer is for consideration. A gift of property in which a transferor has no interest will not be protected under this section if the transferor acquires title to the property after the gift. Where a reversioner has joined in the execution of a deed of gift executed by a Hindu widow the fact that he purports to be one of the donors will not affect his interest under S. 43. The principle laid down in S. 43 or its adaptation will not, therefore, debar the reversioner who has consented to a gift made by a Hindu widow from claiming the property if succession opens in his favour. (Para 16)

Anno: T. P. Act, S. 43 N. 5.

CASES REFERRED: Paras

(A) (V10) AIR 1923 All 387: 45 All 339 (FB) 3, 11, 12, 13, 16. 21, 22

(B) (1859-61) 8 Moo Ind App 529: 2 Suth WR 61 (PC) 8

(C) (V5) AIR 1918 PC 196: 46 Ind App 72 (PC) 8, 11, 12, 14

(D) ('07) 34 Cal 329: 34 Ind App 87 (PC) 11

(E) (V14) AIR 1927 Bom 260: 51 Bom 475 (FB) 13

(F) (V16) AIR 1929 Mad 502: 52 Mad 556 (FB) 14, 21

(G) (1735) 1735-1 White & Tuder, 9th Edn., 373 14

(H) (V28) AIR 1941 Cal 383: 199 Ind Cas 593 15

(I) (V4) AIR 1917 PC 95: 45 Ind App 35 (PC) 16

(J) (V16) AIR 1929 Oudh 185: 4 Luck 622 18

(K) (V19) AIR 1932 Oudh 90: 7 Luck 360 19

(L) (V26) AIR 1939 Oudh 145: 1939 Oudh WN 346 20

(M) (V30) AIR 1943 Oudh 196: 19 Luck 37 21

K. S. Verma holding brief of S. C. Das, for Appellants; R. N. Shukla, for Respondents.

MALIK C. J.:

This case was referred to this Bench, as it raised a question of law on which there was a difference of opinion between a Full Bench of the Allahabad High Court and some Division Bench rulings of the Avadh Chief Court. The point for decision is whether a reversioner who had given his consent to a gift made by a Hindu widow of a part of her husband's property could claim possession of that property on the death of the widow, the succession having opened in his favour.

(2) The facts of the case are that one Padam Singh died issueless in the year 1899 leaving a widow Deoka Kuar, who got possession of his estate. On 16-11-1916, Deoka Kuar and four other persons, Tikam Singh, Jit Singh, Bhikham Singh and Tilak Singh, who were the presumptive reversioners on that date, executed a deed of gift in favour of Niranjan Singh, Dharmu Singh and Har Bakhsh Singh, sister's sons of Deoka Kuar, transferring to them one-sixth share in the estate. On 10-11-1931, Deoka Kuar died and Bhikham Singh and Tilak Singh, who were alive on that date, became the owners of the property. They did not challenge the deed in their lifetime and on 2-4-1943, before the expiry of 12 years a suit was filed by Madho Singh, son of Tilak Singh deceased and Suraj Bakhsh Singh and Durga Bakhsh Singh, legatees under the will of Bhikham Singh for possession of the one-sixth share that had been gifted. The defendants are the sons of Niranjan Singh, Dharmu Singh and Har Bakhsh Singh, all the three having died before the date of the suit.

(3) The trial Court following a decision of the late Avadh Chief Court decreed the suit on 21-12-1943 and the appeal filed by the defendants was dismissed by the lower appellate Court on 24-7-1944. On 30-3-1949, the case was referred by a learned single Judge to a Full Bench but in December, 1949 when the case came up before a Bench of three learned Judges, in view of the decision in — 'Fateh Singh v. Thakur Rukmini Rawanji Maharaj', AIR 1923 All 387 (FB) (A), the case was referred to a larger Bench. In the referring order of Kidwai, J. there is a full and detailed discussion of the case law on the point and it is therefore not necessary for us to refer to them in detail.

(4) The right of a Hindu widow in her husband's estate is now well-settled by case law. It has been held that she is not a life tenant as recognised in English law; that the entire estate vests

in her during her lifetime only with certain restrictions on her power of alienation. She has the right to alienate a reasonable part of the estate for religious or charitable purposes and for the benefit of the soul of her deceased husband. She has also the right to transfer her husband's estate or a part of it for what their Lordships of the Judicial Committee have characterised as 'worldly purposes'. A worldly purpose would generally be for legal necessity or for a purpose which is obviously for the benefit of the estate.

(5) The question has often arisen as to the effect of a consent given by the next presumptive reversioners to an alienation made by a widow. If the presumptive reversioners have consented to a transfer of a part of the estate the law is now well-settled that it may be presumed that the transfer was for purposes recognised under the Hindu law. This is based on a simple principle that when a person does something which might be against his interest, there must be some good reason why he does it. If the presumptive reversioners consent to an alienation by a Hindu widow, it must be presumed that they were satisfied that the widow was doing something within her rights and they had, therefore, no objection to it.

(6) Where a Hindu widow has transferred the entire estate with the consent of the next presumptive reversioners the transfer has been upheld on the ground that it is in fact a surrender by the widow to the presumptive reversioners and is a transfer by them to the transferee.

(7) If, however, the widow has made a transfer of only a part of the estate with the consent of the presumptive reversioners, the question arises on what principle such a transfer can be supported where obviously it cannot be for a religious or charitable purpose for the benefit of her husband's soul and is not for legal necessity or for the benefit of the estate.

(8) Whatever observation may have been made in the case, — 'Collector of Masulipatam v. Cavaly Vencata Narainapah', 8 Moo Ind App 529 (PC) (B), as regards a transfer made by a Hindu widow with the consent of the reversioners, in a later case,—'Rengaswami Goundan v. Nachiappa Gounden', AIR 1918 PC 196 (C), their Lordships pointed out that if it was held that mere consent of the presumptive reversioners to a transfer made by a Hindu widow validated it, then it would amount to holding that the estate vested in the widow and the presumptive reversioners and they between them had the right to alienate it. Their Lordships held that this was not correct and for the reason that a Hindu reversioner had merely a 'spes successionis' and had no vested interest in the property.

Where, however, a transfer is made for consideration and the presumptive reversioners had either consented to that transfer or had joined it as executants, it may be presumed that the transfer was for legal necessity and the burden of proving that the transfer was not valid would be on the reversioners who inherit the property on the death of the widow but so far as the reversioners who had joined in the execution of the deed or had consented to it, they would be barred from challenging the document. The same result would follow in a case where a Hindu widow had made a transfer without consideration but the consent of the reversioners had been obtained by payment. Having received consideration the reversioners cannot obviously claim that the widow had no right to transfer the property by gift.

(9) Difficulty, however, arises in a case where a widow makes a gift of a part of the estate, not for any religious or charitable purpose which might be conducive to the well being of the soul of the deceased husband and the transfer is supported only on the ground that the next body of presumptive reversioners were parties to it or had consented to the transfer. There can be no doubt that if on the death of the widow the property was inherited by reversioners other than those who had consented to the transfer they would not be bound by such consent. If, however, the consenting reversioners themselves succeed to the property the question arises whether they can go back on their consent and claim that the widow had no right to make the gift and they were entitled to get possession of the property.

(10) A reversioner who had consented to the gift and had not received any consideration for such a consent cannot be deemed to be estopped, unless on the faith of the consent given the donee had acted to his detriment. The doctrine of election would also not be strictly applicable, as that doctrine applies to a case where a person claiming to repudiate a deed has accepted some benefit under the same deed. The Courts of Equity have held that he cannot approbate and reprobate, i.e., he cannot derive benefit from a part of the document and at the same time claim that he would not be bound by the rest of it. This aspect has been fully dealt with in the referring order of Kidwai, J. and it need not, therefore, be dealt with now at any great length. The learned Judges in Lucknow, who took the contrary view, based their judgment on the ground that neither the doctrine of estoppel nor the doctrine of election would strictly apply to such a case.

(11) At the same time it must be remembered, as has been pointed out by their Lordships of the Judicial Committee, that a Hindu widow is the owner of the property and the entire property vests in her. Her rights of alienation are no doubt restricted but a transfer made by her for a purpose not justified under Hindu Law is not void but is voidable and, when a reversioner gives his consent to such a transfer, the probabilities are that he gave it for some good reason and the principle that their Lordships of the Judicial Committee have laid down, as interpreted in Fateh Singh's case, is really an extension of the doctrine prevailing in the Courts in England that if a person has solemnly given his consent to a transfer, he should not be allowed to go back on it.

Their Lordships in 'AIR 1918 PC 196 (C)', while dealing with this question at great length, did not confine their decision to the facts of that case but attempted to lay down the whole law regarding transfers by Hindu widows of the entire estate or a part of it for a purpose not recognised by Hindu Law and the effect thereon of consent given by the reversioners for consideration and without consideration. Dealing with the question of a

reversioner who had consented to a transfer and had then succeeded to the property on the death of the widow, they pointed out that S. 115, Evidence Act, may not apply to such a case and posed a question as follows:

"How can it be said that the plaintiff, by any act of his. led the respondents to think that something was true, and then to act on that belief?"

Their Lordships then held that in the absence of these two pre-requisites S. 115, Evidence Act, which contains the rule of estoppel in India would not apply. Their Lordships then went on to consider whether the reversioner, who succeeds to the property, which had been transferred by a Hindu widow with his consent, may not be barred from claiming the property on the ground of ratification. Dealing with this aspect their Lordships said:

"It is scarcely that (ratification), though it might be hyper-criticism to object to the use of the word".

Then their Lordships dealt with the question whether the doctrine of election applied and pointed out that though a reversionary heir has a right to challenge any alienation at its inception, he is not bound to do so and can wait till the death of the widow. After having dealt with various grounds which could be urged against a reversioner who had consented to a transfer and was yet claiming the property their Lordships said:

"Of course something might be done even before that time which amounted to an actual election to hold the deed good."

It is these words on which the learned Judges of the Allahabad High Court relied for their decision in 'Fateh Singh's case (A)', that the consenting reversioner who succeeded to the property must be deemed to have made an election to ratify that deed and cannot, therefore, claim the property. (See 'AIR 1923 All 387 (FB) (A)'. In the majority judgment delivered by Mears C. J., Banerji, Piggott and Ryves JJ., it was said:

"It is towards the close of their judgment that their Lordships laid down the principle upon which the controversy now before us ought, in our opinion, to be determined. After discussing various aspects of the question, and explaining the decision in 'Bajrangi Singh's case' their Lordships entered upon this particular aspect of the question in an important paragraph which begins with the words, 'No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract. It is only voidable.' For this last proposition express authority is quoted in the case of — 'Bijoy Gopal Mookerjee v. Krisha Mahishi Debi', 34 Cal 329 (PC)(D).

Their Lordships go on to point out that, if a reversioner who had actually succeeded to the estate, thereupon did something which showed that he treated the alienation as good, he would lose his right of complaint. This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election to hold the deed good.' They then pointed out that a presumptive reversionary heir was not bound to challenge an alienation by the widow in possession of the estate as soon as it came to his knowledge, but was entitled to wait till the death of the widow has affirmed his character.' They added, 'of course something might be done even before that time which amounted to an actual election to hold the deed good.' If these words are carefully considered with reference to their context, it seems to us quite beyond question that they refer to something done by the reversioner before the death of the widow has affirmed his character".

After having said as above, the conclusion arrived at by the learned Judges was that:

"no reversioner could well have done anything before the death of the widow which so clearly amounted to an actual election to hold good the transfer effected by the widow, while in possession of the estate to which he had since succeeded, as what Fateh Singh did when he executed the deed of 12-5-1905. Having made this election he cannot be permitted, now that the succession has opened in his favour in respect of half of the estate formerly in Mst. Muniam's possession, to challenge the validity of the transfer which he had expressly bound himself to accept. Whether his action be spoken of as a ratification of the transfer, or as an election to hold good the deed of 19-4-1905, we are satisfied that it is binding upon Fateh Singh so that he personally is not permitted to challenge its effect."

(12) Trouble, however, arises when we bear in mind that a reversioner has a mere 'spes successionis' and has no interest in the property in the lifetime of the widow. If property is gifted by a Hindu widow to him and to a stranger no doubt the doctrine of election might apply. A reversioner cannot transfer his 'spes successionis' and if he has not derived any benefit under the deed of gift executed by a Hindu widow nor has received any consideration for giving his consent, there may be no question of estoppel operating against him and it may not strictly be a case of his claim being barred by ratification or election. The ground on which the view taken in 'Fateh Singh's case (A)', can be supported is that the transfer being voidable and the reversioner having consented to it, by an extended doctrine of election laid down by their Lordships in — 'Rangaswami Goundan v. Nachiappa Gounden', (C), he cannot be allowed to repudiate a transaction to which he had consented and claim the property when the reversion opens in his favour. This would, however, only apply to the consenting reversioner if he succeeds to the property and not to any other reversioner who succeeds to the property the consenting reversioner having died in the lifetime of the widow.

(13) Though, therefore, no clear principle could be evolved out of the judgment in — 'Fateh Singh's case (A), the view was followed by a Full Bench of the Bombay High Court in — 'Akkava Ramchandrappa v. Syadkhan Muthekhan', AIR 1927 Bom 260 (E). The judgment of the Court was delivered by Marten, C. J. The learned Chief Justice said:

"after dealing next with the question of estoppel which, in that particular case, their Lordships held did not arise as the plaintiff never consented to the deed, nor was his claim traced through any consenting party, their Lordships dealt with yet a fourth branch under which transactions may be upheld. Put shortly, that branch amounts to an election by a reversioner to treat the transaction as good."

Dealing with this question the learned Chief Justice proceeded to say:

"In the present case the plaintiff actually joined in the deed by which the property in question was alienated. That is, I think, a clear election to hold the transaction as valid. That being so, in my judgment it makes no difference whether in such a case of election, the party electing was a male or was a female. A reversioner whether male or female could bring an action in the lifetime of the widow to set aside an alienation alleged to be invalid. If that is so, and he or she can thus elect to challenge a transaction as invalid, then surely it follows that he or she may also elect to hold that deed as valid. I think it must also be conceded that an election testified by actual joinder in a deed of alienation must be at least as good as any act of ratification or sanction given after that deed of alienation."

(14) The same view was taken by a Full Bench of the Madras High Court in — 'Ramakottayya v. Viraraghavayya', AIR 1929 Mad 502 (F). Though the learned Judges were of the opinion that it did not come strictly within the doctrine of election as understood in the leading case of — 'Streatfield v. Streatfield (1735) 1 White and Tudor, 9th edition, 373 (G), the learned Chief Justice (Sir Murrey Coutts Trotter, C. J..) delivering the judgment of the Full Bench stated:

"Their Lordships (of the Judicial Committee in 'Rangaswami Gounden v. Nachiappa Gounden (C)') do not specify what class of cases they had in contemplation. One would obviously be where the presumptive reversioner had brought himself either within the doctrine of estoppel, or had taken a benefit and thereby fallen within the doctrine of election strictly so called, as defined in 'Streatfield v. Streatfield (G)'.

The Allahabad and Bombay High Courts hold that a third case exists, namely, where although no one has been damnified so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring himself within the meaning of the strict doctrine of election, he has nevertheless positively and definitively chosen to announce his intention and in fact agreed to abide by the act of the widow. The Full Benches of Allahabad and Bombay have decided that he can do so even while he only occupies the character of a presumptive reversioner. We agree with the Allahabad and Bombay Courts in thinking that if he takes such a step he is personally debarred from resiling from it afterwards. Indeed it is so obviously desirable that the Courts of India should speak with one voice on a matter of such constant recurrence as this that we should not dissent from those decisions unless we were convinced that they were contrary to the decision of the Privy Council in 'Rangaswami Gounden v. Nachiappa Gounden (C)'."

(15) In a single Judge decision of the Calcutta High Court delivered by B. K. Mukherjea, J. (the Chief Justice Designate of India) in — 'Hare Krishna v. Upendra Kumar', AIR 1941 Cal 383 (H), his Lordship said:

"Now, the consent of the presumptive reversioners does not by itself validate an act of alienation by the widow. It simply gives rise to a presumption as to the existence of legal necessity — a presumption which the actual reversioner is always entitled to rebut. But if the actual reversioner is the same person as the one who has given consent as presumptive reversioner, a different consideration arises and he is precluded from disputing the validity of the alienation. This is on the ground that a presumptive reversioner is competent to elect to treat the alienation as operative against his 'spes successionis' even during the lifetime of the widow, and, if he himself is the reversioner at the time of her death, the consent already expressed by him is binding on him."

(16) In the case of — 'Amrit Narayan Singh v. Gaya Singh', AIR 1917 PC 95 (I), their Lordships of the Judicial Committee held that the right of a Hindu reversioner in the lifetime of the widow was a mere 'spes successionis' and was not capable of being transferred. The learned Judge (Mukherjea, J.) was, however, of the opinion that it is possible for the reversioner to treat the alienation as operative against the 'spes successionis' and by giving his consent to the transfer debar himself from claiming the property if the succession opened in his favour. Section 43, T. P. Act (Act IV of 1882) provides:

"Where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists."

The section, however, partly reproduces the doctrine of what is commonly known in England as a grant feeding the estoppel shorn of some of its technicalities but it applies only to a case where a transfer is for consideration. A gift of property in which a transferor has no interest will not be protected under this section if the transferor acquires title to the property after the gift. Where a reversioner has joined in the execution of a deed of gift executed by a Hindu widow the fact that he purports to be one of the donors will not affect his interest under S. 43. The principle laid down in S. 43, T. P. Act, or its adaptation will not, therefore, debar a reversioner who has consented to a gift made by a Hindu widow from claiming the property if succession opens in his favour. The transfer can, therefore, be protected only on the ground laid down in 'Fateh Singh's case (A)', and followed by the High Courts of Bombay and Madras.

(17) The position, therefore, is that in a large part of the country the view has prevailed that

a reversioner, who has consented to a transfer made by a Hindu widow, though he may not have himself received any consideration, will not be allowed to claim the property on the death of the Hindu widow if the succession opens in his favour. In the referring order this position has been noticed by Kidwai, J. who has stated:

"It may be that the principle adopted by the various Full Benches is a further development of a widow's power to alienate and, having now been accepted by four High Courts for a period of about 25 years, it should not be negatived but so far as Avadh, at least, is concerned, this principle was not accepted and it would not be giving effect to the rule of 'stare decisis'."

(18) We have, therefore, examined the Avadh cases. Four cases of Avadh were cited before us. In one of them (— 'Bindeshwari Singh v. Har Narain Singh', AIR 1929 Oudh 185 (J)), the learned Judges held that the consent by the reversioner in whose favour the succession had opened out was not established. The learned Judges said:

"In the circumstances and having regard to the finding of the lower appellate Court, we are unable to hold that the recital contained in the deed of relinquishment dated 28-5-1928, evidences a consent by a reversioner to an act of transfer of the estate by the female heir."

The rest of the judgment, therefore, where the learned Judges discussed the question whether the doctrine of estoppel or election will apply is 'obiter'.

(19) In — 'Babu Singh v. Rameshwar Bakhsh Singh', AIR 1932 Oudh 90 (K), the finding was that the reversioners had actually received consideration for their consent and were, therefore, bound by the consent and could not repudiate the same. Any expression of opinion, therefore, as regards the other position where a reversioner had given his consent without any remuneration was mere 'obiter'.

(20) In — 'Debi Dayal v. Sri Radha Krishna', AIR 1939 Oudh 145 (L), the transfer was made by a Hindu widow for religious and pious purposes. It was ratified by the next presumptive reversioners and the question arose whether the share gifted was a reasonable share of the whole estate. The learned Judges were of the opinion that a reasonable portion of the estate alienated for religious or pious purposes would be 1/20th share and a three-fourth share of the estate could not be said to be a reasonable portion of it. Though the learned Judges have carefully discussed the validity of a consent, given without consideration, by a reversioner at some length and with a good deal of what they say we respectfully agree the decision, to our minds, is of doubtful validity. Where a Hindu widow makes a transfer for a valid purpose, recognised under the Hindu Law, the question whether the share transferred was or was not a reasonable portion of the whole estate would depend on various circumstances and where the whole body of the next presumptive reversioners consented to the transfer, a presumption should arise that the transfer was of a reasonable portion of the estate.

(21) The only other case cited before us was — 'Ram Bharosey v. Bhagwandin', AIR 1943 Oudh 196 (M). In that case Bennett and Madeley JJ. followed 'Fateh Singh's case (A)', and agreed with the observation made in that case and in the case of 'Ramakottayya v. Viraraghavayya (F)'.

(22) It cannot, therefore, be said that the law in Avadh was different from the law laid down in Allahabad, Bombay, Madras and Calcutta. We agree, with respect, with the learned Judges of the Madras High Court that in a matter of this kind it is desirable that all the High Courts in India should speak with a common voice and lay down the same law on the ground of 'stare decisis'. We, therefore, uphold the view in 'Fateh Singh's case (A)', and hold that where a reversioner has succeeded to the property on the death of a Hindu widow, he would be debarred from claiming the property which the widow had made a gift of with his consent.

(23) The result, therefore, is that this appeal is allowed, the decrees of the lower courts are set aside and the plaintiff's suit is dismissed, but in view of the peculiar circumstances of this case, we make no order as to costs.

D.H.Z. Appeal allowed.

(S) AIR 1955 ALLAHABAD 292 (Vol. 42, C.N. 86)

FULL BENCH

LUCKNOW BENCH — MALIK C. J., KIDWAI, BEG, MUKERJI, H. S. CHATURVEDI, MEHROTRA AND SAHAI JJ. (20-12-1954)

Deota Din, Plaintiff-Appellant v. Gur Prasad and another, Defendants-Respondents.

S. C. Appeal No. 225 of 1946, against Order of Civil J., Rae Bareli, D/- 17-1-1946.

Transfer of Property Act (1882), Ss. 3, 8 — Transfer of Zamindari — Presumption.

The question whether a building is or is not appurtenant to the zamindari must primarily be a question of fact and intention. The question has to be determined by taking into consideration all the surrounding circumstances. Though the question in each case must depend upon the facts the presumption must be that in a case of a residential house it is not necessarily appurtenant to the zamindari and unless it can be established from evidence that it was intended to be transferred along with the rest of the zamindari, the house must be deemed to have remained the property of the erstwhile Zamindar. Case law discussed. (Paras 12, 27)

Anno: T. P. Act, S. 3 N.6; S. 8 N. 2, 4, 9, 15.

CASES REFERRED: Paras

(A) (V23) AIR 1936 All 14: 1935 All LJ 1118 — 17, 24

(B) (V14) AIR 1927 PC 135: 54 Cal 669 (PC) — 17, 20

(C) ('82) 4 All 381 — 23, 26

(D) (1900) 22 All 168: 1900 All WN 31 — 27

(E) (V26) AIR 1939 All 415: ILR (1939) All 607 (FB) — 25

(F) (V14) AIR 1927 Oudh 240: 6 Oudh WN 1150 — 26

(G) ('74-75) 2 Ind App 256: 1 Cal 104 (PC) 26
(H) ('03) 30 Ind App 71: 30 Cal 556 (PC) 26

N. Banerji, for Appellant; Sri Ram and R. B. Chaudhri, for Respondent (No. 2).

MALIK C. J.:

This case was referred to a Full Bench of seven Judges by reason of a conflict between certain decisions of the Chief Court at Lucknow and a decision of a Full Bench of five Judges at Allahabad.

(2) The plaintiff filed a suit for joint possession over a Kothri marked in a plan attached to the plaint, for perpetual injunction restraining defendants 1 and 2 from interfering with the plaintiff's possession and enjoyment of the said Kothri, for declaration of his right to build a Sahadra which had fallen down and for recovery of Rs. 70/- the price of the plaintiff's share of the materials of the Sahadra which, it was alleged, had been misappropriated by defendants 1 and 2. The suit was contested by defendants 1 and 2, and the other defendants were more or less 'pro forma'.

(3) The learned Munsif decreed the suit in part. On appeal by the defendants 1 and 2, the lower appellate Court set aside the decree of the trial Court and dismissed the plaintiff's suit in its entirety. When the second appeal came up before a learned single Judge, he referred the case to a larger Bench.

(4) The plaintiff and defendants 1 and 2 are members of the same family being descended from a common ancestor Daryao. This family had an ancestral house in village Gurha, pargana Kamraon, district Rae Bareli. The common ancestor Daryao had seven sons, and one of his sons Baryar had five sons. Sadho was one of the sons of Baryar. He had two sons Baijnath and Jagannath. In the year 1896 there was a partition in the family and the Kothri and the Sahadra, according to the case in the plaint, fell to the share of Baijnath and Jagannath. Later in his oral pleadings the plaintiff amended this statement and alleged that only half share in the Kothri and the Sahadra had fallen to the share of Baijnath and Jagannath. Baijnath and Jagannath had a share in the Zemindari in village Gurha. This share they had mortgaged on 21-11-1893.

The share ultimately was transferred for payment of the mortgage debt and came into the possession of one Mani Ram. Hazari Lal filed a suit for pre-emption and got possession of the property which had been transferred to Mani Ram. Defendants 1 and 2 are the sons of Hazari Lal, who was grandson of Baryar through another son Thakur. In the year 1910 Balgovind, defendant 6, and three widows, Mst. Jian, Mst. Lachhmin and Mst. Basanti, who had inherited 1/8th share in the half portion of the Kothri and the Sahadra from Baijnath and Jagannath, transferred their share to Bishunath, uncle of the plaintiff, and on the death of Bishunath the plaintiff inherited this portion. Besides this portion which the plaintiff claimed in the manner indicated above, the plaintiff had an ancestral share in the house with which we are not concerned.

(5) The plaintiff's contention was that he was in possession of the Kothri and the Sahadra but in the year 1944 the Sahadra fell down and defendants 1 and 2 misappropriated the materials and also started interfering with plaintiff's possession of the Kothri which compelled the plaintiff to file the suit.

(6) The main defence with which we are concerned is the plea that when Baijnath and Jagannath lost their entire Zamindari share in village Gurha, they must be deemed to have ceased to have any interest in the ancestral house, the Kothri and the Sahadra, which must be deemed to have passed to Mani Ram mortgagee and by pre-emption to the contesting defendants.

(7) The trial Court held that Baijnath and Jagannath did not mortgage the whole of their interest in village Gurha, and they did not lose their entire Zamindari interest and therefore continued to remain owners of the Kothri and the Sahadra. The trial Court decreed the plaintiff's suit in part. The lower appellate Court, however, disagreed with this finding and relying on certain decisions of Oudh Chief Court held that Baijnath and Jagannath having ceased to own any Zamindari share in village Gurha, their interest in the residential house must also be deemed to have passed to Mani Ram.

(8) Another point was raised that in the pre-emption suit no mention was made of any share in the residential house, and the defendants could not, therefore, claim that they had acquired any share in the residential house by pre-emption. The lower appellate Court, however, held that the plaintiff must rely on his own title, and even if the defendants had not acquired the property under the pre-emption decree, the plaintiff could not get a decree in his favour unless he could establish his title to the property.

(9) It is admitted that in the mortgage deed of 21-11-1893, in the suit filed by the mortgagee on the basis of that mortgage and in the pre-emption suit no specific mention was made about the Kothri and the Sahadra. The point that arises for decision is, therefore, whether on a transfer of the Zamindari, the interest in the residential house must also be deemed, in the absence of anything to the contrary, to have passed to the transferee.

(10) The learned Counsel on behalf of the respondents had urged that when a house belonging to a co-sharer or a Zamindar is situated inside a mahal in which he has a share as a Zamindar, the presumption must be that the house is appurtenant to the Zamindari, and when the entire Zamindari interest is sold, the house must also pass with it. Reliance is also placed on the provisions of S. 8 of the Transfer of Property Act and it is urged that when land is transferred everything that is attached to that land must also pass along with it and, therefore, on a sale of a Zamindar's interest in a Mahal, his residential house must also be deemed to have been sold.

(11) On the other hand, it is urged that a house for residential purposes is not necessarily a part of the Zamindari and is not appurtenant to it. Only such houses as are built for the purposes of the Zamindari and are intimately connected with it and used for purposes of collection etc., may be appurtenant to Zamindari but not necessarily the residential house.

(12) The question whether a building is or is not appurtenant to the Zamindari must primarily be a question of fact and intention. The question has to be determined by taking into consideration all the surrounding circumstances. In most of the cases that were cited before us the question was decided on the basis of the facts of the particular case, but in some of the cases the burden was placed on the person who claimed that the house was appurtenant to the zamindari, while in others it was held that the buildings including the residential house must be deemed to have passed with the zamindari, unless the other side could show that it did not.

(13) A co-sharer or a sole owner of a mahal owns no doubt every inch of the land within the mahal. There may be within that area buildings which are ordinarily used for the purposes of the zamindari and are owned by the zamindar as such. Houses in the abadi, which are occupied by tenants, collection houses etc., may be appurtenant to the zamindari. Shops and bazars owned by the zamindar as such may be appurtenant to the zamindari but ordinarily a residential house built for the zamindar and the members of his family to live in even though built on land within the zamindari is not necessarily appurtenant to it. A house for residential purposes is built so that a person and the members of his family may live in it and ordinarily such a house cannot be deemed to be appurtenant to the zamindari.

(14) It has been held in some cases that a zamindar loses his interest in the residential house when he ceases to be a co-sharer. The view has not been taken that if a zamindar starts selling his interest in a mahal by instalments, a corresponding share in the residential house passes to the transferee with each sale. And there can be no reason for holding that his entire share in the residential house would pass to the last purchaser.

(15) In the reported cases that were cited before us stress was always laid on the fact that the zamindar had ceased to own a share in the village and must, therefore, be deemed to have ceased to own the residential house. Even in the case before us the Munsif decided in plaintiff's favour on the ground that Baijnath and Jagannath had left in their possession a fractional share in the zamindari, while the lower appellate Court decided against the plaintiff on the ground that the entire share of Baijnath and Jagannath was transferred. In a case where the entire share is transferred in instalments, the last purchaser could not be deemed to be the owner of the entire share which was held by the transferor and he should not, therefore, be allowed to claim the entire house as his property.

(16) While in the case of a tenant who is admitted to the tenancy by the land-lord and is provided either with a house to live in or with land on which to build a house where he can live, there may be a presumption that the house occupied by him is appurtenant to his holding, in the case of a zamindar it is not necessary for the effective ownership of the zamindari that the zamindar should have a house to live in within his zamindari and it cannot, therefore, be said that the residential house of the zamindar, because it is situated within the village area, must be deemed to be appurtenant to the zamindari held by him. We have already said that this presumption will not apply with respect to buildings which he owns for the purposes of the zamindari. In the case of a taluqdar it may be that the Kot or the Qila of a Taluqdar which he owns and possesses, as a Taluqdar for the time being, might be appurtenant to the Taluqa but, as we have already said, it would depend upon the facts of each case.

(17) Dealing with this question in — 'Kanhaiya Lal v. Sheva Lal', AIR 1936 All 14 (A), Sir Syed Sulaiman pointed out that when a co-sharer builds a residential house on a land of which he is a co-sharer, then his rights can be divided into three parts: (1) a joint right in the site; (2) a proprietary right in the materials, and (3) a right of residence in the house situated on the site. If his Zamindari is sold, there can be no doubt that his joint right in the site must go with it but it does not necessarily follow that the proprietary right in the materials and his right of residence must also pass. In this connection it may be useful to refer to certain remarks made by their Lordships of the Judicial Committee in — 'Narayan Das v. Jatindra Nath', AIR 1927 PC 135 at p. 137 (B). Their Lordships said :

> "Having special regard to the view held in India respecting the separation of the ownership of the buildings from the ownership of the land, and to the recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself, their Lordships are of opinion that in order to make a house erected upon the land, as well as the land itself, subject to the Govenment power of sale for arrears of revenue special words indicating the intention of the Legislature to make the building subject to sale would be necessary."

In the case before their Lordships which arose out of a revenue sale, their Lordships laid stress on the intention of the Legislature as expressed in the statute. When a property is transferred by private treaty or by auction sale, the intention is to be gathered from the treaty or by auction sale, the intention is to be gathered from the terms of the agreement or from the documents relating to the auction sale held by the Court. The intention, according to their Lordships, had to be clearly expressed by special words indicating an intention that the building was also subject to sale. Similarly, the burden should be on those who say that the intention was that not only the zamindari share but also the residential house was transferred.

(18) In this connection it may be useful to refer to S. 118 of the U. P. Land Revenue Act (Act 3 of 1901). The section is not directly applicable. It only indicates the manner in which a dwelling house is to be dealt with on a partition of a mahal. The section provides that

> "If in making a partition it is necessary to include in the portion allotted to one co-sharer

the land occupied by a dwelling house or other building in the possession of another co-sharer, the latter shall be allowed to retain it with the buildings thereon, on condition of his paying for it a reasonable ground rent to the co-sharer in whose portion it may be included."

It would thus appear that though the land is partitioned, the building is treated as the separate property of the co-sharer whose dwelling house it is. If, on the other hand, it was to be treated exactly in the same manner as if it was a part of the Zamindari, then the dwelling house and other buildings in the possession of the co-sharer should also be partitioned with the partition of the zamindari and compensation paid to those who spent money on the constructions.

(19) Reliance is placed on S. 8 of the Transfer of Property Act. The first part of the section is general and deals with transfer of property, and provides that when property is transferred in the absence of any intention which is express or is necessarily implied, the transfer passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Under this clause when a Zamindari share is transferred, along with the transfer must pass interest which the transferor had in that share and in the legal incidents thereof so that anything appurtenant to the zamindari share must go along with it. This will not advance the case of the respondents any further as it would have to be decided whether a residential family house is or is not appurtenant to the zamindari. Reliance is, therefore, placed on the second clause that

"Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth."

(20) "Attached to the earth" mean (see S. 3 of the Transfer of Property Act)

"(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached."

It is urged that S. 8 read with S. 3 makes it clear that where land is sold, the buildings situated on it must be deemed to have been sold along with it. Two things have to be kept in mind in this connection. The section is subject to the exception that this result would not follow if a different intention is expressed or is necessarily implied.

There is no rule of law in India, as was pointed out by their Lordships of the Judicial Committee in Narayan Das's case (B), that whatever is affixed or built on the soil becomes a part of it and is subject to the same rights of property as the soil itself. Unless the transfer makes it clear that the residential house of the zamindar was intended to be included, it must necessarily be implied that it was not intended that it should be included. Moreover the sale of a share in a mahal or even the sale of the entire mahal is not necessarily a transfer of land, at least, it is not a transfer of land as such. A Zamindar has got certain rights in a mahal. These rights may give him the right to remain in possession of certain lands situated within that area but when a share in the mahal is sold, it cannot be said that it is a sale of any specific plot of land. The section deals with the sale of land as such and in the case of a sale of a plot of land there is a presumption that everything that is attached to the earth goes with it but the same presumption does not necessarily arise where a share in a mahal or even the whole mahal is sold.

(21) In some cases distinction was drawn between an auction sale and a sale by private treaty and it was held that S. 8 of the Transfer of Property Act would not apply to an auction sale by reason of the provisions of S. 2(d) of the Act. By an auction sale the right of the mortgagor in the property mortgaged is sold and if a mortgage of a Zamindari share includes the residential house by reason of the provisions of S. 8, then by the auction sale of the property mortgaged the residential house must also be deemed to have been sold to the auction purchaser. It is, therefore, not necessary to distinguish between an auction sale and a voluntary sale. To our minds the same principle should govern both.

(22) A number of cases have been cited by learned counsel.

(23) In — 'Abu Husan v. Ramzan Ali', 4 All 381 (C), a Qila belonging to one Kadir Ali Khan was sold and it was held that he held it 'qua Zamindar'. From the brief report that is available no further facts appear and if the Qila was held by Kadir Ali Khan qua Zamindar and was a part of his Zamindari, with the sale of the Zamindari and Qila would naturally go with it.

(24) In — 'Banke Lal v. Jagat Narain', 22 All 168 (D), it appears from the judgment that the house property was specifically included in the application for execution. The only question was whether it had in fact been attached & the learned Chief Justice expressed the opinion that the Kothi & the garden which were the subject-matter of dispute in that case had been attached & had been sold. There is nothing in the judgment from which it would appear for what purpose the Kothi and the garden were used. It is not said that they were the family residential house of the Zamindar. It might well be that the Kothi was what is known as a collection house or the Kot of the Zamindar.

It is significant that the learned Chief Justice dealing with the case remarked that even in such a case it is possible to give evidence

"of the circumstances connected with the acquisition, construction, or user of the buildings, from which it may properly be inferred that they are not appurtenances of the Zamindari",

and then he went on to remark that there was

"no evidence showing for what purpose or in what manner either the Hawkins Kothi or the Kothi in Begam Bagh was used at any time up to the sale of 20-11-1885."

The case cannot be said to lay down any general principle and must be confined to the facts of that particular case. We have already referred to the decision of Sir Shah Sulaiman Chief Justice and

Bennet, J. in AIR 1936 All 14 (A), which we have followed.

(25) The next case that was cited to us, — 'Umrao Singh v. Kacheru Singh', AIR 1939 All 415 (FB) (E), was a decision of a Full Bench of five Judges which necessitated this reference to a Full Bench of seven Judges. Mr. Justice Allsop took a contrary view and the whole of his decision is based on the provisions of S. 8 of the Transfer of Property Act. The learned Judge assumed that a transfer of a share in a Zamindari is transfer of a plot of land and held that all buildings situated on that land passed with it. Moreover as was pointed out by Iqbal Ahmad, J., the section is subject to any express or implied intention to the contrary and, if we may say so with respect, he was right in his view that it must be implied that the house was not included. That was a case of a usufructuary mortgage and even after the mortgage the mortgagor had continued to be in possession of the residential house. It is a matter of common knowledge that when a zamindar makes a usufructuary mortgage of his zamindari share, though the mortgagee may get possession of the collection house and other such buildings which are appurtenant to the zamindari, the possession of the residential family house is never given to the mortgagee.

(26) The cases of Oudh that were cited to us were — 'Krishna Kumari v. Rajendra Bahadur', AIR 1927 Oudh 240 at p. 253 (F). The learned Judge followed the decision in 4 All 381 (C), and held that the house built inside the Taluqa must go with the Taluqdari but the house built outside the Taluqa must be deemed to be non-Taluqdari property. The question in that case was what was Taluqdari property and what was non-Taluqdari property which had been dealt with by the previous Taluqdar under a will. The learned Judge purported to rely on two decisions of the Privy Council — 'Mst. Bhagbutti Daee v. Bholanath Thakoor', 2 Ind App 256 at p. 262 (PC) (G) and — 'Asghar Reza Khan v. Mahomed Mehdi Hossein Khan', 30 Ind App 71 at p. 76 (PC) (H), but neither of those two cases are really of much help or even relevant.

In Mst. Bhagbutti Daee's case (G), it was held that a Hindu widow had no greater power of alienation over the profits than she had over the corpus of her husband's estate and that the property acquired by the widow from the income of her husband's estate could not be alienated by her and must be deemed to be of the same nature as the rest of the property. This decision is no longer good law as in later decisions their Lordships of the Judicial Committee have held that a Hindu widow has full rights of disposal over the profits from the estate of her deceased husband. In Asghar Reza's case (H), the property dealt with was a bazar and the question was when the entire rights in the zamindari were sold, the erstwhile Zamindar could claim that he was still the owner of the bazar. It was pointed out that the bazar was held on the land situated within the zamindari and it was appurtenant to the zamindari itself and must go with it. The case did not relate to the family residential house of a zamindar.

(27) We are, therefore, of the opinion that the question in each case must depend upon the facts but the presumption must be that in a case of a residential house it is not necessarily appurtenant to the zamindari and unless it can be established from evidence that it was intended to be transferred along with the rest of the zamindari, the house must be deemed to have remained the property of the erstwhile Zamindar.

(28) The result, therefore, is that this appeal must be allowed, the decree of the lower appellate court set aside and the decree of the trial Court restored with costs in this court and the lower appellate Court.

D.H.Z. Appeal allowed.

(S) **A.I.R. 1955 ALLAHABAD 296 (Vol. 42, C.N. 87)**

SPECIAL BENCH

MALIK C. J., MOOTHAM AND V. BHARGAVA JJ. (17-12-1954)

Mahabir Prasad Niranjanlal, Applicant v. Commr. of Income-tax, U. P. and V. P., Lucknow, Respondent.

Misc. Case No. 83 of 1949.

(a) Income-tax Act (1922), S. 30(2) — "Ordinarily", meaning of.

The argument that an Appellate Assistant Commissioner can accept the appeal even if it is filed beyond 30 days if the delay is only of a few days is not sound. The word 'ordinarily' in S. 30 (2) does not affect the period of 30 days. The word has probably been used as the Appellate Assistant Commissioner has the right to admit an appeal filed after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within time. (Para 8)

Anno: I. T. Act, S. 30 N. 2.

(b) Income-tax Act (1922), Ss. 30 (1) and 33 — Rejection of appeal by Appellate Assistant Commissioner on ground of limitation — Appeal from his order does not lie.

An order by the Appellate Assistant Commissioner refusing to admit an appeal on the ground that it is not presented within time is an order under S. 30(1) of the Act. Since it is an order under S. 30 (1), no appeal lay to the Appellate Tribunal against that order. Case law Ref. (Para 16)

Where an Appellate Assistant Commissioner has held that the appeal is barred by limitation and sufficient cause had not been made out for condoning the delay, his order is an order under S. 30(1) and not an order under S. 31. AIR 1953 SC 118, Foll. (Para 16)

And as no appeal lay to the Appellate Tribunal under S. 33, the Appellate Tribunal cannot consider the question whether the Appellate Assistant Commissioner should or should not have condoned the delay. (Para 18)

Anno: I. T. Act, S. 30 N. 1; S. 31 N. 2; S. 33 N. 1.

CASES REFERRED: Paras

(A) (V41) AIR 1954 Cal 468: (1952) 22 ITR 131 9
(B) (V39) AIR 1952 Mad 232: (1952) 21 ITR 1 9
(C) (V19) AIR 1932 PC 165: 59 Ind App 283 (PC) 9
(D) (V41) AIR 1954 SC 73: 1954 SCA 973 (SC) 9
(E) (V22) AIR 1935 All 572: (1935) 3 ITR 200 11
(F) (V39) AIR 1952 All 249: (1951) 19 ITR 63 11
(G) (V39) AIR 1952 All 143: (1951) 19 ITR 58 11
(H) ('50) 1950-18 ITR 204 (All) 11
(I) (V39) AIR 1952 Bom 157: (1952) 21 ITR 63 11
(J) (V40) AIR 1953 All 775: (1953) 24 ITR 141 11
(K) (V25) AIR 1938 PC 175: 65 Ind App 236 (PC) 11
(L) (V16) AIR 1929 Lah 593: 10 Lah 596 (FB) 11
(M) (V40) AIR 1953 SC 118: (1953) 23 ITR 180 (SC) 14

J. Swarup, for Applicant; S. C. Das, for Respondent.

MALIK C. J.:

This is a reference under S. 66(1) of the Indian Income-tax Act. The questions originally referred to this Court were as follows :

"1. (a) Whether an order passed by an Appellate Assistant Commissioner refusing to admit an appeal by holding that it was not presented within time is an order under S. 30, Cl. (2), of the Income-tax Act or under S. 31 of the Act?

(b) Whether an appeal is competent to the Tribunal from such order?"

(2) An application was filed under S. 66(2), Income-tax Act, stating that certain other questions of law arose out of the Appellate Order and praying that those questions should also be referred to this Court for decision. By an order of this Court dated 19-9-1950, the Appellate Tribunal was directed to refer certain other questions, and as a result of that order a fresh reference was made and besides the questions mentioned above three other questions were framed which were as follows :

"2. Whether an appeal to the Appellate Assistant Commissioner was or was not filed within time i.e. whether the assessee was entitled to a deduction of the whole period between 15th May, 1946 to 7th August, 1946 or only the period between 16th May, 1946 and 19th July, 1946?

3. Whether an appeal lies to the Tribunal in a case where the appeal to Appellate Assistant Commissioner was really not barred by limitation but was within time and the Appellate Assistant Commissioner has refused to admit it?

4. Whether the Tribunal was entitled to consider whether the grounds for condonation of the delay were or were not sufficient where the Appellate Assistant Commissioner had refused to condone the delay?"

(3) The assessee is Mahabir Prasad Niranjanlal of Banaras, the assessment year being 1945-46. On 30-4-1946, the Income-tax Officer passed the assessment order and on 11-5-1946, a notice of demand was served on the assessee. On 15-5-1946, the assessee applied for copies of the assessment order. This application was received by the Income-tax Officer at Kanpur on 16-5-1946. On 19-7-1946, the Income-tax Officer sent the copies by registered post but they were not delivered to the assessee till 7-8-1946. On 2-9-1946, the assessee filed an appeal before the Appellate Assistant Commissioner, but the Appellate Assistant Commissioner refused to admit the appeal on the ground that the appeal was barred by limitation.

(4) Under S. 30(2), Income-tax Act, an appeal has to be filed within thirty days. The relevant portion of the section reads:

"The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment....."

(5) Under S. 67A the day on which the order complained of was made and the time requisite for obtaining a copy of such order has to be excluded.

(6) On behalf of the assesees, it was claimed before the Appellate Assistant Commissioner that the time between 15-5-1946, and 7-8-1946, was the time requisite for obtaining the copies. The Appellate Assistant Commissioner, however, held that time up to 19-7-1946, could be excluded but not up to 7th of August. He accordingly held that the appeal had been filed beyond time and there was no sufficient cause for condonation of the delay. Against that order, an appeal was filed before the Appellate Tribunal. The Appellate Tribunal agreed with the Appellate Assistant Commissioner that time could be excluded only up to 19-7-1946, the date on which the copy was issued to the assessee by post, and not up to 7-8-1946, when the copy was received by him. The Appellate Tribunal also held that the order of the Appellate Commissioner refusing to admit the appeal for hearing was an order under S. 30, Cl. (2) and, as such, not appealable under S. 33 of the Act.

(7) The question that arises for consideration is whether the order passed by the Appellate Assistant Commissioner on 25-11-1946, refusing to admit the appeal was an order under S. 31. If it was not an order under S. 31, then no appeal lay to the Tribunal under S. 33 of the Act and there could be no reference to this Court under S. 66.

(8) The first point to which our attention has been drawn is the use of the word 'ordinarily' in S. 30, sub-s. (2) and it has been urged that an Appellate Assistant Commissioner can accept the appeal even if it is filed beyond 30 days if the delay is only of a few days. We do not think that the word 'ordinarily' affects the period of 30 days. The word has probably been used as the Appellate Assistant Commissioner has the right to admit an appeal filed after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within time.

(9) The other argument of learned counsel was that whenever a memorandum of appeal is presented to the Appellate Assistant Commissioner, whatever the defect in it may be, whether beyond time or within time, whether it is in the prescribed form and is verified in the prescribed manner or not, it is an appeal which has to be disposed of by an order made under S. 31(3) of the Indian Income-tax Act. Learned counsel, however, in view of certain decisions of the Supreme Court,

modified this statement which he had based on the decisions of the Calcutta and Madras High Courts in — 'Gour Mohan Mullick v. Commr. of Agricultural Income-tax, West Bengal', AIR 1954 Cal 468 (A) and — 'Commr. of Income-tax, Madras v. Shahzadi Begum', AIR 1952 Mad 232 (B) and urged before us that if the following three requirements are satisfied, the order must be an order under S. 31:

(a) The Appellate Assistant Commissioner has fixed a date for the hearing of the appeal presented to him;

(b) the appeal has been disposed of; and,

(c) the effect of the order is to confirm, reduce, enhance or annul the assessment.

For the proposition that a defective memorandum of appeal is nevertheless an appeal, learned counsel has relied on a decision of the Privy Council in — 'Nagendra Nath v. Suresh Chandra', AIR 1932 PC 165 at pp. 166-167 (C), which was followed by the Supreme Court in — 'Raja Kulkarni v. State of Bombay', AIR 1954 SC 73 at pp. 74-75 (D). In the latter case, their Lordships of the Supreme Court held, following the Privy Council, that

"any application by a party to the Appellate Court to set aside or revise a decree or order of a Court subordinate thereto is an 'appeal' within the meaning of the above provisions, even though it is irregular or incompetent, or the persons affected by the application to execute were not parties, or it did not imperil the whole decree or order."

(10) The argument was that as a defective memorandum of appeal or a memorandum of appeal presented beyond the period of limitation was still an appeal it could be disposed of only under S. 31; and even though an order rejecting a memorandum on the ground that it is defective or it is barred by limitation may not strictly come within the ambit of any of the sub-sections of S. 31, in effect it amounts to an order confirming the assessment and is, therefore, an order under S. 31(3)(a).

(11) The point arose for the first time in this Court in — 'Shivnath Prasad v. Commr. of Income-tax, Central and United Provinces', AIR 1935 All 572 (E). In that case the appeal had not been presented within time and the Appellate Assistant Commissioner not being satisfied that sufficient cause had been made out refused to admit the appeal. It was held that his order was not an order u/s. 31. This view was followed by a Bench of this Court in the 'Municipal Board, Agra v. Commr. of Income-tax, United Provinces', AIR 1952 All 249 (F). In — 'Mohd. Nain Mohd. Alam v. Commr. of Income-tax, U. P.', AIR 1952 All 143 (G), the Appellate Assistant Commissioner had passed an 'ex parte' order admitting the appeal and condoning the delay under S. 30, sub-s. (2), but later, after having heard the other side, he decided against the assessee and dismissed the appeal on the ground that it was time-barred. It was held by a Bench of this Court that this was an order under S. 31.

In — 'Special Manager, Court of Wards, Narain-das Narsinghdas v. Commr. of Income-tax, U.P. (1950) 18 ITR 204 (All) (H), it was held that an order by an Appellate Assistant Commissioner refusing to condone the delay in the filing of an appeal was an order under S. 30(2), but that if the appeal was in fact within time, it might be possible to urge that it was an order under S. 31, but the point was not decided. In — 'K. K. Porbunderwalla v. Commr. of Income-tax, Bombay City', AIR 1952 Bom 157 (I), an Appellate Assistant Commissioner had passed an order holding that an appeal was time barred and refusing to condone the delay. The Court held that that order, so far as it rejected the appeal on the ground that it was barred by limitation, was an order under S. 31, but that so far as it refused to condone the delay was an order under S. 30 (2). The learned Chief Justice observed:

"that it was not the intention of the Legislature that in a case where the Appellate Assistant Commissioner takes the view that the appeal is barred by limitation, his view should be final and should not be challenged before the Tribunal. The Appellate Assistant Commissioner may take the view that the appeal is barred by limitation on various grounds; he may hold that the appeal is barred on appreciation of evidence as to facts, he may consider that the appeal is barred by limitation on an interpretation of the law, but in every case his decision is subject to a challenge before the Tribunal."

In 'Padampat Singhania v. Commr. of Income-tax U. P. and Ajmer-Merwara', AIR 1953 All 775 at pp. 776-777 (J), this Court followed the view of the Privy Council in — 'Commr. of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas', AIR 1938 PC 175 (K), and of the Lahore High Court in — 'Duni Chand v. Commr. of Income-tax', AIR 1929 Lah 593 at p. 594 (FB) (L), that where an order could have been passed under a particular provision of law purporting to have been made under some other provision, the Court would consider it as an order under a section which really applied and not the section mentioned in the order.

(12) When a memorandum of appeal is presented before an Appellate Assistant Commissioner after the expiration of the period fixed, S. 30 (2) provides that he may admit the appeal if he is satisfied that the appellant had sufficient cause for not presenting it within time. If an appeal is presented after the expiration of the period fixed and the Appellate Assistant Commissioner is not satisfied that the appellant had sufficient cause for not presenting it within that period, he is bound to reject the appeal. The only order that can, therefore, be passed under S. 30 is an order condoning or refusing to condone the delay where the appeal is time barred and the consequential order admitting or refusing to admit the appeal. Section 30 does not provide for the passing of any other order by an Appellate Assistant Commissioner. An order passed one way or the other at the time of the presentation of an appeal beyond time must, therefore, be an order under S. 30, sub-s. (2).

(13) When a memorandum of appeal is presented to an Appellate Assistant Commissioner within the period fixed under the Income-tax Act, S. 30 does not lay down how it is to be dealt with. Under S. 31 (1) a date and the place for hearing has then to be fixed. If, however, the appellate Assis-

tant Commissioner instead of fixing a date and place for the hearing of the appeal rejects the appeal under the mistaken impression that it is time-barred and there is no sufficient cause for condonation of the delay, the question will arise whether the order passed by him can be deemed to be an order under S. 31.

(14) In view, however, of the latest decision of the Supreme Court in — 'Commr. of Income-tax, Madras v. Arunachalam Chettiar', AIR 1953 SC 118 (M), this question can no longer be said to be an open question. In that case the Income-tax Officer made an assessment order on the 23rd of January, 1942. There was an appeal to the Appellate Assistant Commissioner who reduced the assessment by an order dated 25-5-1942. There was a further appeal to the Appellate Tribunal which gave certain directions and allowed the appeal in part by an order dated 20-8-1943. On 26-9-1945 the Income-tax Officer purported to follow the directions of the Appellate Tribunal and amended his previous assessment order. He, however, issued no fresh notice of demand under S. 29.

The assessee filed an appeal before the Appellate Assistant Commissioner who rejected the appeal by an order dated 19-11-1945, on the ground that no appeal lay to him. The assessee then made an application to the Appellate Tribunal which passed an order on 20-2-1946, by which it amended the order of the Income-tax Officer dated 26-9-1945. The question arose whether the order of the Appellate Tribunal dated 20-9-1946, could be said to be an order under S. 33, Income-tax Act, so that a reference could be made to the High Court. The Supreme Court held that it was not such an order. The ground taken was firstly, that the order of the Income-tax Officer dated 26-9-1945, was not an order under S. 23 and, therefore, no appeal lay to the Appellate Assistant Commissioner under S. 30 of the Act and there was in consequence no question of a further appeal to the Tribunal under S. 33 of the Act. In the alternative, it was held that even if the Appellate Assistant Commissioner had wrongly declined to admit the appeal, his order was not an order under S. 31 and there could not, therefore, be an appeal under sub-s. (1) of S. 33 to the Tribunal, and a reference to the High Court under S. 66.

Their Lordships said:

"Even if the order dated 26th September, 1945, made by the Income-tax Officer after the matter came back to him to give effect to the decisions of the Appellate Tribunal be regarded as an order made by him under S. 23 or S. 27 and as such appealable under S. 30 (1) then the order made by the Appellate Assistant Commissioner on 19th November, 1945, declining to admit the appeal clearly amounted to a refusal on his part to exercise the jurisdiction vested in him by law. An order thus founded on an error as to his jurisdiction may conceivably be corrected by appropriate proceedings but it cannot certainly be regarded as such an order as is contemplated by any of the sub-sections of section 31. Such an order not coming within the purview of S. 28 or S. 31, no appeal lay therefrom to the Appellate Tribunal under S. 33 (1) and if no such appeal properly came before the Appellate Tribunal it could not properly make an order under S. 33 (4) and if there was no order under S. 33(4) there could be no reference under S. 66, sub-s. (1) or sub-s. (2)."

(15) Learned Counsel for the assessee has urged that the view expressed by the Supreme Court in the alternative is 'obiter' and on the facts of the case the question did not arise as the assessee had not gone up in appeal to the Tribunal against the order of the Appellate Assistant Commissioner dated 19-11-1945, declining to admit the appeal but had moved the Tribunal by an application to correct the mistake made by the Income-tax Officer in his order dated 26-9-1945. Art. 141 of the Constitution, however, provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India. We must, therefore, consider ourselves bound by the law declared by the Supreme Court even though it was an alternative view taken by their Lordships.

(16) In the case before us the Appellate Assistant Commissioner had held that the appeal was barred by limitation and sufficient cause had not been made out for condoning the delay. Whether his decision was right or wrong, in the view taken by their Lordships of the Supreme Court his order must be held to be an order under S. 30 (1) and not an order under S. 31. Our answer, therefore, to the first question is (a) that the order by the Appellate Assistant Commissioner refusing to admit the appeal on the ground that it was not presented within time was an order under S. 30 (1) of the Act, and (b) that since it was an order under S. 30 (1), no appeal lay to the Appellate Tribunal against that order.

(17) In view of the Supreme Court decision that whether the Appellate Assistant Commissioner is right or wrong in not admitting the appeal the order cannot be an order under S. 31 the second question does not arise and the answer to the third question must be in the negative.

(18) The answer to the fourth question must be that as no appeal lay to the Appellate Tribunal under S. 33, the Appellate Tribunal could not consider the question whether the Appellate Assistant Commissioner should or should not have condoned the delay.

(19) The Department is entitled to its costs, which we assess at Rs. 500/-.

V.S.B. Answers accordingly

(S) A.I.R. 1955 ALLAHABAD 299 (Vol. 42, C.N. 88)

FULL BENCH

MALIK C. J., AGARWALA AND V. BHARGAVA JJ. (5-1-1955)

Shyamlal Pragnarain, Applicant v. Commissioner of Income-tax, U. P., Lucknow, Opposite Party.

Misc. Case No. 80 of 1949.

(a) Excess Profits Tax Act (1940), S. 21 and Sch. I, R. 12 — Income-tax Act (1922), S. 10(2)(x), Proviso — Scope — Bonus or commission payable to employee — Reasonableness for purpose of allowing deduction — Matters to be taken into account.

Section 21, Excess Profits Tax Act makes the provision of S. 10, Income-tax Act, applicable to the computation of the amount of Excess Profits Tax. The reasonableness of the amount of bonus or commission has to be determined by the Income-tax Officer and the Excess Profits Tax Officer under S. 10(2)(x) with reference to the proviso, that is, with reference to the pay of the employee, his conditions of service, profits of the business for the year in question and general practice in similar business. The Excess Profits Tax Officer has been given the further power under R. 12, Sch. I, Excess Profits Tax Act, not to allow deduction in respect of expenses in excess of the amount which he considers reasonable and necessary having regard to the requirements of the business and services rendered. The question of reasonableness of the amount spent must, therefore, be judged with reference to the requirements of the business and if the expenditure relates to a payment for services then the amount must be reasonable having regard to the actual services rendered by the person concerned. (Paras 7, 8)

The word 'reasonable' in S. 10(2)(x), Income-tax Act or in R. 12 of Sch. I, Excess Profits Tax Act, and the words 'necessary having regard to the requirements of the business' in the same rule do not mean that there must be a legal liability to pay. Even an ex gratia payment of bonus or commission may be a reasonable or necessary payment having regard to the requirements of the business under R. 12 and the amount may be reasonable having regard to the provisions of S. 10(2)(x), Proviso, Indian Income-tax Act. (Para 9)

For the purposes of taxation, the question whether the payment is made to employee under a legal contract or it is merely an ex gratia payment does not appear to be of much importance. The question as to the terms of the contract may have been a matter of importance as between the employer and the employee but not for the purposes of the determination of the question of reasonableness or necessity either under the Income tax Act or the Excess Profits Tax Act. (Para 11)

The questions of reasonableness and the payment being necessary having regard to the requirements of the business have to be judged in accordance with the exigencies of the business keeping in view ordinary commercial practice and commercial expediency, and the Excess Profits Tax Officer must, for this purpose, place himself as far as possible in the shoes of the persons carrying on the business and judge the question from their point of view. (Para 12)

The assessee firm had agreed to pay commissions at the rate of 12 per cent. to the Manager and 3 per cent. to the Assistant Manager. There was no written agreement but commissions at these rates were calculated on the profits without deducting income-tax and payments were made of the amounts thus worked out from the year 1935 to 1940. Even after the coming into force of the Excess Profits Tax Act the commissions for the years 1941 and 1942 were calculated and paid on the profits made without deducting income-tax or excess profits tax and neither the Income Tax Officer nor the Excess Profits Tax Officer objected to such payment. In the year 1943 the assessee firm made a profit of Rs. 4,58,957/- and paid commissions to the Manager and the Assistant Manager totalling a sum of Rs. 68,842/-. The sum of Rs. 4,58,957/- was the total profit without deducting the income-tax or the excess profits tax payable. The Income-tax Officer accepted the contention of the assessee that the sum of Rs. 68,842/- was an allowable deduction under S. 10, Indian Income-tax Act. The Excess Profits Tax Officer, however, while accepting the figure that had been worked out by the Income Tax Officer disallowed a sum of Rs. 33,525/- out of the sum of Rs. 58,842/- paid by the assessee firm to the Manager & the Assistant Manager. The order was confirmed in appeal by the Tribunal who thereupon referred the matter to the High Court.

Held (i) the powers of the Excess Profits Tax Officer are limited by the provisions of S. 10 (2) (x), Income Tax Act and R. 12, Sch. I Excess Profits Tax Act. What the assessee should pay to the Manager and the Assistant Manager depends on the terms of the contract between the parties. The Excess Profits Tax Officer can, however, decide under R. 12 of Sch. I, Excess Profits Tax Act whether the payment is reasonable after taking into consideration the provisions of that clause and he has to decide whether the deduction claimed was a reasonable deduction and was necessary having regard to the exigencies of the business and the services rendered by the Manager and the Assistant Manager. (Para 37)

(ii) Any contract between the assessee firm and its employees does not take away the right of the Excess Profits Tax Officer to consider the question of the reasonableness of the payment under S. 10(2)(x), Income-tax Act or R. 12, Sch. I Excess Profits Tax Act, but the mere fact that it was a voluntary payment does not by itself make it either unreasonable or unnecessary. The decision has to be made by the Excess Profits Tax Officer with reference to all the facts and circumstances and in accordance with the exigencies of the business. He must take note of all such other matters as businessmen would generally take into consideration in coming to the conclusion whether a particular bonus or commission should or should not be paid having regard to the requirements of the business and the services rendered by the employees. Case law discussed. (Para 38)

Anno: I. T. Act. S. 10, N. 11.

(b) Excess Profits Tax Act (1940) — Excess Profits Tax and Income Tax — Distinction between the two pointed out.

It is true that assessment under Income-tax Act and the Excess Profits Tax Act is made more or less on the same principles and the

tax is recoverable in the same manner and both are in one sense tax on profits made. But the reasons for the imposition of the tax in the two cases are entirely different. While Income-tax is a tax on the total income from all sources and is claimed on the ground that the state is entitled to a share in the profits, Excess Profits tax is levied only on income from business and purports to be the whole or part of the extra profits made due to the extraordinary situation created by the war over and above the normal profits made by the business.

The tax is, therefore, in respect of a business in contrast to the provisions of the Income-tax Act which provides for a tax being levied on a person. Under S. 12, Excess Profits Tax Act excess profits tax has to be deducted as an expenditure for the purposes of computation of Income-tax. Income-tax is levied on a sliding scale. While Excess Profits tax is charged either at a fixed percentage of the difference between the profits earned and the standard profits. There is no provision in the Excess Profits Tax Act for any refund being made, as there is in S. 48, Income Tax Act. The whole concept behind the two taxes, even if there are many things common between the two, is different and it cannot, therefore, be said that Excess profits Tax must for all purposes be treated in the same way as Income-tax. Case Law Ref.

(Para 24)

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 538: 1954 All LJ 452 (FB) 10
(B) (V31) AIR 1944 Bom 5: 1944-12 ITR 104 14, 33
(C) (1945) 1945-13 ITR Supp. 23: 1944-1 All ER 510 17
(D) (1906) 1906 AC 10: 75 LJ Ch 1 19, 20
(E) (1952) 1952 AC 401: 1952-1 All ER 531 20
(F) (1948) 1948 AC 508: 1948-2 All ER 367 20, 21, 23
(G) (1906) 1906 AC 448: 75 LJ KB 864 20
(H) (1942) 1942-2 All ER 528 21, 22
(I) (1928) 12 Tax Cas 976 25
(J) (1947) 1947-1 All ER 669: 1948-1 KB 130 28
(K) (1920) 1920 AC 273: 89 LJ KB 481 28
(L) (1917) 1917-1Ch 639: 86 LJ Ch 464 29
(M) (1919) 1919-2 Ch 254: 88 LJ Ch 398 30
(N) (1921) 1921-3 KB 597: 90 LJKB 1366 31
(O) ('45) 47 Bom LR 774 32
(P) (V40) AIR 1953 Punj 180: 1953-23 ITR 167 (FB) 34
(Q) (V42) (S) AIR 1955 Mad 56: 1954-26 ITR 265 35

G. S. Pathak, Balram Upadhya, for Applicant, J. Swarup, for Opposite Party.

MALIK C. J.:

This case has been referred to a Full Bench on a difference of opinion.

(2) Proviso (2) to S. 66-A, Indian Income-Tax Act is to the effect that when there is a difference of opinion between the Judges hearing a reference the point of law upon which they differ and the case shall then be heard upon that point only by one or more of the other Judges of the High Court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it. By reason of this proviso we had some doubts whether one of us who was a member of the Division Bench should be on this Full Bench but Mr. Pathak on behalf of the assessee has urged that the proviso only refers to a case where a point of law has been referred for decision and, in such a case, the opinion of the Judge to whom the point has been referred has to go back to the Bench which had heard it and the order has to be passed by it. But that where the whole case has been referred to a new Bench this proviso does not apply and that we can hear the whole reference afresh and give our own decision. This view has been supported by Mr. Jagdish Swarup, counsel for the other side, and both the learned counsel have made a request that even if there be any irregularity they are waving the same and have prayed that the case may be heard and decided by this Bench.

(3) Proceeding now to the reference itself, the facts are very simple. Shyam Lal Prag Narain is a firm carrying on business in Agra. On some date prior to the year 1935 the assessee firm had agreed to pay commissions at the rate of 12 per cent to the Manager and 3 per cent to the Assistant Manager. There was no written agreement but commissions at these rates were calculated on the profits without deducting income-tax and payments were made of the amounts thus worked out. On 6-4-1940, the Excess Profits Tax Act received the assent of the Governor-General and came into force. The Commissions were calculated upon 31-12-1941, and paid on the profits made without deducting income-tax or excess profits tax. The same procedure was followed the next year and commissions were worked out on the same basis on the profits made upto 31-12-1942, and paid to the Manager and the Assistant Manager. The total amount paid as commission was treated as an allowable deduction from the income for payment of Income-tax and Excess Profits Tax and no objection was raised by either the Income-tax Officer or the Excess Profits Tax Officer.

(4) In the year 1943 the assessee firm made a profit of Rs. 4,58,957/- and paid commissions to the Manager and the Assistant Manager totalling a sum of Rs. 68,842/-. The sum of Rs. 4,58,957/- was the total profit without deducting the income-tax or the excess profit tax payable. The Income-tax Officer accepted the contention of the assessee that the sum of Rs. 68,842/- was an allowable deduction under S. 10 Indian Income-tax Act, but whether he allowed the deduction under S. 10(2)(X) or 10(2)(XV) of the Act is not clear and the counsel for the parties are not agreed on the point. The Excess Profits Tax Officer, however, while accepting the figure that had been worked out by the Income Tax Officer disallowed a sum of Rs. 33,525/- out of the sum of Rs. 68,842/- paid by the assessee firm to the Manager and the Assistant Manager.

(5) The assessee appealed to the Tribunal but the appeal failed. The Tribunal thereupon referred the following two questions for decision to this Court:

"(1) Whether in spite of the fact that according to the pre-existing practice commission had been allowed on the net profits of the paying firm at the rate of 12 per cent and 3 per cent respectively before dedcution of the tax, under R. 12 Sch. 1 E. P. T. Rules, the Excess Profits Tax Officer was legally justified in holding that the Excess Profits Tax payable on its profits by the assessee firm should have been deducted before calculating the commission payable at fixed percentage on its net profits?

(2) Whether on the facts and in the circumstances of the case the payment of commission to Babu Lal and Shrichand at fixed percentage of profits without deduction of the excess profits tax by the assessee therefrom could legally be held by the Excess Profits Tax Officer to be unreasonable and unnecessary within the meaning of R. 12(1), Sch. 1, E. P. T. Act?"

(6) As regards the second question, both the learned Judges before whom the reference was put up at the first hearing were of the opinion that the question did not arise. It was as regards the answer to the first question that they had differed. The whole case having been referred to us we now proceed to answer the two questions afresh.

(7) We consider that at the outset it would be useful to point out the relevant provisions of law as the Tribunal does not appear to have kept them clearly in view when deciding the case and on that account a lot of confusion has been created. Section 10, Income-tax Act provides for the mode of computation of income for the purpose of payment of income-tax; S. 10(2) gives the list of allowable deductions and S. 10(2)(x) allows the deduction of

"any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission."

The proviso to this section, however, gives the Income-tax Officer a right to decide whether the amount of the bonus or commission is a reasonable amount, having regard to—

(a) the pay of the employee and the conditions of his service;
(b) the profits of the (business, profession or vocation) for the year in question; and
(c) the general practice in similar (business, profession or vocation).

Section 21, Excess Profits Tax Act makes the provision of S. 10, Income-tax Act, applicable to the computation of the amount of Excess Profits Tax. The Excess Profits Tax Officer is, therefore, also entitled to consider whether the amount payable to an employee as bonus or commission, where such amount would not have been payable to him as profits or dividend, was a reasonable payment, keeping in view the pay of the employee and the conditions of his service, the profits of the business for the year in question and the general practice in similar business. Rule 12 of Sch. I, Excess Profits Tax Act (XV of 1940) is as follows:

"12. (1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and, in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned;

Provided that no disallowance under this rule shall be made by the Excess Profits Tax Officer unless he has obtained the prior authority of the Commissioner of Excess Profits Tax.

(2) Any person who is dissatisfied with the decision of the Excess Profits Tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal.

(3) In relation to chargeable accounting periods ending after 31-12-1942, the Central Government may make rules for determining the extent to which deductions shall be allowed in respect of bonuses or commissions paid."

This rule gives the Excess Profits Tax Officer a right to disallow expenses in excess of the amount which he considers reasonable and necessary having regard to the requirements of the business and, where payments are made for services, to the actual services rendered by the person concerned. There is, however, a check on his authority and he can do so after he has obtained prior authority of the Commissioner of Excess Profits Tax. This rule was introduced probably because the employers, when they realised that they would have to pay a large part of their profits as Excess Profits Tax, became generous and gave away a good part of it to their employees, which generosity they would not have shown if they had not to pay Excess Profits Tax.

(8) The reasonableness of the amount of bonus or commission has to be determined by the Income-tax Officer and the Excess Profits Tax Officer under S. 10(2)(x) with reference to the proviso, that is, with reference to the pay of the employee, his conditions of service, profits of the business for the year in question and general practice in similar business. The Excess Profits Tax Officer has been given the further power under R. 12, Sch. I, Excess Profits Tax Act, not to allow deduction in respect of expenses in excess of the amount which he considers reasonable and necessary having regard to the requirements of the business and services rendered. The question of reasonableness of the amount spent must, therefore, be judged with reference to the requirements of the business and if the expenditure relates to a payment for services then the amount must be reasonable having regard to the actual services rendered by the person concerned.

(9) Learned counsel for the assessee has admitted that the word 'reasonable' in S. 10(2)(x), Income-tax Act or in R. 12 of Sch. I, Excess Profits Tax Act, and the words 'necessary having regard to the requirements of the business' in the same rule do not mean that there must be a legal liability to pay. He has admitted—and to our minds rightly—that even an ex gratia payment of bonus or commission may be a reasonable or necessary payment having regard to the requirements of the business under R. 12 and the amount may be reasonable having regard to the provi-

sions of S. 10(2)(x), proviso, Indian Income-tax Act.

(10) As was observed in — 'Basti Sugar Mills Company Ltd. v. State of Uttar Pradesh', AIR 1954 All 538 at p. 547 (A):

"It does not appear to be necessary to enter into the history of the relations between the industrialists and their workmen in order to determine the nature of 'bonus'. There can be no doubt, however, that, in modern times, bonus, is clearly regarded as deferred wages payable to employees which may be claimed by them as of right under the terms of employment. In the conditions, under which modern industries function, bonus has now come to be recognised as a right of employees which they can claim from their employers under certain circumstances."

The practice of payment of bonus or commission out of the profits of a business has grown by reason of the recognition that the profits are not entirely due to the capital invested but are at any rate, partly due to the labour put in by the workmen who should, therefore, get a share in them. It is also now recognised that such payments work as an extra incentive and help to promote efficiency and also contentment.

(11) It was admitted in the case before us that commission was paid to the Manager and the Assistant Manager at the rate of 12 per cent. and 3 per cent. without deducting either Income-tax or Excess Profits Tax and no dispute had arisen for decision between the assessee and the Manager and Assistant Manager as regards the terms of the contract. For the purposes of taxation, the question whether the payment was made to the Manager and the Assistant Manager under a legal contract or it was merely an ex gratia payment does not appear to be of much importance. The payment was made and the amount was claimed as an allowable deduction. Whether the amount of expenditure incurred could be reduced or disallowed had to be considered in accordance with the provisions of S. 10(2)(x), Income-tax Act and R. 12, Sch. I, Excess Profits Tax Act. The amount could be disallowed in whole or in part if it was found that it was not reasonable and it was not necessary having regard to the requirements of the business and the actual services rendered by the Manager and the Assistant Manager. This was the point that the Excess Profits Tax Officer was required to decide and to which the Appellate Tribunal should have directed its attention. The question as to the terms of the contract may have been a matter of importance as between the employer and the employee but not for the purposes of the determination of the question of reasonableness or necessity either under the Income-tax Act or the Excess Profits Tax Act.

(12) It has also not been disputed before us that the questions of reasonableness and the payment being necessary having regard to the requirements of the business have to be judged in accordance with the exigencies of the business keeping in view ordinary commercial practice and commercial expediency, and the Excess Profits Tax Officer must, for this purpose, place himself as far as possible in the shoes of the persons carrying on the business and judge the question from their point of view.

(13) In the case before us the Appellate Tribunal did not clearly bear in mind what it was called upon to decide and the line followed by it in its appellate order for coming to the conclusion that the Excess Profits Tax Officer was justified in reducing the amount is something like this:

"(a) The Excess Profits Tax payable on the profits made by the assessee firm should have been deducted before calculating the commission payable to the Manager and the Assistant Manager.

(b) Payment made to them on the basis adopted by the assessee firm was of a large sum than what was due to them; and

(c) the payment could not, therefore, be held to be necessary for the requirements of the business as it was both unnecessary and unreasonable to pay more than the agreed amount."

(14) The whole basis of the decision of the Appellate Tribunal, therefore, is that the payment in excess of the agreed amount, being ex gratia payment, could not be held to be reasonable or necessary for the requirements of the business. The Excess Profits Tax Officer followed more or less the same line. He said that in accordance with the decision in — 'Walchand & Co. Ltd. v. Hindustan Construction Co. Ltd.', AIR 1944 Bom 5 (B), the amount of excess profits tax had to be deducted before commission could be worked out for payment to the Manager and the Assistant Manager, and it was, therefore, unnecessary and unreasonable to pay more than the agreed proportion of the profits. The Excess Profits Tax Officer, however, went on to hold that the whole amount paid was an allowable deduction under S 10, Income-tax Act.

(15) We have already said that the question whether it was an ex gratia payment or a payment which the assessee was liable to made under an agreement does not decide the point. Even an ex gratia payment may be considered to be an allowable deduction under S. 10(2)(x), Income-tax Act, and R. 12, Sch. I, Excess Profits Tax Act. On the mere finding, therefore, that it was an ex gratia payment, without considering other facts and circumstances, neither the Excess Profits Tax Officer nor the Appellate Tribunal could come to the conclusion that the payment was necessarily neither reasonable nor necessary having regard to the requirements of the business. Learned counsel for the Department has not disputed this proposition but he has urged that the question whether it was a legal liability that was being discharged or it was merely an ex gratia payment that was being made might be one of the points to be taken into consideration. Even if it is a point to be taken into consideration, it cannot be said to be a circumstances of any great importance, as the question of reasonableness under R. 12 of Sch. I, Excess Profits Tax Act, has to be decided in accordance with the provisions of that rule and the Excess Profits Tax Officer has to decide the question of reasonableness and the question whether the payment was necessary having regard to the requirements of the business and in accordance with the services rendered by the employees with reference to business principles and exigencies of the business.

(16) A large number of cases were cited on the point whether Excess Profits Tax should or should

not be deducted before calculating the commission payable to an employee. This must depend in each case on the terms of the contract. Where the contract is in writing the terms of the written agreement have to be interpreted, but where there is no written agreement, as in this case, the terms of the agreement have to be gathered from such material as may be available.

(17) As was pointed out by Lord Simon in — 'L. C. Ltd. v. G. B. Ollivant, Ltd.', 1945-13 ITR (Supp) 23 (C):

".....the problem.....is the not unfamiliar one of deciding how an agreement should be construed when its written terms provide elaborately for many things, but do not include any express provision to meet a contingency which the parties presumably never anticipated but which has since occurred. The rule to be followed in such cases is clear. The only difficulty is in applying it. The rule is that we are not to make a new agreement for the parties, or to speculate how they would have dealt with the new contingency had they anticipated it; but that (except in cases when the intervening event produces frustration) we have to take the words of the agreement as they stand and apply them, as best we can, to the new situation which has caused the difficulty."

(18) In that case there was a written agreement. The question arose between two contracting parties whether the price which was to be paid by certain instalments was to be calculated on the basis of profits after deduction of the Excess Profits Tax or before deduction of the Excess Profits Tax. Two of the Law Lords, Viscount Simon & Lord Macmillan, were of the opinion that excess profits tax should not be deducted from the profits while the other three Law Lords, Lord Thankerton, Lord Russell and Lord Wright, took the contrary view.

(19) In Halsbury's Laws of England, Edition 3, Vol. 6, Para. 591, p. 291, the law on the point is stated as follows:

"Directors who are remunerated by a percentage of the net profits or by commission on the sum available for distribution are entitled to compute their remuneration on the profits before income-tax is deducted therefrom. As regards profits tax it seems that if on the true construction of the agreement the profits on which the remuneration is based are the divisible profits or profits available for distribution profits tax will be deductible before the amount of the profits is ascertained, but if the profits on which remuneration is to be computed are the profits earned, meaning the profits before their disposal, profits tax will not be deductible in computing them."

The law is now well settled that whenever there is an agreement to share profits, the profits are inclusive of and not exclusive of the income-tax, unless the contract explicitly mentions otherwise. (See — 'Ashton Gas Co. v. Attorney-General', 1906 AC 10 (D).) The reason is obvious. Income-tax is a share of the profits which the State claims as its own for the amenities supplied by it in making it possible for a company to work and earn its profits. The State, therefore, is one of the many co-sharers in the profits earned and the profits must therefore necessarily be inclusive of the amount which is payable to the State as its share.

(20) Learned counsel for the assessee has urged that Excess Profits Tax is of the same nature as income-tax and he has referred us to a decision of the House of Lords in — 'Inland Revenue Commissioners v. Dowdall, O'Mahoney & Co. Ltd.', 1952 AC 401 (E). The facts of that case were entirely different. A company was assessed to and paid taxes in Eire. It had, however, branches in the United Kingdom and in the computation of the profits for purposes of assessment it was claimed that the Taxes, Income-tax and Excess Profits Tax, paid in Eire should be excluded as deductible expenditure. Lord Oaksey pointed out that the taxes paid in Eire were not paid wholly and exclusively for the purposes of the company's trade in the United Kingdom and the amount paid as such could not be claimed as deductible expenditure. Reliance was, however, placed on a sentence in the judgment of Lord Reid at page 419, where his Lordship, dealing with the question as to what is expenditure, quoted with approval the observations of Lord Normand in — 'Smith's Potato Estates Ltd. v. Bolland', 1948 AC 508 at p. 530 (F), which are as follows:

"There is the more substantial reason, that income-tax is an impost made upon profits after they have been earned, and that unless the observations of Lord Davey in — 'Strong & Co. of Romsey Ltd. v. Woodifield', 1906 AC 448 at p. 453 (G), which have often been referred to and applied in later cases, are to be disregarded, a payment out of profits after they have been earned is not within the purposes of the trade carried on by the tax-payer. But excess profits tax also is levied on profits after they are earned and, apart from the statutory provision, is in pari pasu with income-tax."

It is urged that Excess Profits Tax and Income-tax are both imposts on profits and both must be treated alike and the principle governing the — 'Ashton Gas Company's case (D)' should be applied to Excess Profits Tax also.

(21) Two other cases were also cited by Mr. Pathak — 'Re Ollivant & Co. Ltd.'s Agreement', (1942) 2 All ER 528 (H) and 1948 AC 508 (F).

(22) 'Ollivant & Co.'s case (H)' was not a case arising out of either Income-tax Act or Excess Profits Tax Act. The question there arose of interpretation of a contract. It is not necessary to give the terms of the contract, nor to deal with this case at any length as the case is really not relevant for our purposes. Learned counsel has relied on a passage at p. 532 in the judgment of Lord Greene M. R. that:

".....the excess profits tax was not expenditure attributable to the working of the business, but expenditure which falls to be charged after the results of the working of the business have been ascertained;....."

The difference that has been pointed out in the passage quoted from Halsbury's Laws of England has also been brought out in the judgment of Lord Greene that divisible profits of a trading company cannot properly be ascertained without making deduction for Excess Profits Tax.

(23) In — 'Smith's Potato Estates' case (F)' the question was whether legal and accountancy expenses incurred by a trader in contesting the amount of an assessment to excess profits tax were not allowable as deductions in computing profits for the purposes of a subsequent assessment to income-tax or excess profits tax. It was held that they were not money wholly and exclusively laid out or expended for the purposes of the trade. The passage relied on at page 527 is as follows:

"The reason is not far to seek. It is that neither the cost of ascertaining taxable profit nor the cost of disputing it with the Revenue Authorities is money spent to enable the trader to earn profit in his trade. What profit he has earned, he has earned before ever the voice of the tax-gatherer is heard. He would have earned no more and no less if there was no such thing as income-tax. His profit is no more affected by the exigibility of tax than is a man's temparature altered by the purchase of the thermometer, even though he starts by haggling about the price of it."

It is urged that from this sentence we must deduce and hold that profits always mean profits inclusive of Income-tax and Excess Profits Tax. A judgment is an authority for the proposition it decides and we cannot take the observations quoted above as meaning that whatever may be the terms of the agreement, it must always be held that Excess Profits Tax for all purposes must be treated in the same way as Income-tax.

(24) It is true that assessment under the Income-tax Act and the Excess Profits Tax Act is made more or less on the same principles and the tax is recoverable in the same manner and both are in one sense tax on profits made. But the reasons for the imposition of the tax in the two cases are entirely different. While Income-tax is a tax on the total income from all sources and is claimed on the ground that the State is entitled to a share in the profits, Excess Profits Tax is levied only on income from business and purports to be the whole or part of the extra profits made due to the extraordinary situation created by the war over and above the normal profits made by the business. The preamble to the Excess Profits Tax Act makes that clear and is to the following effect:

"Whereas it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities;"

As has been pointed out in several cases, the idea was that the person making this extra profit should not be allowed to keep it to himself when this profit was being made as a result of a calamity which the rest of his countrymen had to face. In England ultimately the whole of this extra profit was taken away by the State. In India, however, two-third was taken away by the State and the person making the profits was allowed to keep one-third for himself. This was, therefore, treated more or less as profit which was not earned by the business but it was a windfall resulting from a world calamity, and S. 4, Excess Profits Tax Act—the charging section— provides that:

"Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits....."

The Tax is, therefore, in respect of a business in contrast to the provisions of the Income-tax Act which provides for a tax being levied on a person. Under S. 12, Excess Profits Tax Act, excess profits tax has to be deducted as an expenditure for the purposes of computation of Income-tax. Income-tax is levied on a sliding scale. While Excess Profits Tax is charged either at a fixed percentage of the difference between the profits earned and the standard profits. There is no provision in the Excess Profits Tax Act for any refund being made, as there is in S. 48, Income-tax Act. The whole concept behind the two taxes, even if there are many things common between the two, is different and it cannot, therefore, be said that Excess Profits Tax must for all purposes be treated in the same way as Income-tax.

(25) In — 'Birt, Potter & Huges, Ltd. v. Commissioner of Inland Revenue', (1928) 12 Tax Cas 976 (I) Lord Hanworth M. R. pointing out the nature of the Excess Profits Tax at page 990 said:

"It does not appear there that the tax is charged upon a person in respect of his activities. It is a tax designed to catch a portion of the amount which is deemed by the Legislature to be in excess of the normal profits of trade or business."

(26) This, however, is a division which is hardly necessary for the purposes of this case. As we have held, the question on what basis commission was payable might be an important question when it arises between two contracting parties and how the point has to be decided has been dealt with in several cases the summary of which if we may say so, has been correctly made in the passage quoted from Halsbury's Laws of England.

(27) Some of the cases cited in this connection by learned counsel for the Department may now be noticed though even they, to our minds, are not of much importance.

(28) In — 'Yeovil Rural District Council v. South Sommerset and District Electricity Co. Ltd.', (1947) 1 All ER 669 (J), the question arose between the Rural District Council and the Electricity Co., whether the liability to pay excess profits tax was a factor which a rating authority was entitled to take into consideration with others in deciding what percentage of the net receipts should be allocated to tenants' profits when the net receipts were apportioned between hypothetical landlord, hypothetical tenant, and rating authority. Lord Tucker quoted with approval Lord Dunedin's remarks in — 'Port of London Authority v. Assessment Committee of Orsett Union', 1920 AC 273 at p. 299 (K) as follows:

"This seems to me to be the key of the whole matter. Sterility in earning profits is one thing, sterility in the disposing of profits in another. The former effects value, the latter does not."

and then went on to say:

"Applying this statement to the present case, excess profits tax sterilises the disposition of a

percentage of the profits, but, so far from sterilising the earnings of profits, it only takes effect if and when such profits have resulted from a condition of fertility. I find it impossible to distinguish between income-tax and excess profits tax for the present purposes."

(29) In — 'Condran v. Stark', (1917) 1 Ch 639 (L) Peterson J. pointed out the difference between Income-tax and Excess Profits Tax. He said:

"Income-tax is ultimately payable by the person who is entitled to receive the profits. A company pays income-tax on behalf of the shareholder and the income-tax payable on his dividend is treated as part of his dividend, so that if he is in fact entitled to exemption he can recover the amount of the tax from the Revenue Authorities.....Excess profits duty on the other hand is assessed on the person owning or carrying on the business and is recoverable as a debt from him.....and is payable in respect of the profits of the business, and not in respect of the benefit which a shareholder or partner derives from the business; .....Nor are excess profits duty and income-tax payable in respect of the same fund; for excess profits duty is for the purpose of income tax treated as an outgoing of the business, which reduces the profits in respect of which income-tax is assessable.....In my view excess profits duty is.....a debt due to the Crown, the amount being ascertained with reference to the amount by which the profits exceed the pre-war standard."

(30) This view was followed by the Court of Appeal in — 'Patent Castings Syndicate, Ltd. v. Etherington', (1919) 2 Ch 254 (M). The question, however, in that case arose between two contracting parties and it related to the meaning of the expression 'payable commission out of the net profits'. Warrington, L. J., remarked that a reasonable interpretation of the agreement would be that the company intended to give to its employees a share of the money which belonged to it and not a share out of a sum of money which did not belong to the company but was payable to His Majesty's Treasury. At p. 267 the learned Judge posed a question, "What light, if any, do these statutory provisions throw upon the construction of this agreement" and in answer said:

"In my judgment they only throw this light, that, unlike income-tax, excess profits duty is not a part of the profits which is payable to the company carrying on the business, or to its shareholders. Excess profits duty is, for the purpose of ascertaining what is payable to the shareholders of the company, an outgoing, a sum of money which has to be paid to a third person as a debt of the company, and is therefore an outgoing which has to be paid before it can be ascertained what are the profits distributable amongst the shareholders of the company by way of dividend."

At p. 269 the learned Judge agreed with the decision of Peterson J. in the case already quoted.

(31) In — 'Vulcan Motor and Engineering Co. v. Hampson', (1921) 3 KB 597 (N), which again was a case arising out of a dispute between two contracting parties as to the fund out of which commission was payable, the agreement provided for payment of commission out of the net profits for the year. Bankes L. J. pointed out that on a true construction of the contract the parties were not contracting for payment of anything except the amount of profit divisible amongst the share-holders.

(32) Coming to the decisions of the Indian Courts, the decision in — 'James Finlay & Co. Ltd. v. Finlay Mills Ltd.', 47 Bom LR 774 (O) is not very helpful as the decision turned merely on the words of the agreement which provided that commission was payable at a particular rate without setting aside any sum for payment of income-tax or super-tax or any other tax on income.

(33) In AIR 1944 Bom 5 (B), Beaumont C. J. had again to deal with the question of interpretation of a written agreement and while dealing with that question he pointed out the difference between the Income-tax and Excess Profits Tax.

(34) In — 'Commissioner of Income-tax, Delhi v. Delhi Flour Mills Co. Ltd.', AIR 1953 Punj 180 (FB) (P) the question arose whether, in calculating the annual net profits of the company for purposes of ascertaining the amount payable as commission to the Managing Agents, Excess Profits Tax was or was not to be deducted. The learned Judges were of the opinion that the amount was not deductible and quoted the observations made in some of the English cases.

(35) In — 'N. M. Rayaloo Iyer and Sons v. Commissioner of Income-tax/Excess Profits Tax, Madras', (S) AIR 1955 Mad 56 (Q) the main question turned on the interpretation of certain letters and the other questions in the case are not relevant for our purposes.

(36) The position, therefore, is that the cases cited at the Bar mainly relate to the question of interpretation of written agreements. In the case before us, the assessee had been paying commission at 12 per cent and 3 per cent from the year 1935 to the year 1940 on the profits earned without deducting Income-tax. The fact that Income-tax was not deducted will not, however, be very helpful in determining the terms of the agreement relating to the deduction of Excess Profits Tax. For two years at least, in 1941 and 1942, commission was paid without deducting Excess Profits Tax and neither the Income-tax Officer nor the Excess Profits Tax Officer objected to such payment. The Appellate Tribunal has observed in its appellate order that:

"... the past records showed that according to the existing practice, the commission had been allowed on the net profits at 12 per cent and 3 per cent respectively before deduction of tax."

Mr. Pathak on behalf of the assessee has urged that this is a finding in his favour on a question of fact. Learned counsel for the Department has, however, urged that it is not a finding as regards the terms of the contract but a mere statement of fact as to what was actually done. We find it difficult to hold that this was a finding of fact as to the terms of the oral agreement between the parties. The Appellate Tribunal appear to have taken the view that for working out the

commission payable to the Manager and the Assistant Manager, Excess Profits Tax had to be deducted out of the profits more as a matter of law than a matter depending on the terms of the agreement between the parties.

(37) The questions framed appear to us to be defective. The first question is whether the Excess Profits Tax Officer could under R. 12, Sch. I, Excess Profits Tax Act go against the pre-existing practice and hold that commission payable should have been calculated after deduction of Excess Profits Tax. The powers of the Excess Profits Tax Officer are limited by the provisions of S. 10(2) (x), Income-tax Act and R. 12, Sch. I, Excess Profits Tax Act. What the assessee should pay to the Manager and the Assistant Manager depends on the terms of the contract between the parties. The Excess Profits Tax Officer can, however, decide under R 12 of Sch. I, Excess Profits Tax Act whether the payment is reasonable after taking into consideration the provisions of that clause and he has to decide whether the deduction claimed was a reasonable deduction and was necessary having regard to the exigencies of the business and the services rendered by the Manager and the Assistant Manager. That is our answer to the first question.

(38) The second question too is not very happily worded. Any contract between the assessee firm and its employees does not take away the right of the Excess Profits Tax Officer to consider the question of the reasonableness of the payment under S. 10(2)(x), Income-tax Act or R. 12, Sch. I, Excess Profits Tax Act, but the mere fact that it was a voluntary payment does not by itself make it either unreasonable or unnecessary. The decision has to be made by the Excess Profits Tax Officer with reference to all the facts and circumstances and in accordance with the exigencies of the business. He must take note of all such other matters as businessmen would generally take into consideration in coming to the conclusion whether a particular bonus or commission should or should not be paid having regard to the requirements of the business and the services rendered by the employees. That is our answer to the second question.

(39) The assessee should get its costs of this reference which we assess at a sum of Rs. 500/-.

K.S.B. Answer accordingly.

A.I.R. 1955 ALL. 307 (Vol. 42, C.N. 89)

MALIK C. J. AND GURTU J. (23-9-1954)

Malkhan, Defendant-Applicant v. Mahar Chand and others, Opposite Party.

Civil Revn. No. 1228 of 1953, against order of IInd Civil J., Meerut, D/- 22-11-1952.

Civil P. C. (1908), S. 115 and O. 14, R. 2 — "Case decided" — Determination of preliminary issues.

It cannot be said that by determining certain issues under O. 14, R. 2 as preliminary issues, the lower Court can be said to have decided any case the record of which can be sent for by the High Court under S. 115 and corrected under the provisions of that section. **(Para 14)**

Anno: C. P. C., S. 115 N. 5 Pt. 1; O. 14, R. 2 N. 3.

CASES REFERRED: Paras

(A) (V8) AIR 1921 All 1: 43 All 564 (FB) 3, 4, 16, 17

(B) (V35) AIR 1948 All 244: ILR (1947) All 812 (FB) 7, 12

(C) (V33) AIR 1946 All 89: ILR (1946) All 413 (FB) 10, 13

B. Dayal, for Applicant; G. P. Bhargava, for Opposite Party.

MALIK C. J.:

This is a civil revision under S. 115 of the Code. The plaintiff filed a suit for perpetual injunction against the defendants restraining them from interfering in any manner with plaintiff's possession of certain plots detailed in the plaint. The suit was filed in the Court of the Second Civil Judge of Meerut. The defendants filed a written statement in which, among other pleas, a plea was taken that the civil Court had no jurisdiction to try the suit. The learned Judge framed a number of issues and under O. 14, R. 2 of the Code he decided to try the issue of law first.

(2) Order 14, R. 2 of the Code is as follows:

> "Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

On 2-11-1953, the learned Civil Judge held that the civil Court had jurisdiction to try the suit. It is against that decision that this civil revision was filed.

(3) A preliminary objection is raised by the other side that no revision lies and learned counsel has relied on a decision of a Full Bench of this Court in — 'Buddhoo Lal v. Mewa Ram', AIR 1921 All 1 (FB) (A). The facts of that case were exactly similar. The jurisdiction of the Court had been challenged. The issue as regards jurisdiction was tried as a preliminary issue and it was held that the Court had jurisdiction. A revision against that decision was dismissed on the ground that it was not a 'case decided'.

(4) Learned counsel for the applicant has, however, submitted that the case of — 'Buddhoo Lal v. Mewa Ram (A) may be reconsidered, as the point has been referred to a Bench of 7 Judges.

(5) I do not, however, consider it necessary to postpone the hearing of this case by reason of the fact that a reference has been made in another case to a larger Bench.

(6) Section 115 of the Code provides that:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested. or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

A revision can, therefore, be filed only if any "case has been decided" by a Court subordinate to such High Court. The question here is whether the learned Civil Judge has yet decided any case.

(7) What is a 'case decided' was considered at some length in a Full Bench decision of this Court in — 'Ramzan Ali v. Mt. Satul Bibi', AIR 1948 All 244 (FB) (B). That was no doubt a revision against and application under O. 33 of the Code granting permission to file a suit in 'forma pauperis. It was however, pointed out in that case that for purposes of convenience orders had been classified under two heads — "an order deciding a case" and "an interlocutory order". It was held that an order deciding a case must be an order affecting the rights of the parties and at the same time an order in a proceeding distinct and separable from the main case.

(8) When, however, a Court decides a part of the controversy in a suit and its decision does not terminate the proceedings, it cannot be said to have either decided "a case" or even "part of a case". By trying certain issues first and then the remaining issues, it has merely written its judgment in two parts and both the parts taken together constitute the complete judgment in the case.

(9) 'Judgment' has been defined in S. 2, sub-s. (9), Civil P. C., as meaning "the statement given by the judge of the grounds of a decree or order"; and 'decree' has been defined in sub-s. (2) of S. 2 as meaning:

"the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include:

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation: A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

'Order' has been defined in sub-s. (14) of S. 2 as meaning "the formal expression of any decision of a Civil Court which is not a decree".

(10) In my judgment in — 'Manmohan Lal v. Raj Kumar Lal', AIR 1946 All 89 (FB) (C), I discussed at some length the meaning of the words 'judgment' and 'decree' with reference to the provisions of the Code at pp. 107 and 108 of the Report. I pointed out that these definitions must be read along with S. 33 and O. 20, Rr. 1 and 7 of the Code and expressed the opinion that the words 'with regard to all or any of the matters in controversy in the suit' in sub-s. (2) of S. 2, Civil P. C., "do not mean that there can be separate decrees for each matter in controversy in the suit" and that

"those words have been introduced to make it clear that no Court is bound to decide all the matters in controversy in the suit if it is not necessary to do so to conclusively determine the rights of the parties."

A decree is a formal document which contains the result of the decision of a suit, the reasons for which are given in the judgment of the Court but it has been extended by the Code to orders under S. 47 and S. 144.

(11) During the pendency of a suit, before the final adjudication is followed by a decree, there may be various miscellaneous proceedings of varying importance, some being intimately connected with the determination of the matters in controversy between the parties and the progress of the suit. These deal mostly with procedural matters. There may be other 'quasi' independent proceedings which are decided by separate orders and which cannot be said to be mere procedural matters for the final determination of the case.

In connection with these miscellaneous proceedings the Court has to pass orders and the important ones of such orders are appealable under S. 104 and O. 43 of the Code. Section 105 provides that except those orders mentioned in S. 104 and O. 43 no appeal can be filed against other orders, but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(12) Attempts are frequently made to have an order, which is not appealable, corrected by this Court under S. 115 of the Code. It was pointed out in Ramzan Ali's case (B) that only some orders may amount to a decision of a case, but before it can be a revisable order it must amount to a formal adjudication disposing of a matter collateral to the determination of the question at issue in the suit.

(13) If a Court decides to determine preliminary issues of law under O. 14, R. 2 and as a result of that decision decides that it is not necessary to go into other questions, it has to pass a decree, but if as a result of the decision of those issues the other issues of fact have also to be determined, then the decision of the preliminary issues is only a part of the judgment and so long as the judgment has not been completed by the decision of the other issues of fact or of law that had been left undetermined, a decree cannot be passed.

The Court on determination of the preliminary issues, if it comes to the conclusion that the case has to proceed and the other issues have to be decided, has not got to pass any formal order incorporating the result of its decision. In the circumstances, it cannot be said that it has decided a case or even a part of a case. I have already pointed out in Manmohan Lal's case (C) that the words

"conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit"

do not mean that there can be a number of decrees in a suit, nor can the decision of each issue be

said to amount to "decision of a case" which has to be embodied in a separate decree or order.

(14) In my view, therefore, it cannot be said that by determining certain issues under O. 14, R. 2 of the Code as preliminary issues, the lower Court can be said to have decided any case the record of which can be sent for by the High Court under S. 115 of the Code and corrected under the provisions of that section.

(15) I would, therefore, uphold the preliminary objection and dismiss this Civil Revision.

GURTU J.:

(16) In my view, this case may be said to be covered by the Full Bench case of AIR 1921 All 1 (A) by which I am at present bound. I do not propose to examine the scope of section 115, Civil Procedure Code generally now, as the whole question is before a Full Bench, which will no doubt go into the question more fully.

(17) The case being covered by AIR 1921 All 1 (FB) (A) the preliminary objection must be upheld and this civil revision must fail.

(18) BY THE COURT: The revision is dismissed with costs.

(19) The record may be sent down to the lower Court by an early date.

(20) The stay order is discharged.

V.R.B. Revision dismissed.

(S) A.I.R. 1955 ALL. 309 (Vol. 42, C.N. 90)

FULL BENCH

MALIK C. J., AGARWALA, V. BHARGAVA, MUKERJI, M. L. CHATURVEDI, ASTHANA AND MEHROTRA JJ. (6-1-1955)

Ramrichpal Singh, Defendant-Applicant v. Dayanand Sarup minor through Bhagwat Sarup, Plaintiff-Opposite Party.

Civil Revns. Nos. 461 and 462 of 1948, against order of Civil Judge, Bulandshahr, D/- 10-7-1947.

Civil P. C. (1908), Ss. 10, 115 — Order under S. 10 — 42 All 409: AIR 1920 All 197 (2): 58 Ind Cas 90 — 32 All 623: 6 Ind Cas 831 — 1930 All LJ 235: AIR 1929 All 957: 121 Ind Cas 97 and 1934 All LJ 702: AIR 1934 All 520: 149 Ind Cas 176, Overruled; AIR 1923 Mad 88 (1), Dissented from.

An application under S. 10 has nothing to do with the decision of the question in controversy between the parties in a case. In that sense it cannot be said to be ancillary to the proceedings. In an application under S. 10 the defendant admits that the Court has jurisdiction to entertain the suit. All that he prays for is that since the matters in issue are directly and substantially in issue in a previously instituted suit the hearing of the suit should remain stayed. The Court continues to have seisin of the case and ultimately it has to dispose it of according to law. Viewed from this point of view, the decision of a question under S. 10, where the Court has to consider whether there is a previously instituted suit or not and whether the matters in issue are directly and substantially in issue in that other suit or not, are both questions which have to be determined judicially and if the decision of the two questions is in favour of the defendant, the Court has to stay the suit as the provisions of S. 10 appear to be mandatory. Hence an order under S. 10 is a case decided. A plea under S. 10 does not constitute a defence to the suit and it should not, therefore, be a matter in issue between the parties, and the mere fact that the Court has wrongly framed an issue and decided the point as an issue in the case should make no difference. Case law discussed. 42 All 409: AIR 1920 All 197(2): 58 Ind Cas 90 — 32 All 623: 6 Ind Cas 831 — 1930 All LJ 235: AIR 1929 All 957: 121 Ind Cas 97 and 1934 All LJ 702: AIR 1934 All 520: 149 Ind Cas 176, Overruled; AIR 1923 Mad 88 (1), Dissented from. (Paras 21, 22, 46)

Anno: AIR Com., Civil P. C., S. 115 N. 5.

1953 Mulla: S. 115 P. 410 N. "Interlocutory order" (Lahore view indicated in Mulla is based on overruled case in AIR 1924 Lah 425 — Later F. B. case AIR 1943 Lah 65 which overruled AIR 1924 Lah 425 not noticed in Mulla — Views of Ajmer-Merwara, Kutch, Madhya Bharat, Rajasthan and Lahore (Subsequent to F. B. case in AIR 1943 Lah 65) and conflict between Lahore and Allahabad views not noted in Mulla — Solution of conflict not indicated in Mulla).

CASES REFERRED: Paras

(A) (V8) AIR 1921 All 1: 43 All 564 (FB) 1, 23, 29, 40
(B) (V7) AIR 1920 All 197 (2): 18 All LJ 431 5
(C) ('10) 32 All 623: 6 Ind Cas 831 5
(D) (V35) AIR 1948 All 244: ILR (1947) All 812 (FB) 5, 19, 20, 24
(E) (V16) AIR 1929 All 957: 1930 All LJ 235 5, 33
(F) (V21) AIR 1934 All 520: 1934 All LJ 702 5, 21
(G) (V6) AIR 1919 Oudh 178: 50 Ind Cas 212 5
(H) (V15) AIR 1928 Oudh 355: 3 Luck 650 (FB) 5
(I) (V27) AIR 1940 Oudh 441: 16 Luck 184 5
(J) (V10) AIR 1923 Mad 88(1): 70 Ind Cas 5 6
(K) ('83-84) 11 Ind App 237: 11 Cal 6 (PC) 9
(L) (V4) AIR 1917 PC 71: 40 Mad 793 (PC) 9, 22
(M) (V40) AIR 1953 SC 23: 1953 SCR 136 (SC) 9
(N) (V35) AIR 1948 Nag 258: ILR (1948) Nag 16 (FB) 9
(O) (V42) AIR 1955 All 307: 1954 All LJ 718 23
(P) (V33) AIR 1946 All 89: ILR (1946) All 413 (FB) 23
(Q) (V36) AIR 1949 PC 156: ILR (1950) Mad 1 (PC) 25, 29
(R) (V36) AIR 1949 PC 239: 76 Ind App 131 (PC) 25, 29, 37
(S) (V14) AIR 1927 All 358: 49 All 454 37
(V) ('85) 9 Bom 432 37

H. N. Seth, for Applicant; Satish Chandra, for Opposite Party.

MALIK C. J.:

These two cases came up before a Bench for hearing in the year 1949 and on 10-5-1949, they were referred to a Full Bench as there was a conflict of opinion between the Allahabad High Court and the Oudh Chief Court on the point whether a revision under S. 115, Civil P. C. (Act 5 of 1908) was entertainable by the High Court in a case where a Judge had refused to grant an application under S. 10 of the Code. The Allahabad High Court had held that no revision lay to this Court against the order as it was not a case decided, while the Oudh Chief Court had taken a contrary view that it was a case decided and a revision was entertainable. After the amalgamation of the two Courts in 1948 it was considered proper that there should remain no conflict and the case was, therefore, referred to a Full Bench for decision. When, however, the case was put up before a Bench of three Judges on 22-10-1951, they referred it to a larger Bench and on 24-10-1951, when the case came up before a Bench of five Judges they referred it to a Bench of seven Judges. The Full Bench of three Judges or of five Judges did not give any reason why it was necessary to have the point decided by a Bench of seven Judges. It was, probably, due to the fact that there was a decision by a Bench of five Judges in — 'Buddhu Lal v. Mewa Ram', AIR 1921 All 1 (FB) (A) which the learned Judges thought might have to be reconsidered.

(2) The points referred to the Full Bench are:

(1) Whether an order under S. 10, Civil P. C. is a case decided? and

(2) Whether it would make any difference if the learned Judge had framed an issue on the point and decided the point as a point in the case?

(3) The facts of the case briefly are that a suit was filed for recovery of arrears of rent of a house on the ground that the defendant was a tenant. The defendant filed a written statement in which among other pleas he took the plea that there was a previously instituted suit pending in which the matters in issue in this case were directly and substantially in issue and the suit should therefore remain stayed under S. 10, Civil P. C. (Act 5 of 1908). On the pleas raised in the case a number of issues were framed, issue No. 6 being as follows:

"Is suit liable to be stayed under S. 10, Civil P. C.?"

The Court held that the mere fact that appeals were pending against decrees in suits for rent for certain other periods prior to the period now in dispute did not justify the grant of stay under S. 10 of the Code and rejected the application. Against that order dated 10-7-1948, this revision was filed.

(4) There were two suits filed in the trial Court for two different periods: Suit No. 1 of 1948 and Suit No. 65 of 1947. There were two separate orders in the two suits and there are two revisions before us.

(5) In — 'Sultanat Jahan Begam v. Sundar Lal', AIR 1920 All 197 (2) (B) in a revision against an order dismissing an application under S. 10 of the Code Banerji J. held that it was an interlocutory order and was not a case decided. He purported to follow the decision of this Court in — 'Muhammad Ayub v. Muhammad Mahmood', 32 All 623 (C) which was overruled by a Full Bench in — 'Ramzan Ali v. Mt. Satul Bibi', AIR 1948 All 244 (D). The next case in which the question arose is — 'Bal Krishna v. Ram Kishun', AIR 1929 All 957 (E). Both the learned Judges (Mukerji and Niamat-ullah JJ.) were of the opinion that an order rejecting an application to stay under S. 10 of the Code was not a case decided. Mr. Justice Mukerji was of the opinion that it was a matter merely of procedure which had nothing to do with the merits of the case and was therefore not a case decided. Mr. Justice Niamat-ullah contented himself by saying that in the circumstances of that case where the Court had not decided whether S. 10 of the Code applied or not but had merely directed the case to proceed it could not be said to be a case decided. In — 'Madan Mohan v. Kamla Narain Dube', AIR 1934 All 520 (F) Sulaiman and King JJ. dismissed a revision application where the facts were exactly similar to the facts of the case before us. The plea of S. 10 was raised in the written statement and an issue was framed and the issue was decided.

The learned Chief Justice said:

"The plea that the Court has no jurisdiction to entertain the suit is similar to a plea that it has at least temporarily no jurisdiction to entertain it because of the pendency of another suit. The decision of the Court below on the point that it has jurisdiction amounts to mere finding on a question of law which was the subject-matter of an issue and cannot be treated as being in itself a case decided within the meaning of S. 115, Civil P. C."

On the other hand, in — 'Sital Singh v. Sitla Bakhsh Singh', AIR 1919 Oudh 173 (G) Stuart and Daniels JJ. held that an order under S. 10 staying a suit amounted to a decision that the Court had under existing circumstances no jurisdiction to proceed with the trial of the suit. It was, if wrongly passed, a refusal to exercise a jurisdiction vested in the Court and was open to revision under S. 115. They do not seem to have discussed the question whether it was or was not a case decided. The same view was taken by a Full Bench of the Oudh Chief Court in — 'Sahdeo Singh v. Chanun Kuer', AIR 1923 Oudh 355 (H).

The two questions that were referred to the Full Bench were as follows:

"(1) Is an order by which proceedings are resumed in a suit which had been stayed under S. 10, Civil P. C., a 'case decided', within the meaning of S. 115 Civil P. C.?"

and

"(2) Is an order the effect of which is to refuse to exercise a jurisdiction vested in the Court, under S. 10, Civil P. C., open to revision under S. 115, Civil P. C.?"

The learned Judges differed from the view expressed by the Allahabad High Court and held that it was a decided case. Wazir Hasan J. said that:

"I am content to consider the matter from the standpoint that the meaning to be given to the

word "case" in S. 115 must depend on the particular nature of the proceedings."

Misra J. held that orders passed under S. 10, Civil P. C., stood on quite a different footing from those orders which were generally considered as interlocutory orders. The last case of the Chief Court is — 'Raisuddin v. Basti Sugar Mills, Ltd.', AIR 1940 Oudh 441 (I), where it was held that an order under S. 10, Civil P. C., staying a suit was open to revision under S. 115 as it was a case decided. They followed the previous Full Bench and no further reasons were given.

(6) The only case cited from Madras is — 'Ramchandram Pillai v. Neelambal Achi', AIR 1923 Mad 88 (1) (J). In that case an order refusing to stay proceedings under S. 10 of the Code was held to be an interlocutory order by Phillips J. and the Allahabad view was followed. These are all the cases on S. 10 of the Code to which reference has been made.

(7) Section 115 of the Code is as follows:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

The High Court can, therefore, entertain a revision only if:

(1) a case has been decided,

(2) the decision is by a Court subordinate to the High Court,

(3) no appeal against the decision lies to the High Court, and

(4) the subordinate Court has

(a) exercised a jurisdiction not vested in it by law, or

(b) failed to exercise a jurisdiction so vested, or

(c) acted in the exercise of its jurisdiction illegally or with material irregularity.

(8) The power is, however, discretionary and will be exercised only in the interest of justice.

(9) So far as the grounds (a) and (b) are concerned, there never was much difficulty. They provide that the subordinate Court should have either exercised the jurisdiction that it did not possess or it should have failed to exercise the jurisdiction that it did possess, i.e., failure to exercise jurisdiction or wrongful assumption of jurisdiction. Interpretation of cl. (c), however, gave rise to considerable difference of opinion. The Privy Council in — 'Amir Hassen Khan v. Sheo Baksh Singh', 11 Ind App 237 (PC) (K) and — 'Balakrishna Udayar v. Vasudeva Aiyar', AIR 1917 PC 71 (L) pointed out that the words had "acted in the exercise of its jurisdiction illegally or with material irregularity" related also to the question of jurisdiction and if the Court had jurisdiction to decide the matter the decision could not be challenged under S. 115 merely on the ground that the Court had made an error on a question of law or fact.

The latest decision of the Supreme Court on the scope of S. 115 has now made matters clearer. Their Lordships in — 'Keshardeo v. Radha Kissen', AIR 1953 SC 23 (M) have held that the section can apply only to a case of wrong exercise of jurisdiction. Their Lordships have referred with approval to the referring order of Bose J. in — 'Narayan Sonaji v. Sheshrao Vithoba', AIR 1948 Nag 258 (FB) (N) wherein the learned Judge had said that the words "illegally or with material irregularity" do not cover either errors of fact or law, that they do not refer to the decision arrived at but to the manner in which it is reached. That the errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with.

(10) There has been a lot of controversy as to what is "a case decided". We may in this connection briefly refer to the history of the section. In the Code of Civil Procedure (Act 8 of 1859) there was no provision giving any revisional power to the High Court. Act 23 of 1861 amended that Code in certain respects and S. 35 of the Act provided that:

"The Sudder Court may call for the record of any case decided on appeal by any Subordinate Court in which no further appeal shall lie to the Sudder Court, if such Subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law, and the Sudder Court may set aside the decision passed on appeal in such case by the Subordinate Court, or may pass such other order in the case as to such Sudder Court may seem right."

Section 35 applied only to cases where one appeal was provided but there was no right to file a second appeal. In cases where there was a second appeal to the High Court the section did not apply. But in a case where there was only one appeal to the Subordinate Court the decision on appeal by the Subordinate Court was revisable by the High Court. Revisions, therefore, lay to the High Court only against the decrees or orders passed on appeal by the lower appellate Court where there was no further right of appeal to the High Court.

(11) Act 10 of 1877 replaced the Code of 1859 and S. 622 of the Code provided that:

"The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, and may pass such order in the case as the High Court thinks fit."

The same language was more or less repeated with the addition of the words "or to have acted in the exercise of its jurisdiction illegally or with material irregularity" in the Code of 1882 (Act 14 of 1882), S. 622 of which was as follows:

"The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, and may pass such order in the case as the High Court thinks fit."

The section was, however, redrafted in the Code of 1908 and it now reads:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto and if such subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

The words 'record of any case which has been decided' have been interpreted in a very large number of decisions of the various High Courts and the words have been differently interpreted by different Judges. One interpretation which can no longer be accepted was that though the word 'case' is wider than a suit yet it can only mean a suit or a similar proceeding which is started by an application in the nature of a plaint; for example, testamentary proceedings, matrimonial proceedings, guardianship proceedings, proceedings under the Company Law etc.

It was held in some cases that in a suit it was the suit which was itself a 'case' and it was not possible to envisage any other proceeding arising in that suit which could be called a separate case. The other view was that whenever any order was passed by a Court deciding any matter in controversy between the parties it was a case decided. The third view was that an interlocutory order could not be a case decided and a 'case' when it is a proceeding during the pendency of a suit, must be a proceeding distinct and separable from the issues that properly arise for decision in the case, and must raise a substantial question affecting the rights of the parties. Besides the questions of varying degree of importance that arise for decision during the pendency of a suit there might be other questions before or after the decision of a suit of a controversial nature. Decision of such questions may amount to decision of a case.

(12) There are a large number of decisions under S. 115 which cannot all be reconciled and it would serve no useful purpose to refer to them.

(13) I am not inclined to accept the view that in a suit no final decision of any matter can ever amount to a case decided as the suit itself is a case and only the decision of the suit can amount to a case decided. Nor am I prepared to accept the view that every order passed deciding any matter in controversy must be held to be a case decided.

(14) There may be certain proceedings previous to the institution of the suit or subsequent to the decision of the suit; for example, application for leave to sue in 'forma pauperis'; application for review; application for amendment of decree; application for restoration of a suit dismissed for default; application for setting aside of an ex parte decree, etc. All these proceedings are started by means of an application and have to be disposed of judicially by final orders passed by the Court. These must all be cases decided. These proceedings are all completely separable from the decision of the issues that arise for decision in a case. Though in a way they relate to the adjudication of a dispute between the parties to a suit they can be treated as separate proceedings and their decision can amount to a case decided and if the other requirements of S. 115 are satisfied the High Court can interfere in the exercise of its revisional jurisdiction.

(15) Then there may be other matters which are not ancillary to the decision of the case and are distinct and separable from it. Proceedings which are distinct and separable, when they are disposed of by a final order, which substantially affects the rights of the parties, may amount to a case decided.

(16) Then come matters of varying importance arising during the trial of a suit. These are, to my mind, clearly divisible into three main groups:

1. Orders which are appealable under S. 104 and O. 43, R. 1, Civil P. C.—they can be treated as cases decided and revisions can be entertained provided the orders are not appealable to the High Court. These were the only orders that were revisable under the Civil Procedure Code after its amendment in the year 1861.

2. Orders which are not appealable, but objection to which can be entertained at the time of the hearing of the appeal under S. 105 of the Code on the ground that they affect 'the decision of the case'. The question whether these are revisable orders or not will depend upon the nature of the order and the decision of the question whether S. 105 provides an adequate remedy. The test for determining whether they amount to cases decided must be the same as for the next group of orders.

3. Besides these there are innumerable other orders that the Court may have to pass during the progress of a suit pending before it. These may be sub-divided into two groups:

(i) orders which are entirely procedural or routine matters which are not disposed of by final orders; and

(ii) final orders which decide substantial questions and affect the rights of the parties.

(17) Orders under 3(i) may be changed by the Court at its discretion. But orders under 3(ii) must be final decisions so far as the Court passing them is concerned.

(18) What orders will fall under group 3(i) or group 3(ii) is a matter on which there will always be differing views as it is difficult to draw the line and the decision of the Court in each

case would depend upon the nature of the order and the rights affected thereby.

(19) As was pointed out by me in AIR 1948 All 244 (D), sometimes even an order of a mere routine or procedural nature may seriously affect the rights of the parties. The fixing of a date may sometimes substantially affect the rights of one party or another. Refusing to summon a witness for a particular date might again cause substantial loss to a party if the witness cannot be available on any other date. It is, however, not merely a question of loss caused that has to be taken into consideration. Before the High Court can entertain a revision the order must amount to a decision of a case and an order which a Court can itself change at any time cannot be termed an order which decides a case.

(20) In my view the decision of certain proceedings prior to the institution of a suit may amount to decision of a case. On that ground I held in AIR 1948 All 244 (D) that a revision would lie against an order granting or rejecting a pauper application.

(21) An application under S. 10, Civil P. C. has nothing to do with the decision of the question in controversy between the parties in a case. In that sense it cannot be said to be ancillary to the proceedings. In 'Madan Mohan's case (F)' Sulaiman C. J., was of the opinion that it is analogous to a plea raised as regards the jurisdiction of the Court, in an application under S. 10 the jurisdiction being questioned for a limited period. I do not think that this analogy, with great respect, is sound. In an application under Section 10 the defendant admits that the Court has jurisdiction to entertain the suit. All that he prays for is that since the matters in issue are directly and substantially in issue in a previously instituted suit the hearing of the suit should remain stayed. The Court continues to have seisin of the case and ultimately it has to dispose it of according to law. Viewed from this point of view, the decision of a question under S. 10, where the Court has to consider whether there is a previously instituted suit or not and whether the matters in issue are directly and substantially in issue in that other suit or not, are both questions which have to be determined judicially and if the decision of the two questions is in favour of the defendant, the Court has to stay the suit as the provisions of S. 10 appear to be mandatory. It is, therefore, to my mind, a case decided.

(22) Then remains the second question, whether the fact that a plea was taken in the written statement and an issue was framed and that issue was decided, makes any difference. To my mind, it would not. Order 7, R. 1 of the Code sets out the particulars which a plaint should contain. Apart from the facts constituting the cause of action and when it arose, the plaintiff has to show that the Court has jurisdiction. Order 8 of the Code deals with the contents of a written statement. In the written statement the facts asserted have to be denied and other facts may be pleaded by way of defence, set off or counter-claim. Order 14 then deals with the framing and determination of issues. Under O. 14, R. 1, issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. Material propositions are those propositions of law or fact which a plaintiff must allege in order to show his right to sue or a defendant must allege in order to constitute his defence.

To my mind a plea under S. 10, Civil P. C. does not constitute a defence to the suit and it should not, therefore, be a matter in issue between the parties, and the mere fact that the Court has wrongly framed an issue should make no difference. On that point I agree with the observations of Mukerji J. in 'Balakrishna's case (L)' already cited.

(23) Where an issue arises out of the pleadings properly drafted, that is, in accordance with the provisions of O. 7, R. 1 and O. 8, R. 2, even if it has been decided as a preliminary issue under O. 14, R. 2 of the Code, it cannot, to my mind, amount to a case decided. When a case is before a court of law and a number of issues have arisen for decision on the basis of which the Court has to adjudicate upon the rights of the parties the Court cannot pass a number of decrees except that there may be a preliminary decree and a final decree and the reasons given by it for the decree is its judgment. If some of the issues have been determined under O. 14, R. 2 of the Code earlier than others then the judgment must be deemed to have been written in two parts and it cannot be said that the part of a judgment is a final order from which a revision can lie to this Court.

This matter has been recently dealt with by me in — 'Malkhan v. Mahar Chand', AIR 1955 All 307 (O) where I said that

> "if a court decides to determine preliminary issues of law under O. 14, R. 2 and as a result of that decision decides that it is not necessary to go into other questions, it has to pass a decree, but if as a result of the decision of those issues the other issues of fact have also to be determined, then the decision of the preliminary issues is only a part of the judgment and so long as the judgment has not been completed by the decision of the other issues of fact or of law that had been left undetermined, a decree cannot be passed. The Court on determination of the preliminary issues, if it comes to the conclusion that the case has to proceed and the other issues have to be decided, has not got to pass any formal order incorporating the result of its decision. In the circumstances, it cannot be said that it has decided a case or even a part of a case."

I also referred in that case to my decision in — 'Manmohan Lal v. Rajkumar Lal', AIR 1946 All 89 (FB) (P) that the words "conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit" in sub-s. (2) of S. 2 of the Code

> "do not mean that there can be separate decrees for each matter in controversy in the suit, nor can the decision of each issue be said to amount to decision of a case which has to be embodied in a separate decree or order."

The decision of the Full Bench in AIR 1921 All 1 (A) no doubt proceeded on another ground but

the decision can be supported on the ground suggested by me.

(24) In the case before us, however, as I have already pointed out the lower Court erred in framing an issue on this point. It was not one of the pleas that could be raised under O. 8, R. 2 and no issue, therefore, could be framed on the point. The mere fact that the learned Judge wrongly decided to frame an issue should make no difference in the result and his decision refusing to stay the suit will not cease to be a case decided merely because it has been wrongly made a part of the judgment. This portion was, to my mind, clearly separable and amounted to a case decided. As I have already pointed out in the case of AIR 1948 All 244 (D) even though an order may amount to the decision of a case it can be revisable by this Court only if it satisfies the provisions of S. 115 of the Code, that it is an order passed without jurisdiction, or that the Court has failed to exercise jurisdiction or that it has acted with material irregularity in the exercise of its jurisdiction.

(25) I have not referred to the cases that were cited on the general scope of S. 115 as they do not help in determining the question as to what is a case decided. Two such cases cited at the Bar were — 'Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras'. AIR 1949 PC 156 (Q), and — 'Joy Chand Lal v. Kamlaksha Chaudhury', AIR 1949 PC 239 (R). These two cases also do not deal with the question what is a case decided.

(26) In my opinion, therefore, an order under S. 10, Civil P. C. is a case decided and the fact that the learned Judge had framed an issue on the point and decided the point as an issue in the case would make no difference.

AGARWALA J.:

(27) The main point for decision in this case is whether an order refusing to stay the hearing of a suit, made under S. 10, Civil P. C., is a "case decided" or not within the meaning of S. 115, Civil P. C., The word 'case' has not been defined anywhere in the Civil Procedure Code. Its dictionary meanings are numerous. As used as a term of law the dictionary gives the meaning of the word 'case' as 'a suit or action at law; a cause'. A 'case stated or agreed on' is 'a statement in writing of facts agreed on and submitted to the Court for decision of the legal points arising in them' (vide Webster's International Dictionary). The word 'case' occurs in various provisions of the Civil Procedure Code and does not necessarily convey the same meaning. For instance, in S. 13(b) the word 'case' obviously refers to the entire proceeding in which a judgment is delivered. In S. 33 the word 'case' has been used in the sense of a suit because on the judgment being pronounced in the case, a decree is to follow.

In S. 90, the word 'case' is used in the sense of a special case or a case stated for the opinion of the Court. In S. 99, again, the word 'case' refers to the entire proceeding pending in the court of appeal. The word 'case' in S. 113 obviously refers to a statement of facts concerning any point in dispute between the parties to a proceeding on which the opinion of the High Court is sought. In O. 5, R. 8, the word 'case' is used in a different sense. It is used in the sense of the parties' statement of facts and law of the matter in dispute. In O. 6, R. 6, the word 'case' in the phrase, "for the case of the plaintiff or defendant" is again used in the same sense as in O. 5, R. 8. In O. 7, R. 18, again the word 'case' has been used in the same sense.

(28) Apart from the use of the word 'case' in O. 5, R. 8; O. 6, R. 8, and O. 7, R. 18, in which the expression is used as referring to a particular party's allegations, and apart from its use in S. 113, in the sense of a 'case stated' for the opinion of a Court, the word 'case' is used in the sense of an entire proceeding initiated by one party in which that party claims a substantial right on certain facts and circumstances stated by him and seeks some reliefs as against another party. Thus, the essential features of a 'case' are:

1. a proceeding in which a claim is made by one party that he is entitled to certain rights and the denial or admission of those rights by the other party,

2. the rights claimed are substantial, the grant or refusal of which materially affects the interests of a party, and

3. the proceeding is separate and complete by itself.

(29) A proceeding in which the rights of the parties are not to be conclusively decided, but is merely intended to be a step in the determination of those rights cannot by itself be a case or a cause or action at law. Thus if the proceeding is a suit in the sense in which that word is used in the Civil Procedure Code, the suit itself and the whole of it and not a part of it is normally a 'case'. A suit is initiated by a plaint which contains such allegations as are mentioned in O. 7 and there is a written statement by way of defence to the suit and such written statement contains matters which are mentioned in O. 8 of the Civil P. C. The suit is disposed of by means of a decree or a final order dealing with the allegations made in the plaint and the defence raised in the written statement.

A decision on any one of the issues raised in the suit arising out of the defence in respect of matters mentioned in O. 8, unless it disposes of a severable part of the plaintiff's claim cannot in my judgment amount to a 'case'. Therefore normally a separate decision on one of the issues in the suit is not to be treated as a case decided. These issues may relate to the merits of the claim itself or may arise out of the various defences open to the defendant which render the claim not maintainable. Thus, in my opinion, the decision on a question of jurisdiction of the Court to hear and determine a suit or that the suit is barred by limitation or res judicata is not to be treated as a case decided, unless the suit itself is disposed of by the decision. I may point out that I am not here dealing with the question whether a decision on any of these points raises a question of jurisdiction which was the point considered in the two Privy Council decisions: AIR 1949 PC 156 (Q) and AIR 1949 PC 239 (R). In my judgment the decision of the Full Bench

in AIR 1921 All 1 (A) was, with respect, perfectly correct.

(30) There may, however, be proceedings connected with a suit, though not directly bearing upon the trial of the issues arising in the case. These proceedings may be classified as follows:

(a) Antecedent to the suit,

(b) Subsequent to the decision of the suit, and

(c) During the pendency of the suit.

An application for leave to sue in 'forma pauperis' is a proceeding antecedent to the suit, because the suit comes into existence when the application is granted and is treated as a plaint and the court-fee is paid thereon. An application for leave to sue a defendant falls under the same category. The decision on such an application will be a case decided. An application for the restoration of a case dismissed for default of appearance of plaintiff, or an application for setting aside an ex parte decree, and application for review are proceedings taken after the suit has terminated. A decision of any one of such applications will amount to a case decided. So also an execution proceeding taken after the decision of the suit is by itself a separate 'case'.

An application for appointment of a receiver or the issue of an injunction or the attachment of property before judgment are matters that do not touch upon the trial of the issues in a suit. These are, therefore, to be treated as separate cases. An interlocutory order passed during the pendency of a suit on an application which has a bearing upon the trial of the issues of the case cannot be treated as the decision of a 'case' by itself, because such a proceeding is part of a 'case' and not a complete case by itself, unless it can be treated as such on the ground that the Civil Procedure Code makes special provision for it being so treated, inasmuch as an appeal is provided from it, under S. 104 read with O. 42, Civil P. C., or unless a severable part of the plaintiff's claim is thereby disposed of. But orders on applications for adjournment of a case or for summoning of witnesses or settling issues etc., are not orders which dispose of a part of the case or any of the rights of the parties in the suit, but are mere orders connected with the progress of the trial of the suit and are matters of routine. These cannot be treated as 'cases' by themselves.

(31) An application under S. 10, Civil P. C., that the hearing of the suit may be stayed is not one of those matters which are mentioned in O. 8. The words "all matters which show the suit not to be maintainable" in O. 8 clearly mean matters which show that the suit is not maintainable at all and should be dismissed. An application under S. 10 is not a matter which shows that the suit is not maintainable at all. By means of this application a proceeding is initiated in which a claim is made by the defendant that he is entitled to have the hearing of the suit stayed till the decision of a previously instituted suit which is pending and to have the suit decided in accordance with the decision of the previously instituted suit. The right which the defendant claims by means of the application is very material to him in that he will not be called upon to answer the plaintiff's claim afresh, because that will be done in the previously instituted suit and he will be in a position to say to the Court that the decision of the suit must be in accordance with the previously instituted suit. The proceeding is separate from the trial of the matters which are in controversy in the suit and is complete by itself. Therefore it fulfils all the requirements of a "case".

(32) If the plea under S. 10, Civil P. C., is contained in the written statement, the Court very often frames an issue upon it. There is nothing improper in the Court adopting this course. But as already observed an issue raised for a plea under S. 10, Civil P. C., is not really a defence to the suit itself, and therefore, it is a matter which is separate from the trial of the suit and hence a case by itself, even though an issue has been framed by the Court relating to it.

(33) I am in agreement with the opinion of Mukerji J. in AIR 1929 All 957 (E) that a matter under S. 10, Civil P. C., has nothing to do with the merits of the case, but I do not agree with him when he says that it is not a "case" by itself.

(34) I, therefore, agree with my Lord the Chief Justice in the answers that should be given to the questions referred to this Full Bench.

V. BHARGAVA J.:

(35) I have had the benefit of reading the judgment proposed to be delivered by my Lord the Chief Justice. While agreeing with him, I would like to add a few words as I consider that the questions, which arise in this revision, are very easily answered if attention is paid to the language used by the Legislature in various provisions of law which determine the jurisdiction of Courts and in respect of which it may be necessary to find out whether the result of the order of the Court is that a case has been decided. In a number of statutes, the provision made is in the form of a direction to the Court to proceed or to refrain from proceeding in a certain manner or to pass an order that would terminate the proceedings before it. In this class of cases, I may cite a few instances:

(36) Section 242 of the U. P. Tenancy Act lays down:

"242. Subject to the provisions of S. 286 all suits and applications of the nature specified in the Fourth Schedule shall be heard and determined by a revenue Court, and no Court other than a revenue Court, shall, except by way of appeal or revision as provided in this Act, take cognizance of any such suit or application or of any suit or application based on a cause of action in respect of which any relief could be obtained by means of any such suit or application."

Section 55 of the U. P. Panchayat Raj Act (U. P. Act No. 36 of 1947) is as follows:

"55. No Court shall take cognizance of a case or suit which is cognizable under the Act by a Panchayati Adalat unless an order has been passed by a Sub-Divisional Magistrate or Munsif under S. 85."

In both these instances, the Legislature has given a direction to the Court not to take cognizance of the suit in certain circumstances. If a

question arises before a Court and the Court is called upon to decide in any suit already instituted before it whether it can or cannot take cognizance of the suit, the decision will be on a question which determines the power of the Court to proceed with the suit and the validity of the subsequent proceedings in the Court will depend on the correctness of the decision that the cognizance of the suit can be validly taken by the Court. In such circumstances, it must be held that the order of the Court, deciding the question of jurisdiction, amounts to a case decided.

(37) Another example, that may be taken, is provided by S. 3 of the Limitation Act, which lays down :

"3. Subject to the provisions contained in Ss. 4 to 25 (inclusive) every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

By this provision of law, a mandatory direction is given to the Court to dismiss the suit, appeal or application if instituted, preferred or made after the period of limitation prescribed therefor unless it is saved by other provisions of the Act. Consequently, a decision by the Court on the question whether the suit, appeal or application is or is not barred by limitation determines what action is to be taken by the Court in the proceedings and regulates the further conduct of the Court and, in such a case also, therefore, the order of the Court will result in the decision of a case.

Similarly, S. 11, Civil P. C. directs that

"no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Here again, the Court is directed not to try a suit or an issue under certain circumstances and any order by the court in this behalf determines the question whether further proceedings to be taken in the Court are or are not within its jurisdiction.

These two later instances cited by me explain why their Lordships of the Privy Council in AIR 1949 PC 239 (R) remarked:

"There have been a very large number of decisions of Indian High Courts on S. 115, to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-s. (c), nevertheless, if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-s. (a) or sub-s. (b), and sub-s. (c) can be ignored. The cases of — 'Babu Ram v. Munna Lal', AIR 1927 All 358 (S) and — 'Hari Bhikaji v. Naro Vishvanath', 9 Bom 432 (T) may be mentioned as cases in which a Subordinate Court by its own erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of 'res judicata', invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

So far I have mentioned instances where the provision of law is so worded as to raise a question of jurisdiction at the very initial stage in a suit or proceeding; but there can also be cases where, though a court may be rightly seized of a suit or proceeding pending before it, the Legislature may have made a provision directing the manner in which the Court is to proceed further with the suit or proceeding and also laying down that, under certain circumstances, the Court shall stay its hands and refuse to continue further proceedings. An example of a case of this nature is provided by S. 7(1)(a) of the U. P. Encumbered Estates Act which, while giving the consequences of an order passed by the Collector under S. 6 of the Act, lays down:

"7(1)(a). All proceedings pending at the date of the said order in any civil or revenue court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except any appeal (review) or revision against a decree or order, shall be stayed ....."

Very similar is the provision of S. 10, Civil P. C. which has come up for consideration in this case before us and which is as follows:

"10. No Court shall proceed with the trial of any suit ....."

In these cases again, the Court is directed to stay proceedings in the suit which may have been properly instituted before it and cognizance of which may have been taken by the court competently. In these cases, however, the determination of the question by the court whether the suit or proceeding should be stayed also determines the validity of further proceedings by the Court and, consequently, in my opinion, a decision by the Court on such a question must amount to decision of a case.

(38) The other class of cases is whether the Legislature has so worded the provisions of the statute that limitations are not placed on the powers or functions of the Court, nor is any direction intended to be conveyed to a Court as to the manner in which it must exercise its powers but limitations are placed on the right of a party to invoke the jurisdiction of a Court. The simplest example is provided by Ss. 15 to 20, Civil P. C. In all these sections, the language regulates the institution of the suit and not the power of the Court to take cognizance of the suit or to deal with it. Institution of a suit is an act of a party and these sections, therefore, regulate the act of that party. Section 15 requires every suit

to be instituted in the court of the lowest grade competent to try it. Section 16 lays down the Court in which the suit is to be instituted when the forum is to be determined by the situation of the property to which the suit relates. Section 17 permits, under certain circumstances, institution of a suit in different Courts. Section 19 makes special provision governing the institution of suits for compensation for wrongs done to a person or movable property and S. 20 is the general section indicating in which court suits should ordinarily be instituted.

If a suit is instituted in a wrong Court the question whether the Court should proceed with the suit will be a question of jurisdiction but the determination by the court will be a determination of the right of a party to institute the suit and not a determination of the power of the court to continue proceedings in the suit. In such a case, therefore, the decision by the Court must be held to be a decision relating to the right of a party which is a matter intrinsic to the decision of the suit and not a collateral proceeding which will determine the power of the court and its jurisdiction to continue the proceedings. In my opinion, in such a case, the decision by the Court must be held not to amount to a case decided but to be a decision on an issue in the suit arising between the parties relating to their rights.

Very similar is the provision of S. 80, Civil P. C. which prohibits institution of suits against the State or against a public officer until the expiration of two months next after notice in writing has been given. Sections 55 and 59 of the U. P. Court of Wards Act, 1912, may also be referred to in this connection. Under these sections, there is a bar on the right of a ward to sue or be sued except by and in the name of the Collector in charge of his property or such other person as has been appointed in this behalf. This is again a limitation on the right of a party in respect of seeking remedy in court by a suit and if a plea is taken that the suit is not maintainable as being barred by any of these two sections, the determination of that question will be a determination of rights of parties and will, therefore, not amount to a case decided.

(39) Section 192 of the U. P. District Boards Act, 1922, and S. 326 of the U. P. Municipalities Act, 1916, also place limitation on institution of suits against a district board or a municipal board. Questions frequently arise whether a suit has or has not been properly instituted in accordance with these provisions of law. Decisions on such questions must also be held to be decisions relating to rights of parties to seek the remedy in the court and, consequently, orders passed in accordance with these sections or giving in effect to the provisions of these sections will not amount to cases decided.

(40) This division of decisions on question of jurisdiction into these two classes also supports the view taken by My Lord the Chief Justice that it is quite immaterial whether the decision is given after the court has framed an issue on the point or does so without framing any issue. The mere fact that a question is made the subject-matter of an issue cannot affect the nature of the decision and cannot convert a matter which is extrinsic and collateral into a matter intrinsic and ancillary to the suit or proceeding. The decision of the Full Bench of this Court in AIR 1921 All 1 (A), in the view that I have taken above, is, if I may say so with respect perfectly correct. That was a suit in which the plaintiff claimed a sum of money as damages on account of an alleged breach of contract in the Court of the Munsif of Etawah. The defendants took the plea that the suit was cognizable by the civil court at Kanpur and the issue, that arose, was framed by the trial court in the following words:

"Is the suit cognizable by this or the Civil Courts of Cawnpore?"

The court then proceeded to try this issue separately from the rest of the case on the evidence, both oral and documentary, and came to the conclusion that it had jurisdiction and recorded a formal order to that effect. In the revision before the High Court under S. 115, Civil P. C., the question arose whether the order of the Munsif had decided a case so as to determine whether a revision did or did not lie to the High Court. It was held that the decision of the Munsif did not amount to the decision of a case and no revision lay. The question as to the Court, which had jurisdiction to try the suit, depended on the interpretation of clause (c) of section 20 of the Code of Civil Procedure which, as I have mentioned above, regulates the right of a plaintiff to institute a suit and does not place any limitation on the power of a court to take cognizance of the suit. The decision, therefore, was a decision on the right of a plaintiff on a matter, which was in issue before the court, as an intrinsic part of the suit instituted before it, whether, rightly or wrongly. It could not, therefore, be held that a case had been decided and that a revision could be entertained by the High Court under S. 115, Civil P. C.

(41) For the reasons mentioned by me above, I agree with My Lord the Chief Justice and concur in the answers proposed by him to the questions referred to the Full Bench.

MUKERJI J.:

(42) I agree with the judgment of my Lord the Chief Justice and have nothing further to add.

CHATURVEDI J.:

(43) I agree with the judgment of my Lord the Chief Justice and have nothing further to add.

ASTHANA J.:

(44) I agree with the judgment of my Lord the Chief Justice and have nothing further to add.

MEHROTRA J.:

(45) I agree with the judgment of my Lord the Chief Justice and have nothing further to add.

BY THE COURT:

(46) Our answer to the question, therefore, is that an order under S. 10, Civil P. C. is a case decided and the fact that the learned Judge had framed an issue on the point and decided the point as an issue in the case would make no difference.

(47) The case may now be laid before the Bench concerned.

D.H.Z. Answer accordingly.

A.I.R. 1955 ALL. 318 (Vol. 42, C.N. 91)

HARISH CHANDRA J. (24-8-1954)

S. M. Jaffry, Applicant v. The State, Opposite Party.

Criminal Revn. No. 1197 of 1954, against order of Civil and S. J., Banaras in Cri. Revn. No. 418 of 1953.

Criminal P. C. (1933), Ss. 200, 439 and 537 — Omission to examine complainant — Irregularity.

An improper examination of the complainant does not amount to an illegality which will vitiate the subsequent proceedings. It is merely an irregularity and will not affect the subsequent proceedings unless it has prejudiced the accused in any manner. AIR 1915 All 417 — AIR 1933 All 816 — AIR 1945 Oudh 102, Rel. on. (Para 2)

In a case of defamation the complaint did not mention the details of the defamatory matters published. The examination of the complainant under S. 200 was improper in that the complainant merely affirmed that the statements in the complaint were true. After examining the complainant's evidence the Magistrate framed a charge.

Held that the irregularities in the complaint and the examination of the accused were cured under S. 537 as the accused had not been prejudiced. (Para 3)

Anno: Criminal P. C., S. 200 N. 13, 16; S. 537 N. 17.

CASES REFERRED: Paras

(A) (V11) AIR 1924 All 664 (1): 26 Cri LJ 176 2
(B) (V22) AIR 1935 All 745: 36 Cri LJ 860 2
(C) (V2) AIR 1915 All 417: 16 Cri LJ 669 2
(D) (V20) AIR 1933 All 816: 56 All 33: 35 Cri LJ 347 2
(E) (V32) AIR 1945 Oudh 102: 46 Cri LJ 587 2
(F) (V23) AIR 1936 Pat 145: 37 Cri LJ 289 2
(G) (V35) AIR 1948 Mad 424: 49 Cri LJ 554 2
(H) (V11) AIR 1924 Lah 258: 25 Cri LJ 125 2

Rajeshwari Prasad, for Applicant; Govt. Advocate, for Opposite Party.

ORDER: The opposite party filed a complaint alleging that the applicant was the Editor, Printer and Publisher of an Urdu Weekly, 'Khadim', and in the issue of 26-8-1952 of that paper he had published defamatory matters concerning the opposite party and had also made verbal defamatory allegations against him. After this complaint was filed he was examined by the magistrate under S. 200, Criminal P. C., but his examination was not a proper one. In his examination he stated that the facts which were alleged in the complaint were correct and after his examination the accused was summoned and the opposite party was asked to produce his evidence in support of his case. He examined certain witnesses and also filed the issues in which the alleged defamatory matters had been published against him. After a consideration of all that evidence the learned Magistrate found that a prima facie case had been made out against the applicant and he, therefore, framed charges under S. 500, I. P. C., against him. After the charges had been framed the applicant filed a revision before the Sessions Judge, Banaras, which was disposed of by the learned Addl. Sessions Judge. He rejected the revision. The applicant has now filed this revision before this Court.

(2) It has been contended on behalf of the applicant that the omission of the learned Magistrate to examine the opposite party was illegal and vitiated the entire proceedings. In support of his contentions he has relied on two cases of this Court reported in — 'Rekha Chamar v. King-Emperor', AIR 1924 All 664 (1) (A) and — 'Bhagwan Das v. Emperor', AIR 1935 All 745 (B). Both these cases are the decisions of Single Judge. As against these two cases there is a case reported in — 'Bateshar v. Emperor', AIR 1915 All 417 (C). This is the Division Bench case and it was held in this case that the omission to examine a complainant under S. 200, Criminal P. C., was not an illegality but a mere irregularity and was curable under S. 537, Criminal P. C., and did not vitiate the trial. This decision seems to have been followed in 1933 in a case reported in — 'Baldewa v. Emperor', AIR 1933 All 816 (D). In this case also it was held that the failure to examine the complainant under S. 200, Criminal P. C., was merely an irregularity curable by S. 537, Cr. P. C., and did not vitiate the trial on the subsequent proceedings.

The decision in AIR 1915 All 417 (C) was followed in — 'Dulan Dayal Singh v. Emperor', AIR 1945 Oudh 102 (E) wherein it was held that the failure by the magistrate to take the statements of the complainant on oath before sending the case for an investigation under S. 202 was an irregularity which was curable by S. 537 and did not vitiate the trial so long as the accused had not been prejudiced. In this case reference was also made to — 'Ramjas Marwari v. Purulia Municipality', AIR 1938 Pat 145 (F); — 'P. N. S. Aiyar v. K. J. Nathan', AIR 1948 Mad 424 (G) and — 'Mehar Chiragh Din v Emperor', AIR 1924 Lah 258 (H) wherein similar view was taken. In view of the decision in AIR 1915 All 417 (C), which was followed by this Court in AIR 1933 All 816 (D) and AIR 1945 Oudh 102 (E), I am of opinion that improper examination of the complainant does not amount to an illegality which will vitiate the subsequent proceedings. In my opinion it is merely an irregularity and will not affect the subsequent proceedings unless it has prejudiced the accused in any manner.

(3) It has been contended on behalf of the applicant that the framing of the charge has prejudiced the applicant. I am unable to see how the applicant has been prejudiced by mere framing of the charge against him. The learned Magistrate had framed a charge after the examination of the prosecution evidence when a prima facie case had been made out. The applicant knows what the charge against him is and he can very well meet the case. In my opinion the applicant has not been prejudiced by the mere framing of the

charge against him. I do not think that merely because there is some irregularity in the examination of the complainant the subsequent proceedings should be quashed. It has also been contended that the complaint does not mention in details the defamatory matters published against the opposite party in the issue of 26-8-1952. It has been further argued that the charge had been framed also in respect of publication in the issue of 17-8-1952 though it was not mentioned in the complaint. There is no doubt that the complaint has not been properly worded and is rather vague, and, it is only from the subsequent evidence produced by the prosecution that the proper case of the opposite party has been brought to light. The failure to mention the details in the complaint is also in my opinion a mere irregularity.

(4) In the circumstances I do not see any satisfactory reason to interfere with the proceedings as I am not satisfied that the applicant has been prejudiced or will be prejudiced in future on account of the above irregularity. He has got full opportunity to meet the case. The application, therefore, is dismissed.

K.S.B. Revision dismissed.

A.I.R. 1955 ALL. 319 (Vol. 42, C.N. 92)

MALIK C. J. AND GURTU J. (12-10-1954)

Suraj Prasad, Plaintiff-Appellant v. Jagarnath Pd. and others, Defendants-Respondents.

F. A. F. O. No. 204 of 1947, against order of Addl. Civil J., Benaras, D/- 26-4-1947.

(a) Court-fees Act (1870), S. 7 (iv-A), (U. P.) — Suit for partition — Previous partition deed by father on behalf of plaintiff who was then minor in existence — Court-fee to be paid.

Where the plaintiff files a suit for partition alleging that the previous partition by his father between the coparceners including the plaintiff who was then a minor and was represented by his father as guardian, was invalid and that he was entitled to ignore it, the plaintiff must pay court-fees under S. 7 (iv-A), since before the plaintiff can claim partition it has to be adjudged that the deed which was executed on his behalf by his father was not binding on him. (Para 4)

Where a minor is a party to the document and the document has been executed by his legal guardian, it cannot be said that he is not a party to the deed. So the plaintiff has to pay Court-fees on the full value of the subject-matter under S. 7 (iv-A)(1). (Para 6)

Where distinct reliefs arising out of the same cause of action are claimed in the suit, court-fee is payable on the consolidated amount of all the reliefs. Thus instead of the plaintiff being required to pay court-fee separately, i.e., to have the deed adjudged void or voidable and for partition of the property, the court-fee is payable on the consolidated amount of all the reliefs. AIR 1949 All 170, Foll. (Paras 7, 8)

Anno: Court-fees Act, S. 7 (iv) (b), N. 1a.

CASES REFERRED: Paras

(A) (V37) AIR 1950 All 460: 1950 All LJ 299 6

(B) ('42) Civil Misc. Case No. 817 of 1940 decided by Bajpai and Dar JJ. on 10-8-1942 (All) 6

(C) (V36) AIR 1949 All 170: ILR (1949) All 852 7, 8

M. B. Bhatnagar, for Appellant; H. N. Seth, for Respondent.

MALIK C. J.:

This is an appeal under S. 6-A, Court-fees Act, and involves two short points.

(2) A suit was filed for partition of joint family property. Under S. 7 (iv-A) in suits for partition the plaintiff has to pay court-fees as provided for in that sub-section. It appears that the plaintiff's father had entered into a compromise with his other coparceners and a partition deed had been executed by the father not only for himself but on behalf of the minor son as his guardian. This was necessary as in the partition suit the minor had also been impleaded as a party.

(3) The plaintiff filed the suit, out of which this appeal has arisen, for partition of the property ignoring the previous compromise dated 13-1-1952. The plaintiff's contention was that the partition deed dated 13-1-1952, was invalid and he was entitled therefore to ignore it.

(4) The lower court has held that before the plaintiff could claim partition of the property it would be necessary for him to have it adjudged that the partition deed was void or voidable and the plaintiff must, therefore, pay court-fees in accordance with the provisions of S. 7 (iv-A) which is as follows:

"In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value,

(1) where the plaintiff or his predecessor-in-title was a party to the decree or the instrument according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument according to one-fifth of the value of the subject-matter....."

It cannot be disputed that before the plaintiff can claim partition it has to be adjudged that the deed, which was executed on his behalf by his father, was not binding on him. So the plaintiff has to pay court-fees under S. 7(iv-A) also.

(5) Learned counsel has urged that the appellant was not a party to the document and he should, therefore, be made to pay court-fee at one-fifth of the value of the subject-matter and not on the full market value.

(6) Learned counsel has relied on a Division Bench ruling of this Court in — 'Bhuwan Bhushan v. Balbhaddar Das', AIR 1950 All 460 (A) where it was held that "The word 'party' in sub-s. (1) of S. 7(iv-A) refers to the person who is directly a party to the instrument."

For this proposition reliance was placed on an unreported decision — 'Birbal Singh v. Jang Bahadur Singh', Civil Misc. Case No. 817 of 1940 (All) (B). The unreported decision relied on does not, however, go to that length. In that case the question for decision was whether when the Karta had executed a document on behalf of a joint family other members of the joint family could be deemed to be parties to that document. The learned Judges held that the other members of the family, who were not executants of the document, could not be said to be parties to the document. They, however, observed that:

"Ordinarily a person is said to be a party to an instrument when he had signed and executed it or possibly if he is a disqualified person when his guardian had signed and executed it for him."

Where, therefore, a minor is a party to the document and the document has been executed by his legal guardian, it cannot be said that he is not a party to the deed.

(7) The only other point that was raised and which remains for consideration is whether the plaintiff should pay separate court-fees under S. 7 (iv-A) to have the partition-deed adjudged void or voidable and for partition of the property. It was held in — 'Chief Inspector of Stamps v. Suraj Karan', AIR 1949 All 170 (C) that where distinct reliefs arising out of the same cause of action are claimed in the suit court-fee is payable on the consolidated amount of all the reliefs. That decision is binding on us.

(8) We, therefore, modify the order of the lower court to this extent that instead of the plaintiff being required to pay court-fee separately as directed by the lower court the court-fee shall be payable on the consolidated amount of all the reliefs as indicated in 'Chief Inspector of Stamps v. Suraj Karan (C)'.

(9) The appeal is, therefore, partly allowed and the order of the court below is modified. The plaintiff is directed to pay the court-fee within the time that may be allowed by the lower court on the amount mentioned above. The parties shall bear their own costs.

R.G.D. Order accordingly.

(S) A.I.R. 1955 ALL. 320 (Vol. 42, C.N. 93)

ASTHANA J. (17-8-1954)

Dhani Ram, Applicant v. Mst. Ram Dei, Opposite Party.

Criminal Revn. No. 1174 of 1954, against judgment of S. J., Kanpur, D/- 11-5-1954.

Criminal P. C. (1898), S. 488 — "Means" — Meaning of.

The word "means" includes earning capacity. Hence, when a man is healthy and able bodied he must be taken to have the means to support his wife. AIR 1926 Mad 346, Rel. on. (Para 3)

Anno: Cr. P. C., S. 488 N. 7 Pt. 2.

CASE REFERRED: Para

(A) (V13) AIR 1926 Mad 346: 27 Cri LJ 350 3

B. S. Darbari, for Applicant.

ORDER: This revision application arises out of a case under S. 488, Criminal P. C. The applicant was ordered by a first class Magistrate, Kanpur, to pay Rs. 25/- per month as maintenance to his wife. He filed a revision against this order before the learned Sessions Judge who rejected it.

(2) It appears from a perusal of the judgment of the learned Magistrate that the application was made by the wife on the ground that she was maltreated by the applicant and turned out of the house and was refused maintenance by him. She also alleged that after she had been turned out the applicant married a second wife. It was not disputed on behalf of the applicant that he had married a second wife. He, however, denied that he had maltreated the first wife or had turned her out of the house. It is an admitted fact that the first wife contracted a cataract of both the eyes. She examined several witnesses in support of her allegation that she had been maltreated by the applicant and turned out of the house. There is no doubt that the learned Magistrate has not given an express finding in his judgment that the applicant has maltreated his first wife and had turned her out of the house, but from the trend of the judgment it appears that he believed the evidence produced on this point by the wife. There is no doubt that it would have been better if the learned Magistrate would have expressly mentioned it in the judgment that he was believing the evidence on behalf of the wife.

(3) Another contention which was advanced on behalf of the applicant was that there is no finding by the learned Magistrate that the applicant had any means to support his wife and in the absence of such a finding the applicant could not be ordered to pay maintenance to the wife according to the provisions of S. 488, Criminal P. C. There is no doubt that there is no finding on the question of maintenance. The learned Magistrate has relied upon a decision of the Madras High Court reported in — 'In re Kandasami Chetty', AIR 1926 Mad 346 (A), where the word "means" used in S. 488, Cr. P. C., was interpreted. It was held in that case that the word "means" in the section did not mean that the husband should be possessed of any tangible property, but if a man was healthy and able bodied he must be taken to have the means to support his wife. There is nothing on the record of this case to show that the applicant is not healthy or able bodied and is, therefore, not in a position to earn for himself and his wife. The word "means" includes earning capacity and in view of this interpretation the applicant has the means.

(4) Lastly it was argued that the amount of Rs. 25/- per month is excessive and should be reduced. Considering the present times I do not think this amount is unreasonable.

(5) For the reasons given above I decline to interfere in revision. The application is therefore rejected. Leave to appeal to the Supreme Court is refused.

V.S.B. Application rejected.

A.I.R. 1955 ALLAHABAD 321 (Vol. 42, C.N. 94)

BEG AND ROY JJ. (26-8-1954)

Faqira, Appellant v. State, Respondent.

Criminal Appeal No. 648 of 1954, against order of S. J., Meerut, D/- 13-5-1954.

(a) Penal Code (1860), Ss. 300, Cl. 3 and 304, Pt. II — Applicability — Presumption of intention to cause injury — When rebutted — Offence held to be one under S. 304, Part II and not under S. 302, I. P. C.

Section 304, I. P. C., applies to cases where the injury caused is not of the higher degree of likelihood which is covered by the expression "sufficient in the ordinary course of nature to cause death" but is of a lower degree of likelihood which is generally spoken of as an injury "likely to cause death" and such a case does not fall under Cl. 3 of S. 300, I. P. C. AIR 1953 All 203, Rel. on. (Para 10)

To bring an act within the four corners of Cl. 3, it is not enough that the injury actually inflicted is sufficient in the ordinary course of nature to cause death. It is further necessary that the offender should intend to cause an injury of this nature. From the fact that the injury caused is sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the offender intended to cause an injury of that nature. The one does not conclusively prove the other. (Para 20)

The doctrine that man intends the natural consequences of his act cannot be carried too far, for otherwise, it would eliminate from the law the distinction between intentional and negligent or acoidental wrong doing. The true rule is that where the injury caused is not the result of accident or of negligence, a strong presumption arises that the injury caused was intended to be caused, though this presumption may be rebutted by other circumstances, e. g., the motive of the accused, the nature of the instrument of attack, the time and place of attack, the position and condition of the deceased, the number of injuries, the force used, etc. AIR 1953 All 203, Foll. (Para 9)

Thus where it is found that the deceased was the cousin of the accused, that there was no enmity whatsoever between them, that attack was not premeditated, that the accused flared up suddenly when his brother complained to him about the unseemly behaviour of the accused which happened about two hours before the occurrence, that the attack was lodged with fists & kicks and with the wooden side of the handle of the sickle and there was certainly no intention to kill;

Held that the presumption of intention to cause injuries was sufficiently rebutted by the above circumstances, and that the offence made out against the accused was one of culpable homicide not amounting to murder punishable under S. 304, Part II. (Para 12)

(ii) further, that the exigencies of the case would be sufficiently met if the accused is awarded a sentence of three years only. (Para 12)

Anno: I. P. C., S. 300 N. 6, 32; S. 304 N. 1, 6.

(b) Penal Code (1860), S. 300 — Intention and knowledge — Distinction — (Words and Phrases) — (Interpretation of statutes).

The words used in S. 300 connote intention and not knowledge. Knowledge as contrasted with intention would more properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it or passing before it. It would refer to a bare state of conscious awareness of certain facts in which human mind might itself remain supine or inactive. (Para 20)

On the other hand, intention connotes a conscious state in which mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Mental faculties which might be dispersed in the case of knowledge are in the case of intention concentrated and converged on a particular point and projected in a set direction. (Para 20)

The difference between the shades of the meaning of the two words is fine but clear, and the use of the one in place of the other by the Legislature cannot be without purpose. The words used by the Legislature must, therefore, be given their full effect. (Para 20)

Anno: I. P. C., S. 300 N. 3.

(c) Penal Code (1860), Ss. 300, Cl. 4 and 304 — Applicability — Dangerous act — Attack by fists or wooden end of scythe — Degree of knowledge required under Cl. (4).

The emphasis in the preceding part of Cl. 4 is on the imminently dangerous nature of the act itself. It cannot be said that the attack by fists or even by the wooden end of a scythe is by itself of such a nature as must, in all probability, cause death. Death in an attack of this nature is an exception rather than the rule. It is unusual to expect death in cases of this type. (Para 25)

The degree of knowledge required in Cl. 4 is so strong as to make it impossible to believe that the peril of the act ensuing in fatal consequences had not irresistibly forced itself on the mind of the offender and yet he had deliberately chosen to disregard this danger signal. Under this clause the degree of the probability or likelihood of the act resulting in fatal harm is of the highest level. (Para 25)

Where, therefore, this degree of knowledge cannot be fastened on the accused and it is a case where all that can be said is that death might have been known to be the probable result of the act but not a case where death must have been known to be the most probable result of the act, the conclusion brings the case out of Cl. 4 of S. 300 and would reduce the offence to one of culpable homicide not amounting to murder, that is, one under S. 304, I. P. C. (Para 25)

Anno: I. P. C., S. 300 N. 7.

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 203: 1952 All LJ 546: 1953 Cri LJ 565 9, 11, 27

(B) (V40) AIR 1953 All 189: 1952 All LJ 682:1953 Cri LJ 450 12, 27, 28

(C) ('08) 9 Cri LJ 245: 1 Sind LR 1 29

S. N. Mulla and R. K. Shangloo, for Appellant; A. K. Kirty, Govt. Advocate, for Respondent.

ROY J.:

Faqira, son of Nazar, aged 30 years, resident of Rardhana, within police circle Kithore, district Meerut has been convicted under S. 302, I. P. C., and sentenced to death for having committed the murder of his cousin Masit Ullah, alias Bholi on 21-3-1953 at about 2 p.m. He has preferred this appeal from his conviction and sentence and there is also the usual reference by the learned Sessions Judge for the confirmation of the sentence of death.

(2) The case for the prosecution was that on the day in question gram crop was being harvested from the field of one Liaqat by the deceased and by Hafiz alias Fiza, the real brother of the appellant and by others. At about mid-day an altercation took place between the deceased and Hafiz on the question as to who should cut which portion of the standing crop. The dispute was, however, resolved by the other persons who were working on the same field and the two continued to reap the crop till about 2 p.m. It is said that at that time Faqira appellant, the brother of Hafiz, came there and Hafiz complained to Faqira of the unseemingly behaviour of the deceased. The appellant got enraged and he kicked and cuffed Masitullah alias Bholi and gave him some blows with the wooden end of the sickle which he had in his hand. Masitullah fell down unconscious and he expired about two hours later.

(3) A report about the occurrence was lodged at the police station the same evening at 9-30 p.m. by Euddhu chaukidar of the village in which these details had been given and in which the eye-witnesses had been mentioned. The police took up investigation of the matter. The body was sent for post-mortem examination. The post-mortem examination was conducted on 23-3-1953 by the Civil Surgeon of Meerut. The following external injuries were present on the dead body of Masitullah alias Bholi :

1. Contused area 6″ x 4″ on the back and outer side of right arm and elbow and deep congestion was present on cutting the tissues.

2. Contused area 4″ x 2″ on left cheek with swelling around it and deep congestion was seen on cutting the tissues and this congestion extended upto neck.

3. Contused area 2″ x 1″ on back of left elbow and arm. Due to decomposition no other external mark of injury was visible.

(4) On cutting the chest wall very deep area of congestion was present on right side of chest in the lower part in an area 4″ x 3″ and another area of congestion was present in post axillary line in an area 6″ x 2″. On the left side of chest deep congestion was also present in an area 4″ x 3″ in mid thoracic area near vertebral attachment. One pint of blood was present in right thoracic cavity and flowed like a tap on cutting inter costal muscles. Right lung was deeply congested and lacerated for 1½″ x ¾″. Fracture of 5th and 7th ribs was present on left side. These fractures were present near the vertebral border. The diaphram on left side was very deeply congested and blood stained. Peritoneum was also congested and blood about 8 ounces was present in splenic bed. Walls of the stomach were congested. Spleen was congested and lacerated for 1″ x ¼″ and was lying in a pool of blood. Liver and right kidney were also congested. Death in the opinion of the Civil Surgeon was due to shock and haemorrhage following fracture of ribs, laceration of lung and spleen. The Civil Surgeon was further of opinion that these injuries were caused probably by fists and kicks, and also by the handle of a sickle called daranti. The Civil Surgeon was further of opinion that all the injuries were ante mortem and they could not have been caused by a fall. He further stated that there was no evidence of any abnormality like that of a tumour in the deceased's abdomen.

(5) In support of the prosecution story five eye-witnesses were produced. Three of them, namely, Jumma, Kaley and Ram Chand, P. Ws. 1 to 3 were at the time of the occurrence reaping the crop in the adjoining field of Abbas, and the other two, namely, Amar Singh (P. W. 6) and Mamraj (P. W. 9) were reaping the crop on the field of Liaqat where the occurrence took place. The first set of witnesses who were on Abbas's field did not see the beginning of the assault and they were attracted to the place after the assault had started. The second set of witnesses who were on Liaqat's field saw the occurrence from beginning to end. Their evidence coupled with the medical evidence on the record leaves no manner of doubt that the deceased had been assaulted by the appellant by fists and kicks and the wooden end of the sickle and death was due to the injuries received by him in that assault.

(6) The plea raised by the appellant in his defence was four-fold. Firstly, that the deceased had been assaulted by the appellant's brother Hafiz at the time when the initial quarrel took place and not by the appellant and that the deceased died about two hours later of symptoms which simulated cholera. Secondly, that the injuries were post-mortem and had been occasioned by a fall of the dead body on the ground when it was being taken over on a cot to the thana. Thirdly, that the deceased had a tumour and it was probable that the death ensued on account of the tumour having burst. Fourthly, that the appellant who was not present at all at the time of the occurrence, was falsely implicated at the instance of one Majji Pradhan who was inimical to him.

(7) We have examined the facts and circumstances of the case and the evidence on the record and we are of opinion that the defences taken up by the appellant were not true. It cannot for a moment be accepted that the real culprit Hafiz, the brother of the appellant, was left out and the appellant was roped in his stead. The medical

evidence disclosed that the injuries found on the dead body were ante mortem and were caused by fists and kicks and by the wooden end of the sickle called daranti. The medical evidence further proved that those injuries were not caused by a fall and there was no abnormality like that of a tumour in the deceased's abdomen.

(8) Three witnesses were examined on the side of defence. They were Qadra (D. W. 1), the brother of the deceased, Rahimuddin (D. W. 2), and Shrimati Allah Rakhi (D. W. 3), the mother of the deceased. The first two stated that the incident took place with Hafiz, the brother of the appellant, and that the deceased survived the assault and worked over the field for about another hour when he vomited and purged and became unconscious and he was then removed home where he expired in the evening. The third witness, namely, Shrimati Allah Rakhi stated that when the dead body was being taken to the thana on a bullock-cart, it fell on the ground. The suggestion was that the injuries were the result of that fall. There can be no doubt whatsoever that the defence witnesses were false and suborned witnesses and the theory propounded by them had not had the slightest foundation of truth behind it.

(9) The question next arises what offence was made out. The learned Sessions Judge held that having regard to the nature and extent of injuries and having regard to a Division Bench decision of this Court in — 'Behari v. State', AIR 1953 All 203 (A), the case fell under Cl. 3 of S. 300, I. P. C., and the offence amounted to murder. The learned Sessions Judge in the alternative thought that the case might be covered by Cl. 4 of S. 300, I. P. C. In applying the decision in 'Behari v. State (A)', to the facts of the present case, the learned Sessions Judge relied upon a part of it as divorced from another and a very important part. Clause 3 of S. 300, I. P. C., speaks of

> "intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

In interpreting this provision, it was observed at p. 206 of the report in 'Behari v. State (A)', cited above :

> "The difficulty that usually arises is of ascertaining the intention of the accused when, say, the injury actually caused is fracture of the skull and compression of the brain resulting in death. The injury actually caused is sufficient in the ordinary course of nature to cause death. Did the accused intend to cause the injury actually caused or did he merely intend to cause a wound on the head? The presumption is that man intends the natural consequences of his act. But this doctrine cannot be carried too far, for otherwise, it would eliminate from the law the distinction between intentional and negligent or accidental wrong doing. The true rule is that where the injury caused is not the result of accident or of negligence, a strong presumption arises that the injury caused was intended to be caused, though this presumption may be rebutted by other circumstances, e.g., the motive of the accused, the nature of the instrument of attack, the time and place of attack, the position and condition of the deceased, the number of injuries, the force used etc."

(10) The learned Sessions Judge overlooked these observations with regard to the presumption being rebuttable and he did not direct his mind to the question whether or not the presumption has been rebutted in the present case. In the same decision it was laid down that S. 304, I. P. C., will apply to cases where the injury caused is not of the higher degree of likelihood which is covered by the expression "sufficient in the ordinary course of nature to cause death" but is of a lower degree of likelihood which is generally spoken of as an injury "likely to cause death" and the case does not fall under Cl. (3) of S. 300, I. P. C.

(11) Now what are the facts of the present case? The deceased was the cousin of the accused and there was no enmity whatsoever between them. The attack was not premeditated. The accused flared up suddenly when his brother Hafiz complained to him about the unseemly behaviour of the accused which happened about two hours before this occurrence. The attack was lodged with fists and kicks and with the wooden side of the handle of the sickle. There was certainly no intention to kill, for if that intention had been there, the sickle would have been used very effectively by inflicting injuries with the sharp and iron portion of it. There was absolutely no motive to kill. The ordinary rule that "where the injury caused was not the result of accident or of negligence, a strong presumption arises that the injury caused was intended to be caused" was sufficiently rebutted by the circumstances narrated above, namely, : (1) that there was no motive or intention to kill, (2) that the act was not premeditated, (3) that the relations between the accused and the deceased who were cousins had till then been cordial, and (4) the nature of the instrument of attack and the time and place of attack. The true import of the decision in AIR 1953 All 203 (A), is most often lost sight of by the trial courts, and that is what seems to have happened in the present case as well.

(12) Learned counsel for the State has relied upon the decision in — 'Badri v. State', AIR 1953 All 189 (B), in support of his contention that the offence in the present case would be an offence of murder. We have looked into the facts of that case and we are of opinion that it is clearly distinguishable. There it was found that the injuries inflicted were intentional and they were of such a nature as to cause death in the ordinary course of nature and the injuries were so severe that there was no escape from the conclusion that the case fell under Cl. 3 of S. 300, I. P. C. The conviction in that case was, however, maintained under S. 304, I. P. C., but in the exercise of the revisional jurisdiction the sentence was enhanced. The observations made in that case would not, however, be pertinent to the facts of the present case which are entirely on a different

level. Having regard to the facts and circumstances of the present case and the evidence on the record we are of opinion that the offence that was made out against the appellant was one of culpable homicide not amounting to murder punishable under S. 304, Part II, Penal Code, and we are further of opinion that the exigencies of the case would be sufficiently met if the appellant is awarded a sentence of three years only.

(13) We, therefore, allow the appeal, set aside the conviction and sentence of the appellant under S. 302, I. P. C., but instead we convict him under S. 304, Part II, Penal Code, and sentence him to undergo three years' rigorous imprisonment. The reference is rejected.

BEG J.:

(14) While agreeing with my learned brother on the conclusions arrived at by him regarding the conviction and sentence of the appellant I would like to make some comments on the evidence adduced by the prosecution in this case and on questions of fact and law involved in it. The salient facts of this case have already been set out in the judgment of my learned brother. It is therefore, not necessary to recapitulate them. No doubt, the prosecution has succeeded in proving its case that the appellant Faqira caused injuries to Masitullah alias Bholi on the afternoon of 21-3-1953 and further that these injuries resulted in his death. The prosecution evidence, however, relating to the manner of attack deserves to be sifted on certain particulars.

(15) It seems to me that the prosecution case that the attack was launched by the appellant simultaneously with fists and kicks as well as with the wooden side of scythe is improbable. It would obviously be inconvenient for a person to effectively wield the wooden handle of a scythe as well as his hands and legs at the same time. The probabilities are that the appellant struck the deceased only with fists and not with the wooden side of the scythe at all. Amar Singh (P. W. 6) who was working in the field along with Masitullah alias Bholi clearly stated in his evidence to the following effect :

> "I saw him being beaten only with fists, I did not see him being beaten with the handle of a daranti or with kicks."

Then in the next breath he changed this statement and the court recorded it thus :

> "(Now says) Faqira beat Bholi with kicks and the handle of a daranti also. It was by mistake that I stated that Bholi was beaten only with fists."

Subsequently the witness stated as follows :

> "When I was to appear before the committing Magistrate the Daroghaji had told me that I should state that Bholi had been beaten with fists, kicks and the handle of a daranti and I stated whatever I was asked by the Daroghaji to state."

This statement leads one to think that the prosecution version that the injuries were caused by fists and kicks as well as by the wooden side of a daranti is an embellishment in the case which required some police pressure to support it.

(16) Ram Chand (P. W. 3) also at one stage of the cross-examination stated :

> "I saw with my own eyes Faqira giving fist blows to Bholi".

There is no allegation or even suggestion that any of the above witnesses had turned hostile. On the other hand, the prosecution has throughout relied on them. There is, therefore, absolutely no reason why that part of the evidence of these witnesses which is in favour of the accused should not be accepted, especially as it is supported also by the medical evidence of the doctor who stated that the injuries found on the person of the deceased could be caused by fists and kicks.

(17) Next it should be noted that although an attempt has been made on the part of the prosecution witnesses to make out that the attack was a unilateral one and the deceased was quite inactive in the matter, it appears to me that this is not quite a true picture of the incident. It seems that the position was that both the deceased as well as the appellant were grappling with each other. Their bodies would in that position be inter-locked. This picture of the incident is borne out by Ram Chand (P. W. 3) who stated in cross-examination as follows :

> "I was still in the field in which I was reaping the grams. I saw Faqira and Bholi grappling with each other."

In this situation it is obvious that the position would be a confused one and it would not be possible to predicate that the blow caused by the appellant at any particular spot was aimed by him at that very spot or that he was able to anticipate exactly the nature & effect of each blow or the amount of damage that a particular blow would cause to the deceased. Further, in this situation, it is possible that an injury or damage caused might not necessarily have been the injury or damage intended to be inflicted by the appellant, since in this situation there is a fair possibility of the infliction of an accidental injury exceeding in violence the injury actually intended.

It is also to be borne in mind that it is the admitted case of the parties that the relations between the deceased and the appellant prior to that date of incident were quite cordial. The attack by the appellant on the deceased was a sudden one and was the result of a complaint made by Fiza to his brother Faqira, the appellant, that Masitullah alias Bholi had beaten him (Fiza) earlier in the day. This had led to the sudden provocation of the appellant who had flared up in rage on getting this information. In fact the appellant was related to the deceased as uncle. They were living in different portions of the same house. Even after the present case was started against the appellant, the daughter of the deceased namely, Kumari Jamila, as well as the mother of the deceased viz., Srimati Allah Rakkhi gave evidence in court supporting the case of the appellant.

(18) In the light of the above remarks on the evidence produced by the prosecution in this case the question of law that arises may now

be approached. On the above facts, the question that has to be decided is, whether the offence made out is one of murder or that of culpable homicide not amounting to murder. The word 'murder' is defined in S. 300, I. P. C., which provides as follows :

"Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

2ndly : If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

3rdly : If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly : If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid." (Exceptions 1 to 5 omitted).

(19) So far as the first clause is concerned, it can have no application to the facts of the present case as it is not possible by any stretch of imagination to attribute to the appellant the intention of causing death. It is also not possible to bring the present case within the second clause. The evidence does not disclose that the deceased had any physical infirmity or defect in his body or any special feature in his constitution, which brought about his death or that the offender was aware of any such weakness, defect or special feature. None of the parties has argued before us that the case can be brought under any of these two clauses. It must, therefore, be taken that none of the first two clauses of S. 300, I.P.C., is applicable to the present case.

(20) The trial court has come to the conclusion that the facts in the present case attract the operation of cls. (3) and (4) of S. 300, I.P.C., mentioned above and this position deserves to be examined closely. To attract the provisions of cl. (3), two requirements have to be fulfilled. The first requirement is that the act by which the death is caused should have been done with the intention of causing bodily injury to any person. This requirement would not present much difficulty in most of the cases as the very fact that a person strikes or assaults another or does an act to harm another would by necessary implication point to the conclusion that he intended to cause bodily injury to that person. The second requirement of this clause is that bodily injury intended to be inflicted should be such as is sufficient in the ordinary course of nature to cause death.

On behalf of the State it is argued that the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death is enough to bring the offender within the clutches of cl. (3). I find it difficult to uphold this contention. If it is accepted, then in every case where the injury caused is sufficient in the ordinary course to cause death, the offender would have to be convicted under S. 302, I.P.C., barring of course the cases in which an exception applies. Moreover this interpretation would have the effect of making the words "intended to be inflicted" a surplusage. I am of opinion that the words "intended to be inflicted" can not be ignored nor the qualification which they import into this clause whittled down in this fashion.

Further, it is to be noted that the words used in this section connote intention and not knowledge. Knowledge as contrasted with intention would more properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it or passing before it. It would refer to a bare state of conscious awareness of certain facts in which human mind might itself remain supine or inactive. On the other hand, intention connotes a conscious state in which mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Mental faculties which might be dispersed in the case of knowledge are in the case of intention concentrated and converged on a particular point and projected in a set direction. The difference between the shades of the meaning of the two words is fine but clear, and the use of the one in place of the other by the Legislature cannot be without purpose. The words used by the Legislature must, therefore, be given their full effect.

For the aforesaid reason I am of opinion that to bring an act within the four corners of cl. (3), it is not enough that the injury actually inflicted is sufficient in the ordinary course of nature to cause death. It is further necessary that the offender should intend to cause an injury of this nature. From the fact that the injury caused is sufficient in the ordinary course of nature to cause death, it does not necessarily follow that the offender intended to cause an injury of that nature. The one does not conclusively prove the other. It is possible that the offender intended to cause one degree of harm and the injury actually inflicted cause a degree of harm exceeding in violence the harm intended by him. To my mind, the effect of a finding by the court that the injury actually inflicted is sufficient in the ordinary course of nature to cause death is to raise a presumption that the offender intended to cause bodily injury of that nature. Presumption, however, is not proof. The presumption thus arising is a rebuttable one. Once this presumption has arisen, the court will have to ascertain whether the facts brought out in the case are such as to rebut the presumption that has been raised against the accused.

In other words, the Indian Law has prescribed both an objective as well as a subjective test in this regard. The prosecution passes the objective test when once the court has given a finding to the effect that the injury actually caused is sufficient in the ordinary course of nature to cause death. Having reached that conclusion, the court

is thrown back on an enquiry regarding the subjective condition of the offender's mind and has to ascertain whether it is in a position to say that the subjective requirement has also been fulfilled i. e. whether the accused intended to cause the said injury. It is only after both the objective and subjective tests have been gone through, that this part of the requirement of the third clause can be said to have been fulfilled.

This process may be re-stated in another manner. The court has first to ascertain whether the injury is sufficient in the ordinary course of nature to cause death from the nature of injuries inflicted. Once this fact is found in favour of the prosecution, it has succeeded in proving that the objective requirement is fulfilled. This gives rise to a presumption regarding the subjective requirement. The court then turns to the circumstances of the case to ascertain as to how far this subjective requirement which is presumed in such cases has been rebutted by the circumstances emerging in that case. It is not possible to lay down any abstract rule in regard to this matter as the circumstances of particular case vary. The extent to which this presumption is rebutted will depend upon the consideration of a number of factors peculiar to that particular case. The weapon used, the degree of force utilised in wielding it, the antecedent relations of the parties, the manner in which the attack was made, the nature and number of the injuries inflicted and the part of the body where the injury was inflicted, all these and numerous other factors which may arise in a case have to be considered and the court has to see whether the presumption raised is rebutted as a cumulative effect of all the factors brought to light in the case before it.

If the Court finds that the force of such circumstance is insufficient to displace the presumption raised against the accused, it would hold that the necessary requirements of Cl. (3) have been fulfilled. On the other hand, if the Court finds that the totality of circumstances brought out in evidence are strong enough to rebut the presumption thus raised, it would hold that the requirements of Cl. (3) have not been fulfilled. Further, it is also to be remembered in this connection that even if the weight of such facts and circumstances is such as to create a balance against the presumption so to produce in the mind of the Court a state of mental equipoise, the legal principle of the benefit of doubt would be thrown into the pan in favour of the accused thereby tipping the scales of Justice on his side.

(21) Amongst the factors to be considered in this regard by the court, the kind of weapon used is no doubt an important circumstance. Where the weapon used is a firearm or a sharp-edged weapon, it may be difficult to rebut the presumption. Where such a weapon is used on a vital part of human body the difficulty in rebutting this presumption might be enhanced. Instances of the border line cases presenting difficulty might arise where the weapon used is a blunt one. The weakest type of prosecution cases in this regard would be those in which no weapon at all is used and the attack is found to have been launched merely with fists or fists and kicks.

(22) Another relevant factor, as mentioned above, is the antecedent relations between the parties. If the previous relations have been bitter, it is easier to come to the conclusion that the accused intended to cause the fatal harm. The position of the prosecution would be stronger if the attack is a premeditated one. If, on the other hand, it is found that there was no previous enmity between the parties and the attack was a sudden one and made in provocation that would be a factor which would go in favour of the accused as tending to neutralise the presumption initially raised against him. Again, so far the circumstance of motive is concerned, the weakest form of prosecution case would be the one where it is found that there is no antecedent enmity between the parties but on the other hand the parties are closely related and their relations prior to the date of the incident have been cordial.

(23) The part of the body where the injury has been inflicted and the number of injuries inflicted may also help the court in this regard. The fact that the injury is inflicted on the head or a vital part of the body would strengthen the case of the prosecution. If however, the injury is inflicted on a lower part of the body or on a part of the body which is not vital, the case of the prosecution would not be so strong. The force with which the injury was caused is also an important circumstance. But in considering this circumstance the Court cannot ignore the question whether the degree of harm caused was the result of a set purpose or of accidental factors arising from the situation of the parties in the course of the transaction. The number & nature of injuries inflicted may also be of help in determining this question. The Court may also consider the fact whether the attack was made by a solitary person or was a concerted one made by a number of persons. In a case in which the attack is made by a number of persons on a solitary individual and is a concerted one, it is a strong factor pointing to the conclusion against the accused. On the other hand, if it is an attack made by a solitary individual and is further an unpremeditated one that would be a circumstance in favour of the accused.

(24) Having enumerated instances of some of the considerations that may arise in such cases and the manner of their application by Courts, they may now be applied to the concrete facts of the present case. No doubt, on the side of the prosecution there is the substantial fact that the injuries caused by the accused were sufficient in the ordinary course of nature to cause death. This is enough to raise the initial presumption against the accused. On the other hand, on the side of the accused the evidence presents a number of counter-balancing factors for rebutting this presumption. It clearly shows that the previous relations between the parties were cordial. The appellant was a relation of the deceased. Both of them had joint cultivation. Even after the prosecution was launched against the appellant, the daughter and the mother of the deceased supported him. The attack was not a pre-

meditated or a deliberate one. It was the result of a sudden provocation resulting from a feeling of resentment arising from a realisation of the fact that the brother of the appellant was beaten by the deceased. The probabilities are that no weapon was used by the appellant and that he made the attack only with fists. Dr. Nand Lal in his commentary on the Indian Penal Code, 1929 Ed. Volume II pages 1369-70, while discussing the case of a man who makes a very violent attack on another person with fist on the head which is a vital part of the body makes the following remarks:

"Every man giving another a very violent blow on the head with his fist must be taken to know that the result of the blow may be, and even, is likely to be, injury to the other, sufficient to kill him, but unless it must be taken that ordinary knowledge experience or instinct tell a man that such a result is an ordinary and, therefore, probable consequence of so striking another man, the striker's act would not amount to a greater crime than culpable homicide for at most, it would be an act done with the knowledge that he was likely to cause death, and an intention to cause more than he knew was likely, could not be imputed to him, unless there was further evidence showing what his actual intention was."

Even if it be assumed for a moment that the attack was made by a scythe, the prosecution case itself is that scythe was deliberately inverted and the attack was made from the wooden end with a view to avoid any fatal harm. No doubt the injuries caused were of a serious type but there is also the circumstance that they were caused when the appellant and the deceased were grappling with each other and a situation was created in which the possibility of an injury accidently exceeding in violence the degree of harm intended cannot be eliminated or brushed aside. If the blow had struck slightly away from the ribs and fallen on the fleshy part of the abdomen a serious harm of this nature might not have been caused. The number of external injuries is only 3, so that the attack was not pursued further nor was it continued after fall.

It is possible that the accused having realised that he had caused more harm than intended, himself recoiled and stopped immediately. It is also to be remembered that this is not a concerted attack by a number of persons but a solitary attack made by one individual on another in a state of passion and at the spur of the moment. In my opinion, the effect of the totality of the circumstances mentioned above is to destroy the initial presumption raised against the accused. In any case, the position is not such as to be free from doubt and the benefit of it should go to the accused. The act would, therefore, be taken out of Cl. (3) of S. 300, I.P.C., and would descend to culpable homicide not amounting to murder unless Cl. (4) of S. 300 is applicable to it.

(25) The last question, therefore, that arises is whether Cl. (4) of S. 300, I. P. C., can be applied to the present case. The earlier part of this clause refers to cases where the act of the accused is itself so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause death. The emphasis in the preceding part of Cl. (4) is on the imminently dangerous nature of the act itself. It cannot be said that the attack by fists or even by the wooden end of a scythe is by itself of such a nature as must, in all probability, cause death. Death in an attack of this nature is an exception rather than the rule. It is unusual to expect death in cases of this type. Further, Cl. (4) is usually applied to cases where the act of the offender is not directed against any particular person. There may even be no intention to cause harm or injury to any particular individual. The act proceeds not from any malicious intention towards any particular individual but is the result of a general disregard for human life and safety. There may, however, be rare cases in which the target of attack even under Cl. (4) may be a single individual. The act of a person practising feats of archery by aiming his arrow at the cap of a human being walking at some distance away or of a mother leaving a new born babe in the open might provide an instance of it.

In any case, the degree of knowledge required in Cl. (4) is so strong as to make it impossible to believe that the peril of the act ensuing in fatal consequences had not irresistibly forced itself on the mind of the offender and yet he had deliberately chosen to disregard this danger signal. Under this clause the degree of the probability or likelihood of the act resulting in fatal harm is of the highest level. This degree of knowledge cannot be fastened on the appellant in the present case, nor can the degree of probability or likelihood required under S. 300, Cl. (4) be predicated of the act in question. The utmost that can be said in the present case is that the appellant had knowledge that his act was likely to cause death. In other words, this is a case where all that can be said is that death might have been known to be the probable result of the act but not a case where death must have been known to be the most probable result of the act. This conclusion would bring the case out of Cl. (4) and would again reduce the offence to one of culpable homicide not amounting to murder, that is, S. 304, I. P. C.

(26) As already indicated, in the present case there is no question of intention to cause death or of causing such bodily injury as is likely to cause death and this would take the case out of the purview of part I of S. 304, I. P. C. The present case would, therefore, fall under Part II of S. 304, which applies to a case where the act is done with

"the knowledge that it is likely to cause death, but without any intention to cause death or of causing such bodily injury as is likely to cause death."

(27) On behalf of the State reliance has been placed on two decisions, namely, AIR 1953 All 189 (B) and AIR 1953 All 203 (A), both of which are distinguishable on facts from the present case. In the case of AIR 1953 All 203 (A), the attack was a concerted one. It was a premeditated

attack launched by a number of persons, who had gone together with the intention of giving a beating to the deceased. The facts of this case have no analogy to the present case in which the attack was made by a solitary person who had flared up at the spur of the moment and suddenly resorted to violence. In the case cited, the court found that previous enmity between the parties had been proved and this previous enmity was found to be the motive of the attack. In the present case, it is admitted that there was no previous enmity between the parties and the antecedent relations between them were cordial. In the case cited the attack was made with lathis and the injuries were inflicted on the head. On the other hand, in the present case it appears that the attack was made with fists and even if the prosecution case is accepted, with the wooden side of a scythe which was deliberately inverted with a view to avoid causing any fatal injury.

(28) The other case, namely, AIR 1953 All 189 (B), has also no application to the facts of the present case. In this case the attack was made by a large number of persons. The number of persons was alleged to be 16 but the court found that there were no less than fourteen. All these persons had joined together to make an attack on the deceased. The attack was the outcome of a bitter enmity that had been existing between the parties. It was again a case of a concerted and premeditated attack by a large body of persons in which the court found that the injuries were inflicted with the intention of killing the deceased. None of the two above-mentioned cases can, therefore, provide a parallel with the present case.

(29) A case that might present a closer analogy to the present one is that reported in — 'King Emperor v. Bohram', 9 Cri LJ 245 (Sind) (C). This was a case of a sudden quarrel between solitary individuals in which the accused taking up a wooden pestle had given a blow with it to the deceased killing him in broad daylight in the presence of a number of persons. Dealing with the facts of the case the learned Judges while convicting the appellant under S. 304 Part II, Penal Code, observed as follows :

"The circumstances indicate that the blow which killed Kadu was the unpremeditated outcome of a sudden quarrel and though a reasonable man must have known that it was likely to cause death, the probability of the fatal result was not present to the consciousness of the appellant at the moment. From this we think a sentence of seven years rigorous imprisonment is unduly severe. Maintaining the conviction which we define as passed under the latter half of the section, we reduce the sentence to rigorous imprisonment for three years."

(30) For the above reasons I am in entire agreement with the view of my learned brother that the offence committed by the appellant would fall under S. 304, Part II, I. P. C., and not under S. 302, I. P. C. In view of the circumstances of the case, the sentence of three years rigorous imprisonment passed on the appellant would meet the ends of justice.

(31) BY THE COURT : We, therefore, allow the appeal, set aside the conviction and sentence of the appellant under S. 302, I. P. C., but instead we convict him under S. 304, Part II, I. P. C., and sentence him to undergo three years' rigorous imprisonment.

(32) The reference is rejected.

D.R.R. Reference rejected.

A.I.R. 1955 ALLAHABAD 328 (Vol. 42, C.N. 95)

BEG AND ROY JJ. (10-9-1954)

Mahendrapal and another, Appellants v. The State.

Criminal Appeal No. 629 of 1954 and Referred No. 58 of 1954, against Order of S. J., Etah, D/- 11-5-1954.

(a) Criminal P. C. (1898), S. 154 — Importance of first information report.

The first information report is a valuable document and the accused is entitled to make use of it to protect his own interest by cross-examining the prosecution witnesses with reference to additions and alterations in the story which might subsequently be made in evidence given at the trial in Court. (Para 6)

Anno. Cr. P. C., S. 154 N. 9.

(b) Evidence Act (1872), S. 6 — Facts forming part of same transaction — Illustration (a).

The place where a murder was committed was occupied by a number of persons, apart from the deceased and the eye-witnesses. These persons came up immediately after the murder and they were informed by the eye-witnesses as to who the two accused had been. These persons were not produced as witnesses in the case. Their non-production was explained upon the hypothesis that they did not actually see the culprits.

Held that assuming that these persons did not actually see the accused their evidence was material, not with a view to prove the actual 'fact' of murder, which was 'in issue', but to prove the 'relevant fact', namely, that just after the event the eye-witnesses disclosed the names of the accused to those who came— this relevant fact having been so connected with the fact in issue in view of S. 6, illustration (a), Evidence Act, as to have necessitated the giving of evidence on that relevant fact itself as required by S. 5 of that Act. (Para 7)

Anno. Ev. Act, S. 6, N. 5.

(c) Evidence Act (1872), S. 118 — Witness — Relative of person murdered — Reliability.

Ordinarly a close relative would be the last person to screen the real culprit and falsely implicate an innocent person, and hence the mere fact of relationship far from being the foundation for criticism of the evidence is often a sure guarantee of truth; but no sweeping generalisation can be made. AIR 1953 SC 364 — 21 Suth W. R. (Cr) 13 (19), Rel. on. (Para 8)

(d) Evidence Act (1872), S. 118 — Credibility of witness how to be determined.

In determining on the credit due to the witnesses regard must be had to the following considerations, namely, their integrity, their ability, their number and consistency with each other, the conformity of their testimony with experience, the conformity of their testimony with collateral circumstances.

(Para 9)

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 364: 1953 Cri. LJ 1465 (SC) 8

(B) ('74) 21 Suth W R (Cr) 13 8

S. N. Mulla and Bageshwari Sahai, for Appellants; A. K. Kirty and C. S. Saran for the State.

ROY J.:

Mahendra Pal son of Mittar Singh, aged 19, by caste Brahmin, resident of village Bhojpur, within police circle Awagarh in district Etah, and Bhagwati Prasad son of Salig Ram, aged 40, by caste Brahmin, resident of village Memda within police circle Sidhpura in the same district, have been convicted by the Sessions Judge of Etah under S. 302/34, I. P. C., for the murder of one Thakur Fateh Singh, a member of the U. P. Legislative Assembly on the night between July 1 and 2, 1953, at 2 A. M. in 'ahata' Ramchandraniwas, at a distance of about one furlong from police station kotwali, Etah, by shooting him with a pistol in furtherance of the common intention of both. The actual shooting said to have been done by Mahendra Pal. Bhagwati Prasad is said to have been present by the side of Mahendra Pal armed with a lathi at the time of the occurrence giving Mahendra Pal "a moral support" as the learned Sessions Judge has found. The learned Sessions Judge awarded the sentence of death to Mahendra Pal and the sentence of transportation for life to Bhagwati Prasad. They have appealed against their conviction and sentence. There is also a reference by the learned Sessions Judge for the confirmation of the sentence of death.

(2) Thakur Fateh Singh was a resident of Nagla Kans within police circle Awagarh, in district Etah. He gained a seat in the U. P. Legislative Assembly at the general elections held in 1952. He had taken a set of rooms in the enclosure known as 'ahata' Ramchandraniwas in the town of Etah. In that enclosure there is a cluster of houses occupied by various persons. The prosecution case was that in night in question Thakur Fateh Singh was sleeping in the open in that enclosure and close to him were sleeping his son Vikram Singh, his friend Sardar Mahendra Singh, and his servant Surendra Singh, who were occupying as many 'charpoys' within close proximity to each other. It was alleged that at about 2 A. M. the two appellants came into the 'ahata', Mahendra Pal having been armed with a pistol and Bhagwati Prasad with a lathi.

It was further alleged that on hearing the sound of the footsteps, Vikram Singh awoke and saw the two miscreants in the moonlight and in the light of an electric bulb of zero candle power that was burning as usual at a distance of seven feet from the cot of the deceased. It was further alleged that Mahendra Pal shot at Thakur Fateh Singh from very close quarters, hitting him on the right side of the chest and that death was instantaneous. It was also alleged that Surendra Singh (P. W. 5) and Sardar Mahendra Singh (P. W. 6) woke up and they saw the occurrence, namely, the shooting as also the retreat of the appellants. These facts were embodied in a written report Ext. P-2 that was lodged at the Kotwali by Vikram Singh on the same night at 2-30 A. M. on the basis of which the first information report Ex. P3 was drawn up at the same hour.

(3) The police arrived at the scene of occurrence shortly after the report and investigation was taken up. The post-mortem examination was conducted by the Civil Surgeon of Etah on 2-7-1953 at 8 in the morning. A gun shot wound 1/3"X 1/4" into chest cavity deep situate 3" below and 1¼" internal to the right nipple was found. The edges were contused and blackened. An area 1½" X 1" around the wound showed blackening and tattoing. The wound was directed towards the left, slightly backward and upward. The bullet was found to have passed through the epigastrium fracturing the ziphisternum and injuring the liver and then passing through the heart, going into and lodging itself under the skin below the left arm-pit in posterior axillary line. Two tiny abrasions were present overlying the embedded bullet, and an area of ecchymosis 2¼" X 1½" was present around the bullet. This elongated conical bullet was extracted out of the body.

On internal examination it was found that the left sixth rib was fractured in the mid-axillary line. The pleura was punctured on the left side and the cavity was full of blood. The left lung had a lacerated wound in the lower part of the upper lobe. The pericardium was punctured and was full of clotted and fluid blood. The heart had two wounds 3/4" X 2/3" each communicating with the other at the apex. The liver had a superficial contused wound 1½" X 1/3" on the upper part of the lobe. The stomach was found to contain 6 ounces of digested food. Death, according to medical evidence, took place at about 2 A. M. on account of shock and haemorrhage of the gun-shot wound, the firing having been made at a distance of one or two feet or even less. The medical evidence proved beyond doubt that Thakur Fateh Singh was shot at from very close quarters at 2 A. M. on the night between the 1st and 2nd of July, 1953, and that death ensued on that account.

(4) The question in the present case is whether there is clear and satisfactory evidence to bring home the charge to the appellants beyond all shadow of doubt. The evidence against them consisted of the testimony of a hotel keeper, by name Rawail Singh (P. W. 1), and another witness, by name Kaptan Singh (P. W. 2), who stated that in the evening of 1-7-1953, they saw the two appellants at the Kailash hotel, owned by Rawail Singh, where the two took their dinner on the same table, and also of the testimony of three eye-witnesses Vikram Singh (P. W. 3), Surendra Singh (P. W. 5) and Sardar Mahendra Singh (P. W. 6). The learned Sessions Judge did not attach any importance to the evidence of Rawail Singh and Kaptan Singh and held that their testimony was so unnatural and dis-

crepant that it cannot be said that the two appellants dined at the Kailash hotel that evening.

The learned Sessions Judge, however, believed the three eye-witnesses and came to the conclusion that the prosecution case was proved to the hilt. We have examined that evidence with care and have given our anxious thought to the story told by the three eye-witnesses and we are of the opinion that their evidence lacks the impress of coherence and certainty which is essential to the establishment of a charge of murder beyond all reasonable doubt. The fact that the relations between the deceased and the appellants had been considerably strained for quite a long time admits of no doubt whatsoever. It is proved by positive evidence adduced on behalf of the prosecution and is also admitted by the accused themselves.

Mahendra Pal appellant is the nephew, and Bhagwati Prasad appellant is the mother's sister's son, of one Ram Chander Sharma. They are residents of two different villages. The former is a resident of village Bhojpur which is within police circle Awagarh and the latter is a resident of village Memda which is within police circle Sidhpura. The relations between Thakur Fateh Singh and Ram Chander Sharma, which were previously cordial, got estranged about six years ago when litigation about some land between Thakur Fateh Singh on the one hand and one Smt. Sukhdevi on the other arose wherein Ram Chander Sharma actively helped Smt. Sukhdevi.

There was a case of theft of a cow brought against Ram Chandra Sharma and Mitter Singh the father of Mahendra Pal appellant, in which they were convicted by the trial Court. They suspected that Thakur Fateh Singh was instrumental in having that prosecution launched against them and in getting their conviction. This aggravated the bitterness between them. On 18-8-1952, an assault was made on Thakur Fateh Singh within the compound of the Etah Collectorate and in connection with that matter Ram Chander Sharma, Mahendra Pal appellant, Mitter Singh, Lochan Singh, Kunwar Pal and a sweeper were prosecuted under S. 307, I. P. C. While that case was pending Ram Chander Sharma was murdered and in that connection Udaibhan the nephew of Thakur Fateh Singh and Mithan Singh the servant of Thakur Fateh Singh and two others were prosecuted.

After the murder of Ram Chander Sharma the two appellants, it is alleged, openly declared that they would avenge the murder of Ram Chander Sharma by murdering Fateh Singh. Subsequent to the murder of Ram Chander Sharma, the police initiated proceedings under S. 107, Criminal P. C., against the rival parties and it was during the pendency of those proceedings that the murder of Thakur Fateh Singh took place. Apparently there existed bitter enmity, but that enmity can be the motive for the crime as well as a motive for false implication. Under the circumstances the evidence filed on behalf of the prosecution has to be closely and carefully examined.

(5) The two witnesses Rawail Singh and Kaptan Singh were produced to prove association of the two appellants and their having been seen together just near the scene of occurrence on the previous evening. The reason why the prosecution thought it necessary to produce this evidence is not far to seek. The two appellants, although related, live far from each other. Relationship by itself was not considered sufficient to bring them together to perpetrate this crime. It was, therefore, felt, that to make the matter against them doubly certain evidence was necessary to show that they met together and dined together in the evening in question at the Kailash Hotel.

A close scrutiny of the evidence of Rawail Singh and Kaptan Singh will show that they are suborned witnesses, and they could not, and did not, see the two appellants together at the Kailash hotel. (After reviewing the deposition of Rawail Singh his Lordship referred to the improbability and inconsistency disclosed therein and with respect to the evidence of Kaptan Singh his Lordship concluded):

There can be no doubt whatsoever that Kaptan Singh was falsely introduced into the present story with a view to prove that although the two appellants lived quite apart they were seen together in the evening in question, lending support to the possibility of their combining and making common cause to put an end to the life of Thakur Fateh Singh.

The introduction of these two false witnesses into the case undermines to a considerable extent the rest of the texture of the evidence; and if the prosecution could introduce false element in the case, the 'ipse dixit' of the statement of the other witnesses cannot be accepted unless these witnesses can be said to have told the truth and to have corroborated the material facts which would go to establish the offence. The evidence of the eye-witnesses must, therefore, be put to closest scrutiny to see whether they can be safely relied upon.

(6) As we have already said the three eye-witnesses are Vikram Singh (P. W. 3), Surendra Singh (P. W. 5) and Sardar Mahendra Singh (P. W. 6). We have gone through their evidence and not only do we find that the first information report is lacking in those material particulars which should have been expressed in it under the circumstances of the case, but the witnesses have told a story which creates a reasonable doubt that they did not actually see the culprit, whoever he might have been, before or at the time of firing and that they were awakened after the shot was discharged, and consequently there was just the possibility of their having failed to take a glimpse of the culprit or culprits who had been on their retreat, and, consequently these witnesses subsequently drew upon their imagination that the culprits were no other than the present appellants.

In the first information report it was not expressed that with the approach of the culprits and before the shot was fired, Vikram Singh woke up and challenged the miscreants by shouting "Who is there", nor was it expressed in the first information report that Sardar Mahendra Singh responded by saying: "What is it" — both expressions conveying the full significance of the words, namely, that the sound of the footsteps was good

enough to awaken Vikram Singh, and his shout was good enough to awaken Sardar Mahendra Singh, and that that shout, coupled with the shout of Sardar Mahendra Singh that followed close upon the heels of the first shout, was sufficient enough to awaken Surendra Singh.

The absence of the expression of the two shouts in the first information report might have in different circumstances been overlooked. But in the present case it cannot possibly be ignored that the whole case rests upon the slender feature which was thought very essential at the stage of evidence, namely, that the eye-witnesses were awake before the firing and had, therefore, had the full opportunity of seeing the culprits both at the time of the firing and also at the time of their retreat in spite of the suddenness and swiftness of the action. The 'ahata' is kachha'. The alleged culprits came bare-footed. Manifestly they must have come on tiptoe; and they must have taken all precautions to avoid detection before actually killing the victim.

Vikram Singh, it may be said, awakened only fortuitously, which too is indeed very doubtful. But did he shout and did he awaken the other two persons who were sleeping by his side before the shot was fired. Vikram Singh gave different versions on this question. He at first said that when the shot was fired Sardar Mahendra Singh and Surendra Singh awoke on hearing the report of the shot. He changed this statement immediately and said that they got up before the firing. He again reverted to his earlier statement, namely, that they awoke on hearing the report of the gun-shot. The witness was then asked to clarify what exactly was the situation; and he said that the whole of the occurrence took place within the "fraction of a second" and the two witnesses Sardar Mahendra Singh and Surendra Singh had been awakened before the firing was done. This evidence does not inspire confidence.

Sardar Mahendra Singh's version viz., that when Vikram Singh shouted: "Who is there", he responded: "What is it", is not supported by the other two witnesses. Then again the claim of Surendra Singh that he shouted and chased the culprits when they were running away up to about 20 paces is open to sericus doubt. According to his own version he was afraid to follow the culprits least he may be shot at himself. If the fear was there, he could not have mustered up courage initially to follow the culprits and to give them a chase even up to a distance of about 20 paces. The first information report is conspicuous by the absence of the factum of chase.

The omission in the first information report of the alleged "shouts" and "chase" has been explained by Vikram Singh upon the hypothesis that they were innocent omissions due to his having been in a hurry to make out the report. It is of course not necessary that a first information report should give every detail which is given in evidence at the trial. But where a first information report is made by one who professed to be an eye-witness to the occurrence and he further professed to give essential details of the occurrence, the absence of certain essential features must be based upon good and reasonable hypothesis. The first information report is a valuable document and the accused is entitled to make use of it to protect his own interest by cross-examining the prosecution witnesses with reference to additions and alterations in the story which might subsequently be made in evidence. In the present case the two essential elements of "shouting" and "chasing" were purposeful additions made in evidence; and if these are open to reasonable doubt, it becomes further doubtful whether the eye-witnesses were really in a position to identify the culprits.

(7) The ahata was occupied by a number of persons, apart from the deceased and the eye-witnesses, and it is in evidence that they were sleeping there. It is further in evidence that those persons came up immediately after and it is alleged that they were informed by the eye-witnesses as to who the two culprits had been, namely, the two appellants. Amongst those persons were Onkar Nath Tewari, an Assistant Public Prosecutor, Rajendra Singh Amin, Bhagwat Singh and certain others. These persons were not produced as witnesses in the case. They were, however, examined by the investigating Officer on 2-7-1953, as stated by him. There non-production has been explained upon the hypothesis that they did not actually see the culprits.

Assuming that they did not, their evidence was material, not with a view to prove the actual fact of murder, which was 'in issue', but to prove the 'relevant fact' namely, that just after the event the eye-witnesses disclosed the names of the culprits to those who came ———, this relevant fact having been so connected with the fact in issue in view of S. 6, illustration (a), Evidence Act, as to have necessitated the giving of evidence on that relevant fact itself as required by S. 5 of that Act. S. 5, Evidence Act, says that evidence may be given of the existence or non-existence of every fact in issue and of such other facts as are declared in the Act itself to be relevant.

Section 6, Evidence Act, says that facts, which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occur at the same time and place or at different times and places. Illustration (a) of that section makes it clear that where A is accused of the murder of B by beating him, whatever was said or done by A to B, or by the bystanders, at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact.

Vikram Singh P. W. 3 stated that after the accused ran away he told Onkar Nath Tewari and the other persons who came there that the two appellants were the culprits and had been seen by him committing the crime. If that was so, and if those persons had been examined by the police at the time of the investigation on 2-7-1953, their evidence to prove that relevant fact assumed considerable importance. On this part of the case the learned Sessions Judge observed as follows:

"It has been vehemently urged by the learned counsel for the accused that there were several other persons sleeping at a short distance from the cot of Thakur Fateh Singh and as they were independent witnesses, they should have been produced by the prosecution to corroborate

the statement of the eye-witnesses. The evidence shows that those witnesses consisting of Sri Tiwari, A. P. P., Sri Pandey and Sri Bhagat Singh and an Amin came to the spot only after the accused had made good their escape. Even if these four witnesses had been aroused by the report of the gun-shot, the most that these four witnesses could have seen was the backs of the accused who were running away and it could not have been possible for these witnesses to see the faces of the assailants or to recognise or identify them. These witnesses, therefore, were more or less unnecessary witnesses and hence their non-production does not affect the prosecution case at all.

It has been urged that these witnesses should have been produced in order to corroborate the statement of the prosecution witnesses that they had told these witnesses the names of the assailants immediately after the incident. It would no doubt have given the prosecution more support if these witnesses had been produced and if they had stated that the three eye-witnesses told them immediately after the incident that the assailants were the two accused, but if these witnesses had been produced, the defence would have come forward with the objection that Sri Tiwari is an Assistant Public Prosecutor and hence he should not be believed, that Rajendra Singh Amin who was sleeping about 63 feet away should not be believed because the Collector had taken a keen interest in the case and had gone immediately to the spot in the night of the occurrence and hence he was bound to suppot the prosecution, while Pandey and Bhagat Singh are residents of the Ahata and were bound to be friendly with Thakur Fateh Singh."

We cannot fully subscribe to this line of reasoning adopted by the learned Sessions Judge who drew largely upon his imagination and took a narrow view of the provisions of Ss. 5 and 6, Evidence Act, under which the evidence of those witnesses could have been relevant, and who failed to take note of S. 114, Illustration (g), Evidence Act, namely, that evidence which could be produced and is not produced would, if produced, be unfavourable to the person who withholds it.

(8) It is not disputed that Vikram Singh, Surendra Singh and Sardar Mahendra Singh, prosecution witnesses were sleeping in the 'ahata' close to Thakur Fateh Singh when this murder was committed at 2 a. m. These witnesses were closely related to, or associated with, the deceased. One was the son of the deceased. The other was a bosom friend of the deceased. And the third was a servant of the deceased who had been given protection by the deceased in his hour of distress when he as a warder in the jail at Etah came under clouds and had been suspended and had also been threatened with a prosecution for theft. The mere ground that these witnesses were so closely related to, or associated with, the deceased would, of course be no ground for doubting their testimony.

As has been observed by the Supreme Court in — 'Dalip Singh v. State of Punjab', AIR 1953 SC 364 (A), ordinarily a close relative would be the last person to screen the real culprit and falsely implicate an innocent person, and hence the mere fact of relationship far from being the foundation for criticism of the evidence is often a sure guarantee of truth; but no sweeping generalisation can be made and there can be no general rule of prudence to require corroboration before the evidence is believed and each case must be limited to and governed by its own facts. The Evidence Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted. Nor is any such rule possible.

The proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. For weighing evidence and drawing inferences from it there can be no canon. Each case presents its own peculiarities and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a Judge of facts in this country discharging the functions of a jury in England has to weigh and decide. We fully agree with these observations which were made by Birch J. In — 'Queen v. Madhub Chunder', 21 Suth WR (Cr) 13 at p. 19 (B).

According to Wigmore the common law in repudiating the numerical system lays down four general principles. Firstly, credibility does not depend on number of witnesses. Secondly, in general, the testimony of a single witness, no matter what the issue, or who the person, may legally suffice as evidence upon which the Jury may find a verdict. Thirdly, conversely, the mere assertion of any witness does not of itself need to be believed even though he is unimpeached in any manner because to require such belief would be to give a quantitative and impersonal measure to testimony. And, fourthly, as a corollary of the first proposition all rules requiring two witnesses, or a corroboration of one witness, are exceptions to the general principle.

(9) It follows, therefore, that in determining on the credit due to the witness regard must be had to the following considerations, namely, their integrity their ability, their number and consistency with each other, the conformity of their testimony with experience, the conformity of their testimony with collateral circumstances. Judged by these standards the evidence of the three eye-witnesses in the case is not such as may safely be relied upon, or as may inspire that amount of confidence which may bring one to the only categorical conclusion that the crime had been committed by the appellants and by no other. In the present case these witnesses have demonstrated themselves to be prone to lies on essential particulars. And because of their general unreliability and for the reasons which we have already stated, and also for other reasons which we are shortly going to state, we are not prepared to believe them when they have said that they saw the culprits in action and also in flight.

(10) It is said that the two appellants had given threat to Thakur Fateh Singh that they would put him to death. Evidence on that point is contained in the statement of Vikram Singh alone. (Here the evidence given by Vikram Singh and Surendra Singh was discussed and his Lordship concluded that it would be wholly unsafe to rely upon these witnesses in order to come to a categorical finding that the pistol was discharg-

ed by Mahendra Pal appellant and that the other appellant Bhagwati Prasad was noticed there armed with lathi giving "moral support" to Mahendra Pal as the learned Sessions Judge observed).

(11) In spite of the expedition that had been adopted in the making of the first information report the learned Sessions Judge had a lurking doubt in his mind about the genuineness of the story told by Vikram Singh which may be traced from the following observation made by him in his judgment:

"On the other hand, as there was subsisting enmity between the two parties and as Vikram Singh had been told by his father that Mahendra Pal had given out a threat that he would avenge the murder of Ram Chander Sharma by the murder of Thakur Fateh Singh, it would be natural for Vikram Singh to apprehend that such an act might be committed by Mahendra Pal. Under such circumstances, therefore, if it transpired that Vikram Singh did not actually see the murderers himself, this knowledge that Mahendra Pal had given out such a threat would be likely to make Vikram Singh believe that the murder was committed by Mahendra Pal, and this could be a good reason for Vikram Singh to implicate Mahendra Pal as the murderer, if in case he had not actually seen and recognised the assailants."

(12) If Vikram Singh was labouring under an apprehension such as this, as was visualised by the learned Sessions Judge, when he implicated Mahendra Pal in this crime, his imagination would not be proof of the fact that Mahendra Pal was really the culprit. We must make it clear that we are not doubting the evidence of the three eye-witnesses on the ground of the kinship to, or friendship with, the deceased. We doubt their evidence by reason of their general unreliability and also by reason of the fact that under the circumstances of the case the probabilities are that they were not in a position to see the culprits before the culprits had made good their escape.

It may be added that before writing the first information report and even after writing it but before going to the Thana Vikram Singh did not, as has been stated by him, ask any of the persons who had come to the spot whether they had seen the assailants firing or running away. It is curious indeed that although he was the son of the deceased and was going to make the FIR he did not even care to ascertain the names of the persons who might have seen the attack or who might have provided valuable evidence in support of the case. The name of Mahendra Singh and Surendra Singh came in the first information report because according to Vikram Singh they happened to volunteer themselves that they had seen the occurrence.

(13) The site-plan that was prepared in the case, which is part of the record, brings out the features of the locality and it would not be necessary for us to detail those features. It may, however, be noted that the position where the two miscreants stood is not shown in the site-plan. The investigating officer stated in court that he did not mention the position occupied by the two miscreants in the site plan. The position taken by them was not even expressed in the FIR. This might be because it was not thought proper to commit and pin down the prosecution to any definite case till the medical evidence had been received. For the first time it was disclosed in evidence that Mahendra Pal stood adjacent to the bed. This was done after the medical evidence had been received showing that the shot was fired from a close range. At any rate, the investigating officer should have realised the importance of this point and the fact that he has not shown it in the site-plan leads to a presumption that it was not disclosed to him from what distance the shot was fired.

(14) The two appellants denied having committed this murder. They further denied that any threat had ever been given by them to kill Fateh Singh. They further denied that they were at the Kailash hotel on the evening prior to the occurrence. They contended that they had been implicated on account of enmity. Three witnesses were examined on the side of defence. They were Bishambar Dayal, Chandra Pal and Raghubar Dayal. It would not be necessary for us to go into the merits of the evidence of these defence witnesses. The prosecution must stand upon its own legs and not upon the weakness of the defence.

(15) In our opinion it would be unsafe to base the conviction of the appellants upon the evidence that was produced in the case. At any rate, there is room for reasonable doubt and the appellants are entitled to that benefit. It is really unfortunate that a murder of this nature goes undetected and unpunished. But the responsibility for that sorry state of affairs must he shared equally by the faulty nature of the investigation and the presentation of the case in court and also by an anxiety on the part of the alleged eye-witnesses to prevaricate and to withhold the truth. Accordingly we allow the appeal, set aside the conviction and sentence of the appellants and direct that they be set at liberty at once unless wanted in any other matter. The reference is rejected.

V.S.B. Accused acquitted.

(S) A.I.R. 1955 ALLAHABAD 333 (Vol. 42, C.N. 96)

FULL BENCH — MALIK C. J., MOOTHAM AND V. BHARGAVA JJ. (17-12-1954)

Kunjlal Nawal Bihari, Applicant v. Commissioner of Income-tax, U. P., Lucknow, Respondent.

Income-tax Misc. Case No. 269 of 1949.

(a) Income-tax Act (1922), S. 66(1) — Drawing up statement of the case.

It is necessary that the facts should be clearly stated. The desirable course for the Tribunal is to summarise the facts seriatim and then formulate the questions of law which are said to arise on those facts. Unless this is done, the hearing before the High Court will almost certainly be unnecessarily prolonged. (Para 4)

Anno: Income-tax Act, S. 66 N. 1, 2.

(b) Excess Profits Tax Act (1940), Ss. 10A, 15, 19(2) — Appeal against order under S. 10A — Consideration of validity of notice under S. 15.

The assessee has the right to file an appeal direct to the Appellate Tribunal against an order under S. 10A. An order under S. 10A can be passed only in the course of assessment proceedings. If the assessment proceedings have been concluded they can be restarted by a notice under S. 15 where income had escaped assessment and definite information had come into the possession of the Excess Profits Tax Officer of that fact. If the notice under S. 15 is bad, the re-assessment proceedings must fail on that ground and an order passed under S. 10A would also become useless as no re-assessment can then be made. Where, therefore, the validity of an assessment under S. 14 or the validity of a notice under S. 15 is being challenged, it may be more convenient for the Tribunal in appeal to postpone the consideration of the appeal against order under S. 10A till the question of the validity of the assessment has been finally determined, but if the Tribunal does not decide to follow that procedure, it cannot be said that there was any illegality or irregularity in its order. The Tribunal can refuse to go into the question of the validity of the notice under S. 15 of the Excess Profits Tax Act in the appeal filed against the order under S. 10A.

(Paras 15, 16)

Anno: E. P. T. Act, S. 10A N. 1.

(c) Excess Profits Tax Act (1940), S. 10A — Firm discontinuing business to avoid excess profits tax.

Held that on the finding that the assessee firm had discontinued the sarrafa business, even if the main purpose was reduction or evasion of Excess Profits Tax liability, the amount of profit made by individual partners could not be added to the income of the assessee firm unless it could be held that it was the income of the business carried on by the assessee. AIR 1953 SC 456, Foll.

(Para 17)

Anno: E. P. T. Act, S. 10A N. 1.

(d) Excess Profits Tax Act (1940), S. 10A — "Transaction" — Meaning of — (Words and Phrases — Transaction).

Held that the formation of the new firm and the division of the gold sovereign assets of the sarrafa shop among the partners were transactions within the meaning of S. 10A.

(Para 20)

Anno: E. P. T. Act, S. 10A N. 1.

(e) Excess Profits Tax Act (1940), Ss. 4, 8, 10A — New firm genuine and started to avoid excess profits tax — Inclusion of profit of new firm in income of assessee firm.

Under S. 8(1) for all purposes of the Act including S. 4, a business is to be deemed to have been discontinued and a new business to have been commenced as from the date of the change in the persons carrying on the business. Consequently, whenever, there is a change in the persons carrying on the business, even for purposes of S. 4 the old business must be deemed to have been discontinued and a new business to have been commenced, so that, by a fiction of law, even though that business may have been taken over as a going concern by a new firm, for purposes of the Excess Profits Tax Act, the old business can no longer be held to continue in existence and the provisions of the Act must be applied on the basis that a new business was started on the date of the change in the persons carrying it on. (Para 30)

If there had been, in fact, a cessation of the business and a new business had been started, then the rule laid down in AIR 1953 SC 456 would apply. In one case, it is as a matter of law and in the other as a matter of fact that the old business will be held to have been discontinued and a new business will be deemed to have been started on the date on which the change in the persons, who had carried on the business, took place.

(Para 30)

The Appellate Tribunal did not intend to hold that there was in fact no new firm and it was all a fictitious transaction, but that there was a genuine firm which had taken over from the assessee firm the business in Banaras silk goods, although the main purpose in starting this new firm was to avoid Excess Profits Tax liability. (Para 26)

Held that in view of the fact that the profits made by the new firm were not the profits of the assessee the Excess Profits Tax Officer could not include them under S. 4 of the Excess Profits Tax Act for tax purposes. AIR 1953 SC 456, Foll. (Para 33)

Anno: E. P. T. Act, S. 4 N. 1; S. 8 N. 1; S. 10A N. 1.

CASE REFERRED: Paras

(A) (V40) AIR 1953 SC 456: 1953-24 ITR 395 (SC) 18, 23, 29, 30, 31

G. S. Pathak, for Applicant; J. Swarup, for Respondent.

MALIK C. J.:

This is a reference under S. 66(1), Income-tax Act read with S. 21 of the Excess Profits Tax Act and relates to three assessment years, 1944-45, 1945-46 and 1946-47. The relevant chargeable accounting periods are from 9-11-1942 to 28-10-1943; 29-10-1943 to 16-10-1944; and 17-10-1944 to 4-11-1945.

(2) The questions of law referred to us for decision are as follows:

"1. Whether in the circumstances stated in para 3 of the statement of the case, the Tribunal was justified in refusing to go into the question of the validity of section 15, E. P. T. assessment proceedings and could legally deal with S. 10A, E.P.T. appeal relating to the chargeable accounting period ending 28-10-1943 independently of that consideration?

2. Whether on the facts stated in the statement of the case, the Tribunal could legally draw the inference that the main purpose with which the firm of Kunjlal Banwarilal was formed and the division of gold sovereign of the Sarrafa shop was made was the avoidance or reduction

of the E.P.T. liability and was justified in holding that section 10A, E.P.T. Act applied to such transaction?

3. Whether the formation of the firm Kunjlal Banwarilal and the division of the gold sovereign assets of the Sarrafa shop were transactions within the meaning of S. 10A and attracted the applicability of that section?

4. Whether in the circumstances of the case, the profits earned by the partners from the sale of the gold and sovereign received at the division of the sarrafa shop could legally be included in the assessment of the applicant firm under S. 10A of the E. P. T. Act?

(3) The case came up before a Bench of this Court on 28-9-1950, and was referred to a larger Bench on the ground that the first question was of some importance.

(4) This is again, one of those cases where a great deal of the time of the Court has been wasted by reason of the fact that the Statement of the Case was very badly drafted, and counsel in consequence were not agreed as to what were the facts found by the Tribunal. We have had occasion to point out more than once that the desirable course is for the Tribunal to summarise the facts seriatim and then formulate the questions of law which are said to arise on those facts. Unless this is done, the hearing before this Court will almost certainly be unnecessarily prolonged. As we proceed with this judgment, it will be apparent how necessary it was that the facts should have been clearly stated and the difficulty which this Court had to face in finding out what were the findings which give rise to the questions of law which we are required to answer.

(5) Kunjilal and Bankeylal were two brothers, who carried on business in silk yarn in the name of Munnalal Madanlal. There was a partition between Kunjlal and Bankeylal and after the partition Kunjlal died. In the statement of the case the year of his death is given as 1936 though counsel stated that this was a mistake for 1934. After the death of Kunjlal, the assessee firm known as Kunjlal Nawal Bihari came into existence under a deed dated 17-8-1940. Kunjlal's son Nawal Bihari and five minor brothers of Nawal Bihari owned a twelve anna share in the new firm while the remaining four anna share was owned by Krishna Das and Durga Prasad, maternal uncles of Nawal Bihari. The assessee firm was registered under S. 26A, Income-tax Act, in the year 1941 and carried on business in silk yarn, Banaras Silk goods and sarrafa business. The firm was reconstituted on 30-7-1942, and the shares of Nawal Bihari and his five brothers were slightly altered, Nawal Bihari and Bibhutibhusan being given -/2/3 share each, Pratap Chand and Hariharlal -/2/- each, and Gauri Shanker and Banwarilal -/1/9 each — total remaining -/12/- while Krishna Das and Durga Prasad continued to own a share of -/4/- half and half.

(6) During the first chargeable accounting period — from 9-11-1942 to 28-10-1943 — another new firm known as Kunjlal Banwarilal was started in which the partners were Nawal Bihari and his five brothers and their mother Savitri Devi, Krishna Das, Durga Prasad and Krishna Das' son Brijbhushan Das, the shares of the two families remaining at -/12/- and -/4/- respectively. This firm was also registered under S. 26A of the Indian Income-tax Act and it took over from the assessee the business in Banaras silk goods. The sarrafa business was discontinued by the assessee and the gold and sovereigns were divided among the partners. According to the learned counsel for the assessee, this division was made only among those partners who had contributed the capital and no share was given to Krishna Das and Durga Prasad who had not contributed any capital. The gold and sovereigns partitioned among the members of the assessee firm were sold by the persons to whom they were allotted. It is not clear from the Statement of the Case whether those persons sold the entire share of the gold and sovereigns that were allotted to them. Learned counsel for the assessee has stated that only some of them sold a part of what was allotted to them at the division.

(7) The Income-tax Officer and the Excess Profits Tax Officer treated the firm Kunjlal Banwarilal as a branch of the firm Kunjlal Nawal Bihari and held that the income made by Kunjlal Banwarilal be added to the income of the assessee and made liable for Income-tax and Excess Profits tax. The assessment orders are dated the 28-3-1945.

(8) The assessee filed two appeals before the Appellate Assistant Commissioner, one against the assessment order of the Income-tax Officer and the other against the assessment order of the Excess Profits Tax Officer. The Appellate Assistant Commissioner allowed the appeals on the 9-2-1946, holding that the firm Kunjlal Banwari lal was a genuine firm which was distinct and separate from the assessee firm Kunjlal Nawal Bihari and that there was no legal bar to this new firm being constituted and a part of the business of the assessee firm being handed over to it. The Appellate Assistant Commissioner, therefore, held that the income made by the firm Kunjlal Banwarilal could not be added to the income of the assessee for purposes of Income-tax or Excess Profits Tax. The Income-tax Officer and the Excess Profits Tax Officer were, therefore, directed to pass fresh orders of assessment after excluding the profits made by the firm Kunjlal Banwarilal.

In the Excess Profits Tax appeal, the Appellate Assistant Commissioner however, said:

> "The profit of the business as computed for income-tax purposes before deduction of E. P. T. and adopted for E. P. T. assessment includes the profit earned by the firm Kunjlal Banwarilal. It should be deducted and the assessment be modified accordingly unless the Excess Profits Tax Officer applies the provisions of S. 10A which is open to him."

The Commissioner of Income-tax submitted to the Appellate Order and did not file a further appeal to the Tribunal. Neither in the assessment orders nor in the order of the Appellate Assistant Commissioner is any mention made of the profits made by the sale of gold and sovereigns.

(9) On 6-3-1946, the Excess Profits Tax Officer issued a notice under S. 10A, Excess Profits Tax Act, the relevant portion of which is as follows:

"WHEREAS I am of the opinion that the main purpose of converting the branch shop, viz: Kunjlal Banwarilal into a separate partnership concern was the reduction or evasion of Excess Profits Tax liability. You are required to show cause why the profits of the said new firm be not included in the profits of the firm Messrs. Kunjlal Nawal Bihari under S. 10A of the Excess Profits Tax Act."

(10) Another notice was issued under S. 15, Excess Profits Tax Act on 26-4-1947, to the following effect:

"WHEREAS in consequence of definite information which has come into my possession, I have discovered that profits of the chargeable accounting period commencing 9-11-1942 and ending 28-10-1943 chargeable to Excess Profits Tax have:

(b) been under-assessed,

I therefore propose to reassess the said profits that have

(b) been under-assessed ....."

(11) The assessee in answer to the notice under S. 10A filed objections in which he denied that the main purpose of starting the firm Kunjlal Banwarilal and transferring to it the silk goods business was the reduction or evasion of the Excess Profits Tax liability. On 26-4-1947, the Excess Profits Tax Officer considered the objections and came to the conclusion that the main purpose in constituting the new firm was to escape the Excess Profits Tax liability, and he also held that it was for the same reason that the sarrafa business was discontinued and the stock of gold and sovereigns was divided among the partners.

(12) On 24-5-1947, the Excess Profits Tax Officer made the re-assessment and the income of the firm Kunjlal Banwarilal was added to the income of the assessee. The income made by some of the partners by the sale of gold and sovereigns was also added as a result of the notice under S. 15 on the ground that that income had escaped assessment and the division of the gold and sovereigns had been made to escape the Excess Profits Tax liability.

(13) Against the order of reassessment dated 24-5-1947, an appeal was filed before the Appellate Assistant Commissioner, while against the order dated 26-4-1947, passed under S. 10-A, an appeal was filed before the Tribunal. The appeal filed before the Appellate Assistant Commissioner was dismissed on 1-6-1948, on the ground that it was incompetent inasmuch as the revised assessment was made under S. 10-A, Excess Profits Tax Act and the notice under S. 15, Excess Profits Tax Act, was "merely subsidiary to the application of Section 10-A". We have no information whether a further appeal was filed against the order of the Appellate Assistant Commissioner dated 1-6-1948. The Tribunal dismissed the appeal against the order dated 26-4-1947, on 25-9-1948. An application was made for a case to be stated to this Court under S. 66 (1), Income-tax Act, read with S. 21, Excess Profits Tax Act, and the four questions, quoted above, have been referred to us for decision.

(14) Taking up the first question, S. 10-A (3), Excess Profits Tax Act provides that—

"Any person aggrieved by a decision of the Excess Profits Tax Officer under this section may appeal in the prescribed time and manner to the Appellate Tribunal."

An appeal lies under S. 17 of the Act to the Appellate Assistant Commissioner when an assessee denies his liability to be assessed or objects to the amount assessed, and there is a further appeal against the order of the Appellate Assistant Commissioner to the Appellate Tribunal under S. 19(2), Excess Profits Tax Act.

(15) The assessee, therefore, had the right to file an appeal direct to the Appellate Tribunal against an order under S. 10-A. An order under S. 10-A can be passed only in the course of assessment proceedings. If the assessment proceedings have been concluded, they can be re-started by a notice under S. 15 where income had escaped assessment and definite information had come into the possession of the Excess Profits Tax Officer of that fact. If the notice under S. 15 is bad, the re-assessment proceedings must fail on that ground and an order passed under S. 10-A would also become useless as no re-assessment can then be made. Where, therefore, the validity of an assessment under S. 14 or the validity of a notice under S. 15 is being challenged, it may be more convenient for the Tribunal to postpone the consideration of the appeal against a section 10-A order till the question of the validity of the assessment has been finally determined, but if the Tribunal does not decide to follow that procedure, it cannot in our opinion be said that there was any illegality or irregularity in its order.

(16) Though we do not agree with certain observations made in the Appellate Order of the Tribunal when dealing with this part of the case it does not seem to us to be necessary to go into them and the only way in which we can answer the first question is to hold that the Tribunal could refuse to go into the question of the validity of the notice under S. 15, Excess Profits Tax Act in the appeal filed against the order under S. 10-A of the Excess Profits Tax Act.

(17) Coming now to the fourth question, it appears from the Statement of the Case that the sarrafa business was as a matter of fact discontinued by the assessee; the gold and sovereigns were distributed among the various partners; and the gold and sovereigns allotted to the partners were sold by them and they earned profits. On the finding that the assessee had discontinued the sarrafa business, even if the main purpose was reduction or evasion of Excess Profits Tax liability, the amount of profit made by individual partners cannot be added to the income of the assessee unless it can be held that it is the income of the business carried on by the assessee.

(18) It has been held by the Supreme Court in — 'Sohan Pathak and Sons v. Commissioner of Income-tax, U. P.', 1953-24 ITR 395: (AIR 1953 SC 456) (A), that S. 10-A must be read subject to the other provisions of the Act, and that where the income is not the income of the business carried on by the assessee it cannot be added to his income merely because he had ceased to carry

on that business to escape Excess Profits Tax liability.

(19) Our answer to the fourth question must, therefore, be in the negative.

(20) As regards the third question, learned counsel for the assessee does not now dispute that the formation of the firm Kunjilal Banwarilal and the division of the gold sovereign assets of the sarrafa shop were transactions within the meaning of S. 10-A. The third question must, therefore, be answered in the affirmative.

(21) The Tribunal has, however, added at the end of the question the words "and attracted the applicability of that section". This portion is contested by learned counsel on the ground that even if these were 'transactions' the income of the firm Kunjilal Banwarilal and the profits made by certain individual partners by the sale of gold and sovereigns could not be added to the income of the assessee. We do not think that the words "and attracted the applicability of that section" were intended to cover this point. All that the Tribunal probably meant to ask was whether these were transactions within the meaning of S. 10-A of the Act.

(22) The main controversy has turned round the second question. There is a finding of fact recorded by the Tribunal that the main purpose of forming the new firm and the division of gold and sovereigns of the sarrafa shop was to reduce or evade the Excess Profits Tax liability. We must, therefore, hold that that was the main purpose.

((23) Learned counsel has, however, strenuously urged that the last portion of this question "and was justified in holding that S. 10-A, Excess Profits Tax Act applied to such transactions" should be answered in his favour. He has relied on the decision of the Supreme Court in — 'Sohan Pathak and Sons v. Commr. of I. T., U. P.', (A). Briefly the facts of that case were these: The assessee was a joint Hindu family which carried on business under the name of Sohan Pathak and Sons. The family carried on at Banaras money-lending business and business in Banaras brocade. On 16-7-1943, there was a partial partition in the family and the Banaras brocade business was divided in equal shares among the four branches. The day after the partition the adult members of the family formed two partnerships, admitting the minors to the benefit thereof, and the Banaras brocade business was thereafter carried on in the names of Sohan Pathak Girdhar Pathak and G. M. Pathak and Co. It was held by the Tribunal, and the finding was affirmed by the Supreme Court at p. 399, that the main purpose in effecting a partial partition and starting two partnership firms was the avoidance or reduction of Excess Profits Tax liability.

The Supreme Court, however, remarked that there was

> "no clear finding as to how the partition of the brocade business was actually effected—whether by a division in shares, each branch holding its share in severalty and the business being carried on as before on a partnership basis, or whether by an actual distribution and allotment of specific assets and liabilities among the branches resulting in the disruption and closing down of that business."

The Tribunal was asked to record a clear finding on the point. The Tribunal thereafter held that there was an actual distribution and allotment of specific assets and liabilities among the various branches resulting in the disruption and closing down of the business carried on by the assessee. On the return of the finding the Supreme Court dealt with the case in this way. Their Lordships said:

> "The real and substantial question in the appeals is whether in view of the finding of fact that the old family business was wound up, its assets and liabilities having been actually distributed among the coparceners, and was no longer carried on by the joint family as such during the relevant chargeable accounting periods, S. 10-A has any application to the case."

Their Lordships pointed out that S. 10-A could have no application as the Act itself had no application to a business which did not make any profits during the relevant chargeable accounting period, and went on to say:

> "In other words, if a business, having been discontinued, earned no profits during the chargeable accounting period in question, no excess profits tax can be charged in respect of such business, and that being the position here as respects the old joint family business in Banaras brocade, the appellants are not liable to be taxed as a Hindu undivided family in respect of that business."

(24) The difficulty that we have had to face in this case has arisen out of the confused Statement of the Case and the confused finding given by the Tribunal in the Appellate Order. Mr. Pathak has urged that what the Tribunal has said in its Appellate Order and in the Statement of the Case does not mean that the firm Kunjilal Banwarilal was a bogus firm, but that it was not challenged that it was a genuine firm which was carrying on the Banaras silk goods business, which business the assessee had ceased to carry on. He has relied on the fact that the Commissioner had submitted to the order passed by the Appellate Assistant Commissioner on 9-2-1946, by which order it was finally held that the firm Kunjilal Banwarilal was a distinct and separate firm and the proceedings before the Excess Profits Tax Officer were not u/s. 10, Excess Profits Tax Act, which deals with artificial transactions, but under S. 10-A, which deals with real transactions, the main purpose of which, however is avoidance or reduction of Excess Profits Tax liability.

(25) In the Appellate Order, paragraph 6, the Tribunal characterised the formation of the firm Kunjilal Banwarilal as a device. It stated that the introduction as partners of Savitri Devi and Brijbhushan made no real difference, and that for all practical purposes the benefits which the two groups derived remained the same; but the finding given in paragraph 8 was that the main purpose of constituting the new firm was avoidance or reduction of Excess Profits Tax liability. The same line was followed in the Statement of the Case.

(26) We have however after reading the various orders, after considering the fact that reliance is not placed on S. 10 but on S. 10A of the Excess Profits Tax Act, and taking into account that the fact that the order of the Appellate Assistant Commissioner was allowed to become final, come to the conclusion that the Tribunal did not intend to hold that there was in fact no new firm Kunjilal Banwarilal and it was all a fictitious transaction, but that there was a genuine firm which had taken over from the assessee the business in Banaras silk goods, although the main purpose in starting this new firm Kunjilal Banwarilal was to avoid Excess Profits Tax liability.

(27) Mr. Jagdish Swarup has urged that it must be inferred from the decision of the Supreme Court that even if a new firm is started and the assessee hands over the business to that firm, then if the main purpose is avoidance of Excess Profits Tax liability the assessee cannot be held to have discontinued to carry on that business unless it can be shown that there was a definite break in the business activities the assets and liabilities having been actually distributed among the partners and there has been more than a mere change in the ownership or in the personnel that carried on the business.

(28) Mr. Pathak has urged that there was in fact an actual cessation of the business by the assessee and a distribution of the assets and liabilities between the members of the assessee firm and not a mere transference of the business as a going concern to the new firm Kunjilal Banwarilal. There is no such finding, however, recorded by the Tribunal, and from the Statement of the Case and the Appellate Order all that we get is that the business was transferred to the firm Kunjilal Banwarilal, a fact which might mean no more than that the firm Kunjilal Banwarilal took over the Banaras silk goods business as a going concern.

(29) It is true that the Supreme Court in — 'Sohan Pathak's case (A)' remitted an issue on the point as in that case it was suggested that business continued to be carried on by the joint family, and probably also because it was suggested in the judgment of this Court that it was all a fraudulent transaction. On the findings returned by the Tribunal after the remand it was apparent that the assessee, which in that case was the joint Hindu family, had in fact discontinued the business after the partial partition and the business was being carried on by a partnership. On those facts, their Lordships held that it was not necessary to consider the provisions of S. 8 and it having been found that the business had been discontinued and a new business started, the income made by the new business could not be added to the income of the assessee for the charge of tax under S. 4, Excess Profits Tax Act.

Section 4 provided that subject to the provisions of the Act the tax will be charged, levied and paid in respect of any business if the profits exceed a certain amount. They must, however, be the profits of that business if S. 4 is to apply. If the profits are not of that business, S. 4 would clearly not be applicable, and in — 'Sohan Pathak's case (A)' their Lordships pointed out that if they were not the profits of that business then S. 4 would not apply and even if the assessee had ceased to carry on that business to escape Excess Profits Tax liability, the profits not made by it but by some one else cannot be treated as its profits by applying the provisions of S. 10-A of the Act.

(30) In the case before us, all that we know is that the business in silk goods that was being carried on by the assessee was transferred to the firm Kunjilal Banwarilal, a distinct and separate firm, and that, during the chargeable accounting period profits were made by the firm Kunjilal Banwarilal. It is, therefore, urged that they were not the profits of the business carried on by the assessee and S. 4 would not apply. Section 8(1) Excess Profits Tax Act, provides that

> "As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced."

The words "subject to the provisions of the Act" in Section 4 and "for all purposes of this Act" in Section 8(1) are significant. Tax is to be charged, levied or paid in respect of any business under S. 4 subject to the other provisions of the Act which include the provisions of S. 8(1).

Under S. 8(1) for all purposes of the Act including S. 4, a business is to be deemed to have been discontinued and a new business to have been commenced as from the date of the change in the persons carrying on the business. Consequently, whenever there is a change in the persons carrying on the business, even for purposes of S. 4 the old business must be deemed to have been discontinued and a new business to have been commenced, so that, by a fiction of law, even though that business may have been taken over as a going concern by a new firm, for purposes of the Excess Profits Tax Act the old business can no longer be held to continue in existence and the provisions of the Act must be applied on the basis that a new business was started on the date of the change in the persons carrying it on. If there had been, in fact, a cessation of the business and a new business had been started, then the rule laid down in — 'Sohan Pathak's case (A)' would apply. It is therefore clear that, in one case, it is as a matter of law and in the other as a matter of fact that the old business will be held to have been discontinued and a new business will be deemed to have been started on the date on which the change in the persons, who had carried on the business, took place.

(31) In our view the rule laid down by their Lordships in — 'Sohan Pathak's case (A)' will also apply to this class of cases and the income made by the firm Kunjilal Banwarilal or the income made by some of the partners by sale of gold and sovereign of the sarrafa shop cannot be treated as the income of the assessee for purposes of Excess Profits Tax liability.

(32) Learned counsel for the assessee has not urged that the finding recorded by the Tribunal about the main purpose can be challenged before

us. The second question, as also the other questions, have been badly framed but we need not reframe the questions as the meaning is tolerably clear and it is possible to answer them.

(33) Our answer to the second question, therefore, is that on the facts stated in the Statement of the Case the Tribunal could come to the conclusion that the main purpose underlying the formation of the firm Kunjilal Banwarilal and the division of gold and sovereign of the sarrafa shop was the avoidance and reduction of Excess Profits Tax liability, but in view of the fact that the profits made were not the profits of the assessee the Excess Profits Tax Officer could not include them under S. 4, Excess Profits Tax Act, for tax purposes.

(34) The assessee is entitled to its costs which we assess at Rs. 500/- for each assessment year. The fee payable to counsel for the Department is also assessed at the same figure.

D.H.Z. Answers accordingly.

(S) A.I.R. 1955 ALL. 339 (Vol. 42, C.N. 97)

LUCKNOW BENCH—P. L. BHARGAVA AND BEG JJ. (29-10-1951)

Ram Charan, Appellant v. Bhagwan Dei and others, Respondents.

Second Appeal No. 276 of 1943, against order of Civil Judge, Kheri, D/- 25-5-1943.

(a) Limitation Act (1908), Art. 134 — Execution sale.

Where, in execution of a money decree, immoveable property of a judgment-debtor in which his real interest is only that of a mortgagee, is attached and brought to sale, the auction-purchaser is not a purchaser from the mortgagee within the meaning of Art. 134 even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. Article 134 only applies to cases in which the mortgagee disposes of the property voluntarily. AIR 1950 PC 44 — 25 Mad 99 (FB).

(Para 14)

Anno: Lim. Act, Art. 134 N. 9.

(b) Limitation Act (1908), Art. 134 — Time for redemption not ripe — Limitation for mortgagor's suit under this article.

If in defiance of his contractual and statutory liability, the mortgagee repudiates the mortgage, the mortgagor cannot be bound by the terms of the mortgage; and he cannot be expected to wait for the expiry of the term before he can seek his remedy against a person, who asserts title adverse to him. The cause of action for a suit for redemption may arise after the expiry of the term fixed in the mortgage; but there appears to be no reason to tack on that cause of action to an entirely different cause of action when a transfer prejudicial to his interest is made by the mortgagee and prevent him from enforcing the latter cause of action. AIR 1919 Mad 972 (FB), Dist. (Para 21)

Anno: Lim. Act, Art. 134 N. 17.

(c) Limitation Act (1908), Art. 134 —, "Mortgagee".

A person who purchases the mortgagee rights at an auction-sale steps into the shoes of the original mortgagee and the person who thus acquires the mortgagee rights can be treated as a mortgagee within the meaning of that term in Art. 134 of the Limitation Act. Case law discussed. (Para 33)

Anno: Lim. Act, Art. 134 N. 13.

(d) Limitation Act (1908), Art. 134 — Transfer — Nature of.

The transfer by the trustee or mortgagee for a valuable consideration contemplated by the article refers to an absolute transfer. (Para 39)

Anno: Lim. Act, Art. 134 N. 11.

(e) Limitation Act (1908), Art. 134 — Right barred under the article before amendment in 1929 — Effect of amendment.

Where the transfer by the mortgagee was executed in 1912 the suit is governed by Art. 134 as it stood before the amendment of the year 1929 and it is not necessary for the defendant appellant to establish that the plaintiff had knowledge of the transfer more than 12 years before the institution of the suit. The remedy having become barred by virtue of Section 28 the amendment of the year 1929 could not affect the vested rights or revive the rights which had been extinguished. (Para 46)

Anno: Lim. Act, Art. 134 N. 16.

(f) Limitation Act (1908), Art. 134 — "Mortgagee" — Meaning of.

The term "mortgagee" used in Art. 134 is not confined to the original mortgagee and it includes the heirs of the mortgagee. It also includes a transferee of the mortgagee rights as well, and, the term includes the persons covered by the same term in Art. 148. AIR 1951 All 167 (FB) — AIR 1945 Oudh 258, Rel. on. (Para 49)

Anno: Lim. Act, Art. 134 N. 13.

(g) Transfer of Property Act (1882), S. 60 — Clog on equity of redemption — Provision for compound interest.

A provision for compound interest in any deed of mortgage by itself does not amount to a clog on the equity of redemption. If the mortgagor continues to pay interest in terms of the mortgage deed, there would be no accumulation of interest or compound interest and that would not present any difficulty at the time of redemption. 28 All 570 (PC) and AIR 1917 Oudh 106, Disting. (Para 71)

Anno: T. P. Act, S. 60 N. 28.

(h) Transfer of Property Act (1882), S. 51 — "Believing in good faith that he is absolutely entitled thereto."

A certificate of sale is an important piece of evidence relating to title and it cannot be lightly set aside. Where the sale certificate standing in the name of the transferor showed that the transferor had purchased the property and not only the mortgagee rights

therein it is a circumstance which might lead the transferee to believe that he was absolutely entitled to the property. (Para 67)

Anno: T. P. Act, S. 67 N. 8, 9.

CASES REFERRED: Paras

(A) (V4) AIR 1917 Oudh 106: 3 Oudh LJ 746 8, 70, 73

(B) (V37) AIR 1950 PC 44: 29 Pat 279 (PC) 14

(C) ('02) 25 Mad 99: 11 Mad LJ 323 (FB) 14, 25, 27, 33

(D) (V6) AIR 1919 Mad 972: 40 Mad 1040 (FB) 17

(E) (V25) AIR 1938 Mad 394: 180 Ind Cas 468 17, 18

(F) (V16) AIR 1929 PC 158: 51 All 367 (PC) 18, 35, 37

(G) (V38) AIR 1951 All 167: 1951 All LJ 113 (FB) 24, 49, 50, 54

(H) ('83-84) 11 Ind App 218: 11 Cal 121 (PC) 25, 26

(I) ('05) 2 All LJ 234: 1905 All WN 56 25, 27, 28

(J) ('10) 7 Ind Cas 570 (All) 25, 28

(K) (V14) AIR 1927 All 177: 99 Ind Cas 280 25, 29, 30

(L) (V4) AIR 1917 Oudh 290: 20 Oudh Cas 164 25, 29, 31

(M) (V6) AIR 1919 Oudh 150: 22 Oudh Cas 72 25, 32

(N) (V12) AIR 1925 Sind 167: 19 Sind LR 268 25, 34

(O) (V32) AIR 1945 Oudh 258: 1945 Oudh WN 182 30, 49

(P) (V14) AIR 1927 Mad 1028 35

(Q) (V13) AIR 1926 Oudh 547: 1 Luck 423 (FB) 35, 36, 54

(R) ('70-72) 14 Moo Ind App 1 (PC) 45

(S) (V22) AIR 1935 All 542: 159 Ind Cas 151 58

(T) (V10) AIR 1923 All 11 (2): 70 Ind Cas 958 58

(U) ('05) 27 All 395: 1905 All WN 4 58

(V) (V15) AIR 1928 Lah 250: 113 Ind Cas 53 58

(W) ('06) 28 All 570: 33 Ind App 118 (PC) 72

A. P. Nigam, for Appellant; Kamta Prasad Gupta, for Respondent.

P. L. BHARGAVA J.:

This is an appeal, which arises out of a suit for redemption. The suit was instituted by Ram Charan Lal against Mahadeo Prasad (defendant 1) Hakim Dwarka Prasad (defendant 2), Jhannoo Lal (defendant 3) and Hakim Ram Charan Lal (defendant 4). The property in dispute which consists of a house and a shop, belonged to one Sheo Charan, who died sometime before the year 1904 leaving a widow, Janasa, and two sons, Chheda (major) and Mahadeo (minor). On 1-5-1904, Chheda and Janasa on her own behalf and on behalf of her minor son, Mahadeo, executed a usufructuary mortgage deed with a condition of forclosure hypothecating the property aforesaid to Hakim Dwarka Prasad (Ex. 1). The mortgage was for a period of ten years and no redemption was permitted within the said period. The amount borrowed under the mortgage was Rs. 300/- carrying interest at Rs. 2/- per cent. per mensem compoundable annually. The mortgaged property, which was a 'kham' structure, needed repairs. The mortgagee was permitted, under the terms of the mortgage deed, to utilise the usufruct of the property in repairing the house and the shop without any liability to render accounts at the time of redemption, and to reconstruct the same or any portion thereof at a cost of Rs. 200/-, which amount was to be treated as part of the mortgage money and to carry interest at the aforesaid rate. The mortgagee, Hakim Dwarka Prasad, obtained possession under the mortgage and reconstructed a portion of the house and the shop, it is alleged, at a cost of Rs. 700/- or Rs. 800/-. No foreclosure proceedings were ever taken.

(2) On 13-12-1904, Hakim Dwarka Prasad submortgaged his mortgagee rights, under the mortgage deed of 1-5-1904, to Gangadin, who is now dead and is represented by his son, Jhannoo Lal (defendant 2) (Ex. 2). There was a simple money decree against Hakim Dwarka Prasad and, in execution thereof, on 27-8-1908, his mortgagee rights under the mortgage deed of 1-5-1904, were sold at an auction-sale and purchased by Pancham. On 5-12-1908, Jhannoo Lal instituted a suit on the basis of the mortgage deed dated 13-12-1904 (Ex. 3). A preliminary decree for sale of the mortgagee rights was passed in favour of Jhannoo Lal on 31-3-1909, (Ex. 4). That decree was made absolute on 17-3-1910 (Ex. 5). The decree absolute for sale of mortgagee rights under the mortgage deed of 1-5-1904, was put into execution and the said mortgagee rights were sold and purchased by Jhannoo Lal himself on 3-4-1911. In the sale certificate, which was issued to Jhannoo Lal, the auction-purchaser, instead of the mortgagee rights in the property, i.e. the house and the shop, the property itself was described as the property sold. Jhannoo Lal obtained possession over the property purchased on 25-8-1911 (Ex. D. 2).

(3) According to the statement of Jhannoo Lal Hakim Ram Charan the present appellant, was occupying the house and the shop at the time when he obtained possession thereon. After he (Jhannoo Lal) had obtained possession Hakim Ram Charan executed a 'Kirayanama' in his favour and then the latter offered to purchase the house and the shop. On 9-9-1912, Jhannoo Lal executed a sale-deed of the house and the shop in favour of Hakim Ram Charan aforesaid. The appellant's case is that full proprietary rights in the house and the shop were transferred under this sale deed, while the contesting respondents, Ram Charan Lal, asserts that only the mortgagee rights were conveyed thereunder.

(4) Chheda and Janasa, two of the original mortgagors, are dead. On 6-7-1942, Mahadeo (defendant 1), the sole surviving mortgagor, sold the equity of redemption under the mortgage of 1-5-1904, to Ram Charan Lal, who is the retired Munsarim of the Civil and Sessions Judge's Court, Kheri. This Ram Charan Lal filed the suit for redemption on 30-8-1942, seeking to redeem the mortgage deed of 1-5-1904, with (sic) payment of anything on the allegation that the entire mortgage money had been paid up out of the usufruct of the mortgaged property.

(5) The suit was contested by defendant 4, Hakim Ram Charan Lal, who had held posses-

sion over the house and the shop and reconstructed and made them one of the big buildings in the town of Gola. The defences raised by him, which are relevant for the purposes of this appeal, were that the suit was barred by limitation under Art. 134, Limitation Act (9 of 1908), that even if the suit was held to be within time he was a 'bona fide' transferee for value without notice and as such he was protected under S. 41, T. P. Act; and that, in any case, as he had reconstructed the house believing in good faith that he was absolutely entitled thereto he was entitled to be reimbursed under S. 51, T. P. Act.

(6) The issues material for the purposes of this appeal are issues 3 to 6, which are as follows:

"3. Is the suit barred by time as contended in para. 25 of the written statement of defendant 4?

4 Is defendant 1 a 'bona fide' transferee for value within the meaning of S. 41, T. P. Act? If so, its effect?

5. (a) Has defendant 4 reconstructed the mortgaged property considering himself to be its owner

(b) If so, how much did he spend and is he entitled to be reimbursed under S. 51, T. P. Act?

6. To what relief, if any, is the plaintiff entitled and on payment of what amount?"

(7) The learned Munsif of Kheri, the trial Court, held that the suit was barred by limitation under Art. 134, Limitation Act; and that S 41, T. P. Act, had no application. He did not decide the question of the applicability of S. 51, T. P. Act, and, in view of his finding on the point of limitation, he dismissed the suit.

(8) The plaintiff, Ram Charan Lal, preferred an appeal in the Court of the Civil Judge, Kheri, and the learned Civil Judge held that the suit was not barred by limitation as Arts. 134 and 144, Limitation Act, were inapplicable and Art. 148 of the Act governed the suit; that S. 41, T. P. Act, had no application to the present suit; and that as the contesting defendant did not make proper enquiry into the title of his transferor he was not entitled to be reimbursed under S. 51, T P. Act. On the question of reconstruction of the house and the shop and the costs incurred in connection therewith the learned Civil Judge pointed out that, on the basis of the evidence produced, it was not possible to determine the costs of reconstructions, nor was it necessary to do so. In the end the learned Civil Judge considered the stipulation in the mortgage deed relating to interest and was of opinion that

"having regard to the present market value of the property in suit on annual profits of Rs. 240/- per year at 20 years purchase value under the present conditions the effect of covenant of interest at 2 p. c., p. m. compoundable yearly was to render redemption practically impossible."

Consequently, following a decision of the late Court of the Judicial Commissioner of Oudh in —'Muhammad Ali v. Ramzan Ali', AIR 1917 Oudh 106 (A), the learned Judge held that the equities of the case would be met if the mortgagors were relieved of the harshness of compound rate of the interest. Accordingly, he allowed simple interest at Rs. 2/- p. c. per mensem on Rs. 300/-, the principal sum secured under the mortgage as well as on Rs. 200/-, the costs of reconstruction from the date of the mortgage until six months after the date of the decree and thereafter at Rs. 3/- per cent. per annum on the aggregate amount till satisfaction of the decree. Accordingly he decreed the suit for redemption on payment of the said amount. This appeal has been filed by Hakim Ram Charan Lal (defendant 4).

(9) Learned counsel for the appellant has contended that the present suit is governed by Art. 134, Limitation Act or, in the alternative, by Art. 144 of the same Act and that the learned Civil Judge was wrong in holding that it was governed by Art. 148 of the Act. Learned counsel has invited our attention to the history of Art. 134 of the same Act. It appears that in the Limitation Act (14 of 1859) the corresponding provision was contained in S. 5 of that Act and it provided:

"In suits for the recovery from the purchaser or any person claiming under him of any property purchased 'bona fide' and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase. Provided that, in the case of purchase from a depositary, pawnee or mortgagee, no such suit shall be maintained unless brought within the time limited by Cl. 15, S. 1."

(10) In the Limitation Act, 9 of 1871 the corresponding provision was Art. 134, which was in these terms:

'To recover possession of immoveable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee in good faith and for value — 12 years — the date of purchase."

(11) In the Limitation Act 15 of 1877 there was a slight change made in Art. 134 and it ran as follows:

"To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration — 12 years — the date of the purchase."

(12) The present Limitation Act, 9 of 1908, also introduced a slight change in Art. 134, which now reads as follows:

'To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration — 12 years — the date of the transfer."

The starting point of limitation under Art. 134 of the present Act which was "the date of purchase" was by Act I of 1929 changed to "when the transfer becomes known to the plaintiff."

(13) The learned Civil Judge held Art. 134, Limitation Act, to be inapplicable to the present suit on three grounds: (1) that the rights of Hakim Dwarka Prasad were transferred by a forced sale and not by any voluntary alienation as required by the said Art.; (2) that the transfer

by Jhannoo Lal had taken place within the term fixed under the mortgage deed for redemption; and (3) that Jhannoo Lal was not a mortgagee within the meaning of that term in the said Article.

(14) Learned counsel for the appellant has assailed all the three grounds mentioned by the learned Civil Judge. In regard to the first ground the learned counsel for the appellant did not contest the proposition of law that where, in execution of a money decree, immoveable property of a judgment-debtor in which his real interest is only that of a mortgagee, is attached and brought to sale, the auction purchaser is not a purchaser from the mortgagee within the meaning of Art. 134 of Schedule II, Limitation Act, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein and that Art. 134 only applies to cases in which the mortgagee disposes of the property voluntarily. In fact he cited, on this point the latest decision of their Lordships of the Privy Council in — 'Sudarsan Das v. Ram Kirpal Das', AIR 1950 PC 44 (B), wherein the above proposition of law, which was laid down in — 'Ahmed Kutti v. Raman Nambudri', 25 Mad 99 (FB) (C), was affirmed.

(15) Learned counsel, however, contended that he did not rely upon the auction-sale but upon the voluntary alienation that is the sale which took place on 9-9-1912, by Jhannoo Lal in favour of Hakim Ram Charan Lal.

(16) The appellant has relied upon the auction sale only in order to show that his transferor. Jhannoo Lal, was the assignee of the rights of the original mortgagee. The sequence of events leading to the auction-sale has been set-out in the opening part of this judgment. We have seen that Hakim Dwarka Prasad had executed a sub-mortgage of his mortgagee rights in favour of Ganga Din, father of Jhannoo Lal and that in execution of the decree obtained on the basis of that mortgage, the mortgagee rights of Hakim Dwarka Prasad were sold and purchased by Jhannoo Lal. Whether by virtue of the auction-sale Jhannoo Lal became an assignee of the rights of the original mortgagee or not will be dealt with while discussing the third ground mentioned by the learned Civil Judge. We find no force in the first ground mentioned by the learned Civil Judge for holding that Art. 134, Limitation Act, did not govern the present suit.

(17) The next ground, as we have already seen, is that as the transfer in favour of Jhannoo Lal had taken place within the term fixed for redemption of the mortgage deed, Art. 134 was inapplicable. In this connection the learned Judge has referred to the contention put forward before him, viz., that

> "all the transfers took place before the term of 10 years and the right of redemption had not accrued to the mortgagor so that on authority of — 'Seeti Kutti v. Kunhi Puthumma', AIR 1919 Mad 972 (FB) at p. 984 (D) followed in — 'Krishnaswami Ayyar v. Subaratnam Chetti', AIR 1938 Mad 394 (E), the benefit of Art. 134 could not be availed of and because defendant 4 was aware of such weakness he raised the false plea of relinquishment of equity of redemption by Chheda forming the subject-matter of issue 2 and the finding thereon against him is not challenged".

We have examined the case reported in AIR 1919 Mad 972 (FB) (D). In that case the following questions were referred to the Full Bench for opinion:

> "(1) Does Art. 134, Limitation Act, apply to a transfer from the trustee or mortgagees under which possession is not taken by the transferee?
>
> (2) Where possession is taken under the transfer but at some time after the date of the transaction purporting to transfer the right to take possession, does time begin to run from the date when possession is taken or from the date of the transaction?
>
> (3) Where the mortgage is usufructuary and the mortgagor has no right to obtain possession from the mortgagee at the time of the transfer, does time run against the mortgagor under Art. 134,
>
> (a) from the time of the transfer or
> (b) from the time when the mortgagor's right to sue for possession accrues, under the original mortgage or
> (c) from the time when the transferee enters into possession or
> (d) from the time when the transferee enters into possession and asserts an adverse title to the knowledge of the mortgagee."

The question considered in the above case and relevant for the purposes of this appeal is the third question. Wallis, C. J., Coutts Trotter, Seshagiri Ayyar and Srinivasa Ayyangar JJ. did not deal with the third question or express their opinion thereon. Only Abdur Rahim J. dealt with the third question. The learned Judge observed at p. 980:

> "Article 134, as has been pointed out in more than one decision, does not apply to cases where a trustee or a mortgagee makes the transfer in pursuance of the power vested in him; in such cases the transferee becomes merely an assignee of the trust or mortgage and cannot claim any higher position.....It applies only to transferor's powers. Now a mortgagee in possession is prohibited from doing any act which is destructive or permanently injurious to the property mortgaged (see S. 76, T. P. Act.). If he therefore purports, for instance, to sell the property to a third person the mortgagor would be entitled, although the terms of the mortgage may not have expired to protect his own interests by a proper suit.....It is not, however, necessary to answer the third question."

It follows, therefore, that the decision in AIR 1919 Mad 972 (FB) (D), does not support the contention put forward before the learned Civil Judge or his decision thereon; and, in fact, the observations of Abdur Rahim J. do not support the said contention or the view of the learned Civil Judge.

(18) In the other case AIR 1938 Mad 394 (E), Abdur Rahman J. observed at page 395:

"A close perusal of Art. 134 would show that it was brought into existence with the object of filing suits for possession of the properties primarily mortgaged and subsequently transferred by the mortgagee, etc., in excess of their rights: — 'J. R. Skinner v. Naunihal Singh', AIR 1929 PC 158 at p. 161 (F). If a mortgagee did not exceed his rights, he would be assigning his mortgagee's interest alone and in that case obviously Art. 148 and not Art. 134 would be held to be applicable. If on the other hand the mortgagee exceeded his rights and transferred the entire property as an owner he must be held undoubtedly to have exceeded his rights as a mortgagee. In that case if it is necessary to institute a suit for possession either by a mortgagor or his alienees (as provided in Col. 1 of Art. 134 and which must be read along with what appears in Col. 3 of that Article), it must be presumed that the mortgagee had possession and delivered it to his alienee. This would imply, in my opinion, that the word "transfer" used in Col. 3 of Art. 134 must necessarily refer to a transfer of possession and not merely to a conveyance of title."

(19) We have not been referred to any passage in the case under consideration which might support the contention or the view expressed by the learned Civil Judge.

(20) On behalf of the respondents no serious attempt was made to support this ground stated by the learned Civil Judge for holding that Art. 134 did not govern the present suit.

(21) It is true that the mortgagor was, in terms of the mortgage, precluded from redeeming the mortgage so long as the mortgagee considered himself bound by the terms of the mortgage and did not act in any manner prejudicial to his (mortgagor's) interest. In terms of a mortgage, a mortgagee acquires the limited interest of a mortgagee; and in that capacity, in view of the provisions contained in S. 76, T. P. Act, while in possession of the mortgaged property, he is prohibited from doing an act which is destructive or permanently injurious to the property mortgaged. If in defiance of his contractual and statutory liability, the mortgagee repudiates the mortgage, the mortgagor cannot be bound by the terms of the mortgage; and he cannot be expected to wait for the expiry of the term before he can seek his remedy against a person, who asserts title adverse to him. In the present case the remaining term was only two years, but in other cases there may be a longer term yet to expire — say more than 12 years. In the latter class of cases the mortgagor cannot be left to his fate during that time and run the risk of losing the property altogether. Apart from it, the cause of action for a suit for redemption may arise after the expiry of the term fixed in the mortgage; but there appears to be no reason to tack on that cause of action to an entirely different cause of action when a transfer prejudicial to his interest is made by the mortgagee and prevent him from enforcing the latter cause of action.

(22) The third ground namely that Jhannoo Lal was not a mortgagee within the meaning of that term in Art. 134, Limitation Act, has, however, been the subject of long arguments on behalf of the appellant as well as the respondents. Learned counsel for the appellant has strenuously argued that by virtue of the auction-sale held on 3-4-1941, Jhannoo Lal became the assignee of the rights of the original mortgagee; while on the other hand, the respondents' learned counsel has contended that by virtue of the said sale Jhannoo Lal did not become a mortgagee within the meaning of that term in Art. 134. It appears worthwhile to repeat the circumstances leading to the auction sale held on 3-4-1911. On 13-12-1904, Hakim Dwarka Prasad sub-mortgaged his mortgagee rights under the deed in suit to Ganga Din, father of Jhannoo Lal. In execution of a simple money decree against Hakim Dwarka Prasad on 27-8-1908, the mortgagee rights under the deed in suit were sold at a court auction and purchased by Pancham, which means that Pancham became the owner of the equity of redemption of the mortgagee rights of the deed in suit. Jhannoo Lal then instituted a suit on the mortgage deed in favour of his father and in due course obtained a decree absolute for sale of the mortgaged property, namely the mortgagee rights of the deed in suit and purchased them himself. The sub-mortgage having been thus extinguished the sale of the equity of redemption to Pancham also became ineffective. Jhannoo Lal thus became the owner of the mortgagee rights of the deed in suit and thereby stepped into the shoes of Hakim Dwarka Prasad, the original mortgagee.

(23) On the basis of the facts just stated it has been pointed out on behalf of the appellant that Jhannoo Lal became the mortgagee within the meaning of that term in Art. 134 which includes the heirs, legal representatives and assignees of the mortgagee.

(24) In support of his contention learned counsel for the appellant has invited our attention to a recent Full Bench decision of this Court in — 'Mt. Chunai v. Ram Prasad', AIR 1951 All 167 (FB) (G). In that case his Lordship the Chief Justice thus explained the points of difference between Arts. 134 and 148:

"(1) Article 148 relates to a suit against a mortgagee, and Art. 134 to a suit against a person to whom the immovable property has been transferred by the mortgagee for a valuable consideration and

(2) Article 148 relates to a suit to recover possession or to redeem, while Art. 134 mentions only a suit to recover possession."

The observations of his Lordship the Chief Justice, which are relevant to the question under consideration, are thus summed up at page 171:

"The result, therefore, is that, to my mind, Art. 148 applies to a suit for possession or for redemption against a mortgagee, against the heirs of the mortgagee, against persons to whom the mortgagee's interest only has been transferred, against persons who have purported to purchase the property without paying valuable consideration therefor and against persons who have purchased the property with notice of the mortgage & are thus estopped from denying the

title of the mortgagor. The burden of proving that the transferee had notice of the mortgage & that he was estopped from denying the mortgagor's title, must be on the plaintiff. To all other suit for possession of immoveable property, where property was transferred by a mortgagee in possession to a transferee for valuable consideration, Art. 134 is applicable and in such a suit it is not necessary for the defendant transferee to prove that he is a transferee in good faith."

It would thus appear that the term "mortgagee" used in Art. 148 includes the heirs of the mortgagee, the persons to whom the mortgagee's interest only has been transferred, the persons who have purported to purchase the property but without paying the valuable consideration therefor and the persons who have purchased the property with notice of the mortgage and are thus estopped from denying the title of the mortgagor. There appears to be no reason why the term "mortgagee" used in Art. 134 should be confined to the original mortgagee or his heirs alone. In our opinion, such a limited interpretation of the term "mortgagee" used in Art. 134 would lead to anomalous results.

(25) Learned counsel for the respondents has contended, firstly that a person who purchases mortgagee rights at an auction sale does not step into the shoes of the original mortgagee, and cannot be regarded as a mortgagee within the meaning of that term in Art. 134, Limitation Act. He has attempted to support his contention by citing the following decisions. — 'Kali Das v. Kanhya Lal', 11 Ind App 218 at p. 229 (PC) (H); — 'Sheo Nath Singh v. Mahipal Singh', 2 All LJ 234 at p. 236 (I); — 'Paras Ram v. Lalman', 7 Ind Cas 570 (All) at p. 571 (J); — 'Munawar Ali v. Jagmilan Ram', AIR 1927 All 177 (K); — 'Chhoti Begam v. Ram Prasad', AIR 1917 Oudh 290 at p. 291 (L); — 'Mahomed Mohsin v. Mahomed Abid', AIR 1919 Oudh 150 at p. 151 (M); 25 Mad 99 (FB) at p. 102 (C); and — 'Mahomed Moosa v. Kazi Fatehullah', AIR 1925 Sind 167 (N).

(26) The passage at page 229 of 11 Ind App 218 (H) to which reference has been made is as follows:

"Their Lordships intimated in the course of the argument that the purchase at the sale in execution of the rights and interests of Ruttonmoni, could not, as between the purchaser and Roma Sundari, be considered to fall under this article."

In our opinion, the above observations of their Lordships of the Privy Council only affirmed the principle that a transfer by execution sale is not a transfer within the meaning of that expression in Art. 134, Limitation Act, and we can find nothing in that case which might support the contention that a purchaser of the mortgagee rights at an auction sale does not step into the shoes of the mortgagee and cannot be regarded as a mortgagee within the meaning of that term in Art. 134.

(27) In 2 All LJ 234 at page 236 (I) a similar view was expressed. At page 236 the following passage appears:

"It is true that in the present instance the property itself was sold by auction in execution of Mustaid Hussain's decree in 1884, but the purchaser at the auction sale was not a purchaser from the mortgagee. Article 134 clearly applies to a case in which the mortgagee has himself voluntarily sold the property, and does not apply to the case of a forced sale in execution of a decree."

In support of this view reference was made to the Full Bench decision of the Madras High Court in 25 Mad 99 (C), which has already been noticed by us.

(28) The decision reported in 7 Ind Cas 570 (All) (J), is based upon 2 All LJ 234 (I) and lays down the same rule of law.

(29) The single Judge decision in AIR 1927 All 177 (K), no doubt, contains the following observations:

"That article (Art. 134), in my opinion, cannot protect persons who are not transferees from the mortgagee but are transferees from persons other than the mortgagees or their heirs. The mortgagor is ordinarily allowed a period of 60 years to redeem a mortgage by Art. 148 of the First Schedule to the Limitation Act, and any person who seeks the protection of Art. 134 must strictly bring his case within that article. If one were to extend the operation of Art. 134 to cases of transfers by sub-mortgagees one would have to read into the article, words to the effect; 'property transferred by the mortgagee or by a transferee from the mortgagee' words which are not to be found in Art. 134."

The learned Judge relied upon a decision of the late Court of the Judicial Commissioner of Oudh in AIR 1917 Oudh 290 (L).

(30) In the case reported in AIR 1927 All 177 (K), it was an admitted fact that the defendants were in possession of the property sought to be redeemed from a time long before the institution of the suit, and it was alleged by the plaintiff that the defendants were in possession as sub-mortgagee and that the original mortgagee having been satisfied the defendants were not entitled to resist the suit for redemption. That is not the position here and it must be conceded that the position of a sub-mortgagee is entirely different. Here the appellant had obtained a transfer of the full mortgagee rights. The decision in AIR 1927 All 177 (K), was not followed by the Division Bench in — 'Suleman Bahadur v Fida Husain', AIR 1945 Oudh 258 (O) where it was observed that there was nothing in Art. 134 to show that it was intended to apply only to a transfer made by the original mortgagee and not to a person who was a transferee of the very rights held by the original mortgagee. If we may say so with respect, we entirely agree with this view. Jhannoo Lal, in the present case, is a transferee of the very rights held by the original mortgagee, Dwarka Prasad.

(31) The facts of the case in AIR 1917 Oudh 290 (L), were also different and the relevant passage relied upon in that case is to the effect that a purchaser in execution of a mortgage-decree does not become a mortgagee of the property within the meaning of Art. 134. That is

quite obvious because as soon as a decree is passed the mortgage is extinguished and as a result of a sale in execution of that decree there remains no question of the purchaser stepping into the shoes of any mortgagee.

(32) In AIR 1919 Oudh 150 at p. 151 (M) it was observed by Daniels A. J. C. that there was considerable authority for the view that a purchaser at an auction sale is not entitled to the benefit of Art. 134 even though the sale purports to transfer not merely the mortgagee rights which the judgment-debtor really possessed but full proprietary rights. That proposition of law is not contested on behalf of the appellant.

(33) The case reported in 25 Mad 99 (FB) (C), has already been noticed above and it lays down a proposition of law which is not being disputed in this case.

(34) The case in AIR 1925 Sind 167 (N), lays down the same proposition of law and does not support the argument of the respondents' learned counsel.

(35) We may also notice three other cases, which have been relied upon by the learned Civil Judge, viz., — 'Thiruvikrama Ayyar v. Vyapuri Naicken', AIR 1927 Mad 1028 (P); — 'Sri Ram v. Najibullah', AIR 1926 Oudh 547 (FB) (Q); and AIR 1929 PC 158 (F). In the first case, it was pointed out that Art. 134, Limitation Act cannot possibly apply to a transfer in invitum or by operation of law or in execution, because the article specifically speaks of the transfer made afterwards by the trustees or mortgagee for valuable consideration. This or any other observation in the judgment does not touch the point under consideration.

(36) The question which was referred for the opinion of the Full Bench in AIR 1926 Oudh 547 (Q), was whether the suit was governed by Art. 134, Limitation Act and it was held in that case that a suit by a mortgagor to recover property from a transferee of absolute title from mortgagee was governed by Art. 134 and not by article 148 and that under article 134 the transferee without notice and the transferee with notice stood on the same footing. It would thus appear that this case does not deal with or decide the point under consideration.

(37) The case reported in AIR 1929 PC 158 (F), also does not cover the point under consideration. There it was pointed out that the transfer of property mortgaged contemplated by Art. 134 was something other than an express transfer of the original mortgage and that Art. 134 contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage.

(38) After a review of the case-law cited at the bar we are led to the conclusion that a person who purchases the mortgagee rights at an auction sale steps into the shoes of the original mortgagee and the person who thus acquires the mortgagee rights can be treated as a mortgagee within the meaning of that term in Art. 134, Limitation Act. We, therefore, do not find any force in the third ground also, which has been mentioned by the learned Civil Judge for holding that the present suit was not governed by Art. 134, Limitation Act.

(39) Article 134, Limitation Act relates to suits to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and otherwise transferred by the trustee or mortgagee for a valuable consideration. It is not disputed that the transfer by the trustee or mortgagee for a valuable consideration contemplated by the article refers to an absolute transfer. On behalf of the respondents it has been contended that Jhannoo Lal had only transferred the mortgagee rights possessed by him and he had not transferred any rights higher than the rights possessed by him. This argument is based on the following circumstances: (1) On behalf of the appellant, the position that the full proprietary rights in the house and the shop were sold and purchased by Jhannoo Lal at the auction-sale on 3-4-1911, has not been pressed. Consequently it must be held that only mortgagee rights were sold and purchased; (2) Jhannoo Lal being the son of the sub-mortgagee and having obtained a decree on the basis of the sub-mortgage and being the auction-purchaser in execution of his own decree was fully aware of the fact that the mortgagee rights only were sold and purchased; (3) before the auction-sale the necessary preliminaries must have been taken and Hakim Ram Charan must have been aware of the entire situation and about the property that was actually put to sale, and Jhannoo Lal's statement shows that he had shown all the relevant papers to Hakim Ram Charan; and (4) having regard to the terms of the sale deed it is not possible to hold that proprietary rights and not only the mortgagee rights were sold.

(40) Learned counsel for the appellant pointed out that he still maintained that at the auction-sale the proprietary rights were put up for sale and purchased by Jhannoo Lal and that he never gave up that position. He invited our attention to the sale certificate which clearly indicated that the house and the shop and not only the mortgagee rights therein had been sold. It is, therefore, not possible to say that it was admitted that only the mortgagee rights were put up for sale or actually sold at the auction sale of 1911.

(41) Jhannoo Lal was, no doubt, the son of the sub-mortgagee and he had obtained a decree on the basis of the sub-mortgage and was the auction-purchaser at the auction-sale held in execution of the decree obtained on the basis of the sub-mortgage. There is nothing on the record to show that he treated himself as only the owner of the mortgagee rights. In fact we find that he considered himself to be the absolute owner of the property purchased by him. That is made clear by the fact that he invested a considerable amount in rebuilding the house and the shop and gave them the form of one of the big buildings in the town where they were situate.

(42) The sale proclamation or any other document relating to the auction-sale of 1911 has not been produced in this case and we do not know whether only the mortgagee rights were put up

for sale. Undoubtedly, in the sale certificate the proprietary and not only the mortgagee rights therein have been mentioned and we do not know what was shown in the sale proclamation etc. Hakim Ram Charan might have relied upon the sale certificate, which was admittedly shown to him, and he might not have been aware of the actual position. Jhannoo Lal has, no doubt, stated that he had shown the papers relating to the litigation to Hakim Ram Charan Lal; but this fact has been denied by Hakim Ram Charan Lal. There being oath against oath, the question is whether Jhannoo Lal or Hakim Ram Charan should be believed on this point. It appears difficult to believe the statement of Jhannoo Lal because we find that he has not spoken the whole truth on certain material points, for example, he would have us believe that he had told the scribe of the sale deed executed by him that only the mortgagee rights were being sold. If he had told the scribe that fact must have found place in the sale deed itself; but we do not find any mention thereof in the deed. In his cross-examination he admitted that after seeing the sale certificate Hakim Ram Charan did not ask him to show any other paper. This statement indirectly supports the statement of Hakim Ram Charan that he had been shown only the sale certificate. Jhannoo Lal was unable to give the details of the papers alleged to have been shown by him to Hakim Ram Charan. Jhannoo Lal also attempted to conceal the fact that he had made Pancham a party to his suit. No reliance can, therefore, be placed upon the statement of Jhannoo Lal.

(43) Now coming to the sale deed of 9-9-1912, it makes it absolutely clear that the proprietary rights in the house and the shop and not only the mortgagee rights therein were sold. The deed begins with a recital that under the sale certificate relating to the sale of 3-4-1911, the vendor Jhannoo Lal had become the owner and was in possession of the house and the shop. Further on he stated that he was the exclusive owner of the house and the shop and possessed all the rights therein. While describing the property transferred under the deed Jhannoo Lal stated that he was transferring the house and the shop without the exception of anything, which could be the subject of ownership, for a sum of Rs. 1,000/-. Then the deed proceed to say that the vendor had put the vendee into possession of the house and the shop as an owner like himself and that the vendee had thereby acquired all the rights of ownership like the vendor. The vendor further agreed that if for any reason the vendee was deprived of the property on account of any claim or otherwise, he would be responsible for the same. The deed, read as a whole, leaves no room for doubt that absolute proprietary rights were conveyed by the vendor to the vendee.

(44) We, therefore, see no force in the contention that Jhannoo Lal had not sold absolute proprietary rights in the property but had only transferred the mortgagee rights or that the parties did not contemplate a sale of the porprietary rights. Consequently, on this ground also it cannot be urged that Art. 134, Limitation Act had no application to the present suit.

(45) Another argument put forward on behalf of the respondents was that it was incumbent upon the defendant-appellant to prove all the ingredients which were necessary to bring the suit within the purview of Art. 134, Limitation Act. In this connection reliance was placed upon the observations of their Lordships of the Privy Council in — 'Radhanath v. Gisborne & Co.', 14 Moo Ind App 1 at p. 15 (R). That case was based upon the corresponding provisions of Act 14 of 1859 and their Lordships pointed out at p. 15 that

> "in order to claim the benefit of S. 5 of that Act a defendant must show three things: First, that he is a purchaser according to the proper meaning of that term; second, that he is a 'bona fide' purchaser; and third, that he is a purchaser for valuable consideration."

Learned counsel for the respondent has argued that in addition to these three points in the present case it was incumbent upon the defendant-appellant to establish that the plaintiff had knowledge of the transfer and that the burden of issue in this case was thrown upon him; but he had failed to discharge that onus, which was thrown upon him and was accepted by him. In a suit for recovery of possession of immoveable property governed by Art. 134, Limitation Act, 1908 it must be shown that the immoveable property which was the subject-matter of the suit was mortgaged and afterwards it was transferred by the mortgagee for a valuable consideration. That fact has been clearly established in this case. Under the article as it stood before the amendment in the year 1929 the limitation of 12 years was to run from the date of transfer and the date of transfer being admitted, it was not necessary to prove the date of transfer. The transfer in question was executed on 9-9-1912. The suit to recover possession of immovable property transferred by the mortgagee should have been brought within 12 years from that date. No suit having been instituted within the period of 12 years prescribed by Art. 134, in view of the provisions contained in section 28, Limitation Act, the remedy of the person entitled to recover possession was barred.

(46) It has been contended on behalf of the appellant that the remedy having become barred by virtue of S. 28, Limitation Act the amendment of the year 1929 could not affect the vested rights or revive the rights which had been extinguished. Consequently, Art. 134 as it stood before the amendment of the year 1929 and not the article as it stood after the amendment was applicable to the present case. In our opinion, there is force in this argument and it must be accepted. The suit being governed by Art. 134 as it stood before the amendment of the year 1929, it was not necessary for the defendant-appellant to establish that the plaintiff had knowledge of the transfer more than 12 years before the institution of the suit.

(47) Apart from it we find that the defendant had proved the circumstances which go to show that the original mortgagee Chheeda, had notice of the transfer soon after it was made. We have it from Hakim Ram Charan Lal that Cheda

worked as a labourer and he had engaged him to reconstruct the house and the shop in dispute and he never raised any objection on the basis of the equity of redemption which vested in him. There is no evidence in rebuttal and, in view of the circumstances pointed out above, we see no reason to hold that the original mortgagors had no notice of the transfer of absolute rights in the property to Hakim Ram Charan Lal.

(48) In the present case, the auction-sale held on 3-4-1911 is not being relied upon for the purpose of bringing the case within the purview of Article 134, Limitation Act and it is the sale by Jhannoo Lal in favour of the defendant-appellant, Hakim Ram Charan Lal, which is being relied upon. It is not disputed that the auction sale, which was held in execution of a decree for sale of mortgagee rights, is not a transfer within the meaning of that term in Article 134: but it is contended that the appellant can ignore the auction sale and contend that the starting point of limitation should be taken as the date of the voluntary alienation made on 9-9-1912. In a suit governed by Art. 134 relief by way of recovery of possession is claimed against the person in possession; and in this case the person in actual possession is the transferee under the sale deed, dated 9-9-1912; consequently, we have to take into consideration, for the purposes of Art. 134, the transfer dated 9-9-1912.

(48a) The main distinction between the suits falling under Art. 134 and those governed by Art. 148 is that the former classes of suits are those which are filed 'against the transferees' for valuable consideration from the mortgagee; while the latter classes of suits are those which are filed against the mortgagee. In other words, if a suit is against a person other than the mortgagee it will fall within the purview of Art. 134 and if the suit is against a mortgagee it will be governed by Art. 148.

(49) The point whether the term "mortgagee" in Arts. 134 and 148 includes only the original mortgagee or the heirs, legal representatives and assignees from the original mortgagee has already been discussed earlier in this judgment. As far as the term "mortgagee" used in Art. 148 is concerned, the point is concluded by the authority of the Full Bench decision in AIR 1951 All 167 (G). It is not disputed on behalf of the plaintiff-respondent that the term "mortgagee" used in Art. 134 is not confined to the original mortgagee and it includes the heirs of the mortgagee; and in AIR 1945 Oudh 258 (O) it was pointed out by a Division Bench of the Avadh Chief Court that there was nothing in Art. 134 to show that it was intended to apply only to a transfer made by the original mortgagee and not to a person who is a transferee of the very rights held by the original mortgagee. So, the term 'mortgagee' also includes a transferee of the mortgagee rights as well; and, as already pointed out, we see no reason why the term should not include the persons covered by the same term in Art. 148, according to the Full Bench decision in AIR 1951 All 167 (G).

(50) It remains for us to consider one more argument in this connection, namely, that the defendant-appellant Hakim Ram Charan, who lived in the house and occupied the shop in dispute, had notice of the actual nature of the title possessed in the property by his transferor, Jhannoo Lal. It was attempted to be shown that Hakim Ram Charan Lal occupied the house and the shop soon after the mortgage was executed in favour of Hakim Dwarka Prasad in the year 1904; but there is no evidence on the record to prove that fact. On the other hand, Hakim Ram Charan Lal as D. W. 1 has stated on oath that he came to live in the town of Gola in the year 1911; and if that statement is accepted he could not have occupied the house or the shop in or about the year 1904. The statement of Jhannoo Lal, upon which reliance was placed by the respondent's learned counsel, does not take us previous to the year 1911. Jhannoo Lal obtained possession over the property on 25-8-1912 under the sale certificate which was shown to Hakim Ram Charan Lal and which, as we have already seen, showed that Jhannoo Lal was the full owner of the property. The plea of estoppel based upon the fact that Hakim Ram Charan Lal had notice of the actual nature of the title possessed by his transferor was never raised in the pleadings nor was any issue framed on this point; we do not find sufficient materials on the record to show that he had such notice. This point has assumed importance in view of the recent Full Bench decision in AIR 1951 All 167 (G). We have already stated that it is not possible to accept the statement of Jhannoo Lal at its face value. Consequently, we are not prepared to hold that the defendant-appellant, Hakim Ram Charan Lal had any notice of the fact that Jhannoo Lal was only a mortgagee of the property and that he was therefore estopped from challenging the rights of the mortgagor or his transferee.

(51) The defendant-appellant, Hakim Ram Charan Lal is a transferee from Jhannoo Lal, who was undisputably a transferee of the mortgagee rights under the deed in suit. In our opinion, therefore, the suit was clearly governed by Art. 134, Limitation Act and as such the suit which was filed long after the expiry of the period of limitation prescribed by the said Article was barred by the time, and it should have been dismissed on that ground.

(52) In view of the conclusion at which we have arrived on the question of limitation it is not necessary to discuss the other points which have been raised on behalf of the appellant; but as certain points have been raised and discussed before us we would like to express our views thereon.

(53) It has been contended that if it be held that Art. 134 does not apply and Art. 148 is also inapplicable the residuary Art. 144 must be held to be applicable to the present suit. The learned Civil Judge, as has already been pointed out above, held that the present suit was not governed by Art. 134, but it was governed by Art. 148, Limitation Act. It seems to have been pressed before him that if the suit was not governed by Art. 134, it was governed by Art. 144, Limitation Act. This contention on behalf of the defendant-appellant was answered by the learned Judge in the following summary way:

"I do not see how the residuary Art. 144 is made applicable to this case. It is difficult to conceive that different articles would apply, viz., Art. 148 as against defendant 2 and Art. 144 as against defendant 4."

(54) For the reasons already stated it is not possible to hold that the present suit was as against a mortgagee or against any of the persons referred to in AIR 1951 All 167 (FB) (G). The suit was against a transferee from an assignee of the mortgagee rights and as such it was not a suit of the nature contemplated by Art. 148, Limitation Act. In this connection learned counsel for the appellant has invited our attention to a Full Bench decision of the Avadh Chief Court in AIR 1926 Oudh 547 (Q) to which reference has already been made above. There it was held that a suit by a mortgagor to recover property from a transferee of absolute title from the mortgagee is governed by Art. 134 and not by Art. 148.

(55) We are, therefore, of opinion that the present suit was not governed by Art. 148, Limitation Act. The suit not being governed by Art. 134 or 148, Limitation Act, such a suit would obviously be governed by the residuary Art. 144.

(56) Learned counsel for the respondents has, however, pointed out that the defendant-appellant never pleaded in the trial Court that the present suit was barred by the provisions of Art. 144, Limitation Act. That contention is undoubtedly correct, because issue 3 clearly shows that the plea of limitation was based upon the allegations contained in para. 25 of the written statement of the defendant-appellant. Para. 25 of the written statement was as follows:

"From the time of purchasing it, the defendant No. 4 is continually in possession of the property as a proprietor in the knowledge and information of Chheda aforesaid. The suit of the plaintiff is beyond limitation and this suit is barred by Art. 134, Limitation Act. All the rights of the mortgagor, whether of Chheda or of Janasa, or of Mahadeo, if there were any, have extinguished."

(57) In order to establish that the suit was barred by limitation under Art. 144, Limitation Act it was necessary for the defendant-appellant to establish that he had established adverse possession for a period of 12 years. In para 25 of his written statement, the defendant-appellant merely alleged that he had been in possession of the property since the date of the purchase as a proprietor within the knowledge of Chheda, one of the original mortgagors. As an assignee of the mortgagee rights also the defendant-appellant would have held continuous possession over the property until the date of redemption. Consequently, the mere allegation or proof of the fact of continuous possession was not sufficient in the circumstances of the present case to establish adverse possession. No other hostile acts to establish adverse possession were alleged and as such the plaintiff-respondent had no occasion to rebut any case of adverse possession. In these circumstances, it is difficult to allow at this stage the defendant-appellant to raise the plea of adverse possession, which is a mixed question of law and fact.

(58) In this connection on behalf of the respondent it has been contended that there was no question of adverse possession against the rights and interests of the mortgagor so long as the mortgage deed subsists and in support of their contention they have invited our attention to the following cases: — (1) 'Salig Ram v. Gauri Shankar Tandon', AIR 1935 All 542 at p. 543 (S); (2) 'Mst. Durga Devi v. Girwar Singh', AIR 1923 All 11 (2) (T); (3) 'Muhammad Husain v. Mul Chand', 27 All 395 at p. 396 (U) and (4) 'Zinda v. Mt. Roshnai', AIR 1928 Lah 250 at p. 255 (V).

(59) In the first case, it was pointed out that the mortgagor's right to sue for possession accrues for the first time when after redemption he is unable to take possession of part of the mortgaged property, which he finds to be in possession of a trespasser, who denies his title to it. He becomes entitled to sue the trespasser when he redeems the property and is opposed by the trespasser. It is clear that the period of limitation for his suit is 12 years to be reckoned from the date of redemption, and the trespasser's possession would not become adverse to him till after redemption.

(60) In the second case, the defendants, successors of the mortgagee, who had somehow obtained possession of the mortgaged plot under a usufructuary mortgage, got their names entered in the revenue papers, as if they were occupancy tenants of the disputed land and set up their title by adverse possession. It was held that no such possession, short of the statutory period of sixty years, would be a bar or defence to a suit for redemption, if the parties were otherwise entitled to redeem.

(61) The head-note of the third case is as follows:

"Possession of mortgaged property obtained by ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also, for the reason that such possession, so far as the mortgagor is concerned, cannot become adverse until the mortgagor becomes entitled to immediate possession."

(62) The view expressed in the fourth case is expressed in the following passage:

"Where a mortgagee is let into possession, his position is to some extent that of a trustee and that he is bound to protect the interests of the mortgagor and to prevent any invasion of his rights by a stranger. If the mortgagee by neglect or collusion allowed any person to come into possession of the property, there will be no invasion of the rights of the mortgagor, and when the time for redemption comes, he will be entitled to treat the stranger as a trespasser and the stranger's right by adverse possession against the mortgagor will not commence unless and until the mortgagor had sought to exercise his right of redemption and redeemed the property."

(63) The cases just cited lay down that a person may acquire adverse rights against the mortgagee, but he cannot acquire those rights against the mortgagor; but, in our opinion, the question of adverse possession or the bar of limitation un-

der Art. 144, Limitation Act not having been specially pleaded by the defendant-appellant in the trial Court it cannot be allowed to be raised here at this stage.

(64) The next question which was raised on behalf of the defendant-appellant in the Courts below was that the defendant-appellant was a 'bona fide' transferee for value without notice and as such he was protected under S. 41, Transfer of Property Act; but that plea was abandoned by the learned counsel for the defendant-appellant in this Court. Consequently, we do not enter into the discussion of that question.

(65) The third question which was raised by the learned counsel for the appellant related to the applicability of the provisions of S. 51, Transfer of Property Act. The defendant-appellant alleged that he had reconstructed the house and the shop at a cost of Rs. 10,000/- to Rs. 12,000/- and he was entitled to be reimbursed or to the extent of the amount invested by him in the reconstruction of the house and the shop. In this connection the learned Civil Judge has held that the contesting defendant had failed to prove the amount actually invested by him in the reconstruction of the house and the shop and that the said defendant was not entitled to claim any reimbursement under S. 51, Transfer of Property Act, because he had failed to make the necessary inquiries into the title of his transferor. It is, however, not disputed that the defendant-appellant has made substantial improvements in the house and the shop is now one of the big buildings in the town of Gola.

(66) Section 51, Transfer of Property Act lays down:

"When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. ....."

(67) The defendant-appellant is undoubtedly a transferee of the immovable property sought to be redeemed and there can be little doubt that there were circumstances which might have led him to believe in good faith that he was absolutely entitled to the said property. The most important circumstance is evidenced by the sale certificate standing in the name of his transferor, Jhannoo Lal. The sale certificate shows that Jhannoo Lal had purchased the house and the shop and not only the mortgagee rights therein. It has been admitted in this case by Jhannoo Lal that he had shown the sale certificate to the defendant-appellant and that after seeing the sale certificate he did not see any other document. A certificate of sale is an important piece of evidence relating to title and it cannot be lightly set aside.

(68) Another circumstance which may be considered in this connection is that the defendant-appellant had invested a large sum of money in rebuilding the house and the shop. If the appellant did not honestly believe that he was the absolute owner of the property, he would not have invested such a huge amount in rebuilding the same. The mere fact that the appellant after seeing the sale certificate did not make any further inquiries into the title of his transferor cannot disentitle him to obtain reimbursement under the provisions of S. 51, Transfer of Property Act. We have really to see whether there existed circumstances which might have led him to believe in good faith that he was absolutely entitled thereto. In the circumstances of the present case, he was certainly entitled to believe in good faith that he was absolutely entitled to the property in dispute. The defendant-appellant was, therefore, entitled to claim reimbursement and it was a different matter whether he had succeeded in proving the amount invested by him or not. In view of the finding on the question of limitation it is not necessary to discuss this matter any further.

(69) The last point urged by the learned counsel for the appellant relates to the relief granted to the plaintiff-respondent by the learned Civil Judge. As we have already seen, he has disallowed the compound interest provided in the deed in suit and has allowed redemption on payment of the principal sum secured under the mortgage and the costs of constructions sanctioned under the deed together with simple interest at the rate provided in the deed.

(70) It has been contended on behalf of the appellant that the learned Judge had no jurisdiction to disallow the compound interest provided in the deed when according to his own showing, "the rights and liabilities of the parties should be determined by the term of the contract in the deed". The learned Judge has observed:

"I do not think that the provision for no claim for profits from the mortgagee at the time of redemption operated as a clog or rendered redemption practically impossible by itself, but having regard to the present market value of the property in suit on annual profits of Rs. 240/- per year at 20 years purchase value under the present conditions the effect of covenant of interest at 2 per cent. per mensem compoundable yearly was to render redemption practically impossible".

Accordingly, on the authority of a decision of the late Court of the Judicial Commissioner in 'AIR 1917 Oudh 106 (A)', he considered that the equities of the case would be met if the mortgagors were relieved of compound interest.

(71) It is not possible to say that a provision for compound interest in any deed of mortgage by itself amounts to a clog on the equity of redemption. If the mortgagor continues to pay interest in terms of the mortgage deed, there would be no accumulation of interest or compound interest and that would not present any difficulty at the time of redemption. In the case before us the deed

itself provided for regular payment of interest; and if a huge amount of interest and compound interest has accumulated, the mortgagor himself is responsible for the same and it cannot be said to be the direct result of any of the terms of the deed itself. The learned Judge was unable to point out any condition in the deed which could amount to a clog on the equity of redemption. When it was conceded before the learned Judge that the provisions of the Usurious Loans Act, the Agriculturists' Relief Act and the Debt Redemption Act were inapplicable to the facts of the present case and the lights and liabilities of the parties were to be determined by the terms of the contract mentioned in the deed of mortgage, the Court would have been entitled to interfere with the terms of the contract only if it was shown that they were obtained by fraud or by the exercise of undue influence or amounted to a clog on the equity of redemption. The learned Judge seems to have been influenced by the total amount which would now be due in terms of the mortgage deed; but that consideration should not have weighed with him.

(72) Learned counsel for the respondents has contended before us that in exercise of its equitable jurisdiction the learned Civil Judge had the power to relieve the debtor from the liability to pay compound interest and that the learned Judge should be deemed to have exercised that jurisdiction. Learned counsel was unable to cite any authority in support of his contention. He invited our attention to a decision of their Lordships of the Privy Council in — 'Dhanipal Das and another v. Maheshwar Bakhsh', 28 All 570 at p. 583 (PC) (W). The passage on which the learned counsel relied is cited below:

> "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended S. 16 only. He also mistook the English law. Apart from a recent statute, an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud, which is not this case. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case."

The facts of the present case are, however, entirely different, and we are not prepared to hold that the learned Civil Judge had any jurisdiction to reduce the contractual rate of interest as contended by the learned counsel.

(73) The case reported in 'AIR 1917 Oudh 106 (A)', is clearly distinguishable. There the mortgage deed had been executed by a person of tender years and by a 'pardanashin' lady and the language of the document did not appear to have been thoroughly explained to the executants; while the terms were vague and ambiguous. In the circumstances of that case, it was held that if the effect of the covenant relating to interest was to render redemption practically impossible, relief should be given to the debtors. That is not the position here. Here the learned Judge has allowed interest at the rate provided in the deed, but consider the stipulation about compound interest as inequitable.

(74) It is, therefore, not possible for us to uphold the finding of the learned Civil Judge on the question of compound interest. In our opinion, if the suit was held to be within time, redemption should have been allowed on payments of the amount due in terms of the mortgage deed in suit.

(75) As the suit filed by the plaintiffs-respondents was barred by limitation, it ought to have been dismissed. Accordingly, we allow this appeal, set aside the decision of the Court below and dismiss the plaintiff's suit with costs throughout.

D.H.Z. Appeal allowed.

(S) A.I.R. 1955 ALL. 350 (Vol. 42, C.N. 98)

MALIK C. J. AND JAMES J. (24-11-1954)

Salik Ram Upadhia, Defendant-Appellant v. B. Jai Gopal Singh, Plaintiff-Respondent.

First Appeal No. 123 of 1949, from decision of Civil Judge, Sultanpur, D/- 31-3-1949.

(a) Contract Act (1872), S. 38 — Tender — Debtor and Creditor — Insured cover is not legal tender of debt — (Debtor and Creditor — Tender).

If the amount due is validly tendered to the creditor by the debtor or by his agent, on the debt becoming payable, the creditor is bound to accept the money and if he does not accept it he is not entitled to claim interest after the date of the tender. (Para 5)

Valid tender of a debt can only be in the currency of the country which is recognised as legal tender. An insured cover cannot be treated as legal tender. The creditor is not bound to accept the insured cover merely because it is insured for a sum larger than the debt due. (Para 5)

Anno: Contract Act, S. 38 N. 2, 4.

(b) Civil P. C. (1908), Ss. 52, 53 — Debt borrowed by R a Hindu — Death of R issueless leaving only widow — Will by deceased providing that widow was to be owner during her lifetime — After widow, property to go to J — Suit and decree against widow on basis of debt — Decree to be realized out of estate — Surrender by widow in favour of J — Execution — Parties — (Hindu law — Will) — (Hindu law — Widow — Surrender).

One R, a Hindu, after borrowing a sum of money, died issueless leaving a widow S surviving him. The will executed by him provided that S was to be the owner of the property during her lifetime as a Hindu widow and that during her lifetime no one else had any interest in the property. The will further provided that one J or his male descendants were to get the property only if they were living on the date of the death of the widow. The creditor obtained a decree against S on the debt. The decree was to be realized from estate of the deceased. Thereafter S relinquished the property in favour of J on

the condition, amongst others, that he would pay off the debts. The decree-holder subsequently applied for execution of decree against J for recovery of the amount due from the estate of the deceased R. J filed an objection that the decree was not executable against him and that his name could not be substituted in place of the name of the widow.

Held that it could not be said that there was a vested remainder in J on the date of the death of R. The widow represented the entire estate of the deceased and the decree passed against her was binding on the estate.

(Para 6)

Held further that when J got the deed of surrender from the widow he undertook to pay all the debts. He was, therefore, in a sense her legal representative for payment of the debt. The widow was still alive on the date when the suit was decided by the lower court and J could not have got the property if the widow had not surrendered the estate in his favour. He was, therefore, clearly bound by the undertaking given in the deed and was estopped from challenging the same.

(Para 7)

Anno: C. P. C., S. 52 N. 9; S. 53 N. 6.

N. D. Pant and S. K. Verma, for Appellant; Vishwanath Singh, for Respondent.

MALIK C. J.:

This is an appeal on behalf of the defendant-appellant against a decree passed by the learned Civil Judge of Sultanpur. The points raised in the case were not very difficult but the learned Judge got lost in the number of authorities that were cited before him and appears to have come to an entirely erroneous conclusion.

(2) On Thakur Rudra Pratap Singh, Taluqdar of Rampur, had borrowed a sum of money from one Salik Ram on 10-5-1932. Thakur Rudra Pratap Singh died issueless on 3-5-1933. He, however, left a widow surviving him, named Thakurain Sri Nath Kuar. On 14-10-1930, he executed a will which contained the following provision about his wife if he died issueless:

"That Thakurain Sri Nath Kuar will be the owner of the entire taluqa and all the moveable and immoveable properties etc., mentioned above as the widow of the Hindu family provided she leads a moral life. Thakurain Saheba aforesaid shall have no right to transfer the immoveable property. Till the life-time of Thakurain aforesaid no other person shall have any right of any sort in the said property."

The next paragraph in the will is to the effect that after the death of Thakurain Saheba the entire property was to go to Thakur Jai Gopal Singh, son of Thakur Vijay Bahadur Singh, who was to be the owner thereof, but in case neither he nor any male issue were alive on the date of the death of the widow the property was to go to the male issue of Thakur Rajeshwari Prasad Singh.

(3) After the death of Thakur Rudra Pratap Singh the widow applied for mutation of her name in the village records, mutation was effected and she got possession of the property. On the 2nd of June 1939, Salik Ram filed a suit against Sri Nath Kuer and claimed the money out of the estate of the deceased. A decree was passed in his favour and the decree provided that the money was to be realised from the estate of the deceased Thakur Rudra Pratap Singh. This decree is dated 30-9-1939. On 2-7-1941 Sri Nath Kuar relinquished the property in favour of Thakur Jai Gopal Singh on condition that he will pay off the debts and will arrange for the maintenance of the widow.

On 24-8-1946 the decree-holder applied for execution of the decree against Thakur Jai Gopal Singh for recovery of the amount due from the estate of the deceased Thakur Rudra Pratap Singh. Thakur Jai Gopal Singh filed an objection on the 23-9-1946 that the decree was not executable against him and that his name could not be substituted in place of the name of the widow. On 2-11-1946 however counsel appearing for him agreed to the substitution of his name but as the decree-holder did not proceed with the execution the papers were consigned to the record room on 13-11-1946.

(4) On 13-12-1947 Thakur Jai Gopal Singh filed the suit out of which this appeal has arisen that on 15-8-1932 Thakur Rudra Pratap Singh had made a valid tender of the entire amount due and as Salik Ram had refused to accept the money on 18-8-1932, interest ceased from that date and the widow should have taken this plea in her written statement and she not having done so by reason of fraud or gross negligence the decree was not binding on him.

The other plea was that on the death of Thakur Rudra Pratap Singh the life estate vested in Thakurain Sri Nath Kuar while the vested remainder was in Thakur Jai Gopal Singh. That he should have been impleaded as a defendant in the suit filed by Salik Ram for the recovery of the money. That the widow could not represent the estate and the decree passed against her was not binding on him. That the widow having surrendered the estate in his favour the decree was not executable against the property left by the deceased in his hands. Both these pleas found favour with the learned Judge and he discussed the law at great length on these and other points that were raised before him.

(5) The plea of valid tender of the money was raised on these facts: On 15-8-1932, an insured cover for Rs. 5200/- was sent by Thakur Rudra Pratap Singh to Salik Ram and a sum of Rs. 45/- was sent by money-order. In the coupon, it was mentioned that the insured cover contained currency notes of Rs. 5200/- and the balance of Rs. 45/- was being sent by money-order. If the amount due is validly tendered to the creditor by the debtor or by his agent, on the debt becoming payable, the creditor is bound to accept the money and if he does not accept it he is not entitled to claim interest after the date of the tender. By sending an insured cover, however, though it might have been insured for Rs. 5200/- and might even have contained currency notes of the value of Rs. 5200/- the debtor cannot be said to have validly tendered the money.

The creditor was not bound to accept the insured cover and take the risk of its not contain-

ing currency notes of the value mentioned in the coupon. Valid tender of a debt can only be in the currency of the country which is recognised as legal tender. An insured cover cannot be treated as legal tender. There are authorities to the effect that by offering a cheque or by offering any article of value even if that article is of a larger value than the debt due the debtor cannot claim to have offered to pay the debt. The creditor was not bound to accept the insured cover merely because it was insured for a sum of Rs. 5200/- and in the coupon it was mentioned that notes of that value had been enclosed. There was, therefore, no valid tender of the debt on 15-8-1932, and the view taken by the learned Judge that the widow was guilty of gross negligence in not taking the plea that interest had ceased on the day when Salik Ram had refused to accept the insured cover was all wrong.

(6) Then remains the second question whether in the lifetime of Sri Nath Kuar Thakur Jai Gopal Singh should have been impleaded. We have already referred to the will which provided that Sri Nath Kuar was to be the owner of the property during her lifetime as a Hindu widow and that during her lifetime no one else had any interest in the property. The will further provided that Thakur Jai Gopal Singh or his male descendants were to get the property only if they were living on the date of the death of the widow. It cannot, therefore, be said that there was a vested remainder in Thakur Jai Gopal Singh on the date of the death of Thakur Rudra Pratap Singh. The widow represented the entire estate of the deceased and the decree passed against her was binding on the estate.

(7) The learned Judge has also failed to consider that when Thakur Jai Gopal Singh got the deed of surrender from the widow he undertook to pay all the debts. He was, therefore, in a sense her legal representative for payment of the debt. The widow was still alive on the date when the suit was decided by the lower Court and Thakur Jai Gopal Singh could not have got the property if the widow had not surrendered the estate in his favour. He was, therefore, clearly bound by the undertaking given in the deed and was estopped from challenging the same.

(8) In our view the plaintiff was bound by the decree in suit No. 14 of 1939 passed against Thakurain Sri Nath Kuar and was not entitled to the reliefs claimed by him in the plaint. The appeal is allowed, the decree of the lower Court is set aside and the plaintiff's suit is dismissed with costs in both the Courts.

V.B.B. Appeal allowed.

(S) A.I.R. 1955 ALL. 352 (Vol. 42, C.N. 99)

LUCKNOW BENCH — BRIJ MOHAN LALL AND RANDHIR SINGH JJ. (22-11-1954)

Mahadeo Prasad, Applicant v. Sheo Dass, Opposite Party.

Appeal No. 210 of 1951, against Order of Dist. J. Gonda, D/- 17-4-1951.

Provincial Insolvency Act (1920), S. 9(1)(b) — Liquidated sum — Amount found due if accounts are taken.

A and B were carrying on joint business, one contributing the capital and the other labour. A applied under S. 9(1) of the Provincial Insolvency Act. The amount which was alleged by A to be due by B was on account of profits earned by the business. It was alleged that a certain sum would be found due if the accounts prepared by B were examined and that as B had not paid up that sum he should be adjudged an insolvent.

Held that the relationship between the two partners in business could not be said to be that of a creditor and a debtor and that the amount which may be found due on accounting cannot be said to be a liquidated sum within the meaning of S. 9(1)(b). Case law referred. (Paras 6, 8)

Anno: Pro. Insl. Act, S. 9 N. 3.

CASES REFERRED : Paras

(A) (V28) AIR 1941 Mad 895: ILR (1942) Mad 147 7

(B) (V13) AIR 1926 Cal 234: 87 Ind Cas 751 7

(C) (V28) AIR 1941 Nag 167: ILR (1942) Nag 518 7

(D) (V22) AIR 1935 Rang 435: 160 Ind Cas 367 7

H. D. Srivastava, for Applicant; P. N. Bhatt, for Opposite Party.

RANDHIR SINGH J.:

This is an application for revision which was originally instituted as a second appeal but was later treated, at the request of the appellant, as an application for revision arising out of proceedings under the Insolvency Act.

(2) It appears that the applicant filed an application under the Provincial Insolvency Act for adjudging the opposite party an insolvent and the act of insolvency, which was alleged on behalf of the applicant, was that the opposite party, who was a partner in business with the applicant had not paid the profits which were due to the applicant on account of the business.

(3) The application was resisted on behalf of the opposite party on the ground that such an application was not maintainable, firstly, because no relationship of creditor and debtor existed and secondly that the amount claimed was in the nature of unliquidated damages and as such the application was barred under the provisions of S. 9(1)(b), Provincial Insolvency Act.

(4) The Court of first instance upheld the objections raised on behalf of the opposite party and held that the amount said to be due by the opposite party was in the nature of unliquidated damages and as such the application was barred under S. 9(1)(b), Provincial Insolvency Act. The applicant then went up in appeal to the District Judge who agreed with the view taken by the Court of first instance and dismissed the appeal. He has now come up in revision.

(5) The first point which arises for determination in this case is whether there was a liquidated sum which was payable either immediately or at some future time. Section 9(1)(b) of the Act is as follows :

"A creditor shall not be entitled to present an insolvency petition against a debtor unless

(b) the debt is a liquidated sum payable either immediately or at some future time."

(6) In the present case, it is not disputed that the applicant and the opposite party were carrying on joint business, one contributing the capital and the other labour and that the amount which was alleged by the applicant to be due by the opposite party was on account of profits earned by the business. It was also alleged in the application that the opposite party had written the accounts himself and if the accounts were examined, the amount claimed by the applicant would be found due. It remains, however, to be considered whether such a claim was or was not a 'liquidated sum' within the meaning of S. 9(1)(b) of the Act.

(7) Learned counsel for the applicant has cited some rulings in which the question is said to have cropped up. In — 'Gangi Reddi v. Narasimha Reddi', AIR 1941 Mad 895 (A), the question which arose before the Madras High Court was if an order passed by an insolvency Court rejecting an application merely because complicated questions of fact and law would arise was a good order. The facts of the reported case were that an application to adjudge another party an insolvent was presented and the defence of the alleged debtor was that the creditors had agreed to a composition scheme and had accepted it and as such no debt was due by him. The execution of the composition deed was, however, disputed and it was under these circumstances that the insolvency Court rejected the application. It was held, however, that an application for insolvency could not be rejected merely because complicated questions of law and fact would arise. This authority is not, therefore, of much assistance to us in this case.

Another case cited on behalf of the applicant is — 'Ananta Kumar v. Sadhu Charan', AIR 1926 Cal 234 (B). In this case it appears that the only question which arose for determination was whether the plea taken by a debtor that no sum was due by him or that a very small sum was due could be determined by the insolvency Court and it was held that the decision of such a question was entirely the concern of the insolvency Court. In — 'Bibi Janbi v. Abbas Ali', AIR 1941 Nag 167 (C), the point involved was altogether different. It was contended that a deferred dower debt was not a debt within the meaning of S. 9(1)(b) of the Act. It was, however, held in this case that a contingent interest would also be covered within the meaning of 'debt'.

In — 'U Ba Thwin v. U Tun Tha', AIR 1935 Rang 435 (D), it was held by a Division Bench that a sum can be said to be liquidated if it could be computed with certainty and a debt would be said to be liquidated if it could be readily ascertained on inquiry. In this reported case a claim had been made for mesne profits on account of a share in an estate and it was contended that the mesne profits could be calculated from the rents collected. It was, however, held that the debt would not be a liquidated debt if it involved an elaborate inquiry in order to ascertain the net amount due. This last ruling in fact favours the contrary contention and not the argument advanced by the learned counsel for the applicant.

(8) The applicant had in the present case alleged that a certain sum would be found due if the accounts prepared by the opposite party were examined and that the opposite party had not paid up that sum and he should, therefore, be adjudged an insolvent. As remarked above such a relationship between the two partners in business cannot be said to be that of a creditor and a debtor and the amount which may be found due on accounting cannot be said to be a liquidated sum within the meaning of S. 9(1)(b), Provincial Insolvency Act. We are, therefore, clearly of opinion that the application was not maintainable and the view taken by the two Courts below was correct.

(9) The application is, therefore, dismissed with costs to the opposite party.

(10) Since the revision application has been dismissed, Civil Miscellaneous Application No. 603 of 1952 is also dismissed.

D.R.R. Petitions dismissed.

(S) A.I.R. 1955 ALL. 353 (Vol. 42, C.N. 100)

FULL BENCH

AGARWALA, BRIJ MOHAN LALL AND M. L. CHATURVEDI JJ. (4-1-1955)

Moradhwaj, Decree-holder-Appellant v. Bhudar Das, Judgment-debtor-Respondent.

F. A. F. O. No. 205 of 1946, and F. A. F. O. No. 27 of 1947; Ex. Second Appeal No. 1114 of 1947 and Second Appeal No. 947 of 1947, against decree of Addl. Civil J., Etah, D/- 4-2-1946.

(a) Practice — Reference to Full Bench — Reference of entire case — Desirability.

Although it is always competent for a Bench of the High Court to refer an entire case to a Full Bench of the Court, yet it is always desirable, whenever possible, to refer to a larger Bench only those points on which the decision of a larger Bench is considered to be necessary. Questions of fact or law on which there is no necessity of inviting the opinion of a larger Bench should not be referred to the larger Bench, as firstly, it involves unnecessary waste of time of the larger Bench and secondly, it might also happen that the opinion of the larger Bench on question of law of a controversial nature may be rendered obiter by reason of the ultimate decision of the case. (Para 4)

(b) Arbitration Act (1940), Ss. 2(c), 21 — Power of appellate and execution Court to refer case to arbitration — (Civil P. C. (1908), Pre. Ss. 107, 141) — (General Clauses Act (1897), S. 8) — ILR (1947) All 227: AIR 1947 All 304 and ILR (1948) All 629: AIR 1948 All 443, Overruled. AIR 1943 Oudh 304, Not foll.

The Arbitration Act incorporates the provisions of the repealed Second Schedule of the Code of Civil Procedure and is in 'pari materia' with that Code. The Limitation Act and the Civil Procedure Code apply to arbitrations under the Arbitration Act (vide

Ss. 37 and 41 respectively). Words used in Acts 'pari materia' are to be interpreted in one and the same sense, unless the contrary appears. The provisions of the Arbitration Act in regard to arbitration in pending suits are practically the same as they were in the Second Schedule. In Chapters II & III the word 'suit' means the original proceeding in the Court of first instance. There is, therefore, no reason to think that the word 'suit' in S. 21 and in the definition of the word 'Court' in S. 2 (c) as applicable to that section has been used in any other sense. The word 'suit' therefore, does not include appeals or execution proceedings and the word 'Court' in S. 2(c) refers to a Court of original jurisdiction. In the case of appeals, however, S. 107, Civil P. C. read with S. 8, General Clauses Act, 1897, empowers an appellate Court to refer an appeal from a decree in a suit to arbitration. The repeal of Sch. 2 and its reenactment in the Arbitration Act does not make any difference so far as the powers of the appellate Court under S. 107 are concerned, because those powers will refer to the provisions of the Arbitration Act which have taken the place of the Second Schedule. ILR (1947) All 227: AIR 1947 All 304, Overruled; AIR 1948 All 443, Approved; AIR 1943 Oudh 304, Not foll. (Paras 19, 20, 21, 22)

As S. 141, Civil P. C. does not apply to execution proceedings, S. 8, General Clauses Act can be of no help in the matter of arbitration in execution proceedings. ILR (1948) All 629: AIR 1948 All 443, Overruled. (Para 23)

Thus, an appellate Court can refer to arbitration the dispute in an appeal from a decree in a suit, while an execution Court cannot refer a dispute in execution proceedings to arbitration. A 'fortiori' an appellate Court hearing an appeal from an order made in execution proceedings cannot refer the dispute between the parties to arbitration. (Para 26)

Anno: AIR Man., Arbi. Act, S. 2(c) N. 1; S. 21 N. 6, 17; General Clauses Act, S. 8 N. 1.

AIR Com., Civil P. C., Pre. N. 7.

AIR Com., Civil P. C., S. 107 N. 27; 1953 Mulla, S. 107, P. 385 N. "Sub-section (2)" (Saurashtra, Allahabad and Calcutta rulings on Pt. (k) not noticed in Mulla).

AIR Com., Civil P. C., S. 141 N. 2; 1953 Mulla, S. 141, P. 447 N. "This .... execution" (15 Pts. extra in AIR Com.).

AIR Com., Civil P. C., S. 141 N. 3; 1953 Mulla, S. 141 (Topic in AIR Com. note not independently discussed in Mulla).

(c) Arbitration Act (1940), S. 47, Proviso — Whether award can be treated as adjustment or compromise — (Civil P. C. (1908), O. 21, R. 2, O. 23, R. 3).

An award obtained without the intervention of Court in respect of matters which are the subject-matter of a proceeding pending in a court of law can only be given effect to as an adjustment under O. 21, R. 2, or under O. 23, R. 3, Civil P. C. if all the parties interested give their consent to this being done and not otherwise. (Para 29)

Anno: AIR Man, Arbi. Act, S. 47, N. 1.

AIR Com.: Civil P. C., O. 21 R. 2 N. 6; 1953 Mulla, P. 755 N. "Adjustment" (7 Pts. extra in AIR Com. — Note in AIR Com. exhaustive and illustrative — Nagpur view and P. C. ruling in AIR 1937 PC 256 which reversed AIR 1935 Cal 596, not noticed in Mulla).

AIR Com.: Civil P. C., O. 23 R. 3 N. 7; 1953 Mulla, O. 23, R. 3, P. 985, N. "Agreement .... suit" (12 Pts. extra in AIR Com. note — Contra Calcutta view in AIR 1917 Cal 327 on Pt. (S), Lahore view in AIR 1927 Lah 99 on pt. (w) and Madras, Oudh and Rangoon views on pt. (y) not noticed in Mulla).

CASES REFERRED: Paras

(A) (V34) AIR 1947 All 304: 1947 All LJ 445 3, 25
(B) (V35) AIR 1948 All 443: 1948 All LJ 556 3, 25
(C) ('74) 21 Suth WR 210: 12 Beng LR 266 (FB) 8
(D) ('75) 7 NWP HCR 243 (FB) 8, 20
(E) ('81) 3 Mad 78 10
(F) ('88) 10 All 71: 1888 All WN 1 13
(G) ('90) 12 All 179: 1890 All WN 53 13
(H) ('91) 18 Cal 635 13
(I) ('95) 17 All 106: 22 Ind App 44 (PC) 13
(J) (V23) AIR 1936 All 378: 58 All 797 14
(K) (V12) AIR 1925 Cal 812: 52 Cal 559 14
(L) (V22) AIR 1935 All 125: 161 Ind Cas 103 14
(M) (V26) AIR 1939 Nag 186: ILR (1939) Nag 250 (FB) 14
(N) (V28) AIR 1941 Bom 20: 192 Ind Cas 583 14, 25, 27
(O) (V27) AIR 1940 All 445: 190 Ind Cas 522 19
(P) (1785) 1 Leach 352: 168 ER 279 19
(Q) (1758) 1 Burr 445: 97 ER 394 19
(R) (1904) 1 Australia CLR 702 19
(S) (V34) AIR 1947 Cal 93: ILR 1946-2 Cal 492 25
(T) (V41) AIR 1954 Pat 106: 32 Pat 417 25
(U) (V30) AIR 1943 Oudh 304: 208 Ind Cas 187 25
(V) (V12) AIR 1925 All 276 (2): **47 All 57** 25
(W) (V36) AIR 1949 All 100: ILR (1948) All 363 25
(X) (V40) AIR 1953 All 9 26
(Y) (V15) AIR 1928 Mad 1025: 51 Mad 800 (FB) 27
(Z) (V12) AIR 1925 All 503: 47 All 637 (FB) 27
(Z1) (V26) AIR 1939 Rang 300: 1939 Rang LR 280 (FB) 27
(Z2) (V37) AIR 1950 Orissa 169: ILR (1950) Cut 1 28
(Z3) (V39) AIR 1952 Pat 258: 30 Pat 985 28
(Z4) (V38) AIR 1951 Mys 57: 30 Mys LJ 28 28
(Z5) (V40) AIR 1953 Cal 690: 92 Cal LJ 181 28
(Z6) (V40) AIR 1953 Mad 781: ILR (1953) Mad 677 (FB) 28
(Z7) (V32) AIR 1945 Mad 294: ILR (1946) Mad 39 28
(Z8) (V29) AIR 1942 All 145: ILR (1942) All 357 (FB) 28

Shambhu Prasad, for Appellant; K. C. Saxena and J. Swarup, for Respondent.

AGARWALA J.:

These are four connected appeals and arise in the following circumstances. The parties are closely related to each other. They were originally members of a joint Hindu family. Then there was a partition between them. They now own contiguous houses. Disputes about easementary rights regarding doors 'janalas parnalas' and walls cropped up and in connection with them there was some 'marpit' between them. Several litigations were pending in the civil and criminal courts in connection with these disputes, when on 11-12-1944 an agreement of reference was entered into between them by which they referred all these litigations as well as other disputes to arbitrators. The litigations then pending were four in number. One was an appeal No. 218 of 1944 arising out of suit No. 575 of 1943 (L. Moor Dhuj v. L. Bhumandal Dass), the second was Execution Appeal No. 111 of 1944, arising out of execution proceedings in connection with the decree in suit No. 196 of 1934, filed by Moradhwaj against Lala Bhumandal Das, the third was suit No. 12 of 1944 for recovery of Rs. 2100/- as damages for assault, Moradhwaj, plaintiff v. Bhumandal Das and Bhudar Das, and the fourth was an execution application No. 698 of 1940 in connection with suit No. 184 of 1934, Moradhwaj v. Bhumandal Das.

All these cases were pending in the court of the Civil Judge of Etah. There was a fifth matter in dispute. A criminal complaint was filed by Ajit Prasad, son of Moradhwaj against Bhumandal Das and eight other persons under Ss. 147, 452 and 323, I. P. C. The accused were convicted by the first Court but were acquitted in appeal. Ajit Prasad intended to file a revision application in the High Court but had not actually filed it. All these matters were referred to arbitration by an agreement of reference dated 11-12-1944. Applications were then made in all the four cases on 12-12-1944, that these cases be referred to the arbitrators mentioned in the agreement of reference. In execution case No. 698 of 1940, the application was rejected on the ground that an execution case could not be referred to arbitration. In execution appeal No. 111 of 1944, suit No. 12 of 1944 and civil appeal No. 218 of 1944, the Court, however, referred the cases to the arbitrators by an order dated 11-1-1945. The award was ultimately made on 14-3-1945.

In the award, the arbitrators stated that the parties had mentioned to them that so far as the criminal case was concerned, there was no dispute pending between them, and that for that reason they were not giving any award on that dispute. In other cases they gave their award decreeing some and dismissing the others. An application was made under S. 14, Arbitration Act by Lala Bhumandal Das and Lala Bhudar Das which was registered as suit No. 14 of 1945 for directing the arbitrators to file the award in Court and to pass a decree in terms thereof. Moradhwaj and Ajit Prasad objected that the award was invalid for various reasons and no decree could be passed in terms thereof.

Their main objection was that it was incompetent either for the execution Court or the appellate Court to refer the matters pending before them to arbitration under the Arbitration Act. But their objections were dismissed and decrees were passed in terms of the award, both in the application under S. 14 (suit No. 14 of 1945) as well as in the other three pending cases, namely, in execution appeal No. 111 of 1944, suit No. 12 of 1944 and Civil Appeal No. 218 of 1944, in accordance with the terms of the award. Against these four decrees Lala Moradhwaj and Ajit Prasad have come up in appeal to this Court.

(2) First Appeal from Order No. 205 of 1946 arises out of the application made under S. 14, Arbitration Act (suit No. 14 of 1945), Execution Second Appeal No. 1114 of 1947 arises out of Execution Appeal No. 111 of 1944, Second Appeal No. 947 of 1947 arises out of Appeal No. 218 of 1944 and First Appeal from Order No. 27 of 1947 arises out of suit No. 12 of 1944. It only remains to mention that the decree under execution in execution case No. 698 of 1940 in which the application for reference to arbitration was rejected, is stated to have been satisfied and is no longer pending execution.

(3) The appeals came up for hearing before a Bench of this Court which referred the case to a larger Bench on account of a conflict between certain decisions of this Court, viz., — 'Shukrullah v. Mt. Rahmat Bibi', AIR 1947 All 304 (A) where a Bench of two learned Judges of this Court held that an appellate court has no jurisdiction under the Arbitration Act to refer an appeal to arbitration, and — 'Munni Lal v. Kishun Prasad', AIR 1948 All 443 (B) where another Bench of two learned Judges held that both an appellate Court as well as an execution Court could refer the dispute between the parties to arbitration under the Arbitration Act. In the latter case, it was observed that even if the dispute could not be referred to arbitration by an appellate or execution Court, the award of the arbitrators could be given effect to as an adjustment. The learned Judges in making the reference to a larger Bench, after observing that

> "it seems to us, therefore, very desirable that this important question of law on which there was a difference of opinion between the two Benches of this Court should be considered and decided by a Full Bench."

directed that, "the papers be laid before the Hon'ble the Chief Justice for constitution of a larger Bench to decide these appeals."

(4) I may be permitted to point out that, although it is always competent for a Bench of this Court to refer an entire case to a Full Bench of the Court, yet it is always desirable, whenever possible, to refer to a larger Bench only those points on which the decision of a larger Bench is considered to be necessary. Questions of fact or law on which there is no necessity of inviting the opinion of a larger Bench should not, in our opinion, be referred to the larger Bench, as firstly, it involves unnecessary waste of time of the larger Bench and secondly, it might also happen that the opinion of the larger Bench on questions of law of a controversial nature may be rendered obiter by reason of the ultimate

decision of the case. Both the parties before us have urged that this Bench may only decide the questions of law on which there seems to be a difference of opinion in the cases of this Court already referred to.

(5) We therefore propose to answer the following questions only in this reference:

1. Can an execution Court or an appellate Court refer a case pending before it to arbitrators for decision?

2. Can an award made out of Court, be given effect to as an adjustment of a pending case when one of the parties objects to this being done?

(6) The first question has to be answered mainly upon the interpretation of two words, "suit" and "Court", which appear in S. 21, Arbitration Act. The section is as follows:

> "Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply in writing to the Court for an order of reference."

The word "Court" is defined in S. 2(c) of the Act as follows:

> "'Court' means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under S. 21, include a Small Cause Court."

(7) It is contended on behalf of the respondents that the word 'suit' includes execution proceedings as well as appeals, and the word "Court" includes Courts of not only original jurisdiction but also execution and appellate Courts. Alternatively, it is contended by them that so far as the power of an appellate Court to refer appeals to arbitration is concerned, an appellate Court has the same jurisdiction under S. 107, Civil P. C. as a Court of original jurisdiction has, and reading S. 107 along with S. 8, General Clauses Act, an appellate Court can exercise the power conferred upon a Court of original jurisdiction by S. 21, Arbitration Act; and that in so far as an execution Court is concerned, S. 141, Civil P. C. read with S. 8, General Clauses Act will enable an execution Court to refer disputes to arbitration under S. 21, Arbitration Act.

On behalf of the appellants it is contended that the word 'suit' does not include an execution proceeding or an appeal and that Ss. 107 and 141, Civil P. C. or S. 8, General Clauses Act do not apply to the provisions of the Arbitration Act. In support of their respective arguments parties have referred to the previous history of the law of arbitration and the entire scheme of the Arbitration Act.

(8) Under a regulation dated 17-6-1787, the Court was authorised to refer any dispute to an arbitrator of its own accord, even against the wishes of the parties. The Bengal Regulation (16 of 1793) amended the law and authorised Courts to refer 'suits' to arbitrations. It made no provision for reference to arbitration of disputes outside Courts. The Civil Procedure Code of 1859 contained provisions regarding reference to arbitration in Ch. VI, Ss. 312 to 327. Under S. 312, any matter in difference between the parties in a 'suit' could be referred to arbitration. Section 325 provided for a judgment to be passed 'according to the award' and 'upon the judgment which shall be so given, a decree shall follow.' Then there was a provision that 'it shall be carried into execution in the same manner as other decrees of the Court." Under S. 326 an agreement of reference could be filed in Court and the application filing the agreement of reference was to be treated and registered as a suit, and the same procedure as provided for reference in pending suits was to be followed. Under S. 327 an award obtained outside the Court without the intervention of the Court could be filed in Court within six months of the date of the award by means of an application which was to be registered as a 'suit' and "if no sufficient cause be shown against the award, the award shall be filed, and may be enforced as an award made under the provisions of this chapter."

There was no specific provision for reference to arbitration of disputes arising in execution proceedings. From the terms of the sections quoted above, it was clear that it was not intended that there should be any arbitration in execution proceedings. In regard to appeals, S. 358 provided that "the appellate Court shall have all the like powers in regard to the granting of time, adjourning the hearing of the suit, examining the parties or their pleaders, and awarding costs, or otherwise as are hereinbefore contained in regard to Courts of original jurisdiction." This section was repealed by S. 1 of Act 23 of 1861, but S. 37 of that Act provided that:

> "Unless when otherwise provided, the appellate Court shall have the same powers in cases of appeals which are vested in the Courts of original jurisdiction in respect to original suits."

A question arose as to whether, under the provisions of the above section, an appellate Court could refer an appeal to arbitration. In — 'Juggeshur Dey v. Kritartha Moyee Dossee', 21 Suth WR 210 (FB) (C) it was held that the appellate court could not refer the matters in difference in a suit to arbitration. This ruling was dissented from by the North Western Provinces High Court in a Full Bench case reported in — 'Chiranji Lal v. Jamna Das,' 7 NWP, HCR 243 (FB) (D). It was observed—

> "It has for many years been the practice of this Court and of the courts subordinate to it, on the application of the parties to an appeal, to refer to arbitrators the matter in difference between the parties, and to deal with the award under the provision of Chapter VI of the Code of Civil Procedure; nor, so far as we are aware, has the legality of the practice been questioned or doubted in these provinces."

It was further observed that—

> "Although the term 'suit' may apply to a suit in any stage of its progress, whether in a court of first instance or in a court of appeal, and had S. 312 stood alone, we might have considered its use in that section embraced proceed-

ings in appeal, yet, looking to the terms of Ss. 326 and 327, we accept the view that the whole Chapter in which these sections find a place was intended to apply to courts of first instance. But were it not for the ruling to which we have alluded, we should have considered it free from doubt that the provisions of S. 37, Act XXIII of 1861, clothed appellate courts with the like authority as is given to courts of first instance by Ss. 312 and 325 of the Code."

(9) The Civil Procedure Code of 1859 was repealed by Act 10 of 1877, but similar provisions were made with regard to arbitration in the later Code as well, vide Ss. 506 to 526. The provisions of S. 37 of Act 23 of 1861 were incorporated in S. 582. The following clause was also added:

"The provisions hereinbefore contained shall apply to appeals under this Chapter so far as such provisions are applicable."

'The provisions hereinbefore contained' included the provisions for reference to arbitration in suits. Under the Act of 1877, therefore, it was clear that the appellate Courts could refer matters in dispute in a suit to arbitration, by virtue of the provisions of section 582.

(10) Act 10 of 1877 was repealed by Act 14 of 1882. The provisions relating to arbitration were similar to those made in the previous Act, vide Ss. 506 to 526. The provisions of S. 582 of Act 10 of 1877 were incorporated in S. 582 of the Code of 1882. By this time it was well settled that an appellate Court with the consent of parties could refer a case to arbitration. See — 'In re Sangaralingam Pillai', 3 Mad 78 (E).

(11) In the Civil Procedure Code of 1908, important sections of the old Civil P. C. were enacted as sections, while sections of lesser importance relating to procedure were incorporated in Schedules. The sections relating to arbitration were incorporated in Sch. 2. Section 107 of the Code of 1908, corresponding to S. 582 of the Code of 1882 provides:

"(1) Subject to such conditions and limitations as may be prescribed an appellate Court shall have power—

(a) to determine a case finally,

(b) to remand a case,

(c) to frame issues and refer them for trial,

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein."

(12) There can be no doubt that as under the previous Codes, so also under the Code of 1908, so long as Sch. 2 was not repealed the appellate Court could refer a matter in dispute in a suit to arbitration by virtue of the provisions of S. 107, because the appellate Court has the same powers and performs the same duties, as nearly as may be, as are exercised by the courts of original jurisdiction.

(13) The power which is possessed by a Court of original jurisdiction in respect of suits and may be exercised by an appellate Court is, however, not possessed by execution Courts and a special procedure for execution has been provided for in the Code. Section 141, corresponding to old S. 647, does not apply to execution proceedings. The Allahabad High Court applied the procedure applicable to suits to execution applications by virtue of S. 647, vide — 'Sarju Prasad v. Sita Ram', 10 All 71 (F) and — 'Fakirullah v. Thakur Prasad', 12 All 179 (G). A contrary view was taken by the Calcutta High Court in — 'Bunko Behary v. Nil Madhav', 18 Cal 635 (H). An appeal was taken to the Privy Council from the Allahabad decision in 'Fakirullah's case (G)'. While the appeal was pending in the Privy Council, the Legislature amended S. 647 by adding an Explanation thereto in the following terms:

"This section does not apply to applications for the execution of decrees which are proceedings in suits."

The Privy Council, in the appeal pending before it, held that both before and after the Explanation, the procedure for suits did not apply to the execution proceedings, vide — 'Thakur Prasad v. Fakirullah', 17 All 106 (PC) (I). The law having been thus enunciated by the Privy Council, the Legislature, in the Civil Procedure Code of 1908, while enacting the main provisions of S. 647 of the Act of 1882 in the new S. 141, did not consider it necessary to retain the Explanation which had been added to the old S. 647.

(14) It was urged that an execution proceeding is a proceeding in a suit. But the proceeding in a suit is not the same thing as the suit itself. An execution proceeding is a proceeding which follows a decree passed in a suit. The procedure up to the stage of passing of a decree is quite different from the procedure followed in the execution of the decree. Schedule 2, Civil P. C. applied to a stage before the passing of the decree. Before the enactment of the Arbitration Act of 1940, it has always been held under the Civil Procedure Code that the proceedings in execution cannot be referred to arbitration; see — 'Sarju Lal Behari Lal v. Sukhdeo Prasad', AIR 1936 All 378 (J); — 'T. Wang v. Sona Wangdi', AIR 1925 Cal 812 (K); — 'Bachan Lal v. Amar Singh', AIR 1935 All 125 (L); — 'Ramdayal Munnalal v. Sheodayal', AIR 1939 Nag 186 (FB) (M). In — 'Zumaklal Motiram v. Fulchand Tarachand', AIR 1941 Bom 20 (N) the same view was taken, but it was held that an award could be regarded as an adjustment under O. 21, R. 2, C. P. C. With this aspect of the case we shall deal later.

(15) Thus, the position before the enactment of the Arbitration Act, 1940 was that reference to arbitration could be made in appeals from decrees passed in suits, while it could not be made in execution proceedings.

(16) When the Arbitration Act of 1940 was enacted, the law relating to arbitration was to be found mainly in the Second Schedule of the Civil Procedure Code and in the Indian Arbitration Act of 1899. These provisions were repealed

and a consolidated Act was passed to deal with the entire law relating to arbitration. The preamble to the Act shows that it is a consolidating and amending Act. The scheme of the Act is this: Chapter II deals with arbitration without intervention of the Court. This Chapter contains Ss. 3 to 19. It is clear that this Chapter deals with a case in which there is no suit pending and parties have agreed to refer their differences to arbitration and an award is also made without the intervention of a Court. Chapter III deals with arbitration with the intervention of the Court where no suit is pending. In other words, where there is an arbitration agreement, but where no award has been made, the agreement may be filed in Court by means of an application. Such application will be registered as a suit and then the matter will be referred to arbitrators. Chapter IV, which consists of Ss. 21 to 25, deals with arbitration in pending suits. Parties may apply to the Court to have the suit or any issue therein referred to arbitration and thereafter the other provisions relating to arbitration shall be followed. Then there are general provisions which apply to all the three kinds of arbitration proceedings mentioned in Chapters II, III and IV.

(17) Under Chapter II, when an award has been made, it has to be filed in 'Court' and the Court ultimately passes a decree in terms of the award. Under Chap. III, an agreement of reference is filed in 'Court' by means of an application, and then the application is registered as a suit and the matter is referred to arbitration and after the award has been made, a decree is passed in terms of the award in the same manner as in Chapter II.

(18) Which is the 'Court' in which the award under Chap. II and an application under Chap. III shall be filed? According to the definition of the word 'Court' as given in S. 2(c), it is "the civil Court having jurisdiction to decide the questions forming the subject-matter of the reference, if the same had been the subject-matter of a suit." There can be no doubt that in Chaps. II and III, it must be a Court of original jurisdiction and the word 'suit' in the definition of 'Court' and in S. 20 of Chap. III must mean an originating proceeding and cannot include an appeal or execution proceeding.

(19) Does the word 'suit' not carry the same meaning in S. 21? Sometimes a 'suit' is said to include an 'appeal', because it is a continuation of a suit in a superior Court. But that is not the sense in which the word is used in the procedural codes of India unless it is specifically provided to the contrary. In the Civil Procedure Code, in the Limitation Act (vide S. 2(10)) in the U. P. Tenancy Act, 1939 (vide — 'Bindraban Katian v. Ganga Ram', AIR 1940 All 445 (O), the word 'suit' is used as not including an appeal. The Arbitration Act incorporates the provisions of Sch. II of the Civil P. C. & is 'n 'pari materia' with that Code. The Limitation Act and the Civil P. C. apply to arbitrations under the Arbitration Act (vide Ss. 37 and 41 respectively) words used in Acts 'pari materia' are to be interpreted in one and the same sense, unless the contrary appears.

In Craies on Statute Law, Fifth Edition, page 125, it is stated:

"Where Acts of Parliament are in 'pari materia' that is to say, are so far related as to form a system or code of legislation, the rule as laid down by the twelve Judges in Palmer's case (R. V. Palmer', (1785) 1 Leach 352 at p. 355 (P)) is that such Acts 'are to be taken together as forming one system, and as interpreting and enforcing each other'."

In 'Rex v. Loxdale', (1758) 1 Burr 445 at p. 447 (Q) Lord Mansfield laid down the rule thus:

"Where there are different statutes in 'pari materia', though made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other."

In — 'Perth Local Board v. Maley', (1904) 1 Australia CLR 702 at 715 (R) Griffith C. J. said:

"It is usual to credit the Legislature with a knowledge of the existing law on the subject dealt with; and when we find that such a meaning has been constantly attributed to the word 'necessary' in other Acts dealing with similar matters, they may have reasonably expected that the word would in this Act be construed as having the same meaning."

(20) The provisions of the Arbitration Act in regard to arbitration in pending suits are practically the same as they were in Sch. II, which were interpreted in the Full Bench of the N. W. P. High Court in the case of 7 NWP HCR 243 (D) already cited as not by themselves applying to appeals and in the other cases already cited as not applying to execution proceedings. In Chapters II and III the word 'suit' means the original proceeding in the court of first instance. There is therefore no reason to think that the word 'suit' in S. 21 and in the definition of the word 'Court' in S. 2(c) as applicable to that section has been used in any other sense. The word 'suit', therefore, does not include appeals or execution proceedings and the word 'Court' in S. 2(c) refers to a court of original jurisdiction.

(21) In the case of appeals, however, S. 107, Civil P. C. read with S. 8, General Clauses Act, 1897 empowers an appellate Court to refer an appeal from a decree in a suit to arbitration. Section 8, General Clauses Act provides:

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

(22) The Arbitration Act repeals and re-enacts the provisions of Sch. II of the Civil P. C. Section 107, Civil P. C. conferred upon the appellate Court the same powers and the same duties as nearly as may be conferred and imposed by the Code on the Courts of original jurisdiction in respect of suits instituted therein. The word

'Code' included Sch. II also and therefore, it was held that under Sch. II an appellate Court has, in exercise of the powers conferred upon it under S. 107 the power to refer matters to arbitration. The words 'any other enactment' in S. 8 must, in our opinion, include the non-repealed part of the former enactment. The word 'Code' in S. 107 would therefore include a reference to the Arbitration Act which has incorporated the provisions of Sch. II of the Civil P. C. This would become apparent if the word 'Code' in S. 107 was amplified and in its place the following words were written:

"the Sections and Schedules of the Code."

The repeal of Sch. 2, and its re-enactment in the Arbitration Act, therefore, does not make any difference so far as the powers of the appellate Court under S. 107 are concerned, because those powers will still refer to the provisions of the Arbitration Act which have taken the place of the Second Schedule.

(23) As S. 141, Civil P. C. does not apply to execution proceedings, S. 8, General Clauses Act can be of no help in the matter of arbitration in execution proceedings. Further, from the fact that the Arbitration Act provides for the passing of decrees in terms of the award after an award is filed in court and objections thereto have been rejected, and such decree is intended to be executed, an execution proceeding does not appear to be a fit subject of arbitration because to apply the provisions of the Act will be contrary to the provisions of the Civil P. C. For instance, orders on objections or claims under O. 21, R. 58 and O. 21, R. 95 or 97 are not decrees under the Civil P. C., and can be challenged by means of a suit. This cannot be done in the case of an award. Even in the case of objections under S. 47, Civil P. C., where the order deciding the objection is a decree, the decree is not intended to be 'executed' — what is executed is the decree in the suit and the decision on the objection under S. 47 merely deals with a hurdle in the path of the execution of the decree.

(24) I may now deal with the cases decided by the various High Courts in India upon the interpretation of S. 21 read with S. 2(c), Arbitration Act.

(25) In AIR 1947 All 304 (A) a Bench of this Court held that the word 'Court' as defined in S. 2, Arbitration Act was applicable only to Courts of original jurisdiction. The Bench further held that an appellate court could not refer an appeal to arbitration. Section 8, General Clauses Act was, however, not brought to the notice of the Court. To the same effect is the decision of the Calcutta High Court in — 'Abani Bhusan v. Hem Chandra', AIR 1947 Cal 93 (S). The Patna High Court in — 'Thakur Prasad v. Baleshwar Ahir', AIR 1954 Pat 106 (T) construed the definition of 'court' in S. 2, Arbitration Act differently, as including an appellate Court as well. In my opinion the interpretation put upon the definition of the word 'Court' in 'Shukrullah's case (A)' is the correct one.

In AIR 1948 All 443 (B) a Bench of this Court held that S. 8, General Clauses Act read with S. 107, Civil P. C. empowered an appellate Court to refer a dispute to arbitration. With this opinion I am in respectful agreement. But the Bench went on further to hold that the word 'suit' in S. 21, Arbitration Act included an execution proceeding.

In support of this view, the Bench referred to a decision of a single Judge of the Oudh Chief Court in — 'Jafar v. Abdul Ghafoor', AIR 1943 Oudh 304 (U). In the Oudh case an execution proceeding for the delivery of possession over certain property was referred to arbitration on 16-7-1940, that is, after the commencement of the Arbitration Act. Two questions were raised in the case: (1) Whether execution proceedings could be referred to arbitration, and (2) whether a revision lay against the decree passed in terms of an award, on the ground of invalidity of the reference to arbitration. The learned Judge held that an execution proceeding could be referred to arbitration. He based his opinion not upon any authority but purely upon the view that

> "there is no reason to restrict the meaning of the word 'suit' in S. 21 in such a way as to exclude execution proceedings which are only a continuation of the suit"

and that

> "generally speaking a suit may fairly be interpreted to include the proceedings taken to execute the decree unless there is anything to suggest to the contrary."

This single Judge decision of the Oudh Chief Court could hardly lend support to the view expressed by the learned Judges in 'Munni Lal's case (B)'. They relied on three other cases, namely, — 'Mohd. Habibullah v. Tikam Chand', AIR 1925 All 276 (2) (V); AIR 1941 Bom 20 (N) and their own earlier decision in — 'Balram Singh v. Dudh Nath', AIR 1949 All 100 (W). In AIR 1925 All 276 (2) (V), it was held by a Bench of this Court that under S. 24, Civil P. C., an execution proceeding could be transferred. This was so held because the word 'suit' as used in S. 24 was held to include execution proceedings. Section 24 clearly empowered a Court to transfer execution proceedings because the words are "transfer any suit, appeal or 'other proceedings' pending before it." "Other proceedings" would clearly include an execution proceeding and it was not necessary to hold that the word 'suit' included an execution proceeding.

In AIR 1941 Bom 20 (N) it was clearly held that Sch. 2, Civil P. C., dealing with arbitrations, did not apply to execution proceedings, but it was observed that an award obtained in execution proceedings operated as an adjustment of the decree and might be recorded under O. 21, R. 2, Civil P. C. With this aspect of the matter I shall deal later on. In AIR 1949 All 100 (W) an application for the redemption of a mortgage under S. 12, U. P. Agriculturists' Relief Act (Act 27 of 1934) was referred to arbitration. It was held that these proceedings could be referred to arbitration. If I may say so, with respect, this is a perfectly correct decision. But this was not a decision on the point we are considering in this case and could hardly be relied upon by the Bench for their view that execution proceedings could be referred to arbitration.

(26) In — 'Lakshmi Narain v. Ram Babu', AIR 1953 All 9 (X) it was held that an appellate court has jurisdiction to refer a matter to arbitration. In my opinion, therefore, an appellate court can refer to arbitration the dispute in an appeal from a decree in a suit, while an execution court cannot refer a dispute in execution proceedings to arbitration. A 'fortiori' appellate court hearing an appeal from an order made in execution proceedings cannot refer the dispute between the parties to arbitration.

(27) This brings us to the second question in the case, whether an award obtained on a reference outside court while a suit or other proceeding is pending, can be treated as an adjustment under O. 23, R. 3, or under O. 21, R. 2, Civil P. C.

Section 89, Civil P. C. provided that

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule."

Thus, the provisions of Sch. II were to be exhaustive of the mode in which an award could be enforced except in so far as it was "otherwise provided by any other law."

Leaving aside cases which fell under the Arbitration Act of 1899, some Judges held that the provisions of O. 23, R. 3 and of O. 21, R. 2, Civil P. C. which spoke of adjustment or compromise were that "other law" mentioned in S. 89 and in award, not obtained in the manner provided for in Sch. II could yet be treated as an adjustment or compromise on the ground that the agreement of reference itself was such an adjustment or compromise, and there was a promise contained in that agreement that the "award" given by virtue of the agreement would be binding on the parties, even though a party to the reference may have objections to the award. See — 'Subbaraju v. Venkataramaraju', AIR 1928 Mad 1025 (FB) (Y); AIR 1941 Bom 20 (N) and — 'Gajendra Singh v. Durga Kumari', AIR 1925 All 503 (FB) (Z) per Walsh and Kanhaiya Lal JJ. Mukerji J. dissenting. On the other hand, in — 'Maung Hlay v. U Ge', AIR 1939 Rang 300 (FB) (Z1) it was held that there could be no adjustment of a decree by means of an award under O. 21, R. 2, Civil P. C., if it is objected to by any of the parties.

(28) In this state of affairs, opportunity was taken to clarify matters when the law of arbitration was codified by the Arbitration Act of 1940. Section 47, Arbitration Act is similar in language to S. 89, Civil P. C., but a proviso has been added to the following effect:

"Provided that an arbitration award otherwise obtained may, 'with the consent of all the parties interested', be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

The words "with the consent of all the parties interested" are intended to resolve the conflict that prevailed before the Act came into force. These words obviously have reference to the award. All the parties interested must consent to the 'award' being given effect to. Where they do not so consent, the award cannot be taken into consideration as a compromise or adjustment. The consent of the parties to the reference merely and not to the award can by no stretch of imagination be deemed to be a consent to the award itself as actually made. Accordingly, the proviso to S. 47 has been interpreted by almost all the courts in India as meaning that an arbitration award can be taken into consideration as a compromise or adjustment of a suit or execution proceeding only if it has been consented to by all parties concerned 'after' the award was made.

In — 'Indramoni Mohpatra v. Nilamoni Moharana', AIR 1950 Orissa 169 (Z2), Ray C. J., and Das J. observed:

"But the proviso also requires in terms, the consent of all the parties interested as a condition precedent for the exercise of the power to take the matter into consideration. It is to be noticed that the award cannot be taken into consideration on the application of one only of the parties, nor by Court itself suo motu. The context indicates that the 'consent' specified in the proviso is a 'consent' given at the time when the matter is to be taken into consideration."

The same view was taken in — 'Raghunandan Rai v. Sukhlal Rai', AIR 1952 Pat 258 (Z3); — 'Nazir Mohammad v. Kasturchand Gomaji Co.', AIR 1951 Mys 57 (Z4); — 'Jugaldas Damodar Modi & Co. v. Pursottam Umedbhai and Co.', AIR 1953 Cal 690 (Z5) and lastly — 'Abdul Rahman Sahib v. Muhammad Siddiq', AIR 1953 Mad 781 (FB) (Z6) overruling the earlier decision of the same Court in — 'Arumuga Mudaliar v. Balasubramania Mudaliar', AIR 1945 Mad 294 (Z7) in which it was held that there was nothing in the proviso to S. 47 which precluded the antecedent consent of the parties to the award as given in the agreement of reference.

The only case of this Court in which a reference to S. 47, Arbitration Act was made is the Full Bench case in — 'Dular Koeri v. Payag Koeri', AIR 1942 All 145 (Z8). That was a case in which the arbitration was made before the commencement of the Arbitration Act of 1940 and therefore the case fell to be decided under the old law. In view of the earlier decisions of this Court, their Lordships held that an award obtained outside the Court when the suit was pending could be regarded as a compromise under O. 23, R. 3. But they went on to observe that the question had become immaterial in view of the provisions of S. 47, Arbitration Act which enabled this to be done. This observation was obiter and the wordings of the proviso to S. 47 were not specifically considered. To give effect to an award or an adjustment in spite of the objections of one of the parties to it without examining those objections and allowing the party an opportunity to prove them would be, to my mind, most inequitable. If the arbitration had been done under the provisions of the Arbitration Act, every party to the reference could have an opportunity to show that the award was vitiated on account of the misconduct of the arbitrators, or was otherwise unenforceable.

The grounds on which an award can be set aside or remitted to an arbitrator or modified by the court are based on equity, justice and good conscience. But simply because the award has been made without following the procedure prescribed in the Arbitration Act, the award cannot acquire such a sanctity that it cannot be challenged even on those equitable grounds which have been given statutory recognition in the Arbitration Act.

(29) I am, therefore, of opinion that an award obtained without the intervention of Court in respect of matters which are the subject-matter of a proceeding pending in a court of law can only be given effect to as an adjustment under O. 23, R. 2, or under O. 23, R. 3, Civil P. C. if all the parties interested give their consent to this being done and not otherwise.

(30) The other points arising in the case will now be decided by a Bench. Let the papers of the case be laid before the Hon'ble the Chief Justice for the constitution of a Bench for deciding the appeals in the light of the opinion of this Full Bench.

(31) BRIJ MOHAN LALL J. : I agree.

(32) M. L. CHATURVEDI J. : I agree.

D.H.Z. Answers accordingly.

A.I.R. 1955 ALLAHABAD 361 (Vol. 42, C.N. 101)

LUCKNOW BENCH — GHULAM HUSAIN AND KIDWAI JJ. (6-11-1950)

Mst. Ulfat and others, Appellants v. Zubaida Khatoon and another, Respondents.

Second Appeal No. 583 of 1947, against decree of Dist. J. Lucknow D/- 24-5-1947.

(a) Civil P. C. (1908), O. 2, R. 7 — Objection to misjoinder of causes of action.

Where an objection on the ground of misjoinder of causes of action was taken at the earliest opportunity, i.e., in the written statement, but it was subsequently not pressed, it cannot be allowed to defeat the suit at a later stage. (Para 9)

Anno: AIR Com. Civil P. C., O. 2 R. 7 N. 2; 1953 Mulla O. 2 R. 7 (Topic of N. 2 not independently discussed in Mulla — 2 Pts. extra in AIR Com.)

(b) Evidence Act (1872), Ss. 21, 145 — Admission — Value of — Admissibility against person making it. AIR 1946 Lah 65 (FB), Dissent.

An admission by a party in a previous suit is admissible in evidence in a subsequent suit and the burden is upon the party making it to show that it was wrong on the principle that what a party himself admits to be true may reasonably be presumed to be so, though the party making the admission may give evidence to rebut this presumption. But unless and until that is satisfactorily done, the fact admitted must be taken to be established. This is true notwithstanding the fact that statement was not put to the party making it when she came into the witness box. 29 All 184 (PC), Foll.; AIR 1946 Lah 65 (FB), Dissent. (Para 15)

Anno: Evi. Act, S. 21 N. 1, 7.

CASES REFERRED : Paras

(A) (V15) AIR 1928 Lah 289: 108 Ind Cas 52 9
(B) (V14) AIR 1927 Bom 470: 51 Bom 800 9
(C) (V33) AIR 1946 Lah 65: 223 Ind Cas 579 (FB) 13, 14, 15
(D) (V2) AIR 1915 PC 7: 42 Ind App 135 (PC) 14
(E) ('07) 34 Ind App 27: 29 All 184 (PC) 15

I. A. Abassi and Jagdish Narain, for Appellants; Brij Bahadur and Akramuddin Ahmad, for Respondents.

KIDWAI J. :

The following pedigree will help to elucidate the facts of the case :

MT. ULFAT = SIRAJUDDIN (Deft. 1)

- Mt. Sajiram = Jamil
- Mt. Mahumudan (Deft. 2) = Ali Mohammad (Deft. 3)
- Qadeer O. S. P. 1931
- Mt. Asiran = Abdul Rashid
- Zahir Uddin (Death 1942) = Zubeda (Pltf. 1)
  - Mt. Fahmida (Pltf. 2)

(2) Zubeda and Fahmida, mentioned in the above pedigree, instituted the suit out of which this appeal arises against the appellants for the following reliefs : (1) A decree against all the defendants for the partition of a ten annas share in the property left by Zahiruddin which, the plaintiffs alleged, was the entire property entered in list A attached to the plaint and which was in the possession of Ulfat and Mohmudan though a small portion of it — the goods in the tailors shop — was in possession of Ali Mohammad. (2) A decree for dower amounting to Rs. 250/- against defendants 1 and 2; and (3) A decree against defendant No. 1 for the recovery of the jewelry mentioned in list B attached to the plaint which was alleged to belong to the plaintiff No. 1 and was said to have been entrusted by her to defendant No. 1.

(3) All the defendants filed a joint written statement. They alleged : (1) That none of the property mentioned in list A was the property of Zahiruddin; (2) That plaintiff No. 1 remitted her dower and cannot now claim it; (3) That plaintiff No. 1 did not leave any jewelry with defendant No. 1; (4) That in fact plaintiff No. 1 had taken away some money and jewelry belonging to defendant No. 1; (5) That the suit is bad for misjoinder of causes of action; and (6) That Zahiruddin had purchased a house in the name of plaintiff No. 1 and that should also be included in the suit.

(3a) The trial court held : (1) That plaintiff No. 1 had not relinquished her dower; (2) That all the property in list A was property left by Zahiruddin; (3) That defendant No. 1 had taken possession of the ornaments belonging to

plaintiff No. 1; (4) That the house standing in the name of plaintiff No. 1 does not form part of the assets of Zahiruddin.

(4) It appears from the judgment of the trial court that the issue as to misjoinder was not pressed and the court held that there was no misjoinder. On the findings arrived at by the court the suit was decreed for all the reliefs claimed. It was further directed that, if defendant No. 1 failed to return the ornaments given in list B, she should pay the price of the ornaments at the current market rates of silver and gold.

(5) The defendants appealed and the learned District Judge, Lucknow, upheld the findings arrived at by the learned Civil Judge. He, however, held that there was a misjoinder of causes of action but he held that the merits of the case were not affected and that consequently by reason of S. 99, C. P. C., he could not interfere. With regard to the ornaments he modified the decree of the Civil Judge and confined the decree to a return of the ornaments or payment of Rs. 1300/-, the amount mentioned in the plaint as the value of the ornaments.

(6) The defendants have come up in appeal. Their learned Advocate contended : (1) That the suit was bad for multifariousness and a question of jurisdiction was affected; (2) That there was no evidence to prove that house entered at item no. 1 of list A belonged to Zahiruddin and the courts below have relied upon inadmissible evidence to prove this; (3) That the evidence as to the entrustment of the ornaments to defendant No. 1 was insufficient and, in any case, the weight and value of the ornaments were not proved; (4) That, in any case, dower was due not only from defendants 1 and 2 but also from the plaintiffs themselves and so a decree for Rs. 250/- could not have been passed against the defendants.

(7) With regard to the first point, it was urged: (a) That the relief for return of ornaments was claimed only against defendant No. 1 by plaintiff No. 1 and could not have been joined with a suit against all the defendants for a partition of the assets of a deceased person; and (b) That dower was claimed only by one of the plaintiffs against two of the defendants; and it should have been claimed against the other plaintiff also, which affected the merits of the case.

(8) The first objection is perfectly valid. In view of Order II R. 5 C. P. C. the claim against Mst. Ulfat as heir could not be joined with the claim against her in her personal capacity. Further, although the cause of action as to dower could be combined with the cause of action relating to division of inheritance since in respect of both causes the suit was against the heirs as such, plaintiff No. 2 was also one of the persons who should have been sued or the claim reduced proportionately. Neither of these courses was adopted. Thus the suit was certainly multifarious. Nevertheless that cannot be allowed to affect the decision now by reason of O. II, R. 7, C. P. C.

(8a) Order II, Rule 7, C. P. C. provides :

"All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

(9) In the present case the objection was taken at the earliest opportunity, i.e., in the written statement, but it was subsequently not pressed. In these circumstances it cannot be allowed to defeat the suit at a later stage. Vide — 'Hazurimal Malawa Mal v. Ghulam Husain', AIR 1928 Lah 289 (A) and — 'Nathubhai Ichharam v. Narayanacharya Ramacharya', AIR 1927 Bom 470 (B).

(10) With regard to the dower however, there must be some modification of the decree. Defendants 1 and 2 are only liable to pay 6/16 of the debts since they inherit only 6/16 of the property of Zahiruddin. A decree for Rs. 250/- should not, therefore, have been passed against them but only a decree for Rs. 93/12/-.

(11) The lower courts have relied upon Ex. 2, a plan of house No. 1 filed by Zahiruddin in the office of the Municipal Board in order to secure a permit to build, Ex. 3 the permit granted by the Municipal Board and Ex. 4 a statement made by Mst. Ulfat in a criminal case which she filed against plaintiff No. 1 to prove the ownership of the house entered at item 1 of list A. The defendants have filed one document, Ex. A.34 to show that Ulfat paid Rs. 10 Nazrana to Murad Ali for some land. The courts below relying upon Exs. 2 to 4 have held that house No. 1 is proved to have belonged to Zahiruddin. It was contended that Ex. 4 was not admissible in evidence to prove the admission since, although Ulfat came into the witness box, it was not put to her.

(12) Ex. 4 was recorded in the following circumstances: Mst. Ulfat filed a criminal complaint against her daughter-in-law, Zubaida, alleging that she had entrusted some gold ornaments and cash to the said daughter-in-law who had misappropriated them. In support of her complaint she made a statement in court. During the course of cross-examination Mst. Ulfat stated that Zahiruddin left three houses at his death. These three houses could not include the house purchased in the name of Zubaida (and which has been held to belong to Zubaida) because Ulfat proceeded to state that she was in possession of three houses. Thus, this was a clear admission that the three houses — mentioned at items 1 to 3 of list A — were part of the property left by the deceased.

(13) When the plaintiffs instituted the present suit they filed a copy of this statement in support of their case treating it as an admission. The defendants' Advocate admitted the genuineness of the document. Thereafter, Ulfat came into the witness box but she made no attempt to explain this admission; she only denied that she had made any statement to the effect that Zahiruddin left three houses. She was cross-examined at length on this aspect of the case but Ex. 4 was not put to her. It was contended on the

strength of — 'Firm Malik Des Raj Faqir Chand v. Firm Piara Lal Aya Ram', AIR 1946 Lah 65 (FB) (C), that the admission could not be relied upon in the circumstances of the case.

(14) AIR 1946 Lah 65 (FB) (C), fully supports the contention of the appellants, but with all respect I am not prepared to follow it. The decision purports to rest upon — 'Bal Gangadhar Tilak v. Sriniwas Pandit', AIR 1915 PC 7 (D), but the case before the Privy Council was one in which certain statements were sought to be relied upon not as admissions by parties but to contradict witnesses produced in the case. Neither in the notes of arguments as reported in the Indian Appeals nor in the judgment of their Lordships was any reference made to S. 21 of the Evidence Act and only the effect of S. 145 is considered. Further as I have already pointed out, no question of relying upon the previous statements as admissions of the parties arose in that case.

(15) The decision in AIR 1946 Lah 65 (FB) (C), itself refers to earlier decisions in which a different view was taken and it loses sight of the Privy Council decision in — 'Rani Chandra Kunwar v. Narpat Singh', 34 Ind App 27 (E). In that case the question was whether one Makund Singh had been adopted by Raja Kishen Singh. The party relying upon the adoption sought to prove it by producing some earlier statements of Makund Singh to the effect that he had been adopted. Makund Singh was himself examined in the case. He was asked about his earlier statements, as in the present case, and he attempted some sort of an explanation, but the statements were not actually put to the witness. Nevertheless, reliance was placed upon them by their Lordships as admissions and the burden was thrown upon Makund Singh to show that they were wrong on the principle that what a party himself admits to be true may reasonably be presumed to be so, though

> "the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established."

(16) Having regard to the decision in the last mentioned case which was directly in point, the admission of Mst. Ulfat contained in Ex. 4 was admissible in evidence and, in absence of any satisfactory explanation, the courts below were quite right in relying upon it. There is nothing in Ex. A.34 to connect it with house No. 1 in list A.

(17) The evidence of P. W. 3 Hafiz Mohammad Husain proves the various articles of jewelry entrusted to Mst. Ulfat. P. W. 1 Zubaida herself proves their value. The courts might have disbelieved this evidence as being interested, but they have not done so. The value of their evidence cannot, however, be gone into in second appeal and, since it has been accepted as true by the lower courts, the findings arrived at by these courts cannot be interfered with.

(18) With regard to dower, I have already indicated that the plaintiffs were only entitled to a decree for Rs. 93/12/-.

(19) The result is that the decree of the lower appellate court is modified to this extent that the decree for dower is reduced to Rs. 93/12/- instead of Rs. 250/- payable out of the assets left by the deceased Zahiruddin. With this modification, the appeal is dismissed. The parties will give and receive costs in all courts in proportion to their success and failure in the suit. The stay order, dated 7-11-49 is vacated.

(20) GHULAM HUSAIN J.: I agree with the order proposed.

V.B.B. Decree modified.

(S) **A.I.R. 1955 ALL. 363** (Vol. 42, C.N. 102)

DESAI J. (7-2-1955)

Ibarat Husain and others, Accused-Applicants v. The State through Jarrar Hussain, (Complainant)-Opposite Party.

Criminal Revn. No. 1160 of 1954, against order of Addl. Dist. and Sessions J., Kanpur, D/-11-6-1954.

Criminal P. C. (1898), S. 179 — Scope — Complainant's wife removed from his house in Kanpur District and remarried in Gonda District — Jurisdiction of Kanpur Court to try offence of bigamy — (Penal Code (1860), S. 494) — AIR 1926 All 189, Held impliedly overruled.

Where the complainant's wife was taken away from his house in Kanpur District to Gonda District where she was remarried to the accused, the Court at Kanpur has no jurisdiction over the complaint under S. 494, Penal Code. (Para 2)

Under S. 179, it is not enough that a consequence ensues from anything done by the accused; it is also necessary that the consequence is an ingredient of the offence. If the consequence is immaterial to the culpability of the accused, S. 179 does not apply. In an offence under S. 494, I. P. C., the only act done by the offender is of marrying the wife of the complainant; the consequence th t arises from this act is that the complainant is deprived of the consortium of the wife at his place. The consequence undoubtedly arises at the house of the complainant but is not at all an ingredient of the offence of S. 494, I. P. C.; as far as that offence is concerned the consequence is wholly immaterial and the liability of the offender to be punished for that offence does not at all depend upon that consequence. Section 179 would not, therefore, apply and the offence cannot be tried by a Court which has jurisdiction over the area in which the complainant resides. AIR 1934 All 499 (FB), Rel. on; AIR 1926 All 189 held impliedly overruled. (Para 2)

Anno: A.I.R. Man. Penal Code, S. 494 N. 1, 9; A.I.R. Com. Cri. P. C., S. 179 N.3; 1954 Mitra, S. 179 P. 680 N. 557 "consequence" (AIR Com. note exhaustive and analytical — Conflicts between different High Courts and in the same High Courts pointed out — Case law exhaustive.

CASES REFERRED: Paras

(A) (V13) AIR 1926 All 189: 24 All LJ 155: 27 Cri LJ 101 1, 2

(B) (V21) AIR 1934 All 499: 56 All 1047: 35 Cri LJ 982 (FB) 2

R. C. Sinha and S. K. Dongre, for Applicants; Syed Sadiq Ali, for Opposite Parties; A. G. A., for the State.

ORDER: This is an application against an order of the courts below holding that a court at Kanpur has jurisdiction over the complaint filed against the applicants under S. 494, I. P. C. The allegations in the complaint, on the basis of which the question of jurisdiction has to be decided, are that the father-in-law of the complainant took away the complainant's wife from his house in Kanpur district to Gonda district and that in Gonda district she was remarried to the applicant Ibarat Hussain. As the remarriage was performed in Gonda district, it was contended before the trial court in Kanpur that it had no jurisdiction over the offence of S. 494, I. P. C., and that it could be tried only in a court in Gonda district.

The trial court held that the consequence of the remarriage was that the complainant was deprived in Kanpur district of the consortium of his wife and that consequently the offence could be tried in Kanpur district and relied upon — 'Munir v. Emperor', AIR 1926 All 189 (A). The trial court overruled the objection of the applicants and proceeded with the case. The applicants went up in revision to the Sessions Judge, who also relied upon Munir v. Emperor (A)', and dismissed the application.

(2) The material facts in Munir v. Emperor (A), were similar to the facts in the present case, and it was held by Kanhaiya Lal J. that the consequence of the remarriage and the adultery by the wife of the complainant was that he was kept deprived of her company at his house and that consequently the offences could be inquired into by a court which had jurisdiction over the area in which his house was situated. With great respect to the learned Judge, I do not agree.

Under Section 179, Criminal P. C., which is the only section relied upon, it is not enough that a consequence ensues from anything done by the accused; it is also necessary that the consequence is an ingredient of the offence. If the consequence is immaterial to the culpability of the accused, S. 179 does not apply. In an offence under S. 494, I. P. C., the only act done by the offender is of marrying the wife of the complainant; the consequence that arises from this act is that the complainant is deprived of the consortium of the wife at his place.

The consequence undoubtedly arises at the house of the complainant but is not at all an ingredient of the offence of S. 494, I. P. C.; as far as that offence is concerned the consequence is wholly immaterial and the liability of the offender to be punished for that offence does not at all depend upon that consequence. Section 179 would not, therefore, apply and the offence cannot be tried by a court which has jurisdiction over the area in which the complainant resides.

There is no other section which would take the case out of the general rule laid down in S. 177 of the Code. Had the decision in Munir v. Emperor (A), been the last word on the question I would have been obliged to refer the matter to a Bench, but I find that in a subsequent decision this Court has explained Section 179. In — 'Emperor v. Kashi Ram', AIR 1934 All 499 (FB) (B), a Full Bench of this Court stated:

> "If, therefore, the act done and the consequence which has ensued are to be taken as together amounting to the offence, the commission of which is complained against, then it necessarily follows that the consequence must be a necessary ingredient of the offence in order that S. 179 be applicable. If the offence is complete in itself by reason of the act having been done, and the consequence is a mere result of it which was not essential for the completion of the offence, then S. 179 would not be applicable."

Munir v. Emperor (A), was not cited before the Full Bench, but had it been cited, I have no doubt that it would have been overruled. In my opinion the decision in Munir v. Emperor (A), is not the ruling law and I am not bound by it.

(3) The application is allowed and the complaint is dismissed on the ground of want of jurisdiction, without prejudice to the right of the complainant to file a fresh complaint in a court of competent jurisdiction in Gonda district.

V.B.B. Application allowed.

(S) **A.I.R. 1955 ALL. 364 (Vol. 42, C.N. 103)**

GURTU J. (16-12-1954)

B. Ratan Chand, Defendant-Appellant v. Mst. Kalawati, Plaintiff-Respondent.

Second Appeal No. 1588 of 1949, against order of Temporary Civil Judge, Etah, D/- 22-4-1949.

(a) Hindu Law — Maintenance — Wife — Second marriage of husband.

Under pure Hindu law, the mere second marriage of a husband does not entitle the wife to separate residence and maintenance. AIR 1928 PC 187, Rel. on. (Para 6)

(b) Hindu Married Women's Right to Separate Residence and Maintenance Act (1946), Ss. 2(4) and 2(7) — Second marriage prior to Act — Retrospective effect of S. 2(4): AIR 1950 Mad 321 — AIR 1951 Vindh-P 10 and AIR 1954 Orissa 117, Dissent. from — Applicability of S. 2(7).

The words "if he marries again" in S. 2(4) have reference to a marriage which is solemnized subsequent to the passing of the Act. A wife, therefore, cannot claim the benefit of the Act where the second marriage has taken place prior to the Act: AIR 1953 Bom 342; AIR 1950 Nag 33 — AIR 1953 Mad 712, Rel. on; AIR 1950 Mad 321 — AIR 1951 Vindh-P 10, Dissent. from; Observations of Panigrahi C. J. to the contrary in AIR 1954 Orissa 117, held obiter. (Para 13)

Nor would such a second marriage prior to the Act, by itself, be a "justifiable cause"

within the meaning of S. 2(7), for granting the wife separate residence and maintenance. Section 2(7) must be read keeping in view the other sub-clauses of that section.

(Para 14)

CASES REFERRED: Paras

(A) (V15) AIR 1928 PC 187: 110 Ind Cas 30 (PC) 6

(B) (V40) AIR 1953 Bom 342: ILR (1953) Bom 1031 7, 13

(C) (V37) AIR 1950 Nag 33: ILR (1950) Nag 196 8, 10

(D) (V37) AIR 1950 Mad 321: 1950-1 Mad LJ 63 9, 11

(E) (V40) AIR 1953 Mad 712: 1953-1 Mad LJ 649 9, 12

(F) (V41) AIR 1954 Orissa 117: ILR (1954) Cut 14 10

(G) (V38) AIR 1951 Vindh-P 10 11

Jagdish Swarup, for Appellant Bajeshwari Pd., for Respondent.

JUDGMENT: This is an appeal by the defendant-husband. The suit was brought by the respondent-wife and she claimed to recover Rupees 900/- as arrears for past maintenance and claimed future maintenance at Rs. 50/- per month. She alleged her husband's cruelty and she also alleged that he had remarried on or about July, 1935.

(2) The husband denied cruelty.

(3) The trial court framed an issue on cruelty and also an issue on the question whether the plaintiff was entitled to live separately and to get maintenance. On the issue of cruelty, the trial court came to the conclusion that the entire story that the husband was guilty of cruelty towards the wife was totally false. The trial court, however, held that since the husband had remarried, the wife was entitled, under the Hindu Married Women's Right to Separate Residence and Maintenance Act (Act No. XIX of 1946), to live separately and to receive maintenance. Accordingly, the suit was decreed for future maintenance at the rate of Rs. 25/- per month. The rest of the suit was dismissed.

(4) Cross-appeals were filed and the lower appellate court has endorsed the finding of the trial court that the allegation of legal cruelty had not been made out. It held that the plaintiff was not entitled to past maintenance, though it held that the Hindu Married Women's Right to Separate Residence and Maintenance Act (Act No. XIX) 1946 was applicable and she was entitled to future maintenance. Both the appeals were, therefore, dismissed.

(5) The husband has preferred this appeal. It is contended on his behalf that the wife was not entitled to separate residence or maintenance under the Hindu law merely on the ground of remarriage of the husband.

(6) On behalf of the husband, reliance is placed on Mulla's Principles of Hindu Law, 11th edition, S. 555 and Mayne on Hindu Law and Usage, 10th edition, paragraph 688 for the contention that no separate right of residence and maintenance comes into existence under Hindu law merely because the husband has taken a second wife. Attention was invited, in this connection, to the case of — 'B. Naganna Nayudu v. B. Rajya Lakshmi Devi', AIR 1928 PC 187 (A). The contention of learned counsel for the husband appellant is correct that under pure Hindu law, the mere second marriage of a husband does not entitle the wife to separate residence and maintenance.

(7) Learned counsel for the husband appellant then argued that inasmuch as the second marriage took place in or about 1935, the wife could not claim the benefit of Act XIX of 1946 which was not in force in 1935. That Act sets out, among other grounds for claiming separate residence and maintenance, a ground in the following words:

"(4) If he marries again (The reference is to the marriage of the husband)."

It is contended that Act XIX of 1946 will only apply to a case where the second marriage has been solemnised after the coming into force of Act XIX of 1946 and not to a case where the marriage was solemnised before the coming into force of that Act. This contention of learned counsel is supported by the Division Bench case of — 'Laxmibai Wamanrao v. Wamanrao Govindrao', AIR 1953 Bom 342 (B). There it was held that sub-cl. (4) of S. 2 of the said Act was remedial in character and imposed a new liability on one party and conferred fresh rights on another and it was not retrospective. It was held that the words "If he marries again" meant "If he marries again after the Act comes into force".

(8) The same view was taken in — 'Mt. Sukhribai v. Pohkalsing', AIR 1950 Nag 33 (C).

(9) In the Madras High Court, there is a difference of opinion. In — 'Lakshmi Ammal v. Narayanaswami Naicker', AIR 1950 Mad 321 (D), the opposite view was taken, but this decision did not find favour with the learned Judge of the same court who decided the case of — 'Sidda Setty v. Muniamma', AIR 1953 Mad 712 (E).

(10) The matter has also been discussed in — 'Anjani Dei v. Krushna Chandra', AIR 1954 Orissa 117 (F). Mr. Justice Mohapatra, who was one of the members of the Division Bench in that case, did not express himself on the question whether S. 2, Sub-clause (4) would apply to a case where the husband had married for the second time before the Act came into operation because the finding of both the learned Judges was that the husband had been guilty of abandonment for unjustifiable cause, and his conduct even otherwise would amount to cruelty in law which entitled the wife to separate residence and maintenance. The learned Chief Justice, Panigrahi, C. J., however, did consider the question whether S. 2, sub-clause (4) of the Act applied in the case of a second marriage solemnised before the Act. He seemed to be of the view that the view expressed in the Nagpur High Court as quoted hereafter was not correct. Their Lordships of the Nagpur High Court in AIR 1950 Nag 33 (C), had remarked as follows:

"It is obvious that before this Act was passed neither Hindu custom nor statute law, nor the dicta of Judges allowed the wife to live sepa-

rate from her husband if he married a second time."

The learned Chief Justice expressed his inability to accept this statement of the position as made by their Lordships of the Nagpur High Court and he thought that the contrary was established by the cases referred to in his own judgment. It appears that none of the cases so referred to by the learned Chief Justice are pure cases merely of a husband remarrying. Therefore, the learned Chief Justice's observation that

"The Hindu Women's Right to Separate Residence and Maintenance Act 1946, merely gave statutory recognition to the previous dicta of Judges who had on several occasions applied this principle to the facts of individual cases",

does not with all respect seem to be quite accurate.

The relevant discussions in Mulla's Principles of Hindu Law and Mayne on Hindu Law and Usage have already been referred to by me. Moreover, since the decision in the Orissa case was based on another point, the observations of the learned Chief Justice in regard to the retrospective nature of Sec. 2, sub-cl. 4 of the Act appear to be in the nature of an 'obiter dictum'.

(11) In — 'Baijnath Dharamdass v. Hiraman Ram Rasik', AIR 1951 Vindh-P 10 (G), a view, opposite to that taken by the Bombay High Court, has been taken. Reliance was placed on the Madras High Court's case of AIR 1950 Mad 321 (D).

(12) As pointed out earlier, this latter view has not found favour with another learned Judge of the Madras High Court in AIR 1953 Mad 712 (E).

(13) In my view, with respect, the reasoning of the Bombay High Court, in AIR 1953 Bom 342 (B), is sound, and it must be held, upon a construction of Act XIX of 1946, that the words "If he marries again" have reference to a marriage which is solemnised subsequent to the passing of the Act.

(14) On behalf of the wife respondent, it was urged that even if a second marriage prior to the Act could not be availed of under S. 2, sub-cl. (4) of the Act such a re-marriage did constitute a 'justifiable cause'. On the other hand, it is contended that when the Legislature enacted that only a second marriage subsequent to the coming into force of the Act would afford a ground for claiming separate residence and maintenance, then it must be held that a second marriage prior to the coming into force of the Act by itself would not be a 'justifiable cause' for granting the wife separate residence and maintenance. There seems to be force in this contention. Section 2, sub-cl. (7) of the Act must be read keeping in view the other sub-clauses of that section. Further as I have already pointed out, pure Hindu Law did not give the wife a right of separate residence and maintenance in a case where the husband had remarried. The contention of learned counsel for the wife respondent must, therefore, be rejected.

(15) The result, therefore, is that I allow this appeal and set aside the judgments and decrees of the courts below and dismiss the suit. In the circumstances, parties will bear their own costs throughout.

(16) I consider that this is a case in which leave to file a special appeal should be granted and I order accordingly.

V.B.B. Appeal allowed. Leave granted.

A.I.R. 1955 ALLAHABAD 366 (Vol. 42, C. N. 104)

CHATURVEDI J. (9-12-1954)

Basist Singh, Petitioner v. Sm. Maharaji and others, Opposite Parties.

Civil Misc. Writ No. 408 of 1953.

Constitution of India, Art. 226 — Natural justice — (U. P. Panchayat Raj Rules, R. 95-A (2)) — (U. P. Panchayat Raj Act (26 of 1947), S. 85).

In a dispute concerning mutation of name, which was referred to the Panchayati Adalat, the adalat passed an order in favour of A. The Sub-Divisional Officer in a revision set aside that order without giving any notice to A on the ground that the order was signed only by 4 and not by 5 panchas. That order was passed before the enactment of S. 77-A, U. P. Panchayat Raj Act.

Held that the proceedings in question were judicial proceedings and, that being the position, an order passed by the Panchayati Adalat in favour of A could not be quashed without giving an opportunity to him of being heard in the case. That was the rule of natural justice which had been made applicable to all judicial proceedings and also to quasi-judicial proceedings. Further R. 95-A (2), U. P. Panchayat Raj Rules provides that a notice of the application filed in revision along with its copy should be issued to the opposite party and before passing any order on the revision, the Court must give a reasonable opportunity to both the parties of being heard. That being so the view that since S. 85, U. P. Panchayat Raj Act gave power to the Sub-divisional officer to set aside the order on his own motion also there was no necessity of giving notice to A of the date of hearing and that he was not, in any way, prejudiced by the omission because a pure question of law was only involved in the revision was incorrect, being opposed both to the provisions of R. 95-A and the rule of natural justice. (Para 2)

Anno: Const. of India, Art. 226 N. 59.

R. B. Misra, for Petitioner; Hira Lal Kapoor, for Opposite Parties.

ORDER: This is a petition under Art. 226 of the Constitution. There was a dispute concerning mutation of names and the matter was, in due course, referred to the Panchayati Adalat. The Panchayati Adalat decided the case in favour of the petitioner. Respondents 1 and 2 went up in revision against this order of the Panchayati Adalat and the Sub-Divisional Officer set aside that order on the ground that it had been signed only by 4 Panches and not by 5. That order appears to have been passed before the enact-

ment of S. 77-A, U. P. Panchayat Raj Act. It further appears that this order was passed without issuing any notice to the petitioner who had succeeded in the Panchayati Adalat. The petitioner, therefore, applied for a re-hearing of the revision on the ground that the order, quashing the judgment of the Panchayati Adalat, had been passed without any notice having been given to the petitioner. This application has been dismissed by the Sub-Divisional Officer who held that there was no necessity of informing the petitioner of the date fixed for hearing the revision because S. 85, U. P. Panchayat Raj Act gives powers to the Sub-Divisional Officer to set aside the order of a Panchayati Adalat on his own motion also. He also says that no prejudice has been caused to the petitioner by the omission to give this notice because it was a pure question of law and the decision was quite correct on the date on which it was given.

(2) I am unable to agree with the decision given by the learned Sub-Divisional Officer. Rule 95-A (2), U. P. Panchayat Raj Rules provides that a notice of the application filed in revision along with its copy should be issued to the opposite-party and, before passing any order on the revision, the Court must give a reasonable opportunity to both the parties of being heard. Apart from that rule, there can be no doubt that these are judicial proceedings and, that being the position, an order passed by the Panchayati Adalat in favour of the petitioner could not be quashed without giving an opportunity to the petitioner of being heard in the case. This is a rule of natural justice which has been made applicable to all judicial proceedings and also to 'quasi-judicial' proceedings. The view of the learned Sub-Divisional Officer that there was no necessity of giving notice to the petitioner and that the petitioner has not, in any way, been prejudiced by the omission is, in my opinion, incorrect, being opposed both to the provisions of R. 95-A and the rule of natural justice mentioned by me above.

(3) The result, therefore, is that this petition is allowed and the order of the Sub-Divisional Officer, dated 3-12-1952, is quashed. It will be open to the officer now to consider the petitioner's application for a rehearing of the revision on its own merits and if it is correct that he was not served with a notice of the revision petition, he must be given an opportunity of opposing that revision. As it is not known whether the application for re-hearing was opposed by the respondents or not, I direct the parties to bear their own costs.

M.K.S. Petition allowed.

(S) A.I.R. 1955 ALL. 367 (Vol. 42, C.N. 105)

LUCKNOW BENCH—H. S. CHATURVEDI AND RANDHIR SINGH JJ. (27-1-1955)

Sunder Singh, Appellant v. The State, Complainant-Respondent.

Criminal Appeal No. 728 of 1954 and Capital Sentence No. 40 of 1954, against order of Civil and Sessions Judge, Lucknow, D/- 29-9-1954.

Constitution of India, Art. 20(3) — Accused not to be compelled to produce incriminating evidence — Evidence of compulsion — No presumption — (Evidence Act (1872), S. 114.

The contention that the recovery of blood stained articles from the box of the accused and the handing over of the karauli by the accused would amount to a compelled production of incriminating evidence and as such it amounts to an infringement of the fundamental right under Art. 20(3) cannot be accepted, when there was not only 'no' evidence that the accused was coompelled to produce the incriminating articles, but there was not even a suggestion to that effect anywhere in the evidence or in the cross-examination of witnesses. No presumption of compulsion can be raised in every case where the admission of evidence has not been expressly excluded by statute such as Ss. 25 and 26, Evidence Act which expressly exclude from evidence a confession made by the accused before the police. To assume compulsion in all cases where recovery of incriminating articles is made during the course of any investigation would be to brush aside a very strong circumstantial evidence, and this could not have been the intention of the framers of the Constitution in framing Art. 20 (3). AIR 1954 SC 300, Considered. (Para 11)

Anno: Const. of India, Art. 20 N. 5 (h); Evid. Act, S. 114 N. 40.

CASE REFERRED: Para

(A) (V41) AIR 1954 SC 300: 1954 Cri LJ 865 (SC) 11

G. G. Chatterji and S. P. Avasthi, for Appellant; Addl. Govt. Advocate, for the State.

RANDHIR SINGH J.:

The appellant in this case has been convicted by the learned Additional Sessions Judge of Lucknow under S. 302, I.P.C. and sentenced to death.

(2) The case arose out of a murder said to have been committed within the precincts of the city of Lucknow. Ram Lal deceased was an orderly constable of the Deputy Inspector General of Police (Central Range) and used to live in the quarters attached to the residence of the Deputy Inspector General. Some other constables, who were also on the staff of the Deputy Inspector General, resided in the out-houses and one of them was Sundar Singh, who was driver of the staff car. It was alleged on behalf of the prosecution that Sundar Singh appellant, who was a widower, developed intimacy with the young wife of Ram Lal deceased, who also resided with her husband in a kothri close to the kothri of Sunder Singh.

On the night between the 2nd and 3rd February 1954, at about 10 P. M. Ram Lal and Sunder Singh went together on a cycle. Ram Lal was paddling the cycle while Sunder Singh sat behind him on the carrier. At about 1 A. M. Sunder Singh alone returned to the house of the Deputy Inspector General of Police and he was seen by three persons Ram Het, Sadhu Ram and Nabban Khan. Ram Lal did not return with him.

At about 6 A. M. a constable who happened to go out noticed a dead body of a constable lying about a furlong away from the gate of the residence of the Deputy Inspector General of Police. Some people went to see the corpse and it was found that the dead body was that of Ram Lal constable. Intimation was given to the Deputy Inspector General and a first information report was lodged by Ram Het constable at about 7.40 A. M. at the Hazratganj police station.

It was mentioned in this report that Ram Lal and Sunder Singh had gone together on a cycle and at about 1 A. M. Sundar Singh alone returned but Ram Lal did not return. The manner in which the dead body of Ram Lal was discovered is also mentioned in the report. Ram Het constable, who made the first information report, also mentioned in the report that he had suspicion that Sundar Singh had hacked Ram Lal to death.

(3) After the report was lodged, Sub-Inspector Ishtiaq Ahmad came to the place of occurrence and started investigation. He recorded the statements of witnesses and prepared a site plan. The place where the dead body was found as also the residence of the Deputy Inspector General of Police and other adjoining houses are shown in the site plan. Investigation continued and at 3 or 3.30 P. M. the investigating officer chanced to notice a few stains of blood on the shoes worn by the accused. Subsequently his kothri was searched and from a box of which the key was handed over by the appellant a blood-stained patloon and shirt were recovered from the box. The investigating officer was then taken to a culvert from underneath which a blood-stained karauli was taken out by the appellant and given to the Sub-Inspector. A recovery list of all these articles was then prepared and ultimately the appellant was sent up for trial.

(4) The dead body of Ram Lal was sent after an inquest for post mortem examination, which was conducted by the Civil Surgeon. He found as many as 32 incised wounds and stab wounds on various parts of the body of Ram Lal, and death was due in his opinion to shock and haemorrhage from the extensive injuries received by the deceased. The deceased was a young man, about 28 years of age, and was well developed and muscular.

(5) The defence of the appellant was that he did not know anything about the murder. He denied recovery of the blood-stained articles or the making over of the karauli as also the fact that he went out with the deceased at 10 P. M. on the night when the murder was committed.

(6) The learned Additional Sessions Judge believed the story of the prosecution and found the case established satisfactorily against the appellant and sentenced him to death. He has now come up in appeal. There is also the usual reference by the Sessions Judge for the confirmation of the sentence of death passed against the appellant.

(7) The prosecution examined all the three constables, Ram Het, Sadhu Ram and Nabban Khan, who had seen the appellant return alone at 1 A. M. Ram Het and Sadhu Ram also stated that they had seen the appellant and Sunder Singh going together on a cycle at 10 P. M. and that Ram Lal was paddling the cycle and Sundar Singh was sitting on the carrier. All these three witnesses were brother constables of the appellant and were working together at the residence of the Deputy Inspector General of Police. No suggestion of any enmity of any kind has been made with any of these witnesses. An attempt has been made in cross-examination to show that these witnesses were also perhaps friendly with the wife of Ram Lal and any of them may have been instrumental in the death of Ram Lal. This suggestion, however, does not proceed beyond the stage of suggestion, and there is no evidence in support of it. We are unable, therefore, to give credence to this suggestion.

(8) Besides these three witnesses, two witnesses of recovery Abdul Habib and Muhammad Irshad have also been examined They were both 'rickshaw walas' and happened to pass on the road at the time when the sub-inspector was in quest of search witnesses. It has been pointed out by the learned Counsel for the appellant that such search witnesses are usually under the thumb of the police and it is not unoften that they are called for purposes of attesting recovery lists when no respectable person comes forward to witness the recovery.

The investigating officer Ishtiaq Ahmad has given an explanation which appears to us to be very probable. He stated that the only houses which were in the vicinity of the house of the Deputy Inspector General of Police were those of Ministers and he sent word to those persons who resided in the outhouses of the Ministers' residences but none of them turned up and he, therefore, waited for some persons to pass on the road in order to take their assistance as witnesses for the recovery. The Sub-inspector could not exert his influence to persuade witnesses who resided in the compound of the Ministers' houses to come and witness the recovery and it is, therefore, very probable that witnesses passing on the road were called.

(9) Another circumstance relied upon on behalf of the appellant to discredit the testimony of these witnesses was that the ink with which the signatures of the attesting witnesses were affixed was different from the ink with which the recovery lists were scribed. No doubt there seems to be some difference in the shade of the two inks but the names of the witnesses appear in the body of the recovery list and it is, therefore, difficult to believe that witnesses at random were subsequently obtained and made to sign the recovery list.

In order to explain this circumstance, the learned Counsel for the appellant has argued that the police probably put down the names of those witnesses in advance as they could very well count on their support even in their absence. While such a suggestion may not be beyond the range of possibility, we do not think that under the circumstances it could be possible for the sub-inspector to note down the names of the probable witnesses in the distant hope that they may be available and also agreeable to attest the

recovery lists The mere fact that the two witnesses, who attested the recovery lists, happened to be rickshawalas is no ground for rejecting their testimony. They have been examined and cross-examined at length. We have been taken through their statements and it appears to us that there is no good ground for disbelieving them.

(10) The articles, which were found in the box and on the person of the appellant, were sent along with the 'karauli' which was handed over by the appellant, to the Chemical Examiner and the Serologist for examination. The report shows that all these articles were stained with human blood. It has been argued on behalf of the appellant that there was no evidence to show that the box was searched and the karauli was recovered at the instance of the appellant. No doubt evidence has not been led on this point but it appears to us that the investigating officer was not asked about these matters presumably as it was thought that any statements made to the investigating officer by the appellant during the course of investigation may not be admissible in evidence. It can well be presumed that the Sub-Inspector could not have reached the culvert without being led to it by the appellant who was the only person who knew about the karauli and the place where it was concealed.

(11) It has been pointed out that the recovery of blood stained articles from the box of the appellant and the handing over of the karauli by the accused would amount to a compelled production of incriminating evidence and as such it amounts to an infringement of the fundamental right under Art. 20(3) of the Constitution. Reliance has been placed on certain observations of their Lordships of the Supreme Court in — 'M. P. Sharma v. Satish Chandra', AIR 1954 SC 300 (A). In this reported case a search and seizure of documents in the possession of the accused was made in pursuance of warrants issued under S. 96, Criminal P. C. and it was argued that the recovery of incriminating articles in the course of the search so made amounted to compelled production of evidence which was incriminatory. Article 20(3) of the Constitution is as follows:

> 'No person accused of any offence shall be compelled to be a witness against himself."

It was argued before their Lordships of the Supreme Court that the guarantee in Art. 20(3) was only against "testimonial compulsion" and that it was confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. It was, however, held by their Lordships that there was no good reason to confine the contents of the constitutional guarantee to testimonial compulsion only and that it would extend to production of material evidence also.

In the light of the observations of their Lordships of the Supreme Court we have to examine if in the present case the appellant had been compelled to produce any material evidence which could have incriminated him. No doubt if there had been any evidence to prove that the appellant had been compelled to produce the incriminating articles, the argument advanced on his behalf could have had some force. In the present case not only there is no evidence that the appellant was compelled to produce the incriminating articles, but there is not even a suggestion to that effect anywhere in the evidence or in the cross-examination of witnesses.

It has further been argued that a presumption of compulsion should be raised in this case also as is to be assumed in cases where a confession is made by an accused before the police. Sections 25 and 26, Evidence Act expressly exclude from evidence a confession made by an accused person before the police. It is possible that these two sections in the Evidence Act may have been enacted to safeguard against any possible compulsion which might bring about a confession; but no presumption of compulsion can be raised in every case where also the admission of evidence has not been expressly excluded by statute. To assume compulsion in all cases where recovery of incriminating articles is made during the course of an investigation would be to brush aside a very strong circumstantial evidence, and this could not have been the intention of the Framers of the Constitution in framing Art. 20 (3) of the Constitution.

We are unable, therefore, to agree with the contention that the evidence about the recovery of the incriminating articles by the police during the course of the investigation was not admissible in evidence in view of Art. 20(3) of the Constitution.

(12) The cycle of the deceased was found at a distance of about a furlong from the place of occurrence. It is possible that the cycle may have been thrown away by the assailant at a distance after the murder of Ram Lal had been committed.

(13) An examination of the post mortem report shows that the injuries on the neck were on the back part of it. It is, therefore, probable that the appellant, while sitting on the carrier, might have struck the deceased on the neck while he was quite unaware of it and the rest of the injuries might have been caused after he had fallen down. It was not very difficult to overpower a man under these circumstances even though the assailant may be only one.

(14) The learned Counsel for the appellant has also pointed out to us certain discrepancies in the statements of Ram Het and the investigating officer with regard to the making of the report and the visit of the Deputy Inspector General of Police to the place where the dead body was found. Ram Het states that a telephonic message was sent to the police station at Hazratganj and that the Sub-Inspector arrived thereafter. He also states that the D. I. G., Sub-Inspector and other persons went to see the dead body. The Investigating Officer, Ishtiaq Ahmad, on the other hand, denies having visited the dead body in the company of the Deputy Inspector General of Police on the receipt of a telephonic message.

The Additional Government Advocate has put before us a possible explanation. He suggests that it was probably an effort on the part of the investigating officer not to drag the Deputy

Inspector General of Police into the investigation or into the evidence and he, therefore avoided any mention of the presence of the Deputy Inspector General of Police at the place where the corpse was lying or at any time during the course of investigation. We feel, however, that if the Deputy Inspector General, a highly responsible officer, was present at his house at the time when the investigation was started, there would have been nothing improper if he had been called into the witness box to depose to facts which came to his knowledge shortly after the dead body was recovered. It would have been, on the other hand, of great assistance in the trial of the case. The fact remains that there is a discrepancy on this point. This discrepancy does not, however, affect the material part of the investigation.

(15) Whether the report was lodged after a telephone call had been made at the police station or before it, it cannot be doubted that the investigation started at about 8 A. M. Even if the first information report is rejected as inadmissible, on the ground that intimation had been made on the telephone to the police station, the facts mentioned in the first information report are clearly mentioned in the deposition of Ram Het constable who made the first information report. Ram Het has definitely stated that Sundar Singh used to visit Ram Lal's quarters and used to cut jokes with Ram Lal's wife. He has also stated that Ram Lal used to remonstrate with his wife and warned her not to go out and indulge in frequent talks.

(16) The case rested, no doubt, entirely on circumstantial evidence but the circumstantial evidence in this case appears to be so strong and almost conclusive that the inference that the assailant of the deceased could be no other than the appellant himself is irresistible. The learned Additional Sessions Judge has remarked that any irregularities or any planting of blood stained clothes into the box of the appellant could not have been done because the investigation was done almost under the very nose of the Deputy Inspector General of Police. Although there is nothing on the record to show that the Deputy Inspector General of Police took any active interest in the investigation, there seems to be no reason to believe that the investigating officer should have gone to the extent of getting blood stained clothes planted or a blood stained karauli placed under a culvert only to implicate Sundar Singh, who, according to the statement of Ram Het, was a favourite driver of the Deputy Inspector General of Police.

(17) Much stress has been laid on some discrepancies in the statements of the investigating officer and some witnesses with regard to the recovery of shoes of the deceased. The inquest report shows that the deceased was found wearing a pair of shoes and socks at the time when the inquest was made. The investigating officer, however, mentioned that no shoes were recovered on his body, in his statement before the committing Magistrate. When, however, his attention was drawn to the inquest report, he stated that he had given the earlier statement on account of faulty memory.

The learned Counsel for the appellant has also pointed out to some overwritings and additions made in the entries in the malkhana register with regard to the property deposited there. No importance seems to have been attached to the shoes and socks of the deceased, but when the investigating officer realised that some account had to be given of these articles also, it is possible that some entries may have been made subsequently in the malkhana register with regard to the shoes of the deceased. These shoes and socks are, however, not in the list of the articles recovered from the dead body and the explanation of the investigating officer is that as the shoes of Ram Lal bore no blood stains they were not taken into possession. Ram Lal deceased had a number of clothes on his body which were all found to be stained with blood and which were taken into possession. No importance attaches to the non-recovery or to the discrepancies with regard to the entries of the shoes of Ram Lal in the malkhana register.

(18) We are satisfied that the case has been established beyond a shadow of doubt against the appellant and he has been rightly found guilty by the learned Additional Sessions Judge. The learned counsel for the appellant has also addressed us with regard to the sentence awarded to the appellant. In view of the very brutal manner in which the deceased was murdered by the appellant, we feel that the only proper sentence was the one awarded by the Court below. We, therefore, uphold the conviction and confirm the sentence of death passed upon the appellant. The reference made by the learned Additional Sessions Judge is accepted. The sentence of death shall be carried out according to law. Leave to appeal to the Supreme Court has been asked for and is allowed.

H.G.P. Appeal dismissed.

A.I.R. 1955 ALLAHABAD 370 (Vol. 42, C.N. 106)

MEHROTRA J. (19-1-1955)

Pooran Mistry, Petitioner v. State of U. P., Opposite Party.

Criminal Revn. No. 1399 of 1954, against order of Sessions J., Moradabad, D/- 29-4-1954.

(a) Government of India Act (1935), Sch. 7, List II, Item 3 — U. P. Provincial Armed Constabulary Act (40 of 1948) — Validity — (Constitution of India, Sch. 7, List II, Item 3).

In interpreting the words used in the list given in Sch. 7, Government of India Act, 1935 it is an established principle that none of the items are to be read in a narrow or restricted sense. The second principle in interpreting the item in the list is that where there is a seeming conflict between an entry in List II and an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. (Para 6)

The word "Police" in its general sense connotes the department of the Government or the civil force charged with duty to maintain internal peace and order. It is within

the powers of the Provincial Legislature to legislate with regard to the police including its strength, its manner of recruitment and other matters incidental thereto. On a close examination of the Act 40 of 1948 and the purpose underlying the Act, it cannot be said that the object of creating the force of armed constabulary was anything but the maintenance of internal peace and order. The Act came within the ambit of the word "Police". Therefore force created under the Act is not a combatant force like army. AIR 1951 SC 318 — AIR 1941 FC 16, Foll. (Paras 4, 5, 6)

(b) Constitution of India, Art. 14 — U. P. Provincial Armed Constabulary Act (40 of 1948) — Validity.

Having regard to the nature of the subject-matter of the Act 40 of 1948 the armed constabulary is a valid and justifiable classification and the Act is fully supported on the principle of classification. AIR 1953 SC 91, Foll. (Para 7)

Anno: Const. of India, Art. 14 N. 1, 42.

CASES REFERRED: Paras

(A) (V38) AIR 1951 SC 318: 52 Cri LJ 1361 (SC) 6

(B) (V38) AIR 1941 FC 16: 1940 FCR 110 (FC) 6

(C) (V40) AIR 1953 SC 91: 1953 SCR 404 (SC) 7

(D) (V38) AIR 1951 SC 41: 1950 SCR 869 (SC) 8

(E) (V40) AIR 1953 SC 215: 1953 SCR 1129 (SC) 8

(F) (V39) AIR 1952 SC 75: 1952 Cri LJ 510 8

(G) (V39) AIR 1952 SC 235: 1952 Cri LJ 1167 8

S. P. Gupta, for Petitioner; Asst. Govt. Advocate, for Opposite Party.

ORDER: This revision was filed from jail by the applicant against the order of the Sessions Judge of Moradabad who dismissed the appeal of the petitioner filed against his conviction under S. 6(e), U. P. Provincial Armed Constabulary Act (40 of 1948) by the Sessions Judge of Moradabad. In appeal however the Sessions Judge reduced the sentence of imprisonment from three years' rigorous imprisonment to 18 months' rigorous imprisonment. The applicant had prayed that he should be informed of the date fixed for hearing. An order was passed by Hon'ble Mukerji, Judge that the applicant be informed of the date and he should either appear in person or as was desired by him, Sri S. P. Gupta practising in the district Court be informed of the date and asked to appear on his behalf. Notice was then issued to Mr. Gupta and on the date of hearing he appeared and was permitted to argue the case on behalf of the applicant. The charge against the applicant was that he being an officer of the Provincial Armed Constabulary, malingered or feigned disease in himself with effect from 14-3-1951 till 31-3-1951 and thereby committed an offence under S. 7(e) of the U. P. Provincial Armed Constabulary Act (40 of 1948). He was further charged of an offence under S. 6(e) of the said Act.

(2) The prosecution case, in brief is that the applicant was employed in the Provincial Armed Constabulary, IX Bn. stationed at Moradabad and absented himself from duty without permission or leave and malingered and feigned up to 31-3-1951 and subsequently absconded and deserted service. On 2-3-1951 the accused made an application to the Commandant of his Battalion for seven days leave on the ground that his wife had been seduced by certain persons from his father-in-law's place and was sold to someone. The leave was granted with effect from the 7th March till 13-3-1951. He went to his house and on 12-3-1951 he sent a reply paid telegram to his Company Commander, praying for further extension of his leave for ten days. This was refused and he was required to report himself for duty immediately. The order was communicated to him on the same day by wire. He did not report himself on duty and he was noted absent with effect from 14-3-1951.

A notice was sent to him on the 17th March by the Assistant Commandant, requiring him to report himself for duty within seven days, failing which he was to be prosecuted under S. 6(e) of the Act. This notice remained unserved and was received back on 17-4-1951. On 21-3-1951 another application was sent by the applicant accompanied by a medical certificate of the same date, for 20 days leave. In that it was stated that before the expiry of the leave the accused fell ill. This leave would have expired on 2-4-1951. On 31-3-1951 another application was sent by the accused supported by a medical certificate stating that he had not completely recovered as yet and the leave should be extended till 3-4-1951. No order was passed on this application as well. The accused appellant did not report himself on duty even after 3-4-1951. Again on 16-4-1951 the P.A.C. authorities at Moradabad sent a letter to the Deputy Superintendent of Police, Garhwal, requesting him to direct the accused to report himself for duty within seven days of the receipt of that letter. The Deputy Commissioner was informed by the Patwari of the circle on 29-4-51 that the accused-appellant had gone back to join his duty some 16 or 17 days before. No reply was received from the applicant. Another letter was sent to him by the P.A.C. authorities on 30-4-1951.

The applicant remained untraced and thereafter on 7-5-1951 the Commandant of the Battalion lodged a formal report to the S. O. Kotwali, Moradabad, for registering a case of desertion under S. 6(e) of the Act. The Battalion thereafter left Moradabad in January 1952 and on 16-4-1952 after making certain enquiries another request was made to the said S. O. Kotwali to register a case. The Police could not find the applicant and proceedings under S. 87, Criminal P. C. and S. 88, Criminal P. C. were taken against the accused. The charge-sheet was sent on 27-1-1952. In the meantime the applicant got himself enrolled as a police constable at Rampur and when all these facts came to light he was arrested on 26-6-1953.

(3) A number of points have been raised by Sri Gupta on behalf of the applicant. Firstly he has contended that the U. P. Provincial Armed Constabulary Act is 'ultra vires' of the U. P.

Legislature as it is not covered by any of the provincial lists. Secondly it is contended that the Act violates the provisions of Arts. 14 and 19(1) (G), Constitution of India and as such it is void under Art. 13 of the Constitution.

(4) Lastly, it was contended that, in any view of the matter the applicant has already been in jail for a sufficiently long time and the sentence be reduced to the period already undergone. Schedule 7, Government of India Act, 1935 contains a legislative list and these lists contain the subject which can be legislated upon by the Central Legislature and the Provincial Legislature. There is also the concurrent list specifying the subjects on which the Central and the Provincial Legislatures could legislate. In the Provincial Legislative list item 3 relates to the "police including railway and village police". It is within the powers of the Provincial legislature to legislate with regard to the police including its strength, its manner of recruitment and other matters incidental thereto.

(5) The argument of the counsel for the applicant was that the Act creating a force of armed constabulary is not covered by item 3 of the Provincial list of the Government of India Act, 1935. The functions and duties to be performed by the Armed constabulary are not police functions. The functions of the police are enumerated in the Indian Police Act. On a close examination of the Act and the purpose underlying the Act, it cannot be said that the object of creating the force of armed constabulary was anything but the maintenance of internal peace and order. The Act came within the ambit of the word "Police". Therefore, force created under the Act, is not a combatant force like army.

(6) The contention of the applicant is that in the absence of any definition of the word "Police" given in the Government of India Act, it should be given the same meaning as is given to it in the Police Act of 1861. The word "Police" is defined in the said Act "including all persons who shall be enrolled under this Act." It is conceded that the word "Police" in its general sense connotes the "department of the Government or the civil force charged with duty to maintain internal peace and order." In interpreting the words used in the list given in Sch. 7, Government of India Act, 1935 it is an established principle that none of the items are to be read in a narrow or restricted sense.

Reference in this connection may be made to the case of — 'State of Bombay v. F. N. Balsara', AIR 1951 SC 318 (A), where it has been laid down that one of the principles for the interpretation of the items given in the list is that they are not to be read in a narrow or restricted sense. The second principle in interpreting the items in the list is that where there is a seeming conflict between an entry in List II and an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. A similar principle was laid down by their Lordships of the Federal Court in the case of — 'United Provinces v. Atiqa Begum', AIR 1941 FC 16 at p. 25 (B). There is, therefore, no force in the contention of the applicant that the U. P. Act of Armed Constabulary does not come within the ambit of the word "Police" used in the Provincial List.

(7) As regards the contention that the Act is 'ultra vires' in view of the provisions of Art. 14 of the Constitution, it is enough to point out that having regard to the nature of the subject-matter of the Act the armed constabulary is a valid and justifiable classification and the Act is fully supported on the principle of classification.

"It is well settled that a legislature which has to deal with diverse problems arising out of an infinite variety of human relations must of necessity have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate. Mere differentiation or inequality of treatment does not 'per se' amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary: that it does not rest on any rational basis having regard to the object which the legislature has in view." 'Ameerunnissa Begum v. Mahboob Begum', AIR 1953 SC 91 at p. 91 (C).

(8) Reference in this connection may be made to the cases of — 'Charanjit Lal v. Union of India', AIR 1951 SC 41 (D), — 'Ram Prasad v. State of Bihar', AIR 1953 SC 215 (E), — 'State of West Bengal v. Anwar Ali', AIR 1952 SC 75 (F) and the case of — 'Lachhman Das Kewalram v. State of Bombay', AIR 1952 SC 235 (G).

(9) In my judgment the U. P. Armed Constabulary Act is, 'intra vires' and the applicant has been rightly convicted under S. 7(c), U. P. Provincial Armed Constabulary Act (11 of 1948). As regards the sentence, the applicant was convicted by the Assistant Sessions Judge on 15-2-1954. He was arrested on 26-6-1953. He was not let out on bail throughout the trial and before the Sessions Judge in appeal. He has, therefore, been in jail from June 53 to February 1954 as an under-trial prisoner and from February 1954 up to the present day as a convict. He has, therefore, been in jail for more than a year and the ends of justice will be met if the sentence of imprisonment is reduced to the period already undergone. In other respects, the conviction of the applicant is maintained.

D.H.Z. Order accordingly.

(S) A.I.R. 1955 ALLAHABAD 372 (Vol. 42, C.N. 107)

RAGHUBAR DAYAL AND AGARWALA JJ.

(7-1-1955)

Swami Shantanand Sarswati, Appellant v. Advocate-General, U. P., Allahabad and others, Respondents.

Special Appeal No. 127 of 1954, against order of V. Bhargava J., D/- 5-8-1954.

(a) Constitution of India, Art. 226 — Distinction between quasi-judicial act and administrative or executive act — Consent of Advocate-General under S. 92, Civil P. C. — Act of giving

consent is merely administrative act — (Civil P. C. (1908), S. 92) — AIR 1954 Trav-C 331, Dissent. from.

The act of the Advocate-General in giving his consent to the institution of a suit under S. 92, Civil P. C., cannot be called a quasi-judicial act. It is merely an administrative or executive act. AIR 1954 Trav-C 331, Dissent. from. 8 Ind Cas 1160 (1) (Lah), Rel. on. (Para 10)

Section 92, or any other provision, of the Civil Procedure Code does not require the Advocate-General to hold any enquiry or to give an opportunity to the party to be affected of being heard. The rules framed for the guidance of the Advocate-General which are contained in the Legal Remembrancer's Manual, even if they are treated as statutory rules, do not make it incumbent upon the Advocate-General in all cases to give an opportunity to the party concerned of being heard. Further, the Advocate-General is not bound by the rules to act upon the report of the District Officer or to give his consent only on the basis of the facts and circumstances as determined upon the enquiry. He is at liberty to act upon his own pure discretion in spite of the report of the District Officer. Where an officer or other authority is not bound by any rule of law to hold an enquiry and to act strictly in accordance with the facts and circumstances of the case as they appear upon the enquiry, he cannot be said to be acting judicially or quasi-judicially. Even where he is directed to hold an enquiry — but where he is not bound to act in accordance with the facts and circumstances of the case — he merely acts in an executive or administrative manner. (Para 9)

Again, a judicial or quasi-judicial act must involve a decision as to the rights of the parties and must affect the interests of one or the other of the parties. In giving his consent under S. 92, Civil P. C., the Advocate-General is not expected to decide the rights of the contending parties. Even if he has to hold an enquiry, he is merely to see whether there is a 'prima facie' case that should be allowed to go to a Court of law. When he gives his consent to the institution of a suit, he does nothing more than this. By the consent which he gives for the institution of the suit, he does not affect the rights of the person against whom the suit is filed. That person has full opportunity to present his case before the Court in which the suit is filed. The Court is not to be influenced in deciding the case by the fact that the Advocate-General has given his consent to the institution of the suit. It is, therefore, not a case in which there is any decision about a dispute or a claim. (Para 10)

It may be that the Advocate-General will always be well advised to hold an enquiry either himself or through the District Officer as required by the rules after giving notice to the proposed defendants to the suit and to give his consent only when he finds a 'prima facie' case made out for the institution of the proposed suit. But this is merely a directive which can be said to be desirable and cannot be said to be binding as a matter of law. Case law discussed. (Para 11)

(Distinction between quasi-judicial act and administrative or executive act pointed out.)

Anno: Const. of India, Art. 226 N. 163, 164, 165.

AIR Com. Civil P. C., S. 92, N. 24; 1953 Mulla, S 92, P. 329 N "Consent of Advocate-General" (2 Pts. extra in N. 24 to S. 92 in AIR Com. — Part of topic dealt with in the note in Mulla discussed in N. 25 to S. 92 in AIR Com.)

AIR Com. Civil P. C., S. 92, N. 27; 1953 Mulla, S. 92 (Topic discussed in N. 27 to S. 92 in AIR Com., extra).

(b) Civil P. C. (1908), S. 92 — Enquiry by Advocate-General.

When consent has been recently given to a certain number of persons after due enquiry and investigation and if shortly afterwards a smaller number of those very persons ask for a fresh consent because some one of them has dropped out and is not prepared to join as plaintiff in the proposed suit and nothing new has happened in the interval, it would be a sheer waste of time and energy if a fresh enquiry were held. The Advocate-General would be justified in basing his decision upon the materials which were already placed before him on the previous occasion and to give his consent or to withhold it without holding any fresh enquiry. (Para 15)

Anno: AIR Com. C. P. C., S. 92 N. 27; 1953 Mulla S. 92 (Topic discussed in N. 27 in AIR Com. extra).

CASES REFERRED: Paras

(A) (V41) AIR 1954 Trav-C 331: ILR (1954) Trav-C 369 4, 12
(B) (V39) AIR 1952 All 63: 1952 All LJ 342 8
(C) (1924) 1924-1 KB 171: 93 LJ KB 390 8, 10
(D) (1931) 1931-2 KB 215: 100 LJ KB 760 8, 10
(E) (1909) 8 CLR 330 (Aus) 8
(F) (1931) 1931 AC 275: 100 LJ PC 55 8
(G) (1937) 1937-2 KB 309: 1937-2 All ER 726 8
(H) (1863) 14 CB (NS) 180: 143 ER 414 8
(I) (1878) 2 LR Ir 371 8
(J) (1890) 24 QBD 712: 59 LJ QB 250 8
(K) (1875) 10 CP 249: 44 LJ CP 139 8
(L) (1911) 1911 AC 179: 80 LJ KB 796 8
(M) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 8
(N) ('10) 8 Ind Cas 1160 (1): 104 Pun Re 1910 10
(O) (V17) AIR 1930 Mad 129: 53 Mad 223 11

S. N. Misra, for Appellant; J. Swarup, Hari Swarup and K. S. Sinha, for Respondents.

AGARWALA J.:

This is a special appeal from a judgment of a single Judge of this Court in a case under Art. 226 of the Constitution. The dispute relates to the succession to the mahantship of a math known as the Jotir Math. The Jotir Math is one of the four maths founded by the first Shankaracharya at the four corners of India, and is situated in Pauri Garhwal in this State. The other

maths are at Shringiri in Mysore, Gobardhan Peeth in Puri and Sharda Peeth in Gujerat. The Mahants of these maths are also called Shankaracharyas. The last Shankaracharya of Jotir Math was swami Brahmanand Saraswati who died on 20-5-1953. He was alleged to have executed a will, dated 18-12-1952, by which he had nominated as his successor to the mahantship of Jotir Math, as also to his personal properties, Swami Shantanand Saraswati, the appellant before us. Some persons, including respondents 3 to 6, were dissatisfied with the nomination of the appellant to the mahantship and they challenged the accession of the appellant to the mahantship of the math.

The four respondents — 3 to 6 — as well as one Swami Sarupanand made an application to the Advocate General on 25-11-1953, asking him to accord them permission to institute a suit under S. 92, Civil P. C. for some of the reliefs mentioned in that section against the appellant in respect of the properties pertaining to Jotir Math. On receipt of that application the Advocate General directed the Collector of Banaras to hold an enquiry and to submit his report to him. The Collector thereupon issued notice to the appellant and held an enquiry in which both sides adduced evidence before him and he reported that Swami Sarupanand and others, who wanted the consent of the Advocate-General to the institution of a suit under S. 92, Civil P. C., were not entitled to the permission sought. The Advocate General, however, came to a contrary decision and considered that permission should be granted to them and accordingly he granted the permission by an order, dated 29-1-1954.

Later on, Sarupanand, who himself claimed to be the senior-most disciple of the late Swami Brahmanand Saraswati and on that account to be entitled to succeed to the gaddi of Mahant, did not consider that he should himself be a party to that suit. The remaining four persons thereupon made a fresh application to the Advocate-General on 26-4-1954, for a fresh permission being granted to them. The Advocate-General granted them the required permission by an order, dated 29-4-1954. On this occasion no further enquiry was made by the Advocate-General as to whether he should grant the permission or not.

(2) Armed with the sanction of the Advocate-General respondents 3 to 6 filed a suit against the appellant under S. 92, Civil P. C. in the court of the District Judge of Banaras. The appellant thereupon made an application under Art. 226 of the Constitution in this Court praying that the sanction granted by the Advocate-General to the opposite parties may be quashed as the opposite parties had no interest in the math and further because no enquiry had been made by the Advocate-General before he granted the sanction and no opportunity was given to the appellant to show cause why the permission should not be granted. It was alleged that the Advocate-General was bound to act in a quasi-judicial manner in giving his consent under S. 92, Civil P. C. and that he was bound to make an enquiry which he did not do.

The learned single Judge before whom the matter came up for orders dismissed the application without issuing notice to the opposite parties. He based his decision on the ground that if the sanction granted by the Advocate-General was void the petitioner had a remedy of taking that plea in the suit which was pending in the court of the District Judge of Banaras and that, on the other hand, if the sanction of the Advocate General was not void and the plea relating to it could not be taken by him in the suit the order of the Advocate General could not be vacated by this Court in exercise of the powers vested in this Court under Art. 226 of the Constitution because this Court can issue a writ only if the order be void.

(3) In this appeal it has been urged that the reason given by the learned single Judge for rejecting the petition of the appellant was not sound in law. As we have, on hearing counsel, come to the conclusion that even on the merits, there is no force in the appeal, we have not considered it necessary to examine the validity of the reasoning of the learned single Judge.

Two points have been urged before us, first that under S. 92, Civil P. C. the Advocate General in giving his consent acts quasi-judicially and is, therefore, bound to make an enquiry after giving an opportunity to the parties affected by his consent and is also bound to act upon the materials produced before him as a result of the enquiry; and secondly that, in the present case, the Advocate General's order was void, inasmuch as there was no material before him to show that the applicants asking for his consent had any interest in the trust in respect of which the suit was sought to be filed.

(4) Upon the question whether the Advocate General acts quasi-judicially in giving his consent under S. 92, Civil P. C., learned counsel has referred to a decision of the Travancore-Cochin High Court viz., — 'Abu Backer v. Advocate-General of Travancore-Cochin State', AIR 1954 Trav-C 331 (A).

(5) In our opinion, the contention that the Advocate-General is bound to act quasi-judicially under S. 92, Civil P. C. is not sound. Section 92, Civil P. C., lays down that in the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, the Advocate General or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, etc. Where the Advocate General himself does not sue he may authorise two or more persons to sue under the section.

Three conditions have to be satisfied before the persons so authorised can sue: first that there is an express or constructive trust created for public purposes of a charitable or religious nature; secondly that there is an alleged breach of the trust, and thirdly that the persons suing have an interest in the trust. Over and above these, they must be armed with the sanction of the Advocate General.

The section does not lay down the procedure to be followed by the Advocate-General in giving

his consent. Part X, Civil P. C. containing Ss. 121 to 131 authorises the framing of rules for various matters under the Civil Procedure Code. Section 128 lays down in detail the matters for which rules may be framed. There is no provision for making any rules for the exercise of the discretion vested in the Advocate General under S 92.

It has not been shown to us whether the authorities described in Part X, Civil P. C. have made any rules relating to the exercise of the discretion vested in the Advocate General under S. 92, Civil P. C. The Government have no doubt made certain departmental rules which are embodied in the Legal Remembrancer's Manual. These rules and orders are not statutory inasmuch as they are not made in the exercise of the power conferred upon the Government by any law.

They are made for the proper exercise of the business, duties or powers conferred upon the Legal Remembrancer or the Advocate General. These rules are not rules of law in the sense that they can be enforced in a court of law. Any violation of these rules is a matter between the Government and the Legal Remembrancer or the Advocate General.

(6) Even a perusal of these rules shows that the Advocate General in giving his consent under S. 92, Civil P. C., is not bound to act quasi-judicially. These rules are contained in Chap. 17 of the Manual. Rule 386 requires that an application for permission under S. 92 shall be accompanied by a copy of the draft of the plaint proposed to be filed in Court. The applicants are also required to state how they have an interest in the trust.

Rule 387 requires that when the application is received by the Advocate General he shall,

> "unless he considers an enquiry unnecessary, forward it to the District Officer of the district in which the alleged trust property is situated, for enquiry and report as to whether the consent applied for should or should not be given."

Under R. 389 the District Officer is required to enquire into the matter either himself or cause such enquiry to be made by an officer not below the rank of a tahsildar and to report the result to the Advocate General with his opinion whether consent should be given or refused. It is also provided that such enquiry shall not take the form of a regular judicial enquiry and that a visit to the locality and an enquiry on the spot will in most cases expedite matters. Then, R 390 lays down that the Advocate General after considering the District Officer's report, shall decide whether the consent applied for should be given or withheld.

(7) It is clear, therefore, that even under the rules, it is open to the Advocate General not to order any enquiry at all when he considers such an enquiry to be unnecessary and it is also clear that the Advocate General is not bound by the opinion of the District Officer. The rules do not prescribe that notice shall in every case be given to the party against whom the suit is to be instituted or whether any—and if so what—opportunity shall be given to the parties in support of their cases during the course of the enquiry. The enquiry as is contemplated by the rules is a sort of enquiry which even in administrative or executive orders is very often made.

(8) The distinction between a quasi-judicial act and an administrative or executive act was dealt with at length by Agarwala J. in a decision reported in — 'Avadhesh Pratap Singh v. State of Uttar Pradesh', AIR 1952 All 63 (B). After considering the authorities on the point (e.g., — 'Rex v. Electricity Commrs.', (1924) 1 KB 171 (C); — 'King v. London County Council', (1931) 2 KB 215 (D); — 'Huddart, Parker and Co. Proprietary Ltd. v. Moorehead', (1909) 8 CLR 330 (E); — 'Shell Co. of Australia Ltd. v. Federal Commr. of Taxation', 1931 AC 275 (F); — 'Cooper v. Wilson', (1937) 2 KB 309 (G); — 'Cooper v. Board of Works, Wandsworth', (1863) 14 CB (NS) 180 (H); — 'R. v. Doublin Corpn.', (1878) 2 LR Ir 371 (I); — 'Hopkins v. Smethwick Local Board of Health', (1890) 24 QBD 712 (J); — 'Chheetham v. Manchester Corpn.', (1875) 10 CP 249 (K); — 'Board of Education v. Rice', 1911 AC 179 (L) and the decision of the Supreme Court in — 'Province of Bombay v. Khushaldas S. Advani', AIR 1950 SC 222 (M) it was held that

> "a quasi-judicial act requires that a decision is to be given not arbitrarily or in the mere discretion of an authority, but according to the facts and circumstances of the case, as determined upon an enquiry held by the authority after giving an opportunity to the party to be affected of being heard and whenever necessary leading evidence in support of his contentions. Whenever the authority is 'bound' (The Italics are ours (here in ' ')) to make a decision in this way, it acts judicially or quasi-judicially.
>
> The essential difference between an administrative or executive act on the one hand and a judicial and quasi-judicial act on the other is that while in the former case, the authority vested with the power to give a decision affecting the rights of others, may be bound to enter upon an enquiry, he is not bound to give a decision as a result of the enquiry, but may act in his discretion, in utter disregard of the result of the enquiry, in the latter case, such authority is 'bound' (The Italics are ours (here in ' ')) by law to act on the facts and circumstances, as determined upon the enquiry, in which a person to be affected is given full opportunity to place his case before the authority even though the decision of such authority, whether right or wrong, may be final and may not be liable to be challenged in a Court of law."

In the Report of the Ministers' Powers Committee (Command Paper 4060 of 1932), p. 73 (Sec. III, para. 3) as quoted in (1937) 2 KB 309 at pp. 340 and 341 (G), it was pointed out that

> "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of

the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2)" at least, i.e., the presentation of their case by the parties to the dispute and the ascertainment of the fact by means of evidence adduced by the parties to the dispute.

(9) As we have pointed out above, S. 92, or any other provision, of the Civil Procedure Code does not require the Advocate-General to hold any enquiry or to give an opportunity to the party to be affected of being heard. The rules framed for the guidance of the Advocate-General even if they are treated as statutory rules do not make it incumbent upon the Advocate-General in all cases to give an opportunity to the party concerned of being heard. Further, the Advocate General is not bound by the rules to act upon the report of the District Officer or to give his consent only on the basis of the facts and circumstances as determined upon the enquiry. He is at liberty to act upon his own pure discretion in spite of the report of the District Officer.

Where an officer or other authority is not bound by any rule of law to hold an enquiry and to act strictly in accordance with the facts and circumstances of the case as they appear upon the enquiry, he cannot be said to be acting judicially or quasi-judicially. Even where he is directed to hold an enquiry—but where he is not bound to act in accordance with the facts and circumstances of the case—he merely acts in an executive or administrative manner.

(10) Again, a judicial or quasi-judicial act must involve a decision as to the rights of the parties and must affect the interests of one or the other o the parties, (Vide the observations of Lord Atkin in — '(1924) 1 KB 171 at pp. 204 and 205 (C)' and of Slesser L. J. in — '(1931) 2 KB 215 at p. 243 (D)', wherein he analysed the conditions laid down by Atkin L. J. in — 'Rex v. Electricity Commrs. (C)').

In giving his consent under S. 92, Civil P. C. the Advocate General is not expected to decide the rights of the contending parties. Even if he has to hold an enquiry, he is merely to see whether there is a 'prima facie' case that should be allowed to go to a Court of law. When he gives his consent to the institution of a suit, he does nothing more than this. By the consent which he gives for the institution of the suit, he does not affect the rights of the person against whom the suit is filed. That person has full opportunity to present his case before the court in which the suit is filed. The Court is not to be influenced in deciding the case by the fact that the Advocate General has given his consent to the institution of the suit. It is, therefore, not a case in which there is any decision about a dispute or a claim.

For all these reasons we think that the act of the Advocate General in giving his consent to the institution of a suit under S. 92, Civil P. C., cannot be called a quasi-judicial act. In our opinion, it is merely an administrative or executive act. The act was described as administrative in — 'Dhian Das v. Jagat Ram', 8 Ind Cas 1160 (1) (Lah) (N).

(11) It may be that the Advocate-General will always be well advised to hold an enquiry either himself or through the District Officer as required by the rules after giving notice to the proposed defendants to the suit and to give his consent only when he finds a 'prima facie' case made out for the institution of the proposed suit as was held in — 'Pitchayya v. Venkatakrishnamacharlu', AIR 1930 Mad 129 (O). But this is merely a directive which can be said to be desirable and cannot be said to be binding as a matter of law.

(12) The view taken by the Travancore-Cochin High Court in AIR 1954 Trav-C 331 (A) that the Advocate-General acts quasi-judicially in giving his consent under S. 92, Civil P. C., does not, with all respect, appear to us to be sound in law. After discussing some of the cases which have already been mentioned by us earlier, the learned Judges went on to observe:

"The petitioners in the present case have come forward as persons having such an interest in the public trust in question. As beneficiaries they have an undoubted right to see that the trust is properly administered. They have also the right, in cases of mal-administration to institute a suit seeking the aid of the Court in the matter of setting matters right. Section 92, Civil P. C., has placed a restraint on the exercise of this right by persons having an interest in the trust. Clause 2 of the section lays down that such persons can exercise their right to institute a suit for the reliefs mentioned in Cl. 1 only with the consent in writing of the Advocate General. Thus it is obvious that the decision of the Advocate General, whether the consent asked for should be given or not, is a decision affecting the rights of these persons. When the consent is sought for, it is the duty of the Advocate General to come to a definite decision as to whether such consent should be given or not."

It may be observed that S. 92, Civil P. C., does not deal with cases of personal rights of a party who seeks the consent of the Advocate-General. Such party proposes to file a suit not for his own personal benefit but in the interests of the public at large. He has an interest along with others. If he has a special interest of which protection is sought, there is nothing in law which prevents him from instituting a suit without the consent of the Advocate General for the protection of that special interest. The law contemplates that when a suit is to be instituted on behalf of the public at large the Advocate General is the proper custodian of the public interest unless he thinks that some other persons may be authorised to act on behalf of the public. We do not think that the decision of the Advocate General whether the consent should or should not be given is a decision affecting any special right of the persons seeking the permission.

(13) Then the learned Judges of the Travancore-Cochin High Court went on to consider whether the decision is purely a matter depending upon his opinion based on his subjective satisfaction as to whether there is necessity to institute a suit as contemplated or whether he has to arrive at a decision on that question after a judicial consideration of the grounds urged in support of the request for sanction or consent, and they observed that these are matters requiring decision after due investigation. But the mere fact that some sort of investigation has to be made does not necessarily make the decision or the act of the authority concerned a judicial or quasi-judicial decision or act. Their Lordships further observed:

"Even though the section does not specify the manner and the extent of the investigation in these directions, it is obvious that the section contemplates the necessary investigation and inquiries being made by the Advocate General before he finally decides whether the sanction or consent applied for should be given or not. It is equally obvious that he has to make a judicial approach to the question in controversy and then to arrive at a decision after due consideration of the facts and the evidence made available to him."

With respect we do not think that the section requires any such thing being done by the Advocate General. The Advocate General may on such materials as may be made available to him arrive at his own conclusion and give or withhold the consent and it is not a matter to be investigated in a court of law whether the consent was given on proper materials after holding a proper enquiry or not.

(14) The next point urged was that, in the report of the District Officer, it was stated that the applicants had no personal interest in the trust. The Advocate General was not bound to accept the conclusion reached by the District Officer. The full materials upon which the Advocate General based his opinion have not been placed before us by the appellant. Even a copy of the draft of the proposed plaint has not been supplied to us. Nor are we aware what other materials the Advocate General had before him when he gave his consent to the institution of the suit.

(15) It was urged that though in the first instance when the application was made by five persons a regular enquiry was held and an opportunity was given to the appellant to appear and put forward his case before the District Officer, no such enquiry was made and no such opportunity was afforded to the appellant when the second petition by the four respondents 3 to 6 was made on 26-4-1954, and the consent was given within three days only. There is no force in this contention.

When consent has been recently given to a certain number of persons after due enquiry and investigation and if shortly afterwards a smaller number of those very persons ask for a fresh consent because some one of them has dropped out and is not prepared to join as plaintiff in the proposed suit and nothing new has happened in the interval, it would be a sheer waste of time and energy if a fresh enquiry were held. The Advocate General would be justified in basing his decision upon the materials which were already placed before him on the previous occasion and to give his consent or to withhold it without holding any fresh enquiry.

(16) For all these reasons we are of opinion that the petition of the appellant under Art. 226 of the Constitution was rightly dismissed by the learned single Judge. We accordingly dismiss this appeal. The Advocate General and respondents 3 to 6 will have their separate sets of costs. We assess the costs of the Advocate General at Rs. 160 and the same amount as the costs of respondents 3 to 6.

V.B.B. Appeal dismissed.

(S) **A.I.R. 1955 ALLAHABAD 377** (Vol. 42, C.N. 108)

MOOTHAM AND M. L. CHATURVEDI JJ.

(22-12-1953)

The State, Applicant v. Padma Kant Malviya and another, Opposite-Party.

Misc. Case No. 4 of 1950.

(a) Criminal P. C. (1898), S. 145 — Dispute regarding right to pass through certain wicket — Attachment of wicket — Propriety.

Section 145 authorises certain Magistrates, including a Sub-Divisional Magistrate, to attach the subject of dispute and in certain circumstances to declare one of the parties to be entitled to possession thereof, provided he is satisfied that a dispute likely to cause a breach of the peace exists concerning "any land or water or the boundaries thereof" as defined in this section. The only fact which the Magistrate has to determine is which party was in possession of the land or water on the date on which he takes cognizance of the case. He is not concerned with the legal title of either party to the subject matter of the dispute. Where the dispute was with respect to the right to pass through a certain wicket at any hour of the day or night, and the real question was whether the tenant was entitled to a right of way through this wicket at all hours no question of possession arises and the wicket cannot be attached. (Paras 4, 5)

Anno: Cr. P. C., S. 145 N. 29.

(b) Contempt of Courts Act (1952), S. 3 — Publication of pamphlet by one of parties during pendency of proceeding under S. 145, Cr. P. C. — Nothing in pamphlet likely to prejudice decision of question likely to arise — No contempt.

Where there was a dispute regarding the tenant's right of way through a certain gate belonging to the landlord, during all the hours of the day and night, the proceedings under S. 145 were started and the wicket was attached, and during the pendency of the proceedings, the landlord had published a pamphlet describing how and why the wicket was being closed and that the tenant's right to pass through it was not denied, and

there was nothing in it which could be said to be likely to prejudice the decision of any question that could properly arise in the pending proceedings:

Held that the publication of the pamphlet did not constitute contempt. (Para 6)

Govt. Advocate C. B. Misra, for Applicant; S. C. Khare, for both, for Opposite Party.

MOOTHAM J.:

This is an application filed by the City Magistrate, Allahabad, against the opposite parties Sri Padma Kant Malviya and Sri Ganesh Prasad, for taking such proceedings for contempt of the Court of the City Magistrate, as this Court may deem fit.

(1) The facts of the case briefly are that Sri Padma Kant Malviya, opposite party No. 1, owns two houses situated in the same compound in Lukerganj, Allahabad. He himself is residing in one of them and had let out the other to Sri Harjiwan Das Nagar, a dealer in fountainpens. The main gate in the boundary wall of the compound is towards the south, and there are two gates towards the west. One of these two gates used to remain closed but the other one, which is nearer the residence of Sri Harjiwan Das Nagar, used mostly to remain open for egress and ingress. Close to this gate is the bungalow of Sri Baij Nath Kapoor, who in August 1949 was the President of the Allahabad City Congress Committee. Sri Nagar was a friend of Sri Kapoor, and the two were accustomed to visit the houses of each other using for this purpose the gate opposite the latter's house.

(2) On 24-8-1949 there appears to have been some trouble over the closing of this gate, or wicket as it may more appropriately be called. On 25th of August Sri Nagar moved an application under S. 145, Criminal P. C. against the opposite party No. 1, alleging that there was a dispute concerning this wicket. A report from the police was called for, an order for the attachment of the gate was made, and a date was fixed for the production of evidence by both the parties. The order attaching the gate was served on the opposite party No. 1 on 25-8-1949. It is alleged that subsequent to this date a pamphlet was printed and published in Hindi with the title 'congress janon se ek appeal' (an appeal to the members of the Congress).

This pamphlet purported to describe in some detail a dispute that took place at about 7-30 in the evening of 24-8-1949 between Sri Baij Nath Kapoor and Sri Dhara Singh, Sub-Inspector in charge of the City Kotwali, on the one hand and the opposite party No. 1 on the other. It also purported to describe another dispute that took place at about 11 in the night on the same date, when it is said that Sri Kapoor, Sri Nagar and Sri Dhara Singh had some further talk with the opposite party No. 1.

It is alleged in this pamphlet that Sri Baij Nath Kapoor was abusing his position as President of the City Congress Committee, that he had taken the Sub-Inspector of police along with him, and that he and Sri Nagar had used strong and unbecoming language against the opposite party No. 1, whose conduct on both these occasions was that of a gentleman. This pamphlet was printed at the Abhudya Press of which the opposite party No. 1 is the proprietor and keeper and the opposite party No. 2 is the Manager.

(3) Sri Nagar moved the learned City Magistrate on 2-9-1949 to report the matter to this Court, as the contents of the pamphlet purported to affect the decision of the case which had been instituted at his instance under S. 145 of the Code and was then pending before the City Magistrate. A copy of the pamphlet was sent to the learned City Magistrate himself on 3-9-1949 in a cover on which the address of the City Magistrate is said to have been in the handwriting of the opposite party No. 1.

The learned City Magistrate was not prepared to accept the contention of the opposite parties that the pamphlet was written before the institution of the case, because it contained a reference to news item published in the issue of the Leader dated 28-8-1949. The learned Magistrate thought that the pamphlet contained a version of the happenings of an event which was 'sub judice', and that its publication was likely to prejudice the fair hearing of the case. He has made special reference to the passages starting with the last paragraph on page 4 of the pamphlet which, according to him, were calculated to prejudice the minds of the witnesses & of the general public against the merits of a pending judicial proceeding. In his opinion the opposite parties were guilty of the commission of a serious type of contempt of Court.

(4) We have listened carefully to the argument of learned counsel for the applicant, but he has failed to satisfy us that it had been proved in this case that there was any matter contained in the pamphlet which tended to give a version, favourable to the opposite parties, of any matter which was in issue in the proceedings before the learned Magistrate. Section 145, Criminal P. C. authorises certain Magistrates, including a Sub-Divisional Magistrate, to attach the subject of dispute and in certain circumstances to declare one of the parties to be entitled to possession thereof, provided he is satisfied that a dispute likely to cause a breach of the peace exists concerning "any land or water or the boundaries thereof" as defined in this section. The only fact which the Magistrate has to determine is which party was in possession of the land or water on the date on which he takes cognizance of the case. He is not concerned with the legal title of either party to the subject matter of the dispute.

(5) In the present proceedings we find it difficult to understand how a question of possession arises. The opposite party No. 1 is the owner of the two houses and also of the gates and wickets in the compound, and, on the material before us, there does not appear to have arisen any dispute as regards the possession of the gates. The only dispute appears to have been whether one of the wickets in the west was to be left open at all times, so that Sri Nagar may not be put to the inconvenience of taking the longer route by passing through the main gate towards the south. The dispute was with res-

pect to the right of Sri Nagar to pass through the wicket towards the west at any hour of the day or night, and the real question appears to have been whether he was entitled to a right of way through this wicket at all hours.

(6) Assuming (but not deciding) that a dispute concerning a gate is a dispute regarding land within the meaning of S. 145 the contents of the offending pamphlet did not, in our opinion purport to show anything concerning the possession of any party over the wicket. On the other hand, they go to show that the opposite party No. 1 leaves the wicket gate open throughout the day, and that at night he hands over the key to a servant of his in order that it may be opened whenever there was need for doing so.

Neither did the pamphlet purport to say that the opposite party No. 1 had a right to keep the wicket gate closed whenever he liked. It only gave a justification for keeping it generally closed in the night, taking care at the same time to see that nobody was inconvenienced by locking up the wicket gate in the night. There was thus nothing in this pamphlet which in our opinion, could be said to be likely to prejudice the decision of any question that could properly arise in a case under S. 145 of the Code.

(7) The learned Deputy Government Advocate, who appeared for the applicant, conceded that on the evidence on the record in this case he was not able to show as to what matter in dispute in the proceedings under S. 145 was likely to be prejudiced by the printing and publication of the pamphlet; but he asked that the record of the proceedings of the case be summoned from the Magistrate's Court.

We refused to grant this prayer because the case has been pending in this Court for a very long time, and the applicant should have been ready with all the material that he wanted to produce. No satisfactory explanation was offered for not summoning the record before the date of the final hearing, nor are we satisfied that any useful purpose would be served by summoning this record.

In our view proceedings, trivial in themselves, have been given undue prominence, and we do not think that this is a case in which any action should be taken against the opposite parties.

(8) We, therefore, dismiss the application, but in all the circumstances of the case, make no order as to costs.

R.G.D. Application dismissed.

(S) A.I.R. 1955 ALLAHABAD 379 (Vol. 42, C.N. 109)

ASTHANA AND ROY JJ. (3-2-1955)

Dakhi Singh, Appellant v. The State, Respondent.

Criminal Appeal No. 1316 of 1954, against Judgment of 1st Temporary Civil and Sessions J., Allahabad, D/- 22-9-1954.

(a) Penal Code (1860), Ss. 300, Exception (3), 302 and 304 — Police constable while attempting to rearrest escaped thief firing at him but hitting another person — Offence.

A suspected thief who had been arrested by the Police Constables escaped from the running train. One of the Constables pursued him with a view to effect his re-arrest and when he was not in a position to apprehend him, he fired at him but in that process he hit the fireman of the engine and killed him.

Held that the case was covered by Exception 3 to S. 300, Penal Code. The Constable no doubt exceeded the powers given to him by law and caused the death of the fireman by doing an act which he, in good faith, believed to be lawful and necessary for the due discharge of his duty. In such circumstances the offence that was committed was culpable homicide not amounting to murder punishable under S. 304, Part II, Penal Code and not under S. 302. (Para 14)

Anno: Penal Code, S. 300 N. 25.

(b) Criminal P. C. (1898), S. 46 — Right to shoot escaping thief.

Where a suspected thief who has been arrested escapes, the police officer in effecting his re-arrest has no right to shoot him to death. (Para 9)

Anno: AIR Com. Cr. P. C., S. 46 N. 5; ('53) Mitra, S. 46 P. 124 N. 110 "All means" (3 Pts. extra in AIR Com. note — 1 Pt. extra in Mitra).

(c) Penal Code (1860), Ss. 76 and 79 — Police officer in attempting to rearrest escaped thief firing at him but hitting and killing another person.

Where a suspected thief who has been arrested escapes and the Police officer finding that he is not in a position to apprehend him fires at him but in so doing hits another person and kills him, he cannot plead justification either under S. 76 or S. 79. (Para 9)

Anno: Penal Code, S. 76 N. 1.

(d) Criminal P. C. (1898), E. 342 — Circumstance in prosecution evidence raised against accused — Duty to put it to accused.

It is of highest importance, that, when a certain circumstance appearing in the prosecution evidence is to be raised against an accused and certain inferences are intended to be drawn from it, that circumstance must be specifically put to the accused in order to elicit explanation, if any, from him. (Para 12)

Anno: AIR Com. Cr. P. C., S. 342 N. 9; 1949 Mitra, S. 342, P. 1046 N. 977 "Time for examination" (Conflicting propositions given pell mell in Mitra — Conflicts not well indicated and repetition of similar propositions in Mitra).

Vishwa Mitra, for Appellant; Sri Ram Dy. Govt. Advocate, for Respondent.

ROY J.:

This is an appeal by Dukhi Singh who has been convicted by the learned I Temporary Civil and Sessions Judge of Allahabad under S. 302, I. P. C. and has been sentenced to death. Along with the appeal there is the usual reference by the learned I Temporary Civil and Sessions Judge for the confirmation of the sentence of death.

(2) On the night between the 28th and 29th of July, 1953, a mixed train, designated as Up Train No. 375, while going from Banaras Cantt. Station to Allahabad, stopped at Handia Khas railway station at 10.59 p.m. On that train there was the Railway Protection Police consisting of Kashi Singh Havildar Guard and three constables, Chingan Ram, Deomani Singh and Dukhi Singh the appellant. Deomani got down at Katka station for taking water and he had left his rifle together with the cartridges in the compartment which was meant for the R. P. P. The train left Katka station and Deomani could not catch it, with the result that he was left behind there.

(3) At Handia Khas Station Dukhi Singh noticed that a person by name Nanka, who was the servant of Karamat thekedar, was standing near a goods wagon under suspicious circumstances. Karamat thekedar held a contract for the collection of burning cinders, which he was to remove through the aid of his men from the railway track so that the sleepers on the raliway track may not get burnt. There existed previous complaints of theft at Handia Khas station and there was information at the Thana that sugar bags were being tampered with from time to time at that station and in that connection one of the railway empoyees had been suspended. It was in that background that Dukhi Singh the appellant thought that the man whom he had found near the goods wagon was a thief. He arrested him and he took him to his compartment. In that process Rawil, the engine driver, and one fireman Ram Manohar pleaded before him that the man was not a thief but was the agent of the thekedar and he should be let off. Dukhi Singh, however, did not agree and he took him to his compartment.

The train started from Handia Khas station at 12 minutes past 11 in the night and when it had moved a few steps the arrested man jumped down from the train from its off side, namely, the left side. As soon as he escaped Dukhi Singh followed him with the rifle. Kashi Singh, the Havildar Guard, fired a shot from a Very-light Pistol which he had with him. It produced temporarily a flood of light. Dukhi Singh chased the man. The man came from the front of the engine to the right side of the train. It was alleged that Dukhi Singh also came from the same direction and demanded as to where was the driver who had concealed the thief and he further held out that he would shoot him. Ram Manohar fireman got down from the train and was standing near the foot-board of the engine. He is said to have asked Dukhi Singh as to why he would shoot the driver. It was contended that thereupon the appellant shot Ram Manohar with his rifle and Ram Manohar fell by the side of the foot-board wounded. It was further alleged that Dukhi Singh aimed the rifle at the driver and the other fireman, but meanwhile Havildar Kashi Singh came there, caught hold of the rifle and disarmed him. The Assistant Station Master and the Railway Guard meanwhile arrived. It was contended that Ram Manohar told the Guard that the R. P. P. constable had shot him and, on enquiry by the railway guard, the appellant told him that the driver had harboured the thief and had allowed him to escape and so he shot at Ram Manohar fireman.

(4) The Assistant Station Master gave information to the police at police station at Handia as well as to the doctor. The Circle Inspector, who was staying at Handia police station, came along with the sub-inspector of police and some constables and he took the dying declaration of Ram Manohar at 1.15 in the night, — Ram Manohar's condition having been taken to be serious. The Tehsildar of Handia was also informed and he too arrived a little later. After his arrival, he took down another dying declaration by Ram Manohar at 1.30 in the night. On the basis of the dying declaration taken by the Circle Inspector Sri Fida Husain, a first information report was lodged at police station Handia the same night. Ram Manohar was given first aid in the train itself and he was later on removed to the Colvin Hospital at Allahabad where he died on 29-7-1953. An inquest was held. The dead body was sent for post-mortem examination.

(5) The post-mortem examination was conducted on 29-7-1953, at 4 p.m. It disclosed that he had a gun-shot wound of entry, circular in diameter ¼" x abdominal deep, blackened on the margin, at the right side, 2½" above the umbilicus. There was also a lacerated wound of exit 2" x 1" x abdomen deep at the back just to the left of third and fourth lumbar vertebrae. The third and fourth lumbar vertebrae were fractured. The peritoneum was punctured. The transverse colar was also punctured at 2 places. In the opinion of the doctor who conducted the post-mortem examination death was due to shock and haemorrhage on account of the injuries noted above. In his evidence in court the doctor was further of opinion that the bullet must have been fired from a distance of about 10 or 12 feet or at the most from a distance of within 40 or 50 steps.

(6) The police had taken the rifle in question and it was sent to the expert for examination. The expert evidence was to the effect that it had been used at the time alleged by the prosecution. The police recovered blood-stained earth from the place of occurrence, prepared the site-plan and after the necessary inquiry challaned the accused.

(7) In defence the appellant pleaded that he had been given orders by Havildar Kashi Singh to shoot at the thief and that he did so in discharge of his duty. He further contended that it was a case of pure accident that instead of hitting the thief he hit the fireman.

(8) The prosecution relied upon Ex. P1 recorded by Circle Inspector Fida Husain, and also the dying declaration Ex. P32 recorded by the Tehsildar Magistrate. The prosecution further relied upon the evidence of Rawil P. W. 3 who was the driver of the train, Mohammad Nazir Khan P. W. 4 the second fireman on the train, Chingen Ram P. W. 19 a constable of the R. P. P. who was on the train, Bharat Misra P. W. 2 the guard of the train, Sri Fida Husain Circle In-

spector P. W. 1, Sri R. N. Roy P. W. 24 the Tehsildar Magistrate and certain other formal witnesses. Kashi Singh the Havildar Guard of the R. P. P. was examined by the learned Temporary Civil and Sessions Judge under S. 540, Criminal P. C. It was in the evidence of sub-inspector Anwar Ahmad P. W. 21, who was then posted as station officer at police station Handia, that in those days there was complaint at the Thana that sugar bags were being tampered with at Handia railway station and that in that connection a railway employee was already under suspension. The anxiety on the part of the appellant to arrest a thief can, therefore, well be imagined. It is not disputed, in fact it was stated by all the principal witnesses for the prosecution, that after the train had stopped at Handia Khas station a man of the contractor was found near a goods wagon. The appellant considered that since he was there under suspicious circumstances he may be a thief. Accordingly he arrested him and while he was taking him to the compartment meant for the R. P. P. on the train, the deceased along with the driver of the train pleaded that the man was not a thief and that he should be let off. The appellant did not agree to it. The arrested man was taken inside the compartment and when the train moved from the station the man jumped down the train from the off side and tried to escape. He was followed by the appellant. Havildar Kashi Singh fired with the Very-light pistol. The appellant chased that man. The man who had escaped came in front of the train and then turned towards the right side of the train, and so did the appellant.

(9) The appellant's contention was that he had been given orders by the Havildar to shoot at the thief. That contention finds some measure of support from the statement of Kashi Singh Havildar, which was taken by Thakur Ram Pratap Singh, the S. D. H., Handia, in a magisterial inquiry conducted by him. Kashi Singh, however, stated in the Court of Sessions that although in the magisterial inquiry he had stated that he had given orders to shoot, that statement was not a true statement and had been given by him under entreaties by the appellant. Whether that order had been given by him or not does not assume any great importance in the case, because in either event the appellant could not have been entitled to shoot dead the thief or the fireman. In this connection, it would be necessary to refer to S. 46, Criminal P. C. That section lays down that when a police officer arrests a person and such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, such police officer may use all means necessary to effect the arrest; but this does not give a right to cause the death of the person unless he is accused of an offence punishable with death or transportation for life.

In the present case the man who had been arrested was suspected to be a thief. He could not have been accused of an offence punishable with death or with transportation for life. Consequently in effecting his arrest after the escape the police officer had not had the right to cause his death. Reference in this connection may also be made to Ss. 76 and 79, Penal Code. Section 76 provides that nothing is an offence which is done by a person who is, or who, by reason of a mistake of fact and not by reason of a mistake of law in good faith, believe himself to be bound by law to do it. Section 79 lays down that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law in doing it. Under these two sections, it was not open to the appellant to plead justification to the extent that he was entitled to shoot the person dead, or by reason of a mistake to shoot the fireman dead, mistaking him to be a thief.

(10) Coming now to evidence, the principal witnesses in the case are Rawil the engine driver and Mohammad Nazir Khan, the other fireman. Their statement in the court below was that after the arrest of the agent of the thekedar, Ram Manohar and the engine driver were pleading with the appellant that the person arrested was known to them and he was not a thief and that he should be let off. The appellant told them that they had no business to interfere, and he took the arrested man to the railway compartment. The train thereafter started and when it had gone a few steps, there was a shot from the Very-light pistol. The train was then stopped. Both these witnesses stated that thereafter the appellant came from the off-side and turning from the front of the engine came to the right side of the engine; that the appellant said "where is the driver, I shall shoot him"; that thereupon Ram Manohar fireman, who had got down from the engine, asked him as to why he should shoot the driver; that upon the appellant shot at Ram Manohar with his rifle from a distance of about 8 paces and Ram Manohar fell down injured. They further stated that the appellant pointed the rifle towards Rawil driver and fireman Mohammad Nazir Khan and they concealed themselves inside the engine and escaped. This part of the story did not find support from either of the two dying declarations stated above.

In the first dying declaration Ex. P. 1, recorded by the Circle Inspector, it was mentioned that the constable of the R. P. P. had told the deceased that he had harboured a thief, whereupon the deceased replied that he had not done so, and that thereafter the appellant told the deceased that he will shoot him down, upon which the deceased retorted that why should he shoot him down, and then the fire was made. The version of the story given by the fireman and by the engine driver was an improvement over the story given in the dying declaration itself. In the second dying declaration Ex. P-32, recorded by the Tehsildar Magistrate, no part of that conversation had been stated. In the second dying declaration it was stated that a constable of the R. P. P. came and told the deceased "You are a thief", and he fired and the bullet hit the deceased on the abdomen. We find considerable difficulty in accepting the story told by the fireman and by the engine driver in court, when they said that it was a deliberate

act on the part of the appellant when he shot at the deceased fully knowing that he was the fireman and not the alleged thief. On the contrary, in the dying declaration Ex. P-1 we find it having been stated that the servant of the thekedar was standing near the engine when the shot was made. The second dying declaration Ex. P-32 aslo gives an indication that when the bullet was discharged the appellant was under the impression that he was shooting at the thief.

(11) On the question as to the distance from which the shot was fired, there was some divergence in the evidence. Two of the witnesses said that the shot was fired at from a distance of about 10 or 12 feet. The medical evidence was to the effect that the shooting had been done from a distance of about 10 or 12 feet. The doctor later on modified that statement and stated that it could have been from within a range of 40 or 50 steps. In the site-plan that was prepared by the investigating officer it was mentioned that the place from where the appellant fired the rifle was 40 steps away from the place where the fireman fell down dead. We do not know how this factor was incorporated in the site-plan because we do not find anything in the statement of the witnesses to confirm this. At any rate, the medical evidence gives some support to the suggestion that the firing had been done from a distance of about 40 or 50 steps at the most. If that computation of distance is accepted as correct, the theory that the appellant aimed at the alleged thief when he was somewhere near the deceased and he missed the aim and hit the deceased cannot completely be ruled out.

(12) We have next the statement of Sri Bharat Misra, the guard who was on duty on that train. Sri Bharat Misra refers to an alleged extra-judicial confession made by the appellant before him almost immediately after the occurrence. Bharat Misra stated that the appellant was standing at a distance of 4 or 5 paces from Ram Manohar; that Bharat Misra asked the appellant as to why he had shot at Ram Manohar, and the appellant told him that the driver had harboured a thief and had allowed him to run away and it was on that account that he had shot at Ram Manohar. This statement might give the impression that it was the deliberate act on the part of the appellant when he hit Ram Manohar as a measure of retaliation, thinking that Ram Manohar and the driver of the train had been instrumental in the escape of the alleged thief. That part of the story was not, however, confirmed by any of the other witnesses who were produced in the case. Moreover, that alleged extra-judicial confession was not even put to the appellant when he was examined by the learned Temporary Civil and Sessions Judge. It is of highest importance that, when a certain circumstance appearing in the prosecution evidence is to be raised against an accused and certain inferences are intended to be drawn from it, that circumstance must be specifically put to the accused in order to elicit explanation, if any, from him. In the circumstances stated above we are not inclined to attach any importance to the alleged extra-judicial confession, of which Sri Bharat Misra the guard has given evidence.

(13) From a consideration of the totality of circumstances and the evidence in the case we are inclined to think that after the arrested man had escaped from the running train the appellant pursued him with a view to effect his re-arrest and, when he was not in a position to apprehend him, he fired at him and in that process he hit the deceased fireman.

(14) The question then would be what offence is made out. We have given our anxious thought to this question and we are of opinion that the case would be covered by Exception 3 to S. 300 of the Indian Penal Code. That Exception provides that culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, thinks to be lawful and necessary for the due discharge of his duty as a public servant without ill-will towards the person whose death he has caused. In the present case there was no ill-will between the appellant and the deceased. The appellant was a public servant and his object was the advancement of public justice. He no doubt exceeded the powers given to him by law, and he caused the death of the fireman by doing an act which he, in good faith, believed to be lawful and necessary for the due discharge of his duty. In such circumstances the offence that was committed was culpable homicide not amounting to murder punishable under S. 304, Part II, Penal Code. Our conclusion, therefore, is that the appellant should have been convicted under S. 304, Part II, instead of under S. 302, I. P. C.

(15) For reasons stated above we allow the appeal to this extent that we set aside the conviction and sentence of the appellant under S. 302 and convict him under S. 304, part II of the Indian Penal Code and we sentence him to seven years' rigorous imprisonment which we consider adequate in the circumstances of the case. The reference is rejected.

D.S.P. Appeal partly allowed.

A.I.R. 1955 ALLAHABAD 382 (Vol. 42, C.N. 110)

RAGHUBAR DAYAL AND ASTHANA JJ.

(22-12-1954)

Om Prakash, Judgment-Debtor-Appellant v. Sm. Tahera Begam and others, Decree-holders-Respondents.

Ex. First Appeal of 1954, against order of Civil J., Mazaffarnagar, D/- 1-12-1954.

Civil P. C. (1908), O. 21, Rr. 11, 21, 30 and S. 38 — Simultaneous executions — Non-mentioning of result of previous application — Effect.

There is nothing in the Code of Civil Procedure or in any other law which lays down positively that several applications for execution of a decree cannot be filed simultane-

ously. Unless such a right to apply for execution of a decree in any of the modes permissible by law is not definitely restricted a bar should not be inferred from the requirements of the contents of an application for execution given in R. 11; for, the bar to a certain legal right should be clearly laid down by statute and is not to be inferred. In a case where it is to be inferred there should be no other conclusion possible except the conclusion that the other provisions necessarily imply that such a bar should come in existence. There is nothing in the provisions of O. 21, R. 11(2), Cl. (f) to lead to such an inference. (Para 3)

In fact the requirements of cl. (f) cannot be complied with, with respect to the result of the previous execution application in case simultaneous applications for the arrest of the judgment-debtor and for the realisation of the decretal amount by attachment of property were made under R. 30. There is no exception mentioned in R. 11 with reference to the applications which may come under O. 21, R. 30, Civil P. C. Clause (f) of R. 11 does not mean that in case the result of a previous application cannot be noted on account of its not coming to an end the non-mentioning of the result would either make the application bad in law or must lead to the result that the second application must be considered to be barred by law during the pendency of the previous application. (Para 3)

The two modes of execution under R. 30 are mentioned as alternative to other reliefs which are available to the decree-holder. It is not laid down therein that those two modes could be availed of only when no relief is being sought in any other manner. Rule 21 which precedes R. 30 is general in its terms and is not restricted to the decrees for the payment of money; it contemplates that execution of a decree against the person and property of the judgment-debtor can proceed simultaneously. In fact its implication is that in the absence of such a rule the Court may not have had any discretion to refuse the simultaneous applications for execution by arrest of the judgment-debtor and by the attachment and sale of his property. (Para 4)

Hence, it cannot be held that the provisions of O. 21, R. 11(2), Cl. (f), Civil P. C. bar simultaneous execution applications. Several execution applications can be in progress at one and the same time. (Para 5)

Anno: C. P. C., S. 38 N. 10; O. 21 R. 11 N. 9; R. 21 N. 1; R. 30 N. 4.

CASES REFERRED: Paras

(A) (V4) AIR 1917 All 129: 15 All LJ 532 5
(B) (V23) AIR 1936 All 655: 162 Ind Cas 51 5
(C) (V28) AIR 1941 Bom 37: ILR (1941) Bom 89 5

Ram Lal Anand, for Appellants.

RAGHUBAR DAYAL J.:

This is an appeal against the dismissal of the judgment-debtor's objection to the maintainability of a second application for execution during the pendency of the first application for execution. We have heard learned counsel for the appellant and are of opinion that there is no force in this appeal.

(2) Learned counsel for the appellant refers us to O. 21, R. 11 (2) Cl. (f) which provides that every application for execution of a decree will state whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results. It is contended that the necessity of noting the result of the previous execution application means that so long as one execution application has not been finally disposed of no second execution application can be filed, and that therefore this provision of the Code of Civil Procedure operates as a bar to the presentation of a second execution application during the pendency of the first. It is further submitted that when the law contemplated simultaneous execution of a decree in several ways it provided for it and reference in this connection is made to R. 30 of O. 21, Civil P. C. which is:

> "Every decree for the payment of money including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both".

Rule 21 of this Order is:

> "The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor".

(3) There is nothing in the Code of Civil Procedure or in any other law which lays down positively that several applications for execution of a decree cannot be filed simultaneously and it appears to us that unless such a right to apply for execution of a decree in any of the modes permissible by law is not definitely restricted such a bar should not be inferred from the requirements of the contents of an application for execution. The bar to a certain legal right should be clearly laid down by statute and is not to be inferred. In a case where it is to be inferred there should be no other conclusion possible except the conclusion that the other provisions necessarily imply that such a bar should come in existence. There is nothing in the provisions of O. 21, R. 11 (2), Cl. (f) to lead to such an inference. In fact it is clear that the requirements of this clause cannot be complied with with respect to the result of the previous execution application in case simultaneous applications for the arrest of the judgment-debtor and for the realisation of the decretal amount by attachment of property were made and to which type of applications no objection is raised or suggested by the learned counsel for the appellant. There is no exception mentioned in R. 11 with reference to the applications which may come under R. 30 of O. 21, Civil P. C. It must follow, therefore, that the provisions of R. 11 (2), Cl. (f) do not mean that in case the result of a previous application cannot be noted on account of its not coming to an end the non-mentioning of the result would either make the

application bad in law or must lead to the result that the second application must be considered to be barred by law during the pendency of the previous application.

(4) Rule 30 of O. 21, Civil P. C. does provide for the execution of a decree for the payment of money by detention of the judgment-debtor or by the attachment and sale of his property, or by both. Even these two modes of execution are mentioned as alternative to other reliefs which were available to the decree-holder. It is not laid down therein that those two modes could be availed of only when no relief is being sought in any other manner. Rule 21 which precedes R. 30 is general in its terms and is not restricted to the decrees for the payment of money; it contemplates that execution of a decree against the person and property of the judgment-debtor can proceed simultaneously. In fact its implication is that in the absence of such a rule the Court may not have had any discretion to refuse the simultaneous applications for execution by arrest of the judgment-debtor and by the attachment and sale of his property.

(5) We are, therefore, of opinion that it cannot be held that the provisions of O. 21, R. 11 (2), Cl. (f), Civil P. C. bar simultaneous execution applications. The case law on the point fully supports the view that several execution applications can be in progress at one & the same time. We may refer to the cases reported in — 'Sarasti Prasad v. People's Industrial Bank Ltd.', AIR 1917 All 129 (A); — 'Makkhan Lal v. Mt. Bhagwana Kuer', AIR 1936 All 655 (B), and — 'Morarjee Gokuldas and Co. v. Sholapur Spinning and Weaving Co Ltd.', AIR 1941 Bom 37 (C).

(6) We therefore, dismiss this appeal summarily.

H.G.P. Appeal dismissed.

(S) A.I.R.1955 ALLAHABAD 384 (Vol. 42, C.N. 111)

LUCKNOW BENCH — RANDHIR SINGH J.
(1-9-1954)

Sri Bhola Prasad, Defendant-Applicant v. Srimati Jagpala and another, Plaintiffs-Opposite Parties.

Revn. Appln. No. 200 of 1954, against decree of Munsiff, South Lucknow, D/- 31-5-1954.

(a) **Civil P. C. (1908), Ss. 115 and 10 — Order under S. 10 is not a case decided — AIR 1928 Oudh 355 (FB), Dissented from.**

An order passed under S. 10, Civil P. C., is not a case decided and does not, therefore, attract the provisions of S. 115, Civil P. C. AIR 1928 Oudh 355 (FB), Dissented from; AIR 1934 All 520, Foll. (Para 3)

Anno: Civil P. C., S. 115 N. 5; S. 10 N. 15.

(b) **Civil P. C. (1908), S. 10 — Matter in issue in two suits not same — Section not applicable.**

Where the earlier suit was for recovery of rent for a certain period and the subsequent suit was for recovery of rent for the subsequent years and for ejectment, the matter in issue in the two suits would not be deemed to be the same and S. 10 would not be applicable. AIR 1929 All 805, Foll. (Para 4)

Anno: C. P. C., S. 10 N. 4.

CASES REFERRED: Paras

(A) (V15) AIR 1928 Oudh 355: 3 Luck 650 (FB) 3

(B) (V21) AIR 1934 All 520: 149 Ind Cas 176 3

(C) (V16) AIR 1929 All 805: 51 All 1017 4

Manohar Lal, for Applicant.

ORDER: This is an application in revision against an order passed by the Munsif, South Lucknow, refusing to stay a suit on an application of the applicant under S. 10, Civil P. C.

(2) It appears that the opposite party filed a suit for recovery of rent at a certain rate. The suit was contested on the ground that the rate of rent claimed by the plaintiffs was not the agreed rent. The contention of the defendant was repelled and the suit was decreed. The defendant-applicant then went in revision and that revision is pending before this Court.

In the meantime another suit for the recovery of rent for subsequent years for ejectment of the defendant-applicant was instituted. The defendant-applicant then made an application for the stay of this later suit under S. 10, Civil P. C., but the application was rejected by the learned Munsif on the ground that S. 10 of the Code had no application to the facts of the case. He has now come up in revision.

(3) Reliance has been placed on the reported case — 'Sahdeo Singh v. Mt. Chanun Kuer', AIR 1928 Oudh 355 (A) in which it was held that a revision against an order passed under S. 10, Civil P. C., could be entertained as it should be held to be a 'case decided'. This view was, however, not accepted by this Court in — 'Madan Mohan v. Kamla Narain Dube', AIR 1934 All 520 (B). The Avadh ruling has been discussed in this reported case and has been dissented from. This decision in AIR 1934 All 520 (B) is based on an earlier Full Bench decision of this Court. The current view, therefore, of this Court is that an order passed under S. 10, Civil P. C., is not a case decided and does not, therefore, attract the provisions of S. 115, Civil P. C. The application cannot, therefore, be entertained.

(4) Even on merits, the application has no force. The earlier suit was for recovery of rent for a certain period and the subsequent suit is for recovery of rent for the subsequent years and for ejectment. It has been held in — 'Gargi Din v. Debi Charan', AIR 1929 All 805 (C) in a similar case for recovery of rent that the matter in issue in the two suits would not be deemed to be the same and S. 10, Civil P. C., would not be applicable.

(5) The application for revision is, therefore, dismissed.

H.G.P. Application dismissed.

(S) A.I.R. 1955 ALL. 385 (Vol. 42, C.N. 112)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.

(24-8-1954)

Mool Chandra Jain, Judgment-debtor, Appellant v. Jagdish Chandra Joshi, Decree-holder, Respondent.

Ex. First Appeal No. 322 of 1950, against decree of Dist. J., Almora (Kumaon), D/- 3-10-1950.

(a) Civil P. C. (1908), O. 1, R. 8 and O. 21, R. 32 — Decree for perpetual injunction in representative suit — (Specific Relief Act (1877), S. 54).

A decree for perpetual injunction in a representative suit under O. 1, R. 8 can be binding on the parties not actually impleaded but represented by those actually on the record. Case law considered. (Para 11)

Anno: Civil P. C., O. 1, R. 8 N. 21 Pt. 1; O. 21, R. 32 N. 6; Specific Relief Act, S. 54 N. 1.

(b) Civil P. C. (1908), O. 21, R. 32 — Attachment and imprisonment — Preference.

There is nothing in R. 32 which should compel the Court to proceed against the property in preference to committing the defaulter to prison. (Para 12)

Anno: Civil P. C., O. 21, R. 32 N. 2.

CASES REFERRED: Paras

(A) (V30) AIR 1943 Mad 531: ILR (1944) Mad 133 6

(B) ('13) 36 Mad 414: 12 Ind Cas 1006 6

(C) ('89) 12 Mad 356 6, 7

(D) ('10) 33 Mad 483: 6 Ind Cas 229 6, 8

(E) (V29) AIR 1942 Lah 136: 200 Ind Cas 875 9

(F) ('01) 24 Mad 658 9

(G) ('07) 30 Mad 215: 17 Mad LJ 377 9

(H) (V29) AIR 1942 Bom 136: ILR (1942) Bom 504 10

Prem Narain Shukla, for Appellant; N. D. Pant, for Respondent.

RAGHUBAR DAYAL J.:

A decree for perpetual injunction was passed in Original Suit No. 1 of 1948 in the Court of the District Judge of Kumaun on 8-7-1949, restraining the defendants and others from claiming any right over the part of Badreshwar property specified in the schedule attached to the plaint or using it for any purpose whatsoever without the plaintiffs' permission. The plaintiffs were Jagdish Chandra Joshi and others, while the defendants were ten persons, which did not include Mool Chandra Jain. The suit was, however, a representative suit under O. 1, R. 8, C. P. C., and the necessary steps for making the suit representative had been taken.

(2) In September and October 1949 Ramlila celebrations took place at Almora. Mool Chandra Jain was the Secretary of the Committee managing the celebrations. In spite of the Civil Court decree it appears that a section of the people was not amenable to obey it and the district authorities failing to bring about an amicable settlement between the persons inclined to celebrate the Ramlila on the piece of land known as Badreshwar issued an order under S. 144, Criminal P. C., forbidding interference by anyone with the entry of the Ravan procession into the Badreshwar property and from carrying weapons. On 1-10-1949, a Ramlila processsion reached the disputed land and a number of people estimated to be 1500 watched the burning of the effigy of Ravan on that land. Mool Chandra Jain led the procession and was in charge of the management.

(3) The decree-holders applied for the enforcement of the decree of perpetual injunction by committing Mool Chandra Jain to civil prison or by attachment of his property. Mool Chandra Jain contested the execution application on the ground that he had no knowledge of the Civil Court decree. Evidence was recorded and the Court held that Mool Chandra Jain had knowledge about the Civil Court decree. It also considered the other objections of Mool Chandra and decided them against him. The objections were that he acted under orders of the District Magistrate and that he did not actually enter the Badreshwar property but remained at the gate. The Court, therefore, ordered him to be detained in civil prison for one month. It is against this order that this first appeal has been filed by Mool Chandra Jain.

(4) The learned counsel for the appellant has not questioned the finding about the appellant's having knowledge of the decree. There is ample evidence on the record that he knew of the decree and wanted the entry of that procession to that land in spite of the decree in view of the demand and the right of the people. The finding that he did not act under the orders of the District Magistrate is also not challenged. What is contended here is that Mool Chandra Jain did not actually enter the Badreshwar property and therefore did not disobey the decree for perpetual injunction. The decree-holders alleged in the application for execution that he disobeyed the decree and used the property without their permission.

The written reply filed by the appellant did not allege that he had not entered upon that property. No issue was framed with respect to his entry over the disputed property. One of the appellant's witnesses did, however, state that Mool Chandra remained standing at the Badreshwar gate and did not enter it. The solitary witness examined for the decree-holders stated that he did not see him enter that property. No finding on this question can be given in the absence of an issue and of a fair opportunity to the parties to lead all possible evidence on this question.

It appears to us that it was not necessary for Mool Chandra to disobey the decree that he should actually enter on the Badreshwar property. The decree prohibited persons from claiming any right over that property or using that property for any purpose without the permission of the plaintiffs. The evidence on the record establishes that Mool Chandra did claim the right to celebrate the Ramlila over this property and that he was one of the persons who did use that land by burning the effigy of Ravan on it on 1-10-1949. The mere fact, if it be true, that Mool Chandra did not enter on the property makes no difference to the question that he did use the land for a

certain purpose without the permission of the decree-holders.

(5) The contention concerning the view of the Court below about the appellant's disobeying the injunction decree on account of his abetting the others to disobey has also not been pressed.

(6) It was further submitted for the appellant that this decree for perpetual injunction could not be enforced against him personally, and reliance is placed on certain cases of the Madras High Court. The first case referred is — 'Nandaramdas v. Zulika Bibi', AIR 1943 Mad 531 (A). It was held in this case that the persons not actually impleaded in the suit are not to be deemed parties for certain purposes. That is not the point before us. In — 'Sahib Thambi v. Hamid', 36 Mad 414 (B), it was observed in connection with the view that a certain judgment could not bind certain persons in any event with respect to partnership property in their hands and it was not alleged that they were in possession of any such property that

> "The general rule of law, undoubtedly, is, that in suits where one person is allowed to represent others as defendant in a representative capacity and decree passed can bind those others only with respect to the property of those others which he can in law represent and no personal decree can be passed against them, although the parties on record 'eo nomine' may be made personally liable.
>
> This is the principle applied in suits against a Hindu family as represented by its managing member and in suits to which O. 1, R. 8, Civil P. C., 1908, is applicable. It has consequently been held that an injunction in a decree in the latter class of cases is not binding on those who are not actually parties to the record. See: — 'Sadagopachari v. Krishnamachari', 12 Mad 356 (C); and — 'Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar', 33 Mad 483 (D)."

The sole purpose of a representative suit is that a decision in that suit should bind the persons who were not actually before the Court as parties but who are allowed to be represented by those who were actually before the Court as parties. It is not contended for the appellant and it has not been held in any case that the persons not actually impleaded as parties but being represented by others in the suit are not bound by the decree passed.

The observations were made in the setting of the facts of that case which related to certain property and would be of general application if they were to say that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed can bind those others only with respect to the findings on questions which were for consideration as against the persons who were allowed to be represented by the persons actually on the record.

It is clear that findings on questions which were not agitated against the persons so represented could not be binding on them as those findings were not obtained against them but were obtained against only those persons who were actually on the record as parties. The two cases referred to in the observation do not actually decide that a decree for injunction is not binding on those persons who are not actually parties to the suit but are represented by others in a representative suit under the provisions of O. 1, R. 8, Civil P. C.

(7) The case reported in '12 Mad 356 (C)', dealt with a decree of 1828, which was passed in favour of 10 Vadagalai Brahmans plaintiffs against 13 Tengalai Brahmans residing in a certain village. That suit was not a representative suit and therefore the decree treated as a decree for injunction was not held binding on persons who were not actually parties to that suit. That case cannot, therefore, be any authority for the view that a decree for injunction in a proper suit under O. 1, R. 8, C. P. C. will not bind the persons represented in that suit by those actually parties on the record.

(8) The case reported in '33 Mad 483 (D)', was not a case in which a decree for injunction was passed against the actual parties as well as against others represented by them. The decree for injunction was restricted to the actual defendants in the suit. In the circumstances, it could not have been enforceable against those who were not the actual defendants.

(9) Both these Madras cases were considered and explained in — 'Waryam Singha v. Sher Singh', AIR 1942 Lah 136 (E), which fully supports the view of the Court below and goes against the contention for the appellant and holds that a decree for injunction obtained in a representative suit is executable against the defendants who are represented by other persons selected to represent them under O. 1, R. 8, C. P. C. Reliance for this view was placed on the cases reported in — 'Kamal Kutti v. Ibrayi 24 Mad 658 (F); and — 'Marivittil Mathu Amma v. Pathram Kunnot Cherukot', 30 Mad 215 (G). Both these cases, we may mention, do not appear to have been cases in connection with a decree for injunction.

(10) The last case referred to for the appellant is — 'Harischandra Khanderao v. A. S. Craig', AIR 1942 Bom 136 (H). That too did not deal with the disobedience of a decree for injunction.

(11) We are of opinion that there exists no good reason why a decree for perpetual injunction in Lal was misled not only by the first Full Bench a representative suit under O. 1, R. 8, C. P. C., should not be binding on the parties not actually impleaded but represented by those actually on the record. As already mentioned, the sole object of such a suit is to bind those persons with the decree passed in the suit. We, therefore, hold that the appellant was bound by the decree for perpetual injunction.

(12) Lastly, it was urged for the appellant that O. 21, R. 32, C. P. C., provides for the enforcement of the decree by the commitment of the person disobeying to the civil prison or by attachment of property and that the Court below should have proceeded against the property. There is nothing in this rule which should compel the Court to proceed against the property in preference to committing the defaulter to prison. In fact, the rule first mentions commitment to prison and then mentions the alternative of attachment of property and also provides that the decree can be enforced by both commitment and attachment.

We, therefore, do not consider any force in this contention either.

(13) In view of the above the order of the Court below is perfectly correct. We, therefore, dismiss the appeal with costs. The stay order is vacated.

V.R.B. Appeal dismissed.

(S) AIR 1955 ALLAHABAD 387 (Vol. 42, C.N. 113)

MALIK C. J. AND V. BHARGAVA J. (1-9-1954)

Sm. Chandrawati, Plaintiff-Appellant v. L. Suraj Narain, Defendant-Respondent.

F. A. F. O. No. 268 of 1946, from order of Civil J., Moradabad, D/- 10-8-1946.

Civil P. C. (1908), S. 20 — Cause of action in suit for maintenance — (Husband and Wife) — (Hindu Law — Maintenance).

Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. In other words, everything which, if not proved, gives the defendant an immediate right, is part of the cause of action. (Para 10)

At the time of the marriage the husband undertakes the liability to maintain the wife and this liability continues so long as the wife does not disqualify herself from her right to maintenance either by reason of her misconduct or by reason of her refusing to perform her marital duties. It cannot be said that the wife is entitled to be maintained only when she is living with her husband at his place or residence, even if through no fault of hers she has to live separately. (1888) 22 QBD 128, Rel. on. (Para 8)

Held, on the facts of the case, that though the husband lived at D at the time of the desertion of his wife, the liability of the husband to maintain the wife having arisen by reason of the marriage having been performed at M the wife could bring her suit within the jurisdiction of the Court at M. (Para 9)

Anno: Civil P. C., S. 20 N. 14; Pt. 6 N. 15.

CASES REFERRED: Paras

(A) ('38) F. A. F. O. No. 270 of 1936, D/- 6-5-1938 (All) 7

(B) (1888) 22 QBD 128: 58 LJ QB 120 10

B. D. Gupta, for Appellant; K. C. Misra and Vishwa Mitra, for Respondent.

MALIK C. J.:

This appeal was filed on behalf of the plaintiff on 7-11-1946, against an order passed by the learned Civil Judge of Moradabad directing the return of the plaint for presentation to the proper Court on the ground that the Court of the learned Civil Judge of Moradabad had no jurisdiction to entertain the suit.

(2) The plaintiff, Chandrawati, was married to Lala Suraj Narain in the year 1927 in Moradabad. She lived with her husband for a period of ten years and was thereafter turned out by her husband, who, it is alleged, had started illtreating her and had become a man of bad character. She started living with her mother-in-law but the mother-in-law died in 1943. The defendant, the husband of the plaintiff, had by then shifted to Delhi and the plaintiff went to Delhi to live with him, but she was again turned out and she came back to Moradabad. In October, 1944, the defendant remarried.

The plaintiff filed the suit, out of which this appeal has arisen, in the year 1946 claiming arrears of maintenance at the rate of Rs. 400/- per mensem, the claim being for Rs. 12,800/-, for return of certain ornaments valued at Rs. 10,000/-, and for future maintenance at the rate of Rs. 400/- per mensem. The suit was filed in 'forma pauperis'. The leave was granted by the learned Judge and the suit was registered.

(3) In the written statement the defendant took up the plea that as he was living in Delhi and the plaintiff had alleged that he had turned her out a second time when she went to Delhi to live with him, the cause of action must be deemed to have arisen in Delhi and the Moradabad court had, therefore, no jurisdiction.

(4) The learned Judge held in favour of the defendant and directed the return of the plaint as mentioned above.

(5) The plaintiff filed First Appeal from Order No. 268 of 1946 against the order returning the plaint and made several attempts to serve the defendant with notice of the appeal. Notices were sent to an address which was given in the written statement. Ultimately the Court directed substituted service by publication of the summons in the Hindustan Times. After such publication the appeal came up before a Bench of this Court on 10-2-1949, and as the respondent did not appear the Court heard the plaintiff-appellant and came to the conclusion that a part of the cause of action for maintenance arose at the place where the marriage had taken place and under S. 20, Civil P. C. the Moradabad court had, therefore, jurisdiction. The order of the lower Court was set aside and the case was sent back to that Court for being tried according to law.

(6) The learned Judge thereafter heard the case and passed a decree in favour of the plaintiff on 30-8-1949. On the 19-8-1949, before the lower Court had decreed the plaintiff's suit, an application was filed by Suraj Narain defendant, which was registered as Civil Miscellaneous No. 184 of 1949, for setting aside the 'ex parte' order dated 10-2-1949. Notice of this application was issued on the same day by a learned single Judge, but before that application could be heard and disposed of, the lower Court passed the decree dated 30-8-1949.

On 3-1-1951, when the application came up for hearing before the same Bench which had passed the order of 10-2-1949, the Bench was of the opinion that it was possible that the applicant might not have come to know of the hearing of the appeal in this Court, accepted his statement in that regard and vacated the order of 10-2-1949, on payment of a sum of Rs. 200/- within one month. Presumably this amount was paid within

the time allowed as no complaint of non-payment has been made before us.

As a result of the order of the 3-1-1951, First Appeal from Order No. 268 of 1946 was restored to its original number and has come up before us today for decision. It was listed on a previous occasion on 4-5-1954, but as there was some talk of compromise we gave the parties time to settle their disputes, if possible, out of Court. No settlement has been arrived at and we have, therefore, to decide this appeal on the merits.

(7) Besides the view of law taken by Raghubar Dayal and Agarwala JJ., on 10-2-1949, with which we fully agree, there is another unreported decision of this Court, — 'Bhagwati Devi v. Raghubir Saran', F. A. F. O. No. 270 of 1936, decided by Collister and Bajpai JJ., on 6-5-1938 (A)'. In that case the plaintiff had been married at Ghaziabad in the year 1906. The suit was filed in the year 1936 in the court of the Second Subordinate Judge of Meerut. The husband, who was impleaded as the defendant, was living at Delhi and he had re-married there and had refused to live with the plaintiff. The lower court held that as the desertion had taken place at Delhi the cause of action had arisen there and the plaintiff's suit must be filed in Delhi and not in Meerut, within the jurisdiction of which Ghaziabad, the place where the marriage had taken place, was situate. It was held by the learned Judges that the cause of action partly arose at Ghaziabad and the court at Meerut had jurisdiction to entertain the plaintiff's suit.

(8) At the time of the marriage the husband undertakes the liability to maintain the wife and this liability continues so long as the wife does not disqualify herself from her right to maintenance either by reason of her misconduct or by reason of her refusing to perform her marital duties. It cannot be said that the wife is entitled to be maintained only when she is living with her husband at his place of residence, even if through no fault of hers she has to live separately.

(9) In the case before us, the liability of the husband to maintain the wife being there, it having arisen by reason of the marriage having been performed at Moradabad, within the jurisdiction of the learned Civil Judge of Moradabad, a part of the cause of action must be deemed to have arisen there. Under S. 20, Civil P. C., therefore, the plaintiff could bring her suit within the jurisdiction of the Moradabad Court.

(10) It is not necessary for us to deal at length as to what 'cause of action' means. It is now well settled that 'cause of action' means "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact, which is necessary to be proved." — 'Per Lord Esher, Master of the Rolls, in — 'Read v. Brown', (1888) 22 QBD 128 (B). In the same case Lord Justice Fry said

> "Everything which, if not proved, gives the defendant an immediate right, must be part of the cause of action."

Lord Justice Lopes said

> "It includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action."

(11) We are, therefore, satisfied that the judgment of the lower court was wrong, and we hold that the learned Civil Judge had jurisdiction to decide the suit.

(12) Learned counsel for the respondent has urged that the effect of the order of Raghubar Dayal and Agarwala JJ., dated 3-1-1951, was that the decree passed on 30-8-1949, stood vacated, and by reason of our order of this date the case must go back to the trial Court afresh for decision. We have held that the trial Court had jurisdiction to decide the case and it, therefore, had jurisdiction to decree the suit on 30-8-1949. That decree is under appeal in this Court and it will not be right for us to express any opinion as to the merits of that appeal.

(13) For the reasons given by us this appeal is allowed and the order passed by the lower court on 10-8-1946, is set aside. The plaintiff is entitled to her costs.

H.G.P. Appeal allowed.

(S) AIR 1955 ALLAHABAD 388 (Vol. 42, C.N. 114)

RAGHUBAR DAYAL AND AGARWALA JJ.

(19-8-1954)

Naim Singh, Appellant v. Tikam Singh and others, Respondents.

First Appeal No. 146 of 1948, against decision of Civil J., Bulandshahr, D/- 3-2-1948.

(a) Hindu Law — Joint family — Family business — Presumption as to jointness — Onus — (Hindu Law — Joint family — Presumption).

Where a joint family is possessed of joint property the mere fact that a particular item of the property stands in the name of a single member of the family does not raise the presumption that it is the separate and self acquired property of that member. The presumption on the other hand, is that that property also is joint family property like every other joint family property. In the case of a business, however, there is no such presumption. AIR 1942 PC 13 and AIR 1929 PC 1, Rel. on. (Para 3)

The burden to establish that the business, which was since its inception carried on in the name of the defendant and the income of which was never blended with the joint family fund or utilised by the joint family, was joint family business, lies wholly on the plaintiff who sues for share therein alleging it to be the joint family business. The burden is made all the more heavier by the admission that on the date of the suit there had already been a separation in the family in respect of everything else except the money-lending business. (Para 8)

(b) Evidence Act (1872), Ss. 74, 76 — Copies of Income-tax returns — Admissibility of, in evidence — (Income-tax Act (1922), S. 54).

Section 54, Income-tax Act, does not prohibit the assessee or assessees themselves to require the Income-tax Officer to furnish certified copies of the assessment order, or of any statement made therein in the proceedings held before him. Indeed, the Income-tax Manual clearly lays down that a copy of the assessment order will be supplied free of cost to the assessee, and that subsequent copies may be supplied on payment of charges. The returns are public documents within the meaning of S. 74, Evidence Act, and hence the certified copies of the income-tax return are admissible in evidence under S. 76, Evidence Act. AIR 1944 All 114, Rel. on; AIR 1940 Cal 187, Not foll. (Para 7)

Anno: Evidence Act, S. 74 N. 2; S. 76 N. 2; Income-tax Act, S. 54 N. 2.

CASES REFERRED: Paras

(A) (V29) AIR 1942 PC 13: ILR (1942) Kar PC 33 (PC) 3

(B) (V16) AIR 1929 PC 1: 113 Ind Cas 897 (PC) 3

(C) (V27) AIR 1940 Cal 187: ILR (1939) 2 Cal 394 5

(D) (V31) AIR 1944 All 114: ILR (1944) All 221 7

P. N. Shukla and R. B. Misra, for Appellant; Jagdish Swarup, for Respondents.

AGARWALA J.:

This is a defendant's appeal arising out of a suit for partition. The facts of the case, in so far as they are relevant for this appeal, are as follows: Tikam Singh, the original plaintiff, Naim Singh, defendant 1, and Chattar Singh, defendant 2, are own brothers, being the sons of Girwar Singh. Girwar Singh had two brothers, Mohan Singh and Ulfat Singh. Ulfat Singh died issueless. Mohan Singh had two sons, Ram Prasad Singh deceased and Padam Singh, defendant 3. Balmukund Singh defendant 4, is the son of Ram Prasad Singh deceased. Tikam Singh's case in the plaint was that the whole family was at one time joint owning property, as well as money-lending business, that about the year 1937-1938 the Zamindari property was partitioned, but that the money-lending business remained joint. He, therefore, wanted a partition of his 1/6th share out of the money-lending business.

Chattar Singh, Padam Singh and Balmukund Singh practically admitted the plaintiff's case, while Naim Singh, defendant 1, contested it and alleged that he was the exclusive owner of the money-lending business as it was started by him in the year 1916 or 1917 after the death of Mohan Singh with a sum of Rs. 500/- gifted to him by his father-in-law. Tikam Singh, plaintiff, absented himself from the suit when the case came up for final hearing, but defendants 2, 3, and 4 stated that they wanted their shares to be separated and that the suit should proceed. Accordingly, the suit for partition was not allowed to be dismissed for default of Tikam Singh's appearance and defendants 2, 3 and 4 were treated as plaintiffs in the case. The Court below held that the money-lending business was a joint Hindu family business and, accordingly, decreed the suit for partition and for allotment of separate shares to the parties. This is an appeal against that decree by Naim Singh and the only question that falls to be considered is whether the money-lending business was the joint family business or was it a separate, self-acquired business of Naim Singh.

(2) In deciding the above question the Court below proceeded to examine whether the defendant-appellant's case was true or false and having found that it was untrue and having regard to some other evidence came to the conclusion that the business was joint family business. It did not direct its attention to the question whether any, and if so, what money was invested by the joint family in the money-lending business. The learned Judge mainly relied upon certain income-tax returns and orders in which the entire income of the family including the income from the money-lending business was jointly shown as the income of the joint family.

(3) Now, it is well settled that where a joint family is possessed of joint property the mere fact that a particular item of the property stands in the name of a single member of the family does not raise the presumption that it is the separate and self acquired property of that member. The presumption, on the other hand, is that that property also is joint family property like every other joint family property. In the case of a business, however, there is no such presumption. In — 'Bhuru Mal v. Jagannath', AIR 1942 PC 13 (A), Sir George Rankin delivering the opinion of the Judicial Committee observed:

> "Special considerations apply to the question whether or not the business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu law. Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business."

Then his Lordship quoted the observations of Lord Buckmaster in — 'Annamalai Chetty v. Subramanian Chetty', AIR 1929 PC 1 (B):

> "A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate."

(4) In the present case it was conceded that the money-lending business in dispute was carried on in the name of Naim Singh, defendant-appellant, alone. It was admitted that it was not an ancestral business. Again, it was admitted by defendant Balmukund that no money was ever taken from the income of this money lending business to meet the expenses of the joint family and if it was taken at any time for some necessity it used to be returned later on, that Naim Singh used to keep the income from money-lending business, that there were two boxes in the family, one to keep the income from the money-lending busi-

ness and the other for keeping the income from the Zamindari property and that the key of the box in which the income from the money-lending business was kept, used to be in the possession of Naim Singh. Balmukund Singh further stated that there were two sets of account books, one for the income from the money-lending business and the other relating to the other property of the family, and that he did not know how much money was given to Naim Singh to start the business. Padam Singh, defendant who examined himself, stated that the money-lending business was started from the income of the joint-family from Sir and Zamindari. But he could not give any details of the amount that was invested in the money-lending business.

As against these facts the only evidence on which the defendants-respondents rely are the returns of income-tax and the orders of assessment by the Income-tax Officer. As the entire income including the income from the money-lending business was below Rs. 2000/- no income-tax was ever levied on the family. In the year 1932-33 a return was called for, for the first time by the Income-tax Officer because he had heard reports that the family was carrying on extensive money-lending business and an Arhat shop and a cloth business. The family made a return showing the income of the Zamindari property alone but not of the Arhat shop or of the money-lending business. It does not appear whether the income from the cloth business was included in the amount shown as the total income of the family. It appears that later on upon a notice issued by the Income-tax Officer a fresh return was made and the incomes from money-lending business and from the Arhat Shop were included. Even so the total income was less than Rs. 2000/-. In the year of assessment, however, the Income-tax Officer stated that the family was a joint Hindu family and carried on money-lending business, as well as an Arhat shop and cloth business. The same was the case in the two subsequent years, 1933-34 and 1934-35. It is obvious that since the total income was not taxable it was unnecessary for Naim Singh to contend before the Income-tax Officer that the money-lending business was his own separate business.

(5) It was contended by the learned counsel for Naim Singh before us that these documents, the income-tax returns and the assessment orders produced on behalf of the defendants-respondents, were inadmissible in evidence by reason of S. 54, Income-tax Act, read with Ss. 74 and 76, Evidence Act, and reliance was placed upon a decision of a learned single judge of the Calcutta High Court in — 'Prematha Nath v. Nirade Chandra', AIR 1940 Cal 187 (C).

(6) Section 54, Income-tax Act, provides:

"That the assessment proceedings shall be confidential and no particulars in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings in this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purpose of this Act shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof."

Section 74, Evidence Act, defines public documents, and S. 76 states:

"Certified copies of public documents shall be issued by every public officer having the custody of a public document, 'which any person has a right to inspect', shall give that person on demand a copy of it on payment of the legal fees therefor,....."

Section 77 lays down:

"That such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

(7) The learned Judge in the Calcutta case considered that the expression "which any person has a right to inspect" in S. 76 indicated that where no person has a right to inspect the public document concerned no copies thereof can be given, and if copies are given of documents of which a person has no right to make an inspection, the certified copies are not admissible in evidence. The learned Judge held that by reason of S. 54 Income-tax Act, no one could as of right make an inspection of any document contained in proceedings under the Income-tax Act. In our opinion, the conclusions drawn by the learned Judge are not justified by the provisions on which reliance has been placed by him. Section 54, Income-tax Act, does not prohibit the assessee or assessees themselves to require the Income-tax Officer to furnish certified copies of the assessment order, or of any statement made therein in the proceedings held before him. The object of the provision in S. 54 of the Act appears to be that the proceedings would be of a confidential nature and the contents of any statements or order or other proceedings may not be disclosed to outsiders.

We do not think that it was intended that the assessee himself was not to be supplied the copies of such statements or orders. Indeed, the Income-tax Manual clearly lays down that a copy of the assessment order will be supplied free of cost to the assessee, and that subsequent copies may be supplied on payment of charges. If an assessee was not entitled to such copies it would not be possible for him to file appeals or to go to higher Income-tax authorities against the order of an Income-tax Officer. Our view finds support from a decision of our own Court reported in — 'Suraj Narain v. Jhabhu Lal', AIR 1944 All 114 (D).

(8) Even though, however, we find that the income-tax documents are admissible in evidence not much reliance should be placed on statements made before the Income-tax Officer. The reason, as stated already, is that such statements are

intended to be of a confidential nature and it is well known that what has been stated in confidence is not to be used against the maker of the statement. The lower Court found, as already stated, that the defendant-appellant's case that there was a separation in the family in 1923 was false, further that his statement that he started the money lending business with the aid of a sum of Rs. 500/- advanced to him by his father-in-law was also false. But, in our opinion, even so these findings are immaterial.

The burden of proof lay wholly on the plaintiff or on the defendants-respondents to establish that the business, which was since its inception carried on in the name of the defendant-appellant and the income of which was never blended with the joint family fund or utilised by the joint family, was joint family business. The burden was all the more made heavier by the admission that on the date of the suit there had already been a separation in the family in respect of everything else except the money-lending business. This burden, in our opinion, was not satisfactorily discharged. Indeed, upon the evidence as a whole we have no doubt whatsoever that the business was the separate and self-acquired property of the defendant-appellant.

(9) In this view of the matter, this appeal must succeed. We, therefore, allow the appeal, set aside the decree of the Court below and dismiss the suit with costs to the appellant in both the Courts.

(10) We are informed that the lower Court has passed a final decree in terms of its preliminary decree and that a first appeal is pending in this Court against that decree. Since we have set aside the preliminary decree and dismissed the suit in its entirety the appeal from the final decree should be put up for further orders at an early date.

D.R.R. Appeal allowed.

(S) AIR 1955 ALLAHABAD 391 (Vol. 42, C. N. 115)

RAGHUBAR DAYAL AND AGARWALA JJ.

(6-8-1954)

Thakur Lal and others, Applicants v. Mahabir Prasad Sharma and another, Opposite Parties.

Criminal Misc. Contempt Case No. 4 of 1954.

Contempt of Courts Act (1952), S. 1 — Contempt of Court — What amounts to — Abuse of the process of Court — Starting premature proceedings under S. 476, Criminal P. C. against prosecution witness for giving false evidence in committing magistrate's Court before commencement of Sessions trial.

If a person takes legal action in a Court of law which be open to him, he cannot commit any contempt of Court unless the action be held to be not an approach to the Court for redress of the wrong but was really such as can be said to be abusing the process of the Court. AIR 1930 Bom 477 (FB), Ref. to. (Para 13)

After the accused were committed to the Sessions to stand their trial under S. 302, Penal Code, and before the actual commencement of the trial the public prosecutor filed an application before the committing Magistrate for filing a complaint against two of the prosecution witnesses for an offence under S. 193, I. P. C., on the ground that they had made contradictory statements in their statements recorded under S. 164, Criminal P. C., and later in the Court of the Magistrate. The Magistrate issued notices to those witnesses and the proceedings under S. 476, Criminal P. C., remained pending till 28-12-1953 when the Magistrate ordered that they were premature and that an application to that effect could be made after the decision of the sessions case. He accordingly discharged those persons. The sessions case was decided in January 1954 and resulted in the acquittal of the applicant and his co-accused. Before the decision of the sessions case the applicant accused filed an application for taking action against the Public Prosecutor for his committing contempt of Court of the Sessions Judge, before whom the case under S. 302, I. P. C., was pending.

Held that in the circumstances the action of the Public Prosecutor in starting proceedings under S. 476, Criminal P. C., did not amount to contempt of Court. Case law Ref. (Para 3)

Anno: Contempt of Courts Act, S. 1 N. 3.

CASES REFERRED: Paras

(A) (V27) AIR 1940 All 497: 1940 All LJ 579: 42 Cri LJ 211 8
(B) ('48) Misc. Case No. 5 of 1948 (All) 10
(C) (1902) 1902-1 KB 77: 71 LJ KB 4 10
(D) (V39) AIR 1952 All 408: 1949 All LJ 297: 1952 Cri LJ 786 11
(E) (V39) AIR 1952 All 674: 1952 Cri LJ 1160 12
(F) (V17) AIR 1930 Bom 477: 32 Cri LJ 394 (FB) 13

C. S. Saran, for Applicants; S. N. Misra and H. N. Seth, for Opposite Parties.

RAGHUBAR DAYAL J.:

Thakur Lal and others were prosecuted for several offences, including the offence under S. 302, I. P. C. They were committed to the Court of Sessions. Bechu Pande and Pashupati Pande were two of the prosecution witnesses in that case. Their statements were recorded under S. 164, Criminal P. C., on 3-10-1952. They were later examined before the committing Magistrate on 24-6-1953. The sessions trial started on 14-9-1953.

(2) On 20-8-1953, the opposite party Sri Mahabir Prasad Sharma, Public Prosecutor, Ghazipur, filed an application before the committing Magistrate for filing a complaint against Bechu Pande and Pashupati Pande for an offence under S. 193, I. P. C. on the ground that they had made contradictory statements in their statements recorded under S. 164, Criminal P. C., and later in the Court of the Magistrate. The Magistrate issued notices to those witnesses and the proceedings under S. 476, Criminal P. C., remained pending till 28-12-1953, when the Magistrate ordered that they were premature and that an application to that effect could be made after the decision of the sessions case. He accordingly discharged those persons. The sessions case was decided in

January 1954 and resulted in the acquittal of the applicant and his co-accused.

(3) Thakur Lal filed his application before the decision of the sessions case for taking action against Mahabir Prasad Sharma for his committing contempt of Court of the Sessions Judge, Ghazipur, before whom the case under S. 302, I. P. C. was pending. The opposite party in his reply stated that he had put in the application for action under S. 476, Criminal P. C., on the report of B. B. Singh, Inspector, Criminal Investigation Department, and that, if he had committed any contempt, he threw himself at the mercy of the Court and tendered unconditional apology.

(4) Notice was then issued to B. B. Singh to show cause why he be not punished for committing contempt of Court. In reply he stated that he had requested the Public Prosecutor to move in the matter not with the intention to interfere with the fair trial of the case or to put pressure on the witnesses, but to bring those persons to book for their committing perjury. He also tendered unqualified and sincerest apology for any contempt that had been committed by him unwittingly.

(5) On the last date of hearing the learned counsel for the applicant stated that his client did not want to pursue the matter; but considering the matter of great importance we had the question whether the conduct of the opposite parties amounted to the committing of contempt of Court discussed at length, and we have had the help of the learned counsel for the parties in that connection.

(6) On the one hand what has been shown is that it has been held in several cases that it is not desirable that complaint for perjury against a witness be made by a Court before the termination of the case, as such an early action was likely to result in the intimidation of witnesses to be examined and to defeat the object of the trial. Each such case relating to the prosecution for perjury was with respect to the alleged falsity of the statement made by the witness before that Court and did not relate to the case where a witness had made two contradictory statements either in the same Court in the course of the same proceedings or on two different occasions. It has been urged that this distinction, however. does not affect the consideration that Courts should not order prosecution under S. 193, I. P. C., till the termination of the proceedings. No case is, however, cited in which it has been held that such a conduct of the Court or of the party moving the Court for taking action for the prosecution of a witness would amount to contempt of Court.

(7) On the other hand, it is urged, and reliance is placed on several cases decided by this Court, that a person is free to take legal action in a Court of law which is open to him for the redress of the wrong which he considers to have suffered from and that the conduct of the party in taking legal action in a Court of law cannot amount to the commission of contempt of Court, even if it can be said that it has some tendency to affect the decision of a pending case. It is further urged that the opposite parties merely suggested and moved the Court to take action under S. 476, Criminal P. C., and such mere action cannot amount to contempt of Court, even if actual prosecution of a party for making false statements during the pendency of the case be held to amount to contempt of Court.

(8) We agree with the contention for the opposite parties and are of opinion that no contempt has been committed by the opposite parties. We may refer to the case reported in — 'Hrishi Kesh Sanyal v. A. P. Bagchi', AIR 1940 All 497 (A). The facts of the case were that an objector in proceedings for the appointment of a guardian made defamatory statements with respect to the applicant for guardianship. That application was returned for presentation to the proper Court. It was re-presented to the proper Court and thereafter the original applicant moved the first Court to take action against the objector with respect to certain statements in the affidavit filed by the objector which were alleged to be completely false. The applicant also filed a complaint under S. 500, I. P. C. against the objector. This Court was moved to take action against the applicant who had filed the complaint u/s. 500, I. P. C. for punishing him for the contempt of Court he committed both by his moving the first Court to enquire about the falsity of the allegations in the affidavit and for his filing the complaint under S. 500, I. P. C., when the guardianship proceedings were pending in the other Court. It was held in this case that no contempt of Court was committed. It was observed:

> "If a person has or thinks he has a cause of action or a ground of complaint, he is in ordinary circumstances at liberty to have recourse to the Courts".

It was further observed at page 500:

> "Had the opposite party first tried to intimidate the applicant by holding out a threat of prosecution, thereby bringing pressure to bear upon him, the matter would have had a very different aspect. But he did not do this; he took immediate action in the Courts, thereby exercising a right which every individual has of having recourse to a Court of justice."

It would appear, therefore, that what was held was that unless the alleged contemner acts in a manner which coerces the other party from freely proceeding in the litigation, that party cannot commit contempt of Court merely on account of his taking some legal action open to him in a Court of law.

(9) It was further held in that case that the application under 476, Criminal P. C., did not amount to contempt because the alleged contemner merely drew the attention of the Court to the allegations in the affidavit which he claimed to be false and thereafter the responsibility lay with the Court which after enquiry or otherwise, might or might not decide to prefer a formal complaint. The mere application to take action in no way would amount to such action of the applicant as to coerce the party to be proceeded against to act in a manner which would hamper the due administration of justice.

(10) Subsequent to this case similar view was expressed in — 'Deep Chand v. Raizada Sumer',

Misc. Case No. 5 of 1948 (All) (B). In that case some defamatory statements which could have a bearing on the subject-matter of the suit were made against the plaintiff in a suit before the Court of small causes. The plaintiff during the pendency of that suit filed a complaint u/s. 500, I.P.C., against the defendant. Both the criminal Court and the Court of Small Causes would have had occasions to determine certain common points. The defendant moved this Court against the plaintiff for action with respect to the alleged contempt of Court committed by him. It was held that no contempt was committed. One of us observed in that case after referring to the various cases:

"All these cases go against the petitioner and tend to support my view expressed in the very beginning that a party is free to have recourse to such redress in a Court of law, as he be entitled to, irrespective of the fact that the wrong complained of is based on something which had transpired in the proceedings of a pending suit and be a matter for decision in that suit."

Wanchoo J. to whom the case went on difference of opinion expressed himself thus:

"On a consideration, therefore, of these authorities, I am of opinion that in a case where a party files a complaint in Court and there is no direct threat held out to another party to withdraw a certain plea or to desist from carrying on a certain case in Court and where there are no sufficient materials to come to the conclusion that the filing of the complaint was only to harass and handicap the other party and so interfere with the administration of justice, it cannot be held that the filing of the complaint would amount to contempt of Court, even though there might be some identity between the points that might arise for determination in the complaint and in the earlier suit."

He also referred to the observations of Lord Alverstone C. J. in the case of the — 'King v. Tibbits and Windust', (1902) 1 KB 77 at p. 87 (C), which are:

"But, if the judgment of Lord Ellenborough is examined, it will be noted that the main ground of the judgment is that the publication would tend to pervert the public mind and disturb the course of justice and therefore be illegal, and we cannot doubt that, if the attempt so to do be made, or means taken, the natural effect of which would be to create a widespread prejudice against persons about to take their trial, an offence has been committed, whatever the means adopted, provided there be not some legal justification for the course pursued."

and observed that those observations suggested that where there was some legal justification for the course pursued, what might appear to Courts to be contempt might not really amount to it.

(11) Similar views were expressed in — 'Jagannath Prasad v. Ram Chandra'. AIR 1952 All 408 (D). It was observed at p. 412:

"We are clearly of the opinion that if the notice was lawful and in protection of the natural right of the notice-giver and it could not possibly have the effect of interfering with the true course of justice, the giving of the notice would not make the filing of the criminal complaint any more a contempt of Court than it would have been if there were no notice."

(12) The next case is — 'Kamta Prasad v. Ram Agyan', AIR 1952 All 674 (E), which was decided by us. The law was summarised at the end of the case and proposition No. 2 expressed as settled law was:

"If the threat is not express, but is implied in the fact of a party instituting a criminal complaint or taking some civil proceeding which puts the former party to loss, there is no interference with the administration of justice because everybody is entitled to take recourse to law."

(13) It is clear, therefore, that if a person takes legal action in a Court of law which be open to him, he cannot commit any contempt of Court unless the action be held to be not an approach to the Court for redress of the wrong but was really such as can be said to be abusing the process of the Court as was visualised by Marten C. J. in — 'In re, Shamdasani (No. 1)', AIR 1930 Bom 477 (FB) (F) at p. 480, where he observed:

"Accordingly, if the complainant repeats what he has done in the past, namely that as soon as one application for a transfer is refused by the High Court he promptly makes another, then I must warn him that if the matter comes up again before the High Court he will be in grave risk not only of having an order under S. 561-A passed against him but also of having proceedings directed against him for contempt of Court."

(14) We, therefore, discharge the notice issued to the opposite parties and direct the applicant to pay the costs of the Government Advocate and opposite party No. 1, Shri Mahabir Prasad, Public Prosecutor. We do not award costs for the hearing subsequent to the last hearing as that had been done at our request for the elucidation of the law point which was of importance and to elucidate which we have had the advantage of the able arguments of the learned counsel for the parties. We, therefore, order the applicant to pay Rs. 80/- costs of the Government Advocate and Rs. 100/- costs of opposite party No. 1.

K.S.B. Order accordingly.

(S) **AIR 1955 ALLAHABAD 393 (Vol. 42, C.N. 116)**

LUCKNOW BENCH—KIDWAI AND RANDHIR SINGH JJ. (27-1-1954)

Unnao Commercial Bank Ltd., Unnao, Plaintiff-Appellant v. Kailash Nath and others, Defendants-Respondents.

Second Appeal No. 403 of 1945, against order of Dist. J., Lucknow, D/- 19-5-1945.

(a) T. P. Act (1882), S. 54 — Consideration unascertainable on date of sale — Effect on sale transaction.

Where a transaction is on the face of it a completed sale it cannot be taken to be merely an agreement to sell. The mere fact that the consideration is unascertainable on

the date of the sale will not make the transaction of sale an agreement to sell. AIR 1945 Oudh 161, Rel. on. (Para 9)

Anno: T. P. Act, S. 54 N. 12 Pt. 9.

1949 Mulla: S. 54 P. 297 N. "Price" (13 Pts. extra in N. 12 to S. 54 in AIR Com.—4 Pts. extra in Mulla).

(b) **Contract Act (1872), S. 23 — Champertous transaction — Sale of share in house — Validity of transaction — (T. P. Act (1882), S. 54).**

A transaction made for the purpose of financing a litigation is not per se invalid. The Court shall, however, refuse to give effect to such a transaction if it appears that it is unconscionable or unfair or is otherwise opposed to public policy. 4 Ind App 23 (PC), Foll. (Para 10)

(In this case it was held that the transaction was neither opposed to public policy, nor was it unconscionable, extortionate and unfair).

Anno: Con. Act, S. 23 N. 14; T. P. Act, S. 54 N. 12 Pts. 9 and 10.

1949 Mulla: S. 54 P. 297 N. "Price" (13 Pts. extra in N. 12 to S. 54 in AIR Com.—4 Pts. extra in Mulla).

(c) **Contract Act (1872), S. 23 — Champertous transaction — Sale of property — Disparity in consideration — Circumstances to be weighed — (T. P. Act (1882), S. 54) — (Evidence Act (1872), Ss. 101-103).**

Even if it be assumed that, where it appears that a transaction is champertous in nature, the burden of proving that the transaction is fair lies upon the person who seeks to rely on the transaction, still the circumstances have to be weighed as a whole and it is not the mere disparity in consideration which should be the sole criterion for deciding whether a particular transaction is or is not fair. And in doing so it is to be remembered that it is not the market-value of the property which has to be taken into consideration. At the time when such a transaction is entered into, the title of the vendor is itself in jeopardy and as the result of the litigation is always problematical, it is the commercial value of the claim which should be taken into consideration. AIR 1940 PC 19, Rel. on. (Para 12)

Anno: Contract Act, S. 23 N. 14; Evidence Act, Ss. 101-103 N. 25.

T. P. Act, S. 54 N. 12.

1949 Mulla: S. 54 P. 297 N. "Price" (13 Pts. extra in N. 12 to S. 54 in AIR Com.—4 Pts. extra in Mulla).

CASES REFERRED: Paras

(A) ('76-77) 4 Ind App 23: 2 Cal 233 (PC) 9, 10
(B) ('93) 15 All 352: 20 Ind App 127 (PC) 9
(C) (V21) AIR 1934 Rang 346: 153 Ind Cas 405 9
(D) (V34) AIR 1947 All 110: ILR (1947) All 321 9
(E) (V32) AIR 1945 Oudh 161: 19 Luck 595 9
(F) (V27) AIR 1940 PC 19: 67 Ind App 50 (PC) 12

B. K. Dhaon, for Appellant; K. P. Saxena and Harish Chandra, for Respondents; G. T. Wadhwani, for Respondent (No. 5).

RANDHIR SINGH J.:

This appeal has been referred to a Bench by a learned Single Judge as it appeared to him that some points of importance on which, in his opinion, the law was not uniform. arose in the case and required consideration by a Bench.

(2) The appeal arises out of a suit brought by the Unnao Commercial Bank, Ltd., for a partition of a half share in two houses situate in Muhalla Bashiratganj in the city of Lucknow. Baiju and Lachman Prasad, who were brothers, owned two houses and certain other property. Lachman Prasad died in 1930 leaving a son Ram Prasad who is defendant 1. Baiju died in November, 1934, without any issue. His widow Smt. Janaka, is, however, alive.

(3) On the death of Baiju, Ram Prasad executed a sale deed in favour of Ratan Chand in respect of a half share in two houses and some moveable property which belonged to him and Baiju jointly. This sale deed was executed for obtaining money for filing a suit against Smt. Janaka and two others, Smt. Jasrath Dei and Mahadeo Prasad, in whose favour Baiju had executed a will which, according to Ram Prasad, was invalid. Ram Prasad was unable to finance the litigation and, in order to establish his claim to the property, he thought it fit to sell a half share of the property to Ratan Chand in order to raise funds for fighting out the suit. This sale deed in favour of Ratan Chand was executed on 14-12-1934. A suit was thereafter instituted jointly by Ram Prasad and Ratan Chand against Smt. Janaka, Smt. Jasrath Dei and Mahadeo Prasad. The suit was decreed on 17-4-1935, for a declaration that Ram Prasad was the owner of a half share in the property and for possession. An appeal was filed against this decree by Smt. Janaka and others, but this appeal was ultimately dismissed for default of prosecution. A review application against the dismissal of the appeal was also dismissed on the 3-5-1940.

(4) On 2-2-1937, Ratan Chand, who was indebted to the Unnao Commercial Bank, sold away some property, including his half share in the two houses acquired from Ram Prasad. On 16-6-1937, Smt. Janaka, who was held to have a life interest in the other half of the two houses, executed a deed of relinquishment in favour of Ram Prasad. On 24-8-1940, a sale deed was executed by Ram Prasad in favour of Kailash Nath, defendant 3, in respect of a half share in the two houses. This was followed by a partition of the second house, and the southern part of this house fell to the share of Ram Prasad, who then sold his undivided interest in the first house and the share allotted to him in the second house to defendant 2 on 31-8-1940, and defendant 2 sold a half of the second house which she had acquired from Ram Prasad, to defendant 4 on 26-11-1942.

(5) On the basis of the sale deed obtained by the Unnao Commercial Bank, the bank instituted a suit for a partition of a half share in the two houses. The suit was resisted by all the defendants on various grounds. It was alleged that the

sale in favour of Ratan Chand was champertous and that Ratan Chand did not perform his part of the contract under the sale deed executed in his favour and as such no title to any part of the house passed to him. It was also contended that Ratan Chand at best had acquired only a one-fourth share in the house & the plaintiff was, therefore, not entitled to claim a half share. Defendant 4 pleaded that he was a bona fide transferee for value and that the transaction in favour of the plaintiff was not binding on him.

(6) Various issues were framed by the learned Civil Judge who heard the case. He ultimately came to the conclusion that, although the sale-deed which was executed by Ram Prasad in favour of Ratan Chand had been made for financing the litigation, the transaction was fair and equitable and as such was binding upon Ram Prasad and his transferees. He also found that the transaction in favour of Ratan Chand was a completed sale and not an agreement to sell. The suit was, therefore, decreed by the trial Court.

(7) Defendant 3, who was a transferee from Ram Prasad in respect of the share which had been originally sold by him in 1937, then went in appeal to the District Judge. The learned Judge held that under the agreement, which was executed in the shape of a sale-deed, Ratan Chand was only to get half of the fruits of the decree in the suit instituted by Ram Prasad and Ratan Chand against Smt. Janaka and others. He held that the transaction was not unfair and unconscionable, as it appeared to him that one-fourth share in the two houses was meant to be conveyed and this would be a sufficient recompense to Ratan Chand. He therefore allowed the appeal and decreed the plaintiff's suit for a partition of one-fourth share in the two houses. He also allowed Rs. 100/- as mesne profits. The plaintiff has now come up in appeal.

(8) The first point which has been pressed on behalf of the appellant is that the transaction entered into between Ram Prasad and Ratan Chand on 14-12-1934, was in substance a completed sale and not an agreement to sell. A copy of the sale deed Ex. 2 was filed by the plaintiff. A perusal of this document shows that Ram Prasad sold a half share in the two houses in dispute, as also in some moveable property to Ratan Chand for a sum of Rs. 400/-. There is a recital in the sale-deed to the effect that Ram Prasad was not possessed of sufficient funds to enable him to institute a suit against Smt. Janaka, Jasrath Dei and Mahadeo Prasad, who had obtained a will from Baiju which was invalid. It was, therefore, necessary for him to obtain funds for financing the litigation by the sale of a half share in the property.

It is also mentioned in the sale deed that Ratan Chand was to defray the costs of the litigation out of the sale consideration which was left in deposit with him and that he was not to get any further sum from Ram Prasad if the expenses incurred by him in the litigation exceeded the sale consideration. It was further stipulated that Ratan Chand was to do the entire Pairvi of the case and if the costs were less than the sale consideration, Ram Prasad would not be entitled to get that amount from Ratan Chand.

(9) The learned Counsel for the respondent has relied on some cases relating to champertous transactions — 'Ram Coomar v. Chunder Canto', 4 Ind App 23 (PC) (A); — 'Raja Mohkam Singh v. Raja Rup Singh', 15 All 352 (PC) (B); and — 'Soon Thin v. Mg. Than Gywe', AIR 1934 Rang 346 (C). In none of these cases has it been held that if a transaction is on the face of it a completed sale it should be taken to be an arrangement to sell. The mere fact that the consideration was unascertainable on the date of the sale would also not make the transaction of sale an agreement to sell, and this point has been discussed in — 'Beni Madho v. A. U. John', AIR 1947 All 110 (D); and — 'Parmeshwar Bux Singh v. Bachcha Singh', AIR 1945 Oudh 161 (E) also.

There is nothing in the sale deed to show that Ratan Chand was to share in the fruits of the decree passed on the basis of the suit which was to be instituted by Ram Prasad and Ratan Chand. He was given a half share in the property in all events. The consideration of the sale-deed was also mentioned as Rs. 400/- in the sale-deed, although it appears that the true consideration was the amount of the money which Ratan Chand was to spend on behalf of Ram Prasad in the litigation. The consideration was also, therefore, ascertainable, though not on the date of the sale but after the decision of the suit which was to be financed by Ratan Chand. Under the circumstances we are unable to agree with the contention that the transaction embodied in the document Ex. 2 was only an agreement for sale and not a completed sale.

(10) The second point, which is more important, which arises for consideration is whether the transaction dated 14-12-1934, embodied in Ex. 2 was champertous and, if so, was it not binding on the parties. The law on the subject of agreements or contracts which are champertous, as administered in India, has been the subject of various rulings of the Privy Council as also of the various High Courts. There is no specific law against champerty in India and although champertous transactions are prohibited in England, such agreements have not been held to be invalid except in certain circumstances. The leading case on the subject is '4 Ind App 23 (PC) (A)'. which has also been referred to in the judgment of the trial Court in which it has been held

> "that a fair agreement to supply funds to carry on a suit, in consideration of having a share of the property if recovered, ought not to be regarding as being 'per se' opposed to public policy, but agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, or made not with the bona fide object of assisting a claim believed to be just but for the purpose of gambling in litigation, should not be given effect to."

The principles laid down in this leading case still hold good and a transaction made for the purpose of financing a litigation would not 'per se' be held to be invalid. The Court should, however, refuse to give effect to such transactions if it appears

that they are unconscionable or unfair or are otherwise opposed to public policy. Financing a poor litigant who would otherwise not be able to maintain even a just claim would not be opposed to public policy, and if a person advances money to such a poor litigant in order to enable him to fight out a righteous dispute, he would be entitled to get the property sold to him for raising the funds. If, however, it appears to the Court that the transaction was substantially unfair, or that the sole object of the transaction was to finance or promote any unrighteous cause, the Court would relieve the party from the effect of such a transaction. Even where it had been found that the transaction was unfair, a decree for the amount spent by the financier was passed in his favour to compensate him, in lieu of the property which was the subject of the unfair bargain.

The main question which arises for consideration in this case therefore is, if there are circumstances which lead to the inference that the transaction was unfair or unconscionable.

(11) That Ram Prasad had a righteous claim against Smt. Janaka and others cannot be disputed. He was the own nephew of Baiju and, if his assertion that they were members of a joint Hindu family was correct, he was entitled to the entire property of the family on the death of Baiju. Even if he was a separated member of the family, Baiju could not will away the entire property of the family in favour of Smt. Janaka and others. The litigation on which Ram Prasad proposed to embark was, therefore, by no means speculative in nature nor was there any immoral or bad motive behind it. Ratan Chand could, therefore, validly finance Ram Prasad in this litigation and any agreement for financing Ram Prasad could not be said to be opposed to public policy.

(12) Then remains the other question as to whether the transaction was unfair or unconscionable. It has been argued on behalf of the appellant that the property which Ram Prasad purported to transfer to Ratan Chand by means of the sale-deed Ext. 2 was comprised of a half share in two houses and some other moveable property the value of which was in the vicinity of Rs. 3750/- and that a transfer of this property for a sum of Rs. 400/- was an unfair transaction against which Ram Prasad or his transferee should be relieved.

Unfortunately no plea that the transaction was unfair or unconscionable was specifically raised by the defendants in this suit. All that was said on behalf of defendant 1 was that the transaction was champertous in nature. Even if it be assumed that, where it appears that the transaction was champertous in nature, the burden of proving that the transacion was fair lay upon the person who seeks to rely on the transaction, the circumstances have to be weighed as a whole and it is not the mere disparity in consideration which should be the sole criterion for deciding whether a particular transaction was or was not fair.

Although the sale consideration mentioned in the sale-deed was Rs. 400/-, it was expressly stipulated that Ratan Chand was to bear the entire costs of the litigation and was not entitled to recover any amount from Ram Prasad even if the expenses exceeded Rs. 400/-. This would in effect mean that the consideration of the sale deed was the amount to be spent in litigation. Ratan Chand entered the witness box and stated that he had spent Rs. 1400/- towards the costs of the suit instituted by him and Ram Prasad jointly, for declaring the will invalid and for possession of the property. The witness was not cross-examined on this point and no details of the expenses incurred by him were inquired into. The costs mentioned in the decree and awarded to the plaintiffs in that suit no doubt amounted to Rs. 429/12/-, but it is a matter of common knowledge that parties have to incur a good deal of expenditure which is not taxed in the decree. It is, therefore, not improbable that Ratan Chand might have spent much more than what is taxed as costs in the decree.

Moreover, it is not the market-value of the property which has to be taken into consideration. At the time when such transactions are entered into, the title of the vendor is itself in jeopardy and as the result of the litigation is always problematical, it is the commercial value of the claim which should be taken into consideration, vide — 'Ram Sarup v. Court of Wards', AIR 1940 PC 19 (F). The fact that a half share in the two houses was sold for Rs. 800/- to the appellant even after the matter had been finally decided itself goes to show that the commercial value of the claim was not much at the time when the sale deed was made by Ram Prasad in favour of Ratan Chand. Taking all the facts into consideration it appears to us that the transaction was neither unconscionable, extortionate nor unfair.

(13) The third point which has been urged on behalf of the appellant is that Ratan Chand did not perform his part of the contract inasmuch as he did not defray the costs in appeal. As remarked above, the appeal was instituted by Smt. Janaka against the decree passed in favour of Ram Prasad and Ratan Chand, but this appeal was dismissed for default of prosecution inasmuch as the appellant did not deposit the full court-fee. It has been contended on behalf of Ratan Chand that he was bound under the terms of the sale deed only to defray the costs of the suit and there was no mention of the costs of the appeal in the sale-deed. The lower appellate Court has interpreted the word "muqadma" to mean the entire litigation including the appeal.

This interpretation, though not unreasonable, however, does not affect the merits of the case inasmuch as the appeal was dismissed for non-payment of the court-fee on the grounds of appeal, and there was thus hardly any occasion for Ratan Chand to do any pairvi in the appeal. Moreover, the sale-deed was a completed transaction, and if Ram Prasad had to spend any money in defending the case in appeal, it was open to him to have sued Ratan Chand for the recovery of that amount. It has been remarked by the trial Court that there is no sufficient evidence in support of the contention that any money was spent in the proceedings in appeal on behalf of Ram Prasad. It is difficult, therefore, to find that Ratan Chand did not perform his part of the contract.

(14) Another circumstance which has to be taken into consideration is that there was no stipulation in the sale deed that if Ratan Chand did not defray the entire costs of the litigation the sale deed would be ineffectual. At the worst if Ratan Chand had not defrayed the costs of the appeal it would amount to non-payment of a part of the consideration and the only remedy open to the vendor was to sue for the recovery of that amount. No amount has been satisfactorily proved to have been spent by Ram Prasad in the proceedings in appeal.

(15) It has been held in some cases that it is not open to a third party to challenge a transaction as champertous and this plea is open only to the vendor. In the present case Ram Prasad only half-heartedly raised the plea in the trial Court but did not join defendant 3 in the appeal. He submitted to the findings of the trial Court and as such this plea taken by defendant 3 loses much of its force in the absence of any support from Ram Prasad himself. In the deed which was executed by Ram Prasad subsequent to the sale deed made in favour of Ratan Chand, he did not challenge the validity of the sale in favour of Ratan Chand. In fact in the mortgage Ex. A4 made by him in favour of the appellant in 1937 he admitted the sale deed made in favour of Ratan Chand. It was for the first time in the deed in favour of defendant 3 executed in 1940 that Ram Prasad disputed the validity of the sale deed in favour of Ratan Chand. We are, therefore, in agreement with the view taken by the trial Court that Ratan Chand did not omit to perform his part of the contract in the sale deed.

(16) The lower appellate Court has held Ratan Chand entitled to a one-fourth share in the property transferred to him. We have not been able to appreciate the reasoning behind this decision arrived at by the lower appellate Court. There was no mention in the sale-deed that Ram Prasad & Ratan Chand would share the fruits of the decree to be passed in the suit, in equal shares. Ratan Chand was to get half of the property specifically in all events, and it would therefore be difficult to conclude that the vendor and the vendee were to share the fruits of the decree equally. The sale deed was therefore effective in respect of half of the property comprised in the sale deed and not in respect of one-forth share only.

(17) Lastly, it has been argued that Kailash Nath respondent was entitled to a half share in the two houses in dispute even if the sale in favour of Ratan Chand was found to be good. It was expressly mentioned in the sale-deed made in favour of Kailash Nath that the same property which was earlier sold to Ratan Chand was being transferred to Kailash Nath. The suit which has given rise to this appeal was for a partition of a half share and it will not be necessary to determine the respective claims of the defendants in respect of the other half of the property if it is found that the plaintiff appellant is entitled to a half share in the houses. He is also not bound by the partition in respect of house No. 2 made behind his back.

(18) The learned Civil Judge who heard the case has dealt with all the points in detail and we are in agreement with the views expressed by him. The view taken by the lower appellate Court that the appellant was entitled to one-fourth share of the houses does not appear to us to be the correct view.

(19) As a result we allow the appeal and set aside the decree passed by the lower appellate Court and restore the decree passed by the trial Court. The appellant shall get the costs of this appeal from respondent 1 who alone has contested the appeal in this Court.

V.S.B. Appeal allowed.

AIR 1955 ALLAHABAD 397 (Vol. 42, C.N. 117)

LUCKNOW BENCH — KIDWAI AND H. S. CHATURVEDI JJ. (26-11-1954)

The State v. Krishna Murari, Accused.

Criminal Appeal No. 114 of 1953, against order of Sessions J., Lucknow, D/- 12-11-1952.

(a) U. P. Control of Supplies (Temporary Powers) Act (2 of 1947), S. 1(4) — Power of Provincial Government — Nature of — U. P. Cement Control Order, 1948 — Validity — (Government of India Act (1935), S. 59).

The words "or if the Provincial Government by notified order so directs, of two years beginning from that date" in S. 1(4) of the U. P. Act 2 of 1947 do not amount to delegation by the Legislature of its powers and a notification of the U. P. Government D/- 26-9-1947 directing that Act 2 of 1947 should continue to remain in force till 30-9-1948 was valid — AIR 1955 All 48 (FB), Followed; AIR 1951 All 181, held no longer good law. (Para 7)

Consequently, the U. P. Cement Control Order 1948 which was promulgated under the powers conferred by Act 2 of 1947 as extended by the above notification was also valid. (Para 8)

In view of S. 59(1), Government of India Act, which was then in force, the issue of the above notification in the name of the Governor did not indicate that it was not the action of the Provincial Government. (Para 8)

Anno: Govt. of India Act, S. 59 N. 1.

(b) U. P. Control of Supplies (Temporary Powers) Act, 2 of 1947 — Period of duration — (U. P. Control of Supplies Continuation Ordinance (8 of 1948), Cl. 2) — (U. P. Laws (Expiration) Act (28 of 1950), S. 3).

The life of U. P. Act 2 of 1947 was extended first by the U. P. Ordinance 8 of 1948 and thereafter by U. P. Act 43 of 1948 until 30-9-1950. The next step was the U. P. Act 30 of 1950 and although it did not receive the assent of the President till 25-10-1950, by reason of S. 3 of the earlier Act 28 of 1950, Act 30 shall be deemed to have taken effect from 30-9-1950. (Para 13)

There is nothing in the Constitution which prevents the Legislature from giving retrospective operation to statutes whether by means of some provision of the Statute itself

or by means of another statute. The only limitation is that no one can be punished for a crime, which was not a crime at the date at which it was committed. This was specifically guarded against by S. 3 of the Act 28 of 1950. There could thus be no legal challenge to the validity of Act 28 of 1950 and, by reason of that Act, Act 30 of 1950, was deemed to have taken effect from 30-9-1950. Thus in law there was no gap between the date of expiration of Act 2 of 1947 (as extended from time to time) and the date of the enforcement of the Extending Act 30 of 1950. Act 2 of 1947 was therefore still in force on 17-9-1952 when the offence was said to have been committed. (Para 14)

(c) Penal Code (1860), Ss. 79, 40 — Act done under Full Bench decision — Later on decision not accepted as laying down correct law — Technical offence.

The Indian Penal Code does not exempt an act done under a mistake of law from the operation of the penal law but, it is obvious that if a person accepts the decision of a Full Bench of the High Court in the State (from which no appeal has been preferred to the Supreme Court) as a guide to his conduct, he commits nothing more than a technical offence if that view is later not accepted as laying down the correct law. (Para 15)

Anno. I. P. C., S. 40 N. 1; S. 79 N. 1.

CASES REFERRED : Paras

(A) (V38) AIR 1951 All 181: 52 Cri LJ 333 (FB) 3, 7

(B) (V42) AIR 1955 All 48: (Misc. Appln. Nos. 141 & 181 of 1950, D/- 12-10-1954 All) (FB) 7

(C) ('53) Cri. Revn. No. 1581 of 1953 (All) 15

(D) ('51) Cri. Revn. No. 1474 of 1951 (All) 15

Addl. Govt. Advocate, R. B. Bisria, for the State; S. L. Suri, for Accused.

KIDWAI, J.

Krishna Murari Lal was suspected in black-marketting in cement. Accordingly on 17-9-1952, sub-Inspector Masoom Hussain of the enforcement squad, sent one Mohmmad Hanif with two notes signed by Circle Inspector Mehtab Singh, one for five rupees and one for two rupees to purchase a bag of cement. Mohammad Hanif accordingly purchased one bag of cement for Rs. 6/8/-, paid with the signed notes and received eight annas back. When the bag was being loaded on to a riscksha, the Sub-Inspector along with the Circle Inspector who had followed came out of concealment. They took over the cement and the eight anna bit from Mohammad Hanif and questioned the accused. The accused admitted having made the sale and produced the two notes signed by the Circle Inspector.. He was released on bail and a complaint was filed against him on the same day under paras. 4 and 6 of U. P. Cement Control Order read with S. 6, U. P. Control of Supplies (Temporary Powers) Act of 1947.

(2)) The case proceeded immediately. After the sub-Inspector had been examined (he was not cross-examined) the accused pleaded guilty and was convicted by the learned Magistrate who sentenced him to undergo simple imprisonment for one month and to pay a fine of Rs. 200/-.

(3) The accused appealed and the learned Sessions Judge of Lucknow allowed his appeal holding on the authority of a decision of a Full Bench reported in — 'Ram Kishan v. The State', AIR 1951 All 181 (A), that the U. P. Cement Control Order had no legal sanction behind it and was a nullity.

(4) The U. P. Control of Supplies (Temporary Powers) Act 2 of 1947 received the assent of the Governer General on 28-2-1947. Section 1(4) of the Act provided that it should cease to have effect on the expiration of one year beginning with 1-10-1946 "or if the Provincial Government by notified order so directs, of two years beginning from that date."

(5) On 26-9-1947, the Government notified an order directing that the Act should continue to remain in force till 30-9-1948.

(6) On 27-9-1948 the U. P. Cement Control Order, 1948, was promulgated under the powers conferred by Act 2 of 1947 as extended by the notification. By para. 4 of the Order the sale or storage of cement (which is defined in para 2(c) as "PORTLAND CEMENT") except in accordance with a licence granted under this Order was forbidden. It was under this provision that Krishna Murari Lal was prosecuted. The question whether he committed an offence depends upon the question whether the U. P. Control of Supplies (Temporary Powers) Act 2 of 1947 was validly extended by the Government Notification.

(7) As has already been stated, it has been held in AIR 1951 All 181 (A), that the conferment of power on the Government to extend the life of a statute was delegation of legislative power and was bad and that consequently Act 2 of 1947 was not in force when the Uttar Pradesh Cement Control Order, 1948 was promulgated. In this view the order was of no legal effect. Since then, however, a Full Bench of this Court, consisting of five learned Judges, has held in Misc. Appln. Nos. 141 and 181 of 1950, Morarilal v. State', decided on 12-10-54 (since reported in AIR 1953 All 48 (B)) of which the learned Advocate-General has supplied us a certified copy that the law laid down in the earlier Full Bench decision is no longer good law. It has held that similar words used in S. 1(5), U. P. (Temporary) Accommodation Requisition Act 25 of 1947 did not amount to delegation by the Legislature of its powers and a notification extending the life of the Act was valid.

(8)It was also contended, that in any case, Act 2 of 1947 enables the "Provincial Government" to extend the life of the Act while in fact the notified order was issued by the Governor and is consequently bad. Section 59(1), Government of India Act, which was then in force, provides that all executive actions of the Government of a Province must be done in the name of the Governor. The issue of a notification in the name of the Governor does not, therefore, indicate that it is not the action of the Provin-

cial Government. This objection to the validity of the notified order extending the life of Act 2 of 1947 cannot be upheld. It must be held that the U. P. Cement Control Order, 1948, was validly promulgated and must have legal effect given to it.

(9) It has next to be determined whether Act 2 of 1947 was still in force on 17-9-1952 when the offence is said to have been committed.

(10) On 25-9-1948 the life of the U. P. Control of Supplies (Temporary Powers) Act 1947 was extended "until the withdrawal, repeal or expiry of this Ordinance" — vide cl. 2, Ordinance 8 of 1948. Thereafter the U. P. Control of Supplies (Continuance of Powers) Act 43 of 1948 was passed and, having received the assent of the Governor-General on 14-12-1948, it was published in the U. P. Gazette the next day. By it Act 2 of 1947 was continued until 30-9-1950 and Ordinance 8 of 1948 was repealed. No objection has been taken to the validity of this Ordinance and Act; the only contention has been that, since Act 2 of 1947 has expired on 30-9-1947 it was not in existence and could not be continued at the time of the enforcement of Ordinance 8 and Act 43 of 1948. It has already been held that Act 2 of 1947 was validly extended till 30-9-1948 and was in force when Ordinance 8 of 1948 came into effect. Accordingly the effect of that Ordinance and of Act 43 of 1948 was to continue it till 30-9-1950.

(11) The next step was the enactment of Act 30 (the U. P. Control of Supplies (Continuance of Powers) Act) of 1950. The official reports of the proceedings of the Legislature show that the bill was passed by the Legislative Assembly on 18-9-1950 and by the Legislative Council on 27-9-1950. It did not, however, receive the assent of the President till 25-10-1950 and it was published in the Gazette on the 26th (sic) October, 1950. By its own terms it did not have retrospective effect and would, therefore, not continue an Act which has already lapsed and to which the provisions of S. 6, U. P. General Clauses Act had become applicable in the same manner as if it had been repealed by an U. P. Act.

(12) In order to meet such a situation the U. P. Legislature had already passed Act 28 (The U. P. Laws (Expiration) Act) of 1950 which had received the assent of the President on 12-9-1950 and had been published in the U. P. Gazette on 23-9-1950. Section 3 of this Act reads as follows:

"Where any bill may have been or shall be introduced in this present or any future session of the State Legislature for the continuance of any Act which would expire in such Sessions, and such Act shall have expired before the Bill for continuing the same shall have received the assent of the President or Governor, as may be necessary, such continuing Act shall be deemed and taken to have effect from the date of the expiration of the Act intended to be continued, as fully and effectfully, to all intents and purposes as if such continuing Act had actually passed before the expiration of such Act, except it shall be otherwise especially provided in such continuing Act; provided nevertheless that nothing herein contained shall extend or be construed to extend, to affect any person or persons with any punishment, penalty, or forfeiture whatsoever, by reason of anything done or omitted to be done, by any such person or persons contrary to the provisions of the Act so continued, between the expiration of the same and the date at which the Act continuing the same may have received or shall receive the assent."

(13) The official reports of the proceedings of the Legislature show that the U. P. Legislature was in Session on 30-9-1950 on which date Act 2 of 1947 as extended was to expire. It is also shown that the Bill which subsequently became Act 30 of 1950 was introduced into — and indeed passed by — the Legislature in that Session. By reason, therefore of S. 3 of Act 28 of 1950, even though the Bill (which became Act 30 of 1950) did not receive the assent of the President till 25-10-1950, it shall be deemed and taken to have effect from the date of the expiration of the Act intended to be continued.

(14) There is nothing in the Constitution which prevents Legislature from giving retrospective operation to statutes whether by means of some provisions of the Statute itself or by means of another statute. The only limitation is that no one can be punished for a crime, which was not a crime at the date at which it was committed. This is specially guarded against by S. 3 quoted above itself. There can thus be no legal challenge to the validity of Act 28 of 1950 and, by reason of that Act, Act 30 of 1950, shall be deemed to have taken effect from 30-9-1950. Thus, in law, there was no gap between the date of expiration of Act 2 of 1947 (as extended from time to time) and the date of the enforcement of the Extending Act 30 of 1950. The result is that when Krishna Murari Lal sold cement without a licence, he infringed the prohibition contained in the U. P. Cement Control Order and was liable to be punished under S. 6, U. P. Control of Supplies (Temporary Powers) Act.

(15) It was next contended that, in any case, no offence was committed because Krishna Murari Lal was misled not only by the first Full Bench decision of this Court but also by subsequent decisions of this Court in — 'Krishan Lal v. The State', Criminal Revn. No. 1581 of 1953 (C), and — 'Kunji Lal v. The State', No. 1474 of 1951 (D), the first of which was decided by a Division Bench as late as the 9th March 1953 and related to the same order. The Indian Penal Code does not exempt an act done under a mistake of law from the operation of the penal law but, it is obvious that if a person accepts the decision of a Full Bench of the High Court in the state (from which no appeal has been preferred to the Supreme Court) as a guide to his conduct, he commits nothing more than a technical offence if that view is later not accepted as laying down the correct law. In this case, therefore, at the worst Krishna Murari Lal was guilty of a technical criminal offence.

(16) The result is that we allow the appeal filed by the State and set aside the order of acquittal passed by the Sessions Judge. We convict Krishna Murari Lal under the Cement

Control Order of 1948 read with S. 6, U. P. Control of Supplies (Temporary Powers) Act of 1947 but we consider that he is entitled to be released after admonition under S. 3 of the First Offenders' Probation Act of 1938 and we direct accordingly.

H.G.P. Order accordingly.

A.I.R. 1955 ALLAHABAD 400 (Vol. 42, C.N. 118)

M. L. CHATURVEDI J. (15-2-1955)

Mahendra Singh, Applicant v. State of U. P. and others, Opposite Parties.

Civil Misc. Writ Petn. No. 313 of 1954.

Police Act (1861) (as amended by Act 10 of 1882), Ss. 7 and 35 — After amendment, provisions of S. 35 become contradictory to provisions of S. 7 — Effect should be given to S. 7 in preference to S. 35: AIR 1954 Cal 60, Dissent. from.

Section 7 clearly, and in so many words, confers powers on the officers enumerated in the section, to dismiss or otherwise punish police officers of subordinate rank, which means police officers up to the rank of Inspectors of Police. The provisions of S. 35 could be given effect to as long as S. 6 of the Act had not been deleted, but after the deletion of that section in 1882, its provisions become contradictory to the provisions of S. 7. The Legislature appears to have forgotten to delete S. 35 when it deleted S. 6. But there can be no doubt that the Legislature did intend to confer powers on the officers, enumerated in S. 7, to impose the penalties provided therein. Effect should, therefore, be given to the provisions of S. 7 in preference to the provisions of S. 35. AIR 1954 Cal 60, Dissent from. (Para 5)

Anno: AIR Man. Police Act, S. 7 N. 1.

CASE REFERRED: Para

(A) (V41) AIR 1954 Cal 60: 58 Cal WN 18 6

S. C. Khare, for Applicant; Standing Counsel, for Opposite Parties.

ORDER: This is a petition under Art. 226 of the Constitution.

(2) The petitioner was posted as a head constable at police outpost, George Town, police Station Colonelganj, Allahabad, in August, 1952. On 15-9-1952, one Sukru made a report against the petitioner that he used to extort money from persons who grazed their cattle on road patris, and the City Deputy Superintendent of Police noted down the numbers of four one rupee currency notes produced by Sukru and handed them back to him. The City Deputy Superintendent of Police was subsequently informed that the money had been taken by the petitioner from Sukru, and on receiving this information, he along with the Circle Inspector proceeded to the outpost and recovered the currency notes from the pocket of the uniform shirt of the petitioner.

The petitioner was then suspended under the orders of the Senior Superintendent of Police, and proceedings were started against him. The enquiry into the matter was made by Shri Mahendra Singh, Deputy Superintendent of Police, before whom witnesses were produced and who recorded their statements in the presence of the petitioner, and the petitioner was allowed to cross-examine them. The petitioner was further afforded opportunity to offer any explanation or defence for his conduct. The above facts have been taken from the counter-affidavit filed in the case and in the rejoinder affidavit it has been vaguely stated that the contents of para. 3 were not admitted in the form in which they were mentioned.

(3) On 3-1-1953, the Deputy Superintendent of Police submitted his report with a recommendation that the petitioner be dismissed from service. On receipt of the report, the Senior Superintendent of Police issued a notice to the petitioner on 8-1-1953, enclosing a copy of the findings of the Deputy Superintendent of Police, and calling upon the petitioner to show cause why he should not be dismissed from the police force. The petitioner submitted his explanation on 16-1-1953. The Senior Superintendent of police by his order dated 3-2-1953 imposed the punishment of reduction of the petitioner to the post of a constable for a period of three years.

The petitioner went up in appeal against this order, and the Deputy Inspector General of Police was of the opinion that the charge against the petitioner had been proved, but the punishment awarded by the Superintendent was inadequate. He consequently issued another notice to the petitioner to show cause why the punishment, awarded to him by the Senior Superintendent of Police be not enhanced and why he be not dismissed from service. The petitioner submitted his explanation on 2-7-1953. The Deputy Inspector General of Police then called the petitioner for any oral explanation that he might like to give and for hearing the petitioner in his defence.

The petitioner appeared before him on 13-7-1953 and is said to have stated that he had nothing to add to the written statement already submitted by him. The Deputy Inspector General of Police then passed an order on the same day (13th of July) dismissing the petitioner from service. An appeal against that order was dismissed by the Inspector General of Police on 9-1-1954.

(4) The present petition was filed on 6-4-1954, praying for the issue of a writ of certiorari calling for the record of the departmental proceedings and quashing the orders of the Senior Superintendent of Police, the Deputy Inspector General of Police and the Inspector General of Police dated 3-2-1953, 13-7-1953 and 9-1-1954, respectively.

(5) I am not concerned in this case with the other facts stated by the petitioner in his two affidavits, in which an attempt has been made to show that a conspiracy had been hatched against the petitioner and that the petitioner had not extorted any money from Sukru. The question has been considered by the officers, who had authority to go into this matter and their finding is against the petitioner.

The learned counsel for the petitioner has urged two points in support of the petition. His first submission is that the petitioner could not be dismissed by an order of the Senior Superintendent of Police, as the Senior Superintendent of Police does not exercise the powers of a Magistrate, and under S. 35 of the Police Act only a Police Officer exercising the powers of a Magistrate could enquire into any charge against the petitioner, as he was above the rank of a constable. The Police Act is an Act which was passed in the year 1861 and there was S. 6 in the Act, as originally passed, laying down that the Assistant Superintendent of Police, Superintendent of Police, Deputy Inspector General of Police and the Inspector General of Police will have magisterial powers, & S. 35 provides that

> "any charge against a police officer above the rank of a constable under this act shall be enquired into and determined only by an officer exercising powers of a Magistrate."

Section 7 of the Act confers powers on the Inspector General of Police, Deputy Inspector General of Police, Assistant Inspector General of Police and the District Superintendent of Police of dismissing, suspending or reducing any police officer of the subordinate rank and of awarding such other punishments as are laid down in cls. (a) to (d) of the second paragraph of this section. The Act, as it was originally framed, was perfectly workable, as the different officers, enumerated in S. 7, had magisterial powers conferred upon them by S. 6 of the Act. Section 6 was subsequently deleted by the Central Act No. 10 of 1882, but no alteration appears to have been made in S. 35 of the Act.

The result is that under S. 7 the officers enumerated therein have been given powers to dismiss or otherwise punish police officers of subordinate rank but none of these officers, excepting the Inspector General of Police, possesses the powers of a Magistrate and under S. 35 it is only an officer having a power of a Magistrate, who can enquire into the charge against police officer above the rank of a constable.

There thus appears to me to be a contradiction in the terms of Ss. 7 and 35 of the Police Act. There being an inconsistency in the two provisions of law contained in the same enactment, the Court can possibly give effect to the provision of only one of them. I prefer to give effect to the provisions of S. 7. It clearly, and in so many words, confers powers on the officers enumerated in the section, to dismiss or otherwise punish police officers of subordinate rank, which means police officers up to the rank of Inspectors of Police.

The provisions of S. 35 could be given effect to as long as S. 6 of the Act had not been deleted, but after the deletion of that section, its provisions become contradictory to the provisions of S. 7. The Legislature appears to have forgotten to delete S. 35 when it deleted S. 6. But I have no doubt that the Legislature did intend to confer powers on the officers, enumerated in S. 7, to impose the penalties provided therein. I think effect should, therefore, be given to the provisions of S. 7 in preference to the provisions of S. 35.

(6) The learned counsel for the respondents argued that the provisions of Ss. 7 and 35 were not contradictory and effect could be given to both of them. His contention is that the word 'charge' used in S. 35 refers to the type of offences enumerated in S. 29 of the Police Act and does not refer to such matters as remissness or negligence in the discharge of duty, or unfitness for the post, as mentioned in S. 7.

In support of his argument he referred me to the case of — 'Shiv Nandan Sinha v. State of West Bengal', AIR 1954 Cal 60 (A). In this case a Division Bench of the Calcutta High Court held that Ss. 7 and 35 were different in their scope and application and there was no illegality in resorting to either or to both of them. Their Lordships say that proceedings under S. 35 of the Police Act are of a penal nature and do not refer to proceedings taken under S. 7. I do find some difficulty, with all respect, in agreeing with the view taken by the Calcutta High Court.

It is difficult to say that a police officer accused of an act mentioned in S. 7 is not charged with the commission of that act. The Police Regulations provide for a charge being framed for an act mentioned in S. 7. The other difficulty is that S. 29 itself says that in cases coming under that section conviction is to be recorded by a Magistrate and, if S. 35 refers only to charges under S. 29, S. 35 becomes superfluous. But in view of the opinion that I have expressed in the previous paragraph, I do not think it necessary to consider that case in any detail.

(7) The other point urged by the learned counsel for the petitioner is that proper opportunity was not given to the petitioner by the Deputy Inspector General of Police when he issued the notice asking the petitioner to show cause why he should not be dismissed from service. I do not think there is any substance in this point. A previous show cause notice had been issued by the Superintendent of Police and there is no complaint that, as far as the Superintendent of Police is concerned, he did not give proper opportunity to the petitioner to show cause against the proposed dismissal of the petitioner.

In this notice, issued by the Superintendent of Police, the petitioner was asked to show cause why he should not be dismissed from service. A second notice to the same effect was issued by the Deputy Inspector General of Police, and the complaint of the learned counsel is that he said in the order that the cause should be shown in writing within seven days of the receipt of the order. Subsequently he gave to the petitioner opportunity of personally appearing before the Deputy Inspector General of Police.

It has not been stated in the affidavit, filed along with the petition, that the petitioner wanted to produce any fresh evidence before the Deputy Inspector General of Police or to cross-examine the prosecution witnesses. He did present himself before the Deputy Inspector General of Police on the 13th of July, and I believe the contents of paragraph 7 of the counter-affidavit, wherein it is stated that the petitioner told the Deputy Inspector General of

Police that he had nothing to add to the written statement already submitted by him on the 2nd of July. In my opinion, there was a proper show cause notice issued to the petitioner and the petitioner was also given every reasonable opportunity of showing cause.

(8) For the reasons given above, I dismiss this petition with costs.

V.B.B. Petition dismissed.

A.I.R. 1955 ALLAHABAD 402 (Vol. 42, C.N. 119)

RAGHUBAR DAYAL AND CHOWDHRY JJ.

(25-11-1954)

Ch. Harpal Singh and others, Appellants v. Lala Hira Lal, Respondent.

Ex. First Appeal No. 487 of 1951, from decision of 1st Civil Judge, Meerut, D/- 24-11-1951.

Civil P. C. (1908), S. 51, O. 21, Rr. 37 and 10 — Execution of decree by arrest of judgment-debtor — Procedure to be followed.

Before the Court can issue a warrant of arrest or a notice to the judgment-debtor under R. 37 of O. 21, it has to see that the judgment-debtor is liable to arrest in pursuance of the application for execution. This means that the nature of the decree should be such that it can be executed by the arrest of the judgment-debtor and that such circumstances exist that an order of arrest can be made against the judgment-debtor, in case the Court was satisfied of those circumstances. Such circumstances are what are mentioned in Cls. (a) to (c) to proviso to S. 51. The existence of such a circumstance becomes one of the conditions to govern the liability of the judgment-debtor to arrest. This necessarily leads to the conclusion that the existence of such a circumstance should be alleged whether in the execution application itself or in a separate application or affidavit which should accompany the usual tabular execution application. Unless such a circumstance is alleged the Court cannot think of it, and in the absence of it the Court cannot take action under O. 21, R. 37 or issue notice to the judgment-debtor why he should not be arrested. (Para 7)

The procedure to be followed, when the judgment-debtor appears in Court, should be according to what is laid down in R. 40 of O. 21. The judgment-debtor may or may not file any written reply. It is for the decree-holder to lead his evidence in the presence of the judgment-debtor. Such evidence should be in support of his application for execution and should have reference to the grounds which, according to the decree-holder, would justify the arrest of the judgment-debtor in execution of the decree, and which should be one of the grounds mentioned in Cls. (a) to (c) to proviso to S. 51. It is when the decree-holder has led 'prima facie' evidence in support of his application that the judgment-debtor has to be given an opportunity of showing cause why he should not be committed to the civil prison. (Para 8)

Where the decree-holder had led no evidence and the Judge did not appear to have called upon the decree-holder to lead evidence as required by O. 21, R. 40 but examined the judgment-debtor either of his own motion or at the desire of the judgment-debtor, and it was in cross-examination of the judgment-debtor that the fact was elicited that he had sold away some of his property and had not paid anything to the decree-holder and the decree-holder did not pursue the matter further and did not ask the judgment-debtor as to why he did not pay the decree-holder or what he did with that money or whether that money or substantial part of it was still with him and the judgment-debtor was not given an opportunity either by the decree-holder in cross-examination or by the Court after this damaging circumstance had come on the record, to show as to why in view of that circumstance he should not be committed to civil prison, the order for the arrest of the judgment-debtor was wrong. (Para 8)

Mere non-payment to the decree-holder when the judgment-debtor came into possession of means subsequent to the date of the decree would not always be sufficient for coming to the conclusion that the judgment-debtor refused or neglected to pay the decree-holder. Refusal would imply that a request was made to the judgment-debtor at the time when he had the means to pay and yet the judgment-debtor did not pay and declined to make any payment. There must be something on the record to suggest that any such request was made when the judgment-debtor had that money with him and that the judgment-debtor refused to pay the decree-holder. Negligence to pay also would connote that when the judgment-debtor could have paid he just omitted to pay due to his negligence or carelessness. If the judgment-debtor had other claims to satisfy or other more urgent necessities to meet and spent the money on such purposes, it could not be said that he neglected to pay the decree-holder. In the absence of evidence having a bearing on these considerations the Court would not feel satisfied that the judgment-debtor had refused or neglected to pay the decree-holder's amount within the meaning of Cl. (b) to the proviso to S. 51. (Para 9)

Anno: C. P. C., S. 51 N. 1a, 5; O. 21, R. 37 N. 1; O. 21, R. 40 N. 5, 6.

B. L. Dixit, for Appellants; Bhagwan Das Gupta, for Respondent.

RAGHUBAR DAYAL J.:

This is an appeal by the judgment-debtor against the order rejecting his objection to the decree-holder's application for execution of the decree by his arrest.

(2) The decree-holder applied on 29-11-1950 for the execution of his decree for over Rs. 6,000/- by the arrest of the judgment-debtor, mentioning in the application that he had already realised Rs. 1,574/6/-. On this application notice was ordered to be issued to the judgment-debtor.

When the judgment-debtor appeared in court, he put in an application stating various reasons why he should not be arrested in execution of the decree. He was examined on his behalf and stated on oath that he had no intention not to pay the decree-holder. He was cross-examined by the decree-holder and it came out during cross-examination that he had sold certain property to the co-operative societies under two sale deeds, one for Rs. 2500/- and another for Rs. 4,000/- and that out of this amount, which the got for the sale of the property, he did not pay anything to the decree-holder whose decree was without interest.

Thereafter, the learned Civil Judge ordered his arrest holding that it appeared from his not paying a single shell to the decree-holder out of the sale-consideration realised by him that he had made wilful default in payment of the decretal money.

(3) It has been urged for the appellant that this order is bad in law in view of the provisions of S. 51, C. P. C., and in view of no opportunity being given to the judgment-debtor to explain how he had utilised the sale consideration he had received. We agree with the contention for the appellant.

(4) Section 51, C. P. C. provides that one mode of the execution of the decree is by arrest and detention in prison and the proviso to the section is:

"Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to acccunt."

This proviso was added in 1936 by S. 2, Code of Civil Procedure (Amendment) Act, 1936.

(5) The same Act made certain alterations in O. 21, Rr. 37 and 40. Under R. 37 it made it incumbent on the court to issue a notice calling upon the judgment-debtor to appear before the court and show cause why he should not be committed to the civil prison instead of issuing a warrant for his arrest. Prior to this amendment it was discretionary with the court either to issue a warrant of arrest at once or to issue a notice.

The other amendment made in this rule was the insertion of the proviso to the effect that such a notice would not be necessary if the court was satisfied by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the court.

It would be seen that the issue of the notice can be dispensed with only when the court would be justified in ordering the arrest of the judgment-debtor in view of sub-cl. (i) to cl. (a) to the proviso of S. 51. Notice has to be issued to the judgment-debtor whenever the grounds for the arrest of the judgment-debtor would be those mentioned in sub-cl. (ii) to cl. (a) to the proviso of S. 51, or sub-cls. (b) and (c) to the proviso of S. 51.

(6) The amendment in R. 40 led to a different procedure at the hearing of the application when the judgment-debtor appeared in compliance with the notice issued to him.

Sub-rule (1) of R. 40 is:

"When a judgment-debtor appears before the court in obedience to a notice issued under R. 37, or is brought before the court after being arrested in execution of a decree for the payment of money, the court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison."

(7) It appears to us that the proceedings in connection with this execution application for execution by arrest of the judgment-debtor had been against the provisions of O. 21, Rr. 37 and 40 read with S. 51, Civil P. C. Before the court can issue a warrant of arrest or a notice to the judgment-debtor under R. 37, O. 21, it has to see that the judgment-debtor is liable to arrest in pursuance of the application for execution. This means that the nature of the decree should be such that it can be executed by the arrest of the judgment-debtor and that such circumstances exist that an order of arrest can be made against the judgment-debtor, in case the court was satisfied of those circumstances. Such circumstances are what are mentioned in cls. (a) to (c) to proviso to S. 51. Unless those circumstances exist the judgment-debtor cannot be ordered to be arrested. Therefore, the existence of such a circumstance becomes one of the conditions to govern the liability of the judgment-debtor to arrest. This necessarily leads to the conclusion that the existence of such a circumstance should be alleged either in the execution application itself or in a separate application or affidavit which should accompany the usual tabular execution application. Unless such a circumstance is alleged, the court cannot think of it, and in the absence of it the court cannot take action under O. 21, R. 37 or issue notice to the judgment-debtor why he should not be arrested. In this view of the matter the application as presented did not justify the issue of the notice

to the judgment-debtor to show cause why he should not be arrested.

(8) The procedure to be followed, when the judgment-debtor appears in court, should be according to what is laid down in R. 40, O. 21, C. P. C. The judgment-debtor may or may not file any written reply. It is for the decree-holder to lead his evidence in the presence of the judgment-debtor. Such evidence should be in support of his application for execution and should have reference to the grounds which, according to the decree-holder, would justify the arrest of the judgment-debtor in execution of the decree, and which should be one of the grounds mentioned in cls. (a) to (c) to proviso to S. 51. It is when the decree-holder has led 'prima facie' evidence in support of his application that the judgment-debtor has to be given an opportunity of showing cause why he should not be committed to the civil prison.

In the present case the decree-holder led no evidence. The learned Civil Judge does not appear to have called upon the decree-holder to lead evidence as required by O. 21, R. 40, C. P. C. He appears to have examined the judgment-debtor either of his own motion or at the desire of the judgment-debtor, and it was in cross-examination of the judgment-debtor that this fact was elicited that he had sold away some of his property for Rs. 6.000/- and had not paid anything to the decree-holder. The decree-holder did not pursue the matter further and did not ask the judgment-debtor as to why he did not pay the decree-holder or what he did with that money or whether that money or substantial part of it was still with him. In other words, the judgment-debtor was not given an opportunity either by the decree-holder in cross-examination or by the court after this damaging circumstance had come on the record as to why in view of that circumstance he should not be committed to civil prison. It is true that if the learned counsel for the judgment-debtor had been vigilant enough he could have clarified the position, but it was not necessary for him to do so in view of the requirements of law.

If there was nothing on the record which would justify an order against the judgment-debtor for the clarification of this point. It was for the decree-holder to get such facts on the record either by his own evidence or by cross-examining the judgment-debtor or his witnesses as would lead to the satisfaction of the court on one of the points mentioned in cls. (a) to (c) to proviso to S. 51. Failure of the decree-holder to do so cannot go against the judgment-debtor.

(9) Mere non-payment to the decree-holder when the judgment-debtor came into possession of means subsequent to the date of the decree will not always be sufficient for coming to the conclusion that the judgment-debtor refused or neglected to pay the decree-holder. Refusal implies that a request was made to the judgment-debtor at the time when he had the means to pay and yet the judgment-debtor did not pay and declined to make any payment. There is nothing on the record to suggest that any such request was made when the judgment-debtor had that money with him and that the judgment-debtor refused to pay the decree-holder. Negligence to pay also connotes that when the judgment-debtor could have paid he just omitted to pay due to his negligence or carelessness. If the judgment-debtor had other claims to satisfy or other more urgent necessities to meet and spend the money on such purposes, it cannot be said that he neglected to pay the decree-holder. In the absence of evidence which could have a bearing on these considerations the court below could not have felt satisfied that the judgment-debtor had refused or neglected to pay the decree-holder's amount within the meaning of Cl. (b) to the proviso to S. 51, C. P. C.

The learned Civil Judge does not record such a finding. He simply noted that the judgment-debtor had been in possession of money and did not pay the decree-holder and that, therefore, he committed wilful default (sic) on the part of the judgment-debtor. This is not what would justify the arrest in view of Cl. (b) to proviso to S. 51, Civil P. C. In view of the above, we are of opinion that the order of the court below is not proper and should be set aside.

(10) The next question is as to what order should be passed in this appeal. Considering that the decree is an old one, that this execution application was presented in 1950 and that it might mean another series of attempts to serve the judgment-debtor of the notice of any fresh application for execution, we consider it proper that we should remand the case to the court below for proceeding further with the matter subsequent to the stage of the appearance of the judgment-debtor in person.

The creditor will put in an application stating therein the reasons on the basis of which he considers it justified that the judgment-debtor should be arrested in execution of the decree. We fix 24-1-1955 to be the date of the appearance of the parties in the court below. The learned counsel for the appellant-judgment debtor and for the decree-holder have agreed to inform their clients of this date of hearing.

We, therefore, allow the appeal, set aside the order of the court below and remand the case to the court below for further proceedings, as indicated above. We further order the respondent to pay the cost of the appeal to the judgment-debtor appellants.

R.G.D. Appeal allowed.

AIR 1955 ALLAHABAD 404 (Vol. 42 C. N. 120)

RAGHUBAR DAYAL AND ASTHANA JJ.

(6-1-1955)

Tak Chand Fillumal, Appellant v. Western India Match Co. Ltd., Respondent.

F. A. F. O. No. 158 of 1954, from decision of Civil J., Bareilly, D/- 16-7-1954.

Trade Marks Act (1940), Ss. 20, 21(1) and 73 — Passing of action related to use of plaintiff's trade mark — Action, if affected by S. 73.

Sub-section (2) of S. 20 seems to be something like a corollary or a saving provision enacted for purposes of clarification of the effect of the provisions of sub-s. (1) as in its absence it could have been possibly debated that the passing off actions based on the

use of similar unregistered trade marks were barred as that would have amounted to the determination of the question whether there had been any infringement of the unregistered trade mark or not. Therefore the passing off actions which are not affected by the provisions of the Trade Marks Act are those actions which are unrelated to the use of the aggrieved person's trade mark. If they are related to it those suits will necessarily require the determination of the question whether there had been an infringement of the trade mark and therefore would be affected by the provisions of S. 73. (Paras 8 and 9)

No passing off action is likely to succeed when it is based on the use of the plaintiff's trade mark, unless it be shown that the mark used by the defendant is identical or similar to the plaintiff's trade mark and that it had been used in such a manner as to lead persons to consider that that mark was being used as trade mark, meaning thereby that the goods were the goods of the persons who had a right in the trade mark or in a manner as to indicate that the goods were of the other person. These are the necessary ingredients to be established for a claim with respect to the alleged passing off by another of his goods as the goods of the plaintiff. It makes no difference how the suit is framed and whether the relief claimed is alleged to be in connection with the passing off of goods or be claimed in connection with the infringement of the trade mark. (Para 10)

Where, therefore, the entire claim of the plaintiff is based on the fact that the defendants have used a label which is similar to plaintiff's trade mark label and is likely to deceive the potential purchaser, the whole suit is based really on what would amount to the infringement of the plaintiff's trade mark in view of the provisions of S. 21(1) and the suit cannot be said to be outside the purview of S. 73 which bars the institution of suits for the infringement of trade mark or otherwise relating to any right in a trade mark in a Court other than the District Court. AIR 1948 Cal 321 and AIR 1951 Simla 176, Distinguished. (Para 11)

CASES REFERRED: Paras

(A) (V35) AIR 1948 Cal 321 12

(B) (V38) AIR 1951 Simla 176 12

(C) (V35) AIR 1948 Mad 481: ILR (1949) Mad 41 12

S. N. Misra, for Appellant; Bhagwan Das, for Respondent.

RAGHUBAR DAYAL J.:

The plaintiff-respondent No. 1 instituted a suit, suit No. 50 of 1954, in the court of the Civil Judge, Bareilly, against the appellant and several other persons for the issue of a permanent injunction restraining the defendants, their servants and others on their behalf from manufacturing, selling or offering for sale or from passing off or attempting to pass off match boxes not of the plaintiff's manufacture as those of the plaintiff's manufacture by the use of the offending labels, Annexures B-1 and B-2, or any other label of a similar design and appearance as that of the plaintiff. It was further prayed in the suit that the defendants be ordered to deliver up to the plaintiff the entire stock of the offending labels and boxes of matches bearing the offending label under their control & also all loose labels, blocks, wrappers, etc., in their possession. It was further prayed that the defendants be ordered to render an account of the profits made by them by sale of their match boxes by passing them off as the plaintiff's goods under the aforesaid offending label and a decree of the amount of profits so found be passed against them by way of damages.

(2) The plaintiff-company carries on business of manufacturing & selling match boxes. The match boxes manufactured by the plaintiff are packed in boxes & cases each of which bears a label known as "TEKKA" & a specimen of which attached to the plaint is marked Annexure A. This label is said to be commonly and popularly known by the purchasing community as 'Tash', 'Cards' 'Ekka' brand marks. It is alleged that the people in general consider the goods bearing that label to be goods manufactured by the plaintiff and that the plaintiff has thus acquired an exclusive right and title to their trade marks which are also registered. In this connection it is also mentioned in the plaint that the aforesaid label stands as a symbol for the goods manufactured by the plaintiff.

(3) The defendant No. 3, the appellant, is said to be the owner of another label attached to the plaint and marked as Annexures B-1 and B-2. The other defendants 4 to 13 are dealers in match boxes in various places in India. Defendants 1 and 2 manufacture match boxes and matches on behalf of defendant 3. They manufacture their matches under labels marked Annexures B-1 and B-2. It is alleged by the plaintiff in the plaint that they do so with a view to pass off such goods as the goods manufactured by the plaintiff and that they were actually passing their own manufactured goods as the goods manufactured by the plaintiff. Annexures B-1 and B-2 are said to be colourable imitation of the plaintiff's Annexure A and are calculated to mislead purchasers into the belief that in purchasing the defendants' match boxes they were purchasing the match boxes manufactured by the plaintiff.

The further allegations in the plaint are that the defendants adopted this label, Annexures B-1 and B-2, with fraudulent intention and that the similarity between the two labels namely those mentioned in Annexure A and Annexures B-1 and B-2 and the name 'cards' adopted by the defendants were calculated to deceive persons, whether illiterate villagers or literate persons into the belief that while purchasing the defendant's match boxes they were really purchasing those manufactured by the plaintiff and sold as 'TEKKA' of "EKKA" marks and that owing to the introduction of the offending labels considerable confusion had already been created in the market.

(4) Afer the institution of the suit an application was presented for the issue of a temporary injunction restraining the defendants from manufacturing or selling match boxes bearing the labels which are Annexures B-1 and B-2 or any other

similar label which may be a colourable imitation of plaintiff's label Annexure A till the disposal of the suit. Orders were also sought with respect to the disposal of the property attached. The court on hearing the parties passed the required interim injunction order and orders about the attached property. It is against this order that defendant 3 has appealed.

(5) The first and the only point urged in appeal is that the Court of the Civil Judge, Bareilly, had no jurisdiction to entertain this suit in view of S. 73, Trade Marks Act, 1940, which is:

> "No suit for the infringement of a trade mark or otherwise relating to any right in a trade mark shall be instituted in any court inferior to a District Court having jurisdiction to try the suit."

It is contended that this suit is in reality a suit with respect to the infringement of the trade mark or otherwise relating to any right in the trade mark. The plaintiff-respondent, on the other hand, contends that the suit is a suit for the passing off of the goods manufactured by defendants 1 and 2 as the goods of the plaintiff and that therefore this Act does not affect his right of action in this connection in view of S. 20, sub-s. (2) of the Act. We have heard the learned counsel for the parties and are inclined to agree with the contention for the appellant and to hold that this suit was not maintainable in the court of the Civil Judge, Bareilly.

(6) It is no doubt true that an action for the infringement of a trade mark is not identical with an action for the passing off of goods by one person as the goods of another. It is also true that the reliefs claimable in either action are practically similar. As the suits for the infringement of the trade mark are not to lie in a court subordinate to the district Court in view of S. 73, Trade Marks Act and the suit for the passing off of goods, being not covered by the provisions of the Act, can be instituted in Courts other than the District Court., the question before us assumes importance as it affects the jurisdiction.

(7) All actions in connection with the passing off of goods need not include matters which would amount to the infringement of a trade mark. It is, however, possible as appears to us to be in the present case that in some types of action for the passing off of goods the Court cannot decide the main dispute without deciding matters which would determine the questions which are essential and necessary to be determined in connection with the infringement of a trade mark. It is only in such cases that the importance of the question before us arises. In cases where no question about the infringement of a trade mark or no question of determining facts which would amount to the infringement of trade mark is raised, it does not matter that the suit be in the court other than a District Court.

But in cases where the decision of such points is essential for granting the complete relief, in fact the main relief in connection with the passing off action, it looks to us illogical that those points should be determinable by a court inferior to a District Court even though S. 73, Trade Marks Act provides that a suit for the infringement of a trade mark or otherwise relating to any right in a trade mark should not be instituted in a court other than a District Court. We, have, therefore, to interpret the two provisions referred to on behalf of the parties in such a manner as to make the whole scheme of the Act consistent and logical if that be possible.

(8) Section 20 is:

> "20(1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark unless such trade mark has been continuously in use since before the 25th day of February, 1937, by such person or by a predecessor in title of his and unless an application for its registration, made within five years from the commencement of this Act, has been refused; and the Registrar shall, on application in the prescribed manner, grant a certificate that such application has been refused.
>
> 2. Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

It appears to us that the object of sub-s. (1) of S. 20 clearly is that no action be instituted for the infringement of an unregistered trade mark unless it be that an application for the registration of a trade mark, which had been continuously in use since before the 25th day of February, 1937, had been made in the prescribed manner and refused by the Registrar, and that the object of sub-s. (2) really is that in such cases when no suit for the infringement of an unregistered trade mark is possible, suits for passing off action could be instituted in spite of the provisions of this Act. That would retain the right which the person coming to own any right in a trade name had acquired by its long user. The rights of such a person were not completely negatived by the Trade Marks Act. His remedy was restricted merely to an action with respect to the passing off of goods and was not enforceable with respect to the particular mark or trade name.

In this view no difficulty is expected to arise. Whenever a trade mark is registered and anybody passes off goods using that trade mark or its resemblance for the purpose of deception, the person aggrieved can institute a suit complaining that the other person had infringed his trade mark or had adversely affected his right in that trade mark. If the passing off of goods had been independently of the use of the aggrieved person's trade mark, such passing off could be a subject of a suit which is in no way contemplated by the Trade Marks Act and would, therefore, be not affected by the provisions of that Act. Suits by persons who had not registered their trade marks would also be outside the provisions of the Trade Marks Act if they be for the passing off action and not for the infringement of their trade mark.

Sub-section (2) of S. 20 seems to be something like a corollary or a saving provision enacted for purposes of clarification of the effect of the provisions of sub-s. (1) as in its absence it could have been possibly debated that the passing off actions based on the use of similar unregistered trade marks were barred as that would have amounted

to the determination of the question whether there had been any infringement of the unregistered trade mark or not just as in the present suit we are confronted with the question whether the plaintiff's trade mark had been infringed and whether that infringement had let to the passing off of the defendants' goods as the goods of the plaintiff. Such an interpretation of sub-s. (2) S. 20 finds support from the fact that in Trade Marks Act of 1938 (1 and 2 Geo. 6, c. 22) S. 2 is:

"No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark, but nothing in this Act shall be deemed to affects rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

The provisions of this section are practically the same in essence as those of sub-ss. (1) and (2) of S. 20. The only difference is that they are not enacted in two different sub-sections but form part of one section the word "but" occurring between the two types of provisions made in this section, namely barring the right of instituting a certain proceeding for the infringement of an unregistered trade mark and protecting the right in connection with the passing off of goods by another as the goods of the person instituting the suit. In the Trade Marks Act of 1905 (5 Edw. 7, c. 15) Ss. 42 and 45 corresponded to sub-ss. (1) and (2) of S. 20 of our Trade Marks Act, 1940. Section 42 is:

"No person shall be entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trade mark unless such trade mark was in use before the thirteenth of August one thousand eight hundred and seventyfive, and has been refused registration under this Act. The Registrar may, on request, grant a certificate that such registration has been refused".

Section 45 is:

"Nothing in this Act contained shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof".

It would appear that our S. 20 is really based on these two Ss. 42 and 45, Trade Marks Act of 1905 and that the Legislature omitted to note the fact that the provisions of both these sections had been consolidated in S. 2 in the Trade Marks Act of 1938 and which consolidation makes it clear what the rule contained in S. 2 is.

(9) We are, therefore, of opinion that the passing off actions which are not affected by the provisions of the Trade Marks Act of 1940 are those actions which are unrelated to the use of the aggrieved person's trade mark. If they are related to it those suits will necessarily require the determination of the question whether there had been an infringement of the trade mark and therefore would be affected by the provisions of S. 73, Trade Marks Act.

(10) Reference in this connection may now be made to the provisions of S. 21 of the Trade Marks Act. It is:

"21 (1) Subject to the provisions of Ss. 22, 25 and 26, the registration of a person in the register as proprietor of a trade mark in respect of any goods shall give to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark of a registered user thereof using by way of the permitted use, use a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

(a) as being used as a trade mark; or

(b) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or goods with which such a person as aforesaid is connected in course of trade.

2. .....".

What would be deemed to be an infringement of a registered trade mark is provided in this section. The right shall be deemed to be infringed when any person uses a mark identical with the trade mark, or so nearly resembling it as to be likely to deceive or cause confusion in the course of trade in relation to any goods in respect of which it is registered and when such use is in such a manner, as to render the use of the mark likely to be taken either as being used as a trade mark or to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or goods with which such a person as aforesaid is connected in the course of trade.

No passing off action is likely to succeed when it is based on the use of the plaintiff's trade mark, unless it is shown that the mark used by the defendant is identical or similar to the plaintiff's trade mark and that it had been used in such a manner as to lead persons to consider that that mark was being used as a trade mark, meaning thereby that the goods were the goods of the persons who had a right in the trade mark or in a manner as to indicate that the goods were of the other person. These are the necessary ingredients to be established for a claim with respect to the alleged passing off by another of his goods as the goods of the plaintiff. To our mind, it makes no difference how the suit is framed and whether the relief claimed is alleged to be in connection with the passing off of goods or be claimed in connection with the infringement of the trade mark.

(11) We have already mentioned the plaint allegations and it is clear that the entire claim of the plaintiff is based on the fact that the defendants have used a label which is similar to the plaintiff's trade mark label and is likely to deceive the potential purchaser. The whole suit, therefore, is based really on what would amount to the infringement of the plaintiff's trade mark in view of the provisions of S. 21(1), Trade Marks Act. The grievance of the plaintiff is the use of a label similar to his by the defendants and not any other conduct of the defendants which is likely to deceive a purchaser into believing that the goods were the goods of the plaintiff. In

these circumstances, we are of opinion that the suit cannot be said to be outside the purview of S. 73, Trade Marks Act which bars the institution of suits for the infringement of trade mark or otherwise relating to any right in a trade mark in a Court other than the district Court.

(12) We were referred to the cases — 'Ram Krishna v. Firm Haji Jonabally and Abdul Jalil', AIR 1948 Cal 321 (A); — 'Ranjit Lal Maria v. Vidya Parkash', AIR 1951 Simla 176 (B) and the — 'National Sewing Thread Co. v. James Chadwick and Bros. Ltd.', AIR 1948 Mad 481 (C).

(13) In the 'Madras case' it was admitted that it was to be decided without reference to the provisions of the Trade Marks Act, 5 of 1940.

(14) The other cases are distinguishable. The observations therein may impliedly go against the present appellant. In the 'Calcutta case' Mukherjea J. observed:

"It is not disputed on behalf of the petitioners that the present action is not one for infringement of a trade mark. There is no allegation in the plaint of the trade mark being registered, or an application for its registration having been refused. It is also not alleged anywhere that the trade mark had been in use from before 25-2-1937. In our opinion, it is also not a suit where any right to a trade mark will be the subject matter of investigation".

He further observed:

"It (plaint) nowhere states that the plaintiff has got any trade mark of a particular variety, and wants any declaration of title, or relief in regard to that particular trade mark".

It was in these circumstances that it was held that the case did not come within the purview of S. 73, Trade Marks Act and that the Subordinate Judge had implied jurisdiction to entertain and dispose of the suit.

(15) The same can be said about the third case. Harnam Singh J. observed in the Simla case:

"As already mentioned, there is no averment in the plaint that the conditions mentioned in S. 20 (1) of the Act are satisfied. Clearly, the suit out of which these proceedings have arisen does not fall within the exception mentioned in S. 20 (1) of the Act".

He again observed:

"Clearly, the cause of action disclosed in the plaint is not the cause of action appropriate in an infringement action. In an infringement action plaintiff brings the suit alleging that the plaintiff has registered his trade mark or that his trade mark falls within S. 20 (1) of the Act and that the defendant is using a mark which is identical with the plaintiff's mark or so nearly resembles it as to be likely to deceive or cause confusion in the course of trade. Again the relief in such an action is for an absolute injunction against the defendant from using the plaintiff's mark".

We are, therefore, of opinion that these cases do not support the appellants' contention.

(16) In view of the above we hold that the court below had no jurisdiction to entertain the suit and consequently had no jurisdiction to pass the interim injunction order which is under appeal. We, therefore, allow the appeal and set aside the interim injunction order, dated 16-7-1954. The attachment of goods by virtue of the order dated 27-5-1954, is withdrawn. We further order that the supurdars will deliver the property to the persons from whose possession it was attached.

(17) We order respondent 1 to pay costs of the appellant in this Court.

(18) In view of our opinion that the trial Court had no jurisdiction over this case we further order that the office will return the plaint to plaintiff-respondent 1 or to his counsel after he has furnished a copy of the same for the purpose of the record and that the costs of the court below would abide the result of the suit.

(19) The office will after the return of the plaint return the record to the Court below at a very early date.

V.R.B. Appeal allowed.

A.I.R. 1955 ALLAHABAD 408 (Vol. 42, C.N. 121)

RAGHUBAR DAYAL AND AGARWALA JJ.

(16-11-1954)

Sheo Kumar and others, Plaintiffs-Appellants v Gyan Nath Raina and others, Defendants-Respondents.

First Appeal No. 129 of 1947, against decree of 2nd Civil J., Kanpur, D/- 15-11-1946.

(a) Contract Act (1872), Ss. 65 and 73 — Distinction between — Damages for breach of contract — Not provided by S. 65.

Section 65, Contract Act, contemplates something different from what S. 73 contemplates. It contemplates the refund of any advantage which a party has received under an agreement which is discovered to be void or when a contract becomes void. The advantage received can either be restored in the form in which it was received or its equivalent can be awarded to the other party by way of compensation. It, therefore, contemplates only refund of what one has received and does not contemplate the payment of damages to make up for the loss which the party not at fault has suffered on account of the other's committing a breach of the contract.

(Para 27)

Anno: Contract Act, S. 65 N. 6; S. 73 N. 4.

(b) Contract Act (1872), Ss. 73, 65 — Breach of contract to sell property — Damages — Quantum of — Voidable contract — (Hindu Law — Alienation — Father).

A & B, on his behalf and on behalf of his minor sons, had completed a contract for the sale of B's bungalow for Rs. 58.000. A paid Rs. 5000 as earnest money to B. B cancelled the transaction not on the ground that any of the previous terms which had been agreed upon were being resiled from by A, but on a matter which had not been contemplated at the time of settling the transaction. A sued B and his sons for specific performance of the contract or for damages. On evidence it was found that the sale transaction was not for legal necessity or for the benefit of the estate and hence was voidable at the instance of B's minor sons.

Held that the contract arrived at between A and B was a good contract. B did not perform his part of the contract. By that time it had not been avoided by his minor sons. B was, therefore, liable to make good the loss suffered by A on account of his breach. (Para 28)

That in addition to the refund of Rs. 5000 paid as earnest money, A was entitled to damages of Rs. 7000 as on B's own statement, B had an offer for Rs. 65,000 for the property on the date of the breach. Case law referred. (Para 24)

Anno: Contract Act, S. 73 N. 4, 11; S. 65 N. 2, 6.

CASES REFERRED: Paras

(A) ('08) 32 Bom 165: 9 Bom LR 1037 26
(B) ('11) 38 Cal 458: 9 Ind Cas 525 26
(C) (V27) AIR 1940 Lah 159: 188 Ind Cas 383 26
(D) (V5) AIR 1918 Mad 1315: 40 Mad 338 (FB) 26
(E) (V11) AIR 1924 Bom 357: 48 Bom 368 26
(F) (V15) AIR 1928 All 41: 25 All LJ 926 26

Dr. N. P. Asthana, for Appellants; Sarvashri G. S. Pathak, M. A. Kazmi, J. N. Takru and G. Kumar, for Respondents.

RAGHUBAR DAYAL J.:

This appeal arises out of a suit for the specific performance of a contract. The plaintiffs' suit for the specific performance of the contract was dismissed and their claim for damages for Rs. 32,000 on account of breach of contract was decreed for Rs. 7,000 only. The plaintiffs have appealed against the dismissal of their claim.

(2) Defendant-respondent 1 has filed a cross-objection against the decree for damages in favour of the plaintiffs.

(3) It may also be mentioned that the decree in favour of the plaintiffs is also for the undisputed claim for Rs. 5,000 on account of the refund of the earnest money which had been paid by the plaintiffs to the defendant-respondent.

(4) The plaintiffs' case is that on 3-1-1943, an agreement was arrived at between them and defendant 1 with respect to the sale of bungalow No. 13/5 in Civil Lines, Kanpur, with the proprietary and lessee rights in the appurtenant lands for a sum of Rs. 58,000 excluding all costs of stamp and registration which were to be borne by the plaintiffs. It was agreed that a proper sale would be completed within a month. On the conclusion of the contract a sum of Rs. 5,000 was paid by the plaintiffs to defendant 1, who is the father of the other defendants who were minors. Defendant 1 executed a receipt incorporating the terms on which the agreement to sell was made.

(5) It is further alleged that defendant 1 raised certain objections to the draft of the sale-deed and that the plaintiffs agreed to those suggestions but defendant 1 wanted to impose further conditions contrary to those already settled and ultimately sent a cheque for Rs. 5,000 to the plaintiffs saying that the negotiations for sale were brought to a close.

(6) It was further alleged that the bungalow could fetch Rs. 90,000 and that, therefore, the plaintiffs were entitled to damages to the extent of Rs. 32,000.

(7) Defendant 1 contested the suit mainly on the ground that there had been no concluded contract for sale and that when the negotiations did not terminate in an agreement he returned the amount he had received from the plaintiffs by means of a cheque. He denied the correctness of the various allegations suggested by the plaintiffs for making out the sale to be for the benefit of the family.

(8) Defendant 1 justified his insisting on the latest condition absolving him of any responsibility in case the sale transaction fell through on account of any action of the minors challenging the validity of the sale in view of the fact that a notice had been given by the guardian of the minors challenging the necessity for the contemplated sale by their father. He contended that as the sale transaction fell through on account of the repudiation by the minor-defendants the claim for damages was misconceived.

(9) The suit was contested by the minor defendants on the ground that the sale was not for the benefit of the family or for any legal necessity and that therefore the transaction was void and the plaintiffs could not enforce it.

(10) The learned Civil Judge found that the transaction was not for legal necessity or for the benefit of the estate and that therefore the suit could not be decreed for the specific performance of the contract. He assessed the amount of damages relying on the statement of defendant 1 that the offers did not exceed Rs. 64,000 or Rs 65,000 and consequently decreed the suit for damages for Rs. 7,000.

(11) The main question for determination in connection with the appeal and the cross-objection is whether there had been a concluded contract between the plaintiffs and defendant 1. On this point we are in agreement with the finding of the Court below and are of opinion that the contract for sale had been completed between them on 3-1-1943.

(12) Defendant 1 had been trying to sell this house from some time before 11-9-1941. It appears from the letter Ex. 24, dated 17-9-1942, from defendant 1 to a broker that defendant 1 would consider an offer in the neighbourhood of Rs 50,000 for his bungalow and from the letter Ex 30, dated 2-1-1943, that some offer had been made to him and he insisted on getting the cheque by the 5th of January and to be informed very clearly what the offer was. Defendant 1 has not disclosed in his deposition and it is not possible either that the offer made to him by this broker was more favourable than what had been made by the plaintiffs on 3-1-1943. In fact this previous correspondence is just to indicate that defendant 1 had been anxious to sell the house for more than a year and had not been successful in obtaining a clear offer of Rs. 50,000 or so by that time. There should, therefore, be nothing surprising if defendant 1 should readily accept the offer of the plaintiffs for purchasing the house for Rs. 58,000.

The receipt executed by defendant 1 makes it clear that Rs. 5,000 were received by him as earnest money for the sale of his bungalow for the sum of Rs. 58,000 and that it was agreed that

the registration would be effected within one month. The necessary terms of the sale for the purposes of the vendor were to be found mentioned in this receipt. A vendor is solely concerned with the price for the property which he intends to sell. The vendee is not only concerned with the property that he is purchasing but also with the guarantee about a clear title and other safeguards for the same purpose. Earnest money is paid usually after the conclusion of a contract. The question of the registration of the sale deed can arise also after a concluded contract. There is no question of fixing a time limit for the registration of a sale deed if no contract has been arrived at and terms were still to be settled. Nobody could have visualised that the terms must get settled within a specified period of time. The receipt itself therefore lends very good support to the statement of Debi Charan Gupta, one of the plaintiffs, that the terms of the contract had been settled. The correspondence which followed makes this particularly clear.

(13) A draft sale-deed, Ex. 20 was sent to defendant 1 sometime prior to 18-2-1943, as on that date defendant 1 wrote to Mr. Jagdish Behari Lal, Advocate of Kanpur and who had accompanied Debi Charan Gupta to Agra where the conversation about the sale transaction had taken place with defendant 1 that he was returning the draft sale-deed. Paragraph 2 of this letter, Ex. J, said that the portion placed within brackets was to be omitted and the marginal notes were to be added, that the purchaser must take the property with his eyes open with respect to the measurements of the land and that he did not want to bind himself to any bank, nor would place the money in a way that there might be some difficulty in withdrawing it for purchasing fresh property. He wanted the necessary amendments on these two points to be made. The draft sale-deed, Ex. 20, provided:

"In consultation with the legal adviser it has been decided that the amount of sale consideration should at present be deposited in more than one bank as fixed deposit bearing interest, with this condition that when the minor sons of me, the executant, would become major they shall get the amount deposited from the banks. If before the minor sons attain majority, I the executant enter into contract for purchasing one or more property in the name of the minors and for their benefit, I shall have right to withdraw the fixed amount from the said banks and to invest the same in the purchase of the property."

Later on the sale deed provided:

"The remaining amount of Rs. has been deposited by the vendees aforesaid under the instructions of me, the executant, in the Bank in the account of Krishna Murthi Raina, Ram Murthi Raina and Bishun Murti Raina minor sons of me, the executant, with the condition that the said amount deposited be treated as the fixed deposit bearing interest and that the minors aforesaid on attaining majority shall be entitled to withdraw the said amount deposited together with the interest on the same, or if during the period of minority of the aforesaid sons I, the executant, make purchase of any property in the name of the said minors, the entire amount deposited aforesaid or part thereof as the case may be, shall be spent in connection with the purchase of the property."

(14) It would appear, therefore, that the draft sale deed provided for the withdrawal of the money for purchasing fresh property and that the expressions in this draft sale deed could not have led to any difficulty in the withdrawal of the amount. The other suggestion about transferring the amount from one bank to another could not have been open to any objection and could have been very easily incorporated in the sale deed. In fact it does not appear that the plaintiffs raised any objection to accommodate defendant 1 in this small matter.

(15) This letter of the 18th of February was followed by the letter Ex. K, dated 9-3-1943, to Mr. Jagdish Behari Lal. Defendant 1 complained about not receiving back the revised draft of the sale deed, and indicated therein that he had since received higher offers which he had refused because he had accepted the offer of Lala Debi Charan. He requested Mr. Jagdish Behari Lal to have the revised draft sent to him at once so that it could be executed within that month, that is March 1943. He made it clear in this letter that the two points he had raised in the previous letter might be put in the draft sale deed in any language so long as the sense of his conditions was found incorporated. Another significant statement in this letter is:

"Kindly remind L. Debi Charan that during the course of our conversation I had told him these very points and I understood him to say that he had no objection to my placing the money in any bank I liked and to its being taken out for purchasing other property whenever I liked, and that he had already had the measurements of the land taken. In the circumstances there should not now be any controversy and I will expect you to send me draft deed in a form which will be acceptable to both parties, and at once."

This makes it amply clear that the matter about the deposit of the sale consideration in a bank and about its withdrawal had been settled between the parties on the 3rd of January and that there was nothing else which was contemplated by defendant 1 with respect to this sale which had to be further settled. Of course, the terms settled have to be expressed in a formal deed and a possibility of some alterations and suggestions according to one's notions does exist, but such suggestions cannot be raised to the status of terms of the sale transaction. Any undue insistence on such terms must be with a view to back out of the contract and not with a view to get things expressed in a manner that no party should suffer from any loss or inaccurate expression. As already mentioned, this letter confirms our view that the contract of sale had been settled between the parties on the 3rd of January and that the objections which defendant 1 was raising were just with respect to the way in which what had been agreed upon should be expressed in the sale deed.

(16) It may also be mentioned that defendant 1's reference to his refusing higher offers

because he had already accepted the offer of Debi Charan also indicates that upto 9-3-1943, defendant 1 did consider that he had entered into an irrevocable contract of sale with Debi Charan. If he was only negotiating with Debi Charan and no final contract had taken place, there was no reason for him to refuse higher offers.

(17) It may be mentioned here that the letter Ex. 31, dated 24-1-1943, addressed by defendant 1 to his broker indicates that he had been offered Rs. 56,000, which he naturally considered too low having had already an offer of Rs. 58,000 from Debi Charan and that defendant 1 communicated to his broker that he could consider an offer of Rs. 70,000 if he had any for his bungalow. This shows that while defendant 1 was carrying on correspondence with his counsel Mr. Jagdish Behari Lal in connection with the sale deed in suit and just asking for a slight variation in the language of the sale deed, he was carrying on correspondence with a broker for getting a higher price for his bungalow and was thinking of getting something more substantial in the neighbourhood of Rs. 70,000 and that when he was actually offered Rs. 62,000 he did a little calculation and wanted to make sure what would be his net gain after he had paid up the brokerage and other charges, for we find in letter Ex. 32, dated 13-3-1943, by defendant 1 to his broker that the broker had written to him on the 11th of March intimating an offer of Rs. 62,000 and that defendant 1 wanted to know by return of post the net amount which he would get after paying commission, brokerage, etc. He wanted his broker to get the draft sale deed drawn up and sent to him at once and then he would give a final reply. This letter shows that what defendant 1 wrote in his letter, Ex. K, dated 9-3-1943 to Mr. Jagdish Behari Lal that he was not accepting higher offers because he had accepted the offer of Lala Debi Charan was not a true statement of fact but had been introduced as a thin end of the wedge for future contingencies in case he did get a substantially higher offer and wanted to back out of the contract. He could not have expected to execute two sale deeds in the same month with respect to the same property.

(18) On 15-3-1943, defendant 1 again wrote to Mr. Jagdish Behari Lal saying that he had not received the draft sale deed and would like it to be sent at once and that otherwise he would assume that the vendee was unwilling to close the transaction. He further stated in this letter that it was not necessary to mention the names of the banks in the deed and that it might be mentioned that the money would be deposited in the names of himself and the minors and the property would be purchased out of that money and that it should not be mentioned that the money would not be withdrawn until the sons attained majority. It will be noticed that these things were not quite the same what had been mentioned by him in his letter, dated 18-2-1943, and which, according to him, was just giving expression to what had been agreed upon between the parties on the 3rd of January.

Naturally Mr. Jagdish Behari Lal replied to this letter on 19-3-1943, saying that he had explained the matter to Debi Charan who had consulted his lawyers and had been advised that the purchaser would not be safeguarded unless it was mentioned in the draft that if the property was not purchased out of the sale consideration, it would remain in some bank, in fact till the minors attained majority.

He further mentioned that Debi Charan would have no objection that defendant 1 would have the option to transfer the money from one bank to another on the same terms and conditions, that is to say, it would remain in deposit with the other bank till he purchased another property or the minors attained majority. He said that if defendant 1 agreed to this, he would send the amendment draft for his approval and in case he insisted for the omission to mention that the amount would remain in deposit till the minors attained majority he would return the cheque for Rs. 5,000. This letter indicates the reasonable attitude of the plaintiffs upto that time. They were prepared to agree with the suggestion of defendant 1 so far as it did not alter the main terms of the contract and were possibly not prepared to insist on the sale transaction if defendant 1 was not agreeable to it in those circumstances even though the contract had been arrived at between them previously.

(19) In reply to this letter to Mr. Jagdish Behari Lal defendant 1 seems to have sent a letter on the 22nd of March. That letter is not on the record. Mr. Jagdish Behari Lal's reply to that letter is contained in Ex. N, dated 6-4-1943. He had sent that reply on the 28th of March. In this letter Mr. Jagdish Behari Lal stated:

> "The clause which you suggest to be added in the draft sale deed is already there."

He explained the necessity of the safeguarding terms in the sale deed in favour of the vendee and then stated in the last paragraph:

> "If you agree to deposit the purchase money in any bank you consider safest on the terms that it would be paid to you when you purchase another property in the name of minors or they attain majority, the purchaser can have no objection to get the sale deed executed in his favour, as it was the main term of the contract."

This supports our view as already mentioned that this term about the deposit of money and its withdrawal had been agreed upon on 3-1-1943, and that it was one of the main terms of the contract for the purposes of the vendee, and all what defendant 1 had been trying to do was to back out of that particular stipulation. The reply of defendant 1 to this stern letter of Mr. Jagdish Behari Lal is letter Ex. O, dated 12-4-1943. He realised the weakness of his position and stated that he did not object to the condition that the money must remain in some bank until the minors attained majority or the property was purchased for them, and asked Mr. Jagdish Behari Lal to send him a copy of the draft sale deed incorporating the other alterations which he had proposed. This letter does not indicate to what other alterations he was referring unless the reference was to some verbal expressions.

This letter again shows that if the suggestions of defendant 1 be taken to be material suggestions capable of such differences between the parties as could justify their not concluding the contract in case it had not been concluded on the 3rd of January, those suggestions had been accepted and defendant 1 was prepared to execute the sale deed as drafted and modified slightly in some of the expressions. If the contract was not concluded on the 3rd of January it must be taken to be concluded on 12-4-1943. The draft sale deed was sent to defendant 1 and then defendant 1 sent the letter, Ex. P, suggesting that the deed did not make it clear that he was free to transfer the amount from one bank to the other. Paragraph 2 of this letter said that in case the vendee insisted that the money could not be transferred to another bank, he would not agree to keep it for ever in one bank. This seems to be a curious suggestion in view of the letter already mentioned of Mr. Jagdish Behari Lal, dated 19-3-1943, wherein he had said that it could be mentioned in the sale deed that defendant 1 would have the option of transferring the money from one bank to another on the same terms and conditions, that is to say, it would remain invested in the other bank till he had purchased another property or the minors attained majority. It therefore, appears to be again a further attempt on the part of defendant 1 to postpone the execution of the sale deed.

Ultimately on 6-5-1943, defendant 1 returned the draft sale deed with the slip, Ex. 21, dealing with the question of the transfer of the amount. Still in this very letter he raised another point in para. 4 and that was in connection with the Improvement Trust not executing leases in the names of more persons than one and saying that he must have unfettered discretion to purchase property in his own name or the names of his sons on the condition that if it was in his name, he should not transfer it to anyone else, that unless this condition was accepted he would not be able to purchase Trust land and that he should explain this to the vendee. This is quite a new point and again seems to have been raised as a thin end of the wedge after ostensibly agreeing in the opening portion of this letter to the finality of the draft sale deed in case the amendment suggested in the sale deed was incorporated.

He repeated this point in his letter, dated 2-6-1943 and in his letter Ex. R, dated 6-6-1943, he wrote to Mr. Jagdish Behari Lal:

> "In this case I shall not be able to purchase such land in the names of all the sons but only in my own name or in the name of one son. Does your client agree to this? This contingency did not occur to me when the sale deed was drafted but has now arisen and must be provided for. Please let me have your reply with the amendment in the sale deed soon to enable further steps to be taken."

Mr. Jagdish Behari Lal then washed his hands off this affair and wrote to defendant 1 on 13-6-1943:

> "I am tired of writing to you in the matter of sale deed of your bungalow. As soon as you agree to one thing, you come out with some rider the next moment. Your approved draft sale deed is with L. Debi Charan purchaser. He is not my client. It would be better if you write to him direct."

(20) It will be noticed that for the first time defendant 1 referred to Mr. Jagdish Behari Lal as the counsel for the plaintiffs, the vendees, in his letter, dated 6-6-1943, and Mr. Jagdish Behari Lal lost no time to repudiate this suggestion. There was nothing in the correspondence before to indicate that Mr. Jagdish Behari Lal was acting on behalf of Debi Charan, one of the plaintiffs. This only shows how cleverly defendant 1 was drafting his letters with an eye to the future and that Mr. Jagdish Behari Lal, who had been his counsel in other litigations and was acting for him in this transaction, felt it hopeless to conduct the transaction for him and therefore asked him to deal with the vendee direct.

(21) Thereafter the plaintiffs and defendant 1 had been in correspondence with respect to this latest suggestion. Debi Charan suggested to defendant 1 in his letter, Ex. A-3, dated 25-7-1943, that the suggestion would be given careful consideration in the presence of the lawyer and adjusted on the spot and that he should come over to Kanpur for the execution of the sale deed.

This indicates that the plaintiffs were not contemplating any serious difficulty in finding a way out and accommodating defendant 1 even in this new matter raised by him. Defendant 1, however, refused to come over to Kanpur to execute the document till the terms were finally settled and communicated to one another in writing. He further stated in his letter, dated 27-7-1943, that if the plaintiffs did not accept the conditions referred to in spite of the special reasons necessitating them he be informed of the decision by return of post and that otherwise he would be compelled to treat the negotiations as cancelled, and on 29-7-1943, he informed the plaintiffs by letter Ex. X, dated the 29th July that as he had not received a reply to his letter, dated the 27th he was treating the negotiations as cancelled and the contract at an end. He sent a cheque for Rs. 5,000 with this letter.

(22) We need not in the present context follow the further correspondence between the parties because it is clear from the correspondence so far dealt with that Debi Charan for the plaintiffs and defendant 1 on his behalf and on behalf of the minors had completed the contract for the sale of the bungalow for Rs. 58,000 and that there did not remain any particular term of the contract to be settled thereafter. Whatever suggestions were made by the defendant were either accepted by the plaintiffs or were not insisted to by defendant 1. Defendant 1 cancelled the transaction not on the ground that any of the previous terms which had been agreed upon were being resiled from by the plaintiffs but on the ground that the defendants were not probably prepared to agree to his fresh suggestion as a result of the Improvement Trust not executing a lease in favour of more than one person—a matter which had not been contemplated at the time of settling the transaction.

(23) The finding of the learned Civil Judge that the sale transaction was not for legal neces-

sity is not disputed for the appellant. It is contended, however, that the conduct of defendant 1 in selling the ancestral house was the prudent act of the manager of the joint family. We are of opinion that this cannot be said on the basis of the material on the record. There is no clear evidence as to what would have been the income from interest on the deposit of Rs. 58,000 in a bank and whether such income would have been substantially in excess of what the bungalow was fetching by way of rent. Even if the monetary return on the deposit was higher than the receipts from rent, it is very doubtful how far that consideration alone would justify the sale of ancestral property.

Further it is to be considered that the parties were agreeing to the withdrawal of the amount in case defendant 1 purchased some other property. There is nothing on the record to show that such other purchase must have necessarily been a better investment of the amount. Apparently the other property would also be sold in accordance with the rise in prices at that time and there need not have been any great margin of profit. We, therefore, agree with the learned Civil Judge and hold that the sale transaction was not for legal necessity or for the benefit of the estate.

(24) On the question of the quantum of damages the evidence on the record is very meagre. The bare statement of Debi Charan, one of the plaintiffs, that prices had risen by one and a half or double between January 1943 and December 1943 or January 1944 cannot be made the basis of assessing damages, especially when he himself had said that he could not say what was the difference in prices between January 1943 and December 1943 or January 1944. Defendant 1 stated in his deposition that Jivan Baboo's offer was of about Rs. 64,000 or Rs. 65,000 and that probably it was sometime before 6-5-1943. He also deposed that according to his recollection he did not receive up to December 1943 an offer of higher than Rs 70,000 and that it was likely that he might have received before December 1943 offers of about Rs. 70,000. This statement may imply that h had received an offer of Rs. 70,000 but that is not the positive statement of this witness and therefore should not be the basis for assessing damages. In this view of the matter, again, the learned Civil Judge seems to have been in the right in assessing damages by relying on the statement of defendant 1 that he had an offer of about Rs. 64,000 or Rs. 65,000 of this bungalow before 6-5-1943.

(25) It has been contended for the respondent that the plaintiff is not entitled to damages under S. 73. Contract Act (Act 9 of 1872) but is entitled only to the refund of the earnest money in view of S. 65 of the Act. We do not agree with this contention.

(26) Section 73, Contract Act is in a chapter with the heading "Of the Consequences of Breach of Contract" and provides:

> "When a contract has been broken the party who suffers by such breach is entitled to receive, from the party who had broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
> ...."

It is not necessary to refer to cases in which compensation has been awarded to the vendee when the vendor broke a contract for sale, but mention may be made to the cases reported in — 'Ranchhod Bhawan v. Manmohandas Ramji', 32 Bom 165 (A), — 'Nabin Chandra Saha v. Krishna Barana Dasi', 38 Cal 458 (B), — 'Mangal Singh v. Dial Chand', AIR 1940 Lah 159 (C), — 'Adikesavan Naidu v. Gurunatha Chetti', AIR 1918 Mad 1315 (FB) (D) and — 'Shamsudin Tajbhai v. Dahyabhai Manganlal', AIR 1924 Bom 357 (E). If the contention for the respondent be accepted, it would mean that the vendee is not to be reimbursed for any loss he suffers on account of the breach of contract. It is not necessary that earnest money be paid to the vendor in every transaction and even if paid the refund of the earnest money is not for making good the loss which the vendee had suffered on account of the breach of contract but is simply returned to him what he had parted with in the expectation of getting the contract carried out. It has not been shown why the provisions of S. 73, Contract Act do not apply to the facts of the case and why the vendee should not get compensation for any loss he had suffered by the breach of the contract. Section 65, Contract Act is:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

No case has been referred to in which the provisions of this section have been held to apply to the case of breach of contract and in which damages for breach of contract had been claimed Reference to this section was made by one of the Judges in — 'Lachmi Prasad v. Lachmi Narain', AIR 1928 All 41 (F). The question in this case was whether the plaintiff who was challenging the sale deed should reimburse the vendee-defendant for the money spent on improvements. Ashworth J. was discussing the applicability of S. 51, T. P. Act to such a case and in that connection observed:

> "Section 65, Contract Act is a guide as to the principle to be invoked. When a contract becomes void, as it did in this case by the plaintiff repudiating the sale by his father, the plaintiff, as a person who has received advantage, is bound to restore that advantage or make compensation for it. The transfer only became voidable at the instance of the plaintiff. Consequently the lower Court was right in taking into consideration the plea of defendant 2 under S. 51, T. P. Act."

This does not mean that the vendee is not entitled to damages when there is a breach of the contract of sale or when the sale contract falls on account of its being successfully challenged by someone and has therefore become void. The principle of S. 65, Contract Act was referred to for interpreting the provisions of S. 51, T. P.

Act. This case, therefore, is no authority in support of the contention of the respondent that damages cannot be claimed by a vendee from a vendor when there is a breach of the contract for sale.

(27) Section 65, Contract Act contemplates something different from what S. 73 of the Act contemplates. It contemplates for the refund of any advantage which a party has received under an agreement which is discovered to be void or when a contract becomes void. The advantage received can either be restored in the form in which it was received or its equivalent can be awarded to the other party by way of compensation. It, therefore, contemplates only refund of what one has received and does not contemplate the payment of damages to make up for the loss which the party not at fault has suffered on account of the other's committing a breach of the contract,

(28) A breach of the contract takes place when any party to the contract refuses to perform his part. A contract becomes void in the various circumstances mentioned in the other provisions of the Contract Act. A contract is not void 'ab initio'. It is only voidable in certain circumstances. When it is avoided by the particular party who has the option to avoid it, the contract becomes void. An agreement which can be enforced by law is a contract and therefore it would be a mistake to say that a contract is void 'ab initio'. The contract arrived at between the plaintiffs and defendant 1 was a good contract. Defendant 1 did not perform his part of the contract. By that time it had not been avoided by his minor sons who could have avoided it on establishing in Court that the transfer was not valid for want of legal necessity or benefit to the estate. The contract had not become void when defendant 1 refused to perform his part. He is, therefore, liable to make good the loss suffered by the plaintiffs on account of his breach.

(29) In view of the above we are of opinion that the decree of the Court below is correct and that both the appeal and the cross-objection should fail. We accordingly dismiss them with costs.

D.R.R. Order accordingly.

A.I.R. 1955 ALLAHABAD 414 (Vol. 42, C.N. 122)

AGARWALA AND SAHAI JJ. (7-2-1955)

Abdul Qadeer, Plaintiff-Appellant v. Municipal Board, Moradabad and others, Defendants-Respondents.

F. A. F. O. No. 46 of 1955, against order of Civil Judge, Moradabad, D/- 29-1-1955.

(a) Civil P. C. (1908), O. 39, R. 1 — Principle governing issue of injunction — Prima facie case.

The granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the Court does not issue the injunction unless it is thoroughly satisfied that there is a prima facie case in favour of the applicant. (Para 3)

Anno: AIR Com.: Civil P. C., O. 39, R. 1 N. 3. 1953 Mulla: O. 39, R. 1 P. 1151 N. "Principles ....injunction" (11 Pts. extra in AIR Com. note).

(b) Civil P. C. (1908), O. 39, R. 1 — Temporary injunction — Principle of balance of convenience — Matter to be taken into consideration by Court.

When in a suit brought by the Municipal President against certain members of the municipality, the issue of a temporary injunction is sought restraining the defendants from moving a no-confidence motion against him and holding a meeting on a date fixed therefor the Court has, in applying the principle of the balance of convenience, to take into consideration the convenience not only of the parties to the suit, but also of the public at large. Where the question is of an election to a public office, it is not merely the parties that are interested in it but the public is also interested in seeing that proper persons are put in office to conduct public affairs. (Para 4)

Anno: AIR Com. C. P. C., O. 39, R. 1, N. 3. (53) Mulla: O. 39, R. 1, P. 1151, N. "Principles ....injunction" (11 Pts. extra in AIR Com. note).

Syed Sadiq Ali, for Appellant.

AGARWALA J.:

This is an appeal from an order refusing to grant an injunction. Sri Abdul Qadeer is at present the President of the Municipal Board, Moradabad. A motion of no-confidence is going to be moved against him apparently upon a requisition by a majority of the members of the Municipal Board and in pursuance of that motion certain proceedings as required by the Municipalities Act are being taken. The appellant filed a suit in the court of the Civil Judge, Moradabad for the issue of a permanent injunction restraining the defendant who are the Municipal Board, Moradabad, through the Vice-President, the Members of the Board, the District Magistrate of Moradabad and the Additional Sessions Judge of Moradabad from holding any meeting on 8-2-1955. On the date on which the plaint was filed an application for the issue of a temporary injunction restraining the defendants from moving a no-confidence motion against him and holding the meeting on the 8th February was made. This application has been rejected & the present appeal is against that order.

(2) The only ground stated in the application for the issue of a temporary injunction was that some of the members had been coerced into signing the no-confidence motion and the resolution submitted was no resolution in the eye of law.

(3) There are two essential considerations which should weigh with the Court in deciding applications like this. One is that a prima facie case should have been satisfactorily made out and the second is that the balance of convenience should be in favour of the grant of the injunction prayed for. In deciding whether a prima facie case has been made out or not, the Court must be satisfied upon the materials placed before it that what the applicant says is probably true. The Court will not be deciding the matter finally at that stage but still the granting of an injunction being a very serious matter in that it restrains the opposite parties from the exercise of their rights, the Court does not issue the injunction unless it is thoroughly satisfied that there

is a prima facie case in favour of the applicant. The allegation in the present case was that the members had been coerced into signing the no-confidence motion. Beyond the affidavit of the applicant who is an interested party no other documentary evidence was produced to show that the no-confidence motion was signed under coercion. Normally people do not sign under coercion and therefore the presumption is that it was not so signed unless some writing, or affidavit or a letter from those who are alleged to have signed under coercion was forthcoming or some other proof was furnished. No such things were produced in this case.

(4) As regards the balance of convenience, in a matter of this kind, the convenience not only of the parties to the suit, but also of the public at large is to be considered. Where the question is of an election to a public office, it is not merely the parties that are interested in it but the public is also interested in seeing that proper persons are put in office to conduct public affairs. Normally it is better in a case of this kind that the plaintiff is not allowed to continue to work, because, if the suit succeeds and the injunction is not issued the only result will be that the plaintiff will be prevented from exercising his right as President for some time. If, however, the injunction is issued and ultimately the suit fails, the result would be that, with the help of the Court, the plaintiff who ought not have been allowed to function as the President, is allowed to continue in office and to exercise the very wide powers vested in him. The latter alternative is certainly worse than the former. An injunction should be issued in such cases only when the Court is so clearly satisfied about the merits of the plaintiff's claim that it thinks that in all probability the plaintiff will succeed.

(5) We think that there is no force in this appeal and we dismiss it.

V.S.B. Appeal dismissed.

(S) A.I.R. 1955 ALLAHABAD 415 (Vol. 42, C.N. 123)

LUCKNOW BENCH — BRIJ MOHAN LALL AND RANDHIR SINGH JJ. (25-11-1954)

Baba Pawan Das and another, Plaintiffs-Applicants v. Uttar Pradesh Government, Defendant-Opposite Party.

Revn. Appln. No. 100 of 1950, from order of Civil J. Sitapur, D/- 29-3-1950.

Civil P. C. (1908), O. 33, R. 5(d) — Decision on complicated question of law.

Even if it be open to the Court to throw out an application for permission to sue as a pauper if a suit is prima facie barred by some law, it would not be proper for the Court to enter into complicated questions of law in deciding the application at that stage. The question as to whether a second suit for possession would lie, after a suit for a declaration has been thrown out on the ground that relief for possession had not been asked for, is not altogether free from difficulty and the Judge is therefore, not justified in giving a finding on that point in deciding whether permission should or should not be granted to the applicant to sue as a pauper. AIR 1932 All 543, Rel. on. (Para 3)

Anno: C. P. C., O. 33, R. 5 N. 5.

CASE REFERRED: Para

(A) (V19) AIR 1932 All 543: 54 All 525 3

M. P. Srivastava and Dwarka Nath Srivastava, for Applicants; B. K. Dhaon, for Opposite Party.

RANDHIR SINGH J.:

This is an application in revision under S. 115, Civil P. C., against the order of the Civil Judge, Sitapur, dismissing an application for permission to sue in forma pauperis.

(2) It appears that the applicant filed an application for permission to sue in forma pauperis under O. 33, R. 1, Civil P. C. Notice was issued to the Government and to the opposite party and on the date of hearing of the application the learned Civil Judge dismissed the application on the ground that the suit was barred on the principle of res judicata. The applicant had, it is admitted, instituted a suit for a declaration of his title to the property which was the subject-matter of the dispute in the suit which has given rise to this revision. That suit was ultimately dismissed on the ground that the applicant had omitted to sue for possession. It was after the earlier suit had been dismissed that the applicant, along with one other person, made an application for permission to sue in forma pauperis. In this suit he had prayed for possession also.

(3) The learned Civil Judge dismissed the application on the ground that the decision in the earlier suit operated as res judicata and it was not open to the applicant to maintain a second suit on the same cause of action. One other ground on which the application was opposed in the lower Court was that the suit was also barred by O. 2, R. 2 of the Code of Civil Procedure. The lower Court has not expressed any opinion on the second point but has given its decision on the assumption that the suit was not barred under O. 2, R. 2, Civil P. C. The learned counsel for the respondent has conceded in this Court that the view taken by the lower Court on the point of res judicata was not correct.

He has, however, argued that the suit was barred under O. 2, R. 2, Civil P. C. Reliance has been placed on the provisions of O. 33, R. 5(d) of the Code of Civil Procedure in support of his contention that it was open to the lower Court to have gone into the question even at the stage of hearing the application for pauperism. Rule 5 (d) of O. 33, Civil P. C., is as follows:

"The Court shall reject an application for permission to sue as a pauper where his allegations do not show a cause of action."

This rule has been amended by the Allahabad High Court by the addition of an Explanation, but no such Explanation has been added by the rules framed by the erstwhile Chief Court of Avadh. The question arises as to whether the Explanation would be applicable to districts situate in Oudh after the two Courts have been amalgamated into a single Court. This question, however, need not be decided in this case as it is not material for the decision of this revision.

It has been argued on behalf of the respondent that the words of R. 5(d) are wide enough to include the consideration of the maintainability of the suit and as such it would be open to the Court hearing an application of this nature to

go into the question as to whether the suit was barred under S. 11, Civil P. C., or on any other ground such as limitation. The question came up for consideration before the Allahabad High Court in — 'Bhajja v. Muhammad Said Khan', AIR 1932 All 543 (A). This case arose before the explanation was added to rule 5(d) by the Allahabad High Court and it was held that it was not open to the Court in deciding whether the allegations did or did not show a cause of action to decide questions of limitation or other grounds on which the case could be thrown out on a point of law. Learned Counsel for the respondent has cited some rulings in support of the contention that a suit for possession after a suit for a declaration has been dismissed would be barred under O. 2, R. 2, Civil P. C. There are also some authorities which have taken the contrary view.

It is, however, not necessary to decide this point in this revision as we feel that even if it be open to the Court to throw out an application for permission to sue as a pauper if a suit is prima facie barred by some law, it would not be proper for the Court to enter into complicated questions of law in deciding the application at that stage. It cannot be disputed that the question as to whether a second suit for possession would lie, after a suit for a declaration has been thrown out on the ground that relief for possession had not been asked for, is not altogether free from difficulty and the learned Civil Judge was, therefore, not justified in giving a finding on that point in deciding whether permission should or should not be granted to the applicant to sue as a pauper. The order passed by the lower Court should, therefore, be set aside. We accordingly set aside the order and remand the case to the Court below with directions to re-admit the same to its original number and to proceed to decide the application in accordance with law keeping in view the observations made by us above. We, however, make no order as to costs. The application for stay is rejected.

D.H.Z. Revision allowed.

(S) AIR 1955 ALLAHABAD 416 (Vol. 42, C.N. 124)

RAGHUBAR DAYAL AND ROY JJ. (18-10-1954)

Har Dayal Singh, Appellant v. Ram Ujagar Dube, Respondent.

Civil Ref. No. 163 of 1954, against order of Sm. C. C. J., Saharanpur, in Suit No. 10 of 1954.

(a) Civil P. C. (1908), S. 20(c) — "Wholly or in part arises" — Suit for arrears of rent.

Where the defendant tenant agreed to pay rent to the plaintiff landlord at whatever place the plaintiff might be transferred, a suit for recovery of the rent is maintainable in the Court at the place where the plaintiff is posted, in view of S. 20(c), Civil P. C., as part of the cause of action would arise at that place on account of the agreement. (Para 3)

Anno: C. P. C., S. 20 N. 15, 19.

(b) Civil P. C. (1908), S. 16 — Applicability — Suit for recovery of rent of immovable property.

A suit merely for the recovery of rent from a lessee of immovable property cannot be said to be a suit "for the determination of any other right to or interest in immovable property" within the meaning of S. 16(d). Such a suit is not governed by any of the clauses of S. 16. Even if the defendant challenges the plaintiff's right to the house in suit, his contention will not determine the forum. (Para 3)

Anno: C. P. C., S. 16 N. 2, 8.

RAGHUBAR DAYAL J.:

This is a reference under O. 46, R. 1, Civil P. C., by the Judge, Small Causes, Saharanpur.

(2) The plaintiff instituted a suit in the Court of the Munsif Saharanpur for the recovery of Rs. 124 as arrears of rent in respect of the accommodation in house No. 86/3 situate at Lucknow. The defendant did not reside at Saharanpur. The suit was instituted in Saharanpur because according to the plaintiff the defendant lessee had agreed to pay rent at the place of the plaintiff's posting. The plaintiff happened to be posted at Saharanpur & therefore he instituted the suit there. The defendant contended that the Saharanpur Court had no jurisdiction to entertain this suit. The learned Munsif felt doubt on the legal position with respect to the jurisdiction of the Court and, therefore, made this reference.

(3) The suit would be cognisable by a Court at Saharanpur in view of S. 20, cl. (c), Civil P. C., as part of the cause of action would arise at Saharanpur on account of the lessee-defendant's agreement to pay rent at the place where the plaintiff happened to be posted at any particular time. The question is whether S. 16, Civil P. C., would cover this suit, and the learned Munsif seems to think that S. 16, cl. (d), may include this suit. Section 16, cl. (d) is:

> "Subject to the pecuniary or other limitations prescribed by any law, suits for the determination of any other right to, or interest in, immoveable property, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

A suit merely for the recovery of rent from a lessee of immovable property cannot be said to be a suit "for the determination of any other right to or interest in immovable property". The rights which have been specifically mentioned in Cls. (a), (b) and (c) of S. 16 are the rights to the recovery of immovable property with or without rent or profits, to the partition of immovable property and to foreclosure, sale or redemption in the case of a mortgage or charge upon immovable property. No question of the determination of the plaintiff's right to the house arises on the allegations in the plaint. Even if the defendant challenges the plaintiff's right to the house in suit, his contention will not determine the forum. We are, therefore, of opinion that the suit for the recovery of rent of immovable property is not covered by S. 16, Civil P. C.

(4) In view of the above we hold that this suit is maintainable in the Court at Saharanpur. The reference is answered accordingly.

K.S.B. Answer accordingly

(S) AIR 1955 ALL 417 (V 42, C 125 Aug.)

RAGHUBAR DAYAL AND AGARWALA JJ.

(3-8-1954)

Custodian of Evacuee Property U. P. Lucknow, substituted for Qazi Rahim Ilahi, Appellant v. Hamiduddin and others, Respondents.

First Appeal No. 439 of 1946, against decree of Civil and Sessions J., Kanpur, D/- 31-5-1946.

Guardians and Wards Act (1890), Ss. 41(3), 36, 37 — Suit for rendition of accounts against representatives of guardian — Maintainability.

Sections 36 and 37 do not provide for the institution of a suit for rendition of accounts against the representatives of a deceased guardian on the minor"s attaining majority. (Para 5)

A minor cannot call upon the representatives of a deceased guardian to render account, though he can sue them for the recovery of such amounts as the minor alleges to have been due to him from the estate of the deceased guardian on account of his proving the income and expenditure which the guardian did realise and disburse. Such a claim by the minor on attaining majority will not be for the recovery of any specific item realised by the guardian but would be really for the recovery of such amount which on the basis of accounts as proved by the plaintiff the guardian must have had in his hands on behalf of the minor and which the minor can recover from the representatives of the deceased guardian. 22 All 332, approved, case law discussed. (Para 13)

Anno: G. & W. Act, S. 41 N. 4.

CASES REFERRED : Paras

(A) (1900) 22 All 332: 1900 All WN 98 3, 4, 5, 7, 10, 12, 14

(B) ('82) 1882 All WN 6 3

(C) ('13) 18 Ind Cas 876: 17 Cal WN 695 4, 6, 7, 9

(D) ('42) 46 Cal WN 865 5

(E) (V27) AIR 1940 Cal 337: ILR (1940) 1 Cal 372 5

(F) (V5) AIR 1918 Lah 119: 46 Ind Cas 457 7

(G) ('86) 1886 Pun Re 96 7

(H) ('12) 16 Cal LJ 282: 16 Ind Cas 742 8

(I) ('12) 16 Cal LJ 288: 16 Ind Cas 414 8

(J) ('05) 1 Cal LJ 232: 32 Cal 719 8

(K) (V32) AIR 1945 Bom 21: 218 Ind Cas 483 8a

(L) (V7) AIR 1920 Bom 166: 58 Ind Cas 213 9

(M) (V21) AIR 1934 Lah 410: 153 Ind Cas 1093 10

(N) (V15) AIR 1928 Lah 534: 110 Ind Cas 491 10

(O) (V36) AIR 1949 Nag 235: ILR (1948) Nag 794 11

(P) (V9) AIR 1922 PC 115: 45 Mad 378 (PC) 13

Prem Narain Shukla, for Appellant; D. D. Seth and Hirday Nath Seth, for Respondents.

RAGHUBAR DAYAL J. :

Shrimati Saira Bibi was appointed guardian of person and property of Rahim Elahi minor, son of Baksh Elahi, and his sisters on 4-7-1929, by the District Judge of Mainpuri. She appointed Haji Nurul Hasan manager of the property. He was required to furnish accounts to her husband Rafi Uddin. Rafi Uddin executed a surety bond in pursuance of the orders of the court. Saira Bibi remained in possession of the property till her death in November 1932. She filed no accounts in the court of the District Judge, Mainpuri. Rahim Elahi attained majority on 27-5-1942. He instituted the present suit on 26-5-1945, against the four sons of Saira Bibi, defendants Nos. 1 to 4, against Nurul Hasan, defendant No. 6 and against Shrimati Allah Rakkhi, his own sister, defendant No. 5.

The reliefs were claimed against defendants 1 to 4 only and the main relief was that a correct and formal account in respect of the income of the property and the income from the business of the plaintiff for the period from 21-7-1928, upto 14-11-1932, during which Saira Bibi was the guardian and manager of the plaintiff and defendant No. 5 be taken from defendants Nos. 1 to 4, sons and representatives of Saira Bibi deceased, and that any amount which might have remained as unrealised on account of the carelessness and negligence of Saira Bibi be charged against defendants Nos. 1 to 4. It was prayed that a decree for a sum of Rs. 6,500 or any amount which might be found with reference to the correct account to the extent of the plaintiff's share of the income together with interest at the usual rate be passed in favour of the plaintiff.

Of the various grounds on which the suit was contested by defendants 1 to 3, the most important was that they could not be held liable to render accounts for the period their mother had been the certificated guardian of the plaintiff minor. The learned Civil Judge agreed with this contention for the defendants and dismissed the plaintiff's suit. The plaintiff has filed the present appeal.

(2) We may say at the outset that though the plaintiff alleged in the plaint that the income from the minor's property was about Rs. 400 a month and the expenditure was about Rs. 100 a month and that, therefore, the guardian had saved about Rs. 300 a month no evidence was led to substantiate these allegations. The defendants were not called upon to produce accounts for the purpose of providing evidence in support of the plaintiff's contention about definite income and expenditure relating to the minor's property. The court could not have, therefore, found even if it was possible for it under the law, as to what amount due to the minors remained with their guardian and passed on to the defendants after the guardian's death. No decree could, therefore, have been passed for any such amount in these circumstances.

(3) The view of the court below that the representatives of a guardian cannot be sued for rendition of accounts is based on the case reported in — 'Manmothonath Bose Mullick v. Basanto Kumar', 22 All 332 (A). That case followed the earlier case reported in — 'Rameshur Tewari v. Kishun Kumar', 1882 All WN 6 (B) which held that the Judge had no power to require the heirs of Bhugwan Das to render an account for all moneys received and disbursed by him in the capacity of guardian, the provisions being personal to the guardian himself. It was considered that from the provisions of S. 41, Guardians and Wards Act, Act No. VIII of 1890,

it should be inferred that the view expressed in the Allahabad case of 1882 had been considered correct by the Legislature.

(4) The Allahabad case reported in 22 All 332 (A), has been differed from in several cases decided by the other High Courts. We have considered those cases and are of opinion that there is nothing in those cases which should lead us to consider the view taken in the Allahabad case to be wrong. The earliest case is reported in — 'Maharaj Bahadur Singh v. Basanta Kumar Roy', 18 Ind Cas 876 (Cal.) (C). The facts of that case were very much different. The learned Judges stated that the District Judge was in error in holding that no suit lay against the heirs of Khettra Nath Ray and appeared to have considered himself bound by the decision of the Allahabad High Court in that case. They went on to observe:

> "The distinction is a somewhat fine one between a suit against representatives for the rendition of accounts, and a suit against them to recover what may be found due from the estate of the deceased on taking an account. With all respect to the learned Judges who decided that case, we have doubts as to its correctness. Sections 19 and 20 of Act XL of 1858 and Sections 36 and 37 of Act VIII of 1890 appear to us to indicate that such a suit would lie. In this case, however, the circumstances are entirely different."

The Allahabad case did not hold that the representatives of a deceased guardian could not be sued for such amounts which be found due from the estate of the deceased on taking an account. It simply held that the representatives of a deceased guardian could not be sued for the rendition of accounts. When the representatives are sued for the recovery of the amount alleged to be due from the estate of the deceased guardian on account of his dealing with the minor's property, it is for the plaintiff to establish what had been realised and spent by the guardian and what was due to him. The representatives are not bound to explain the entries of the accounts which be before the court.

(5) Sections 36 and 37 of the Guardians and Wards Act (Act No. VIII of 1890) do not provide for the institution of a suit for rendition of accounts against the representatives of a deceased guardian on the minor's attaining majority. Section 36 contemplates of suits instituted against a guardian during the continuance of the minority by any person as next friend with the leave of the court and in case of his death against his representative for an account of what the guardian had received in respect of the property of the ward. It, therefore, does not allow a suit against the representatives of a deceased guardian after the minor had attained majority.

Section 37 of the Act provides that nothing in Ss. 35 and 36 of the Act shall be construed to deprive a ward or his representative of any remedy against his guardian, or the representative of the guardian, which not being expressly provided in either of those sections, any other beneficiary or his representative would have against his trustee or the representative of the trustee. This simply means that ward or his representative can sue the guardian or his representative to establish rights which any beneficiary could claim against his trustee or the representative of the trustee. It is not mentioned in the Calcutta case that a beneficiary can sue the representative of a deceased trustee for rendition of accounts.

The later cases reported in — 'Amiya Krishna v. Debendra Lal', 46 Cal WN 865 (D) and — 'Srish Chandra v. Supravat Chandra', AIR 1940 Cal 337 (E) expressed the view that such a suit cannot be instituted against the representatives of a deceased trustee. It follows, therefore, that the provisions of Ss. 36 and 37 of Act VIII of 1890 referred to in the Calcutta case do not support the view that the representatives of a deceased guardian can be sued for rendition of accounts and that the decision in 22 All 332 (A) was wrong.

(6) In 18 Ind Cas 876 (Cal) (C) the facts, as already mentioned, were different. The suit was really instituted not against the representatives of a deceased guardian but against the guardian himself who had continued to act as the manager of the minor's property after the minor had attained majority. The suit had been decreed against him but had to be reopened on account of a co-defendant coming in under S. 108, Civil Procedure Code of 1882. The guardian died during the pendency of the suit and his legal representatives were brought on the record. It was held that the suit could proceed against them.

(7) The next case is reported in — 'Muhammad Jamil v. Mt. Mehran Bibi', AIR 1913 Lah 119 (F). It was a suit to recover a sum of Rs. 200 or whatever sum might be ascertained to be due after going through the accounts of the defendants who were the widow and minor daughter of the deceased guardian. The suit was maintainable. The case reported in 22 All 332 (A), did not bar it. Reference was made to the case reported in 18 Ind Cas 876 (Cal) (C) and to the alleged overlooking by this Court in 22 All 332 (A), of the provisions of Ss. 36 and 37 of Act 8 of 1890. It was held that S. 41(3) of the Guardians and Wards Act did not bar a minor from instituting a suit against the representatives of the deceased guardian especially when that right was considered to have been preserved by sections preceding S. 41, Guardians and Wards Act. We have already shown that Ss. 36 and 37 of the Act do not allow such a suit to be instituted.

Reference is also made to — 'Seth Chand Mal v. Kalian Mal', 1886 Pun Re 96 (G) in which it was held that a principal can sue the son of an agent for account when the agent dies without rendering accounts. This view has not been uniformly followed by other Courts.

(8) In — 'Kumeda Charan v. Asutosh Chatterjee', 16 Cal LJ 282 (H) a suit for rendition of accounts against the legal representative of an agent was held not maintainable. In — 'Jhapajannessa Bibi v. Rash Behari', 16 Cal LJ 288 (I) such a suit was held good in view of the decision in — 'Sib Chundra v. Chundra Narain', 1 Cal LJ 232 (J) that a suit for money found due from an agent on an account being taken and a

suit for rendering an account cannot be distinguished. The case reported in 1 Cal LJ 232 (J) related to a suit against an agent and not against an agent's legal representative.

(8a) In—'Purshottam Vasudeo v. Ramkrishna Govind', AIR 1945 Bom 21 (K) it was held that the legal representative of a deceased agent can be sued for an account but not for rendition of accounts and that in such a suit for account the burden of proof primarily lies upon the plaintiff and it is for the Court to take an account on such materials as are laid before it by the parties and determine what amount, if any, was due to the plaintiff from his deceased agent.

(9) The next case is reported in — 'Narayan Balaji Nagarkar v. Kashibai Keshav', AIR 1920 Bom 166 (L). It is very much similar to the Calcutta case reported in 18 Ind Cas 876 (Cal.) (C). There also the suit had been instituted against a guardian who died during the pendency of the suit. His legal representatives were then brought on the record. No reasons are given for the view that there seemed no sound reason why the representatives of a deceased guardian should not be liable to account except that this view was in consonance with the opinion of the Calcutta High Court in 18 Ind Cas 876 (Cal) (C), with which we have already dealt.

(10) The next case on the point is reported in — 'Allah Dad Khan v. Mohammad Habib Ullah Khan', AIR 1934 Lah 410 (M). In this case also it is expressed that the Allahabad High Court had overlooked Ss. 36 and 37 of the Guardians and Wards Act in the case reported in 22 All 332 (A) and reliance was placed on an earlier case of the Lahore High Court referred to in the judgment as — 'Mohar Singh v. Daulat Ram', AIR 1928 Lah 534 (1) (N). The reference seems to be wrong because this case is on a different point altogether.

(11) The last case is — 'Mirabai v. Kaushalyabai', AIR 1949 Nag 235 (O). The facts of this case are that on the death of Moti Ram, the guardian of the property of the minors, the maternal grandfather of the minors was appointed guardian and he complained to the District Court that Mira Bai, the widow of the deceased guardian and in possession of the estate, had not delivered to him the possession of cash, ornaments and clothes belonging to the minors and prayed that she be ordered to hand them over to him. The District Court directed Mirabai to hand over the keys of the safes to the guardian of the minors and asked her to prepare a list of the contents of the safes in the presence of responsible persons and to pay over any sums which she found due from her husband to the minors on an examination of the account books. The guardian of the minors was directed to state whether he claimed any additional sum. The guardian stated subsequently that he claimed in all Rs. 7,700 and filed a statement in support thereof. Mirabai was asked to file a reply. She admitted that she had Rs. 3,000/- with her. She was directed to deposit that amount in court and also to check up the ornaments belonging to the minors. Mirabai did not comply with the directions and was ordered to produce the cash in court. She did not comply with the order. No action was taken afterwards.

(12) Sometime in 1931, the then guardian of the minors applied to the District Court that certain sums were due to the minors from the previous guardian Moti Ram and that steps be taken to recover the amount from Mirabai. Ultimately the minor on attaining majority had to file a suit on 12-6-1939, to recover the alleged amount of Rs. 7,756 and odd from Mirabai as the sum for which her husband was liable as he had taken it during her minority and had not repaid it. It will be noticed that this suit was for a definite sum which was alleged to be due, presumably on the basis of the accounts which had been got in court in proceedings before the guardianship court. The view expressed in 22 All 332 (A) did not find favour with the Nagpur High Court as in their opinion S. 41(3) of the Guardians and Wards Act did not exclude a suit for accounts against the representatives of the deceased guardian. Reference was made to the cases already considered by us above and then it was held:

> "Naturally the same considerations will not apply in toto to the legal representatives as would have applied in the case of the guardian. They would not necessarily be in a position to know all the facts, and that would have to be taken into consideration; also their liability would be limited, as in the case of other legal representatives, to the extent of the assets of the deceased in their hands. But, except for that the suit would lie in the ordinary way."

(13) Further, reference was made to the Privy Council case reported in — 'Gopal Chetty v. Vijayaraghavachariar', AIR 1922 PC 115 (P) in support of the view that the suit would have to be for accounts and not for the recovery of the specific debt or debts. This view is not expressed in the Privy Council case, which dealt with the question of a partner's right to claim a share in a specific item of property realised by another partner when the partner had not sued for accounting or when the partner's suit for accounting would have been time-barred as that item itself would have been one of the items for consideration in accounting if that was possible.

The effect of the Allahabad case is not that the minor on attaining majority had to sue the legal representatives for the recovery of specific items but is that the minor cannot call upon the representatives of a deceased guardian to render account, though he can sue them for the recovery of such amounts as the minor alleges to have been due to him from the estate of the deceased guardian on account of his proving the income and expenditure which the guardian did realise and disburse. Such a claim by the minor on attaining majority will not be for the recovery of any specific item realised by the guardian but would be really for the recovery of such amount which on the basis of accounts as proved by the plaintiff the guardian must have had in his hands on behalf of the minor and which the minor can recover from the representatives of the deceased guardian.

(14) In view of the above we are of opinion that there is nothing in these cases which should

incline us to the view that the case reported in 22 All 332 (A), did not lay down correct law.

(15) It follows, therefore, that the appellant's suit had been rightly dismissed by the court below. We, therefore, dismiss the appeal with costs.

D.R.R. Appeal dismissed.

(S) AIR 1955 (Allahabad) 420 (V 42 C 126 Aug.)

AGARWALA AND ROY JJ. (5-4-1954)

Kaley, Applicant v. The State, Opposite Party.

Criminal Appeals Nos. 1688 and 1648 and Referred No. 138 of 1953, against order of S. J., Bulandshahr, D/- 18-11-1953.

Penal Code (1860), S. 396 — Applicability — Armed dacoity — Murder committed by dacoits to facilitate escape — Conviction — Sentence — (Arms Act (1878), S. 19(f)).

There was an armed dacoity in a house in a village. While the dacoits were escaping with the booty the villagers hotly pursued them. The dacoits suddenly turned round and attacked the villagers and then there was a pitched fight between the two sides. Two of the dacoits fired their guns resulting in death of one villager and gun shot injuries to another. These two dacoits were convicted under S. 396, Penal Code and S. 19(f) Arms Act. One who committed the murder was awarded a sentence of death while the other was sentenced to transportation for life. Each of them was also awarded a sentence of one years' R. I. in respect of the offence under the Arms Act.

Held that the accused were rightly convicted under S. 396, Penal Code, and S. 19(f) of the Arms Act and the sentences awarded to them were also proper. Since the murder had been committed to facilitate their escape with the booty, the murder must be held to have been committed in committing the dacoity within the meaning of S. 396, Penal Code.

Though the decision in 3 Cri LJ 294 (All) was correct on facts the law laid down therein held to be too wide. Case law Ref. (Para 5)

While awarding sentence to dacoits, a duty lies upon the Court to see that all protection is given to any member of the public who is brave enough to do his duty in trying to arrest dacoits. The fact that murder is committed because the criminal is being brought to bay and in the desire to escape is not an extenuating circumstance. (Para 5)

Anno: Penal Code, S. 396 N. 1, 4.

CASES REFERRED	Paras
(A) ('94) 16 All 437: 1894 All WN 178	3
(B) ('95) 17 All 86: 1895 All WN 12	3
(C) ('06) 3 Cri LJ 294: 1906 All WN 47	3
(D) (V19) AIR 1932 Cal 818: 33 Cri LJ 722 (FB)	4
(E) (V22) AIR 1935 Oudh 190: 153 Ind Cas 978	5
(F) (V10) AIR 1923 Lah 329(1): 25 Cri LJ 319	5
(G) (V12) AIR 1925 Lah 142(2): 25 Cri LJ 700	5

Simrikh Muni, for Applicant; Govt. Advocate, for the State.

ROY J.:

On the Night between the 27th and 28th of February, 1953, an armed dacoity was committed at the house of Raghubar Dayal and Dhanni Mal at about 1 a.m. in village Piana Kalan in the district of Bulandshahr. The dacoits were 15 or 20 in number. Two of them, namely, Kaley and Atri appellants, were armed with guns and the others were armed with lathis. They entered the house of Raghubar Dayal and Dhanni Mal, overpowered both of them and looted their property. The shouts raised by these two persons attracted their neighbours. During the commission of the dacoity, the neighbours did not actually enter the house. The dacoits, after committing the dacoity, escaped with the looted property. On their retreat, the villagers chased them. When the dacoits had just passed out of the village and were near the Takia of a Faqir by the side of the field of Raja Faqir, they turned round and made an attack on the villagers who were pursuing them. The appellants fired with their guns. Kaley appellant shot at Ratan Singh who died on the spot. Atri appellant shot at Malkhan Singh who received gun-shot injuries but fortunately escaped death.

A pitched fight took place between the dacoits on the one hand and the villagers on the other at that spot and both sides received injuries. The gun of Atri appellant was broken and the gun of Kaley was snatched away from him. They were both beaten, overpowered and arrested. The other dacoits made good their escape. The two dacoits, who were arrested, were handed over to Khem Chand along with the cartridges that were found from their possession and the cartridges that were picked up from the passage where the fight took place. The First Information Report of the occurrence was lodged at the 'thana' by Dhanni Mal at 7 a.m. on 28-2-1953, the 'thana' being at a distance of 4½ miles from the scene of occurrence.

The police took up investigation of the matter. The 'post mortem' examination on the dead body of Ratan Singh was performed on 28-2-1953, at 6 in the evening. Gun-shot wounds were found on his person. Internal examination disclosed that the 5th, 6th and 7th Cervical Vertebrae were fractured and the first rib of the right side was also fractured. In the opinion of the doctor, death was due to shock and haemorrhage as a result of injuries to neck blood vessels caused by shooting. Malkhan Singh was also medically examined and he had gun-shot wounds. The other persons, who received injuries on the side of the complainant, were also medically examined and 'lathi' injuries were found on them. The two arrested dacoits were made over to the police. The defence of Kaley and Atri appellants was that they were not amongst the dacoits. According to Kaley, he was arrested in the evening before the dacoity and he was falsely implicated. Atri alleged that he was arrested in the morning after the dacoity on his way home and he was falsely implicated.

(2) In support of the prosecution story, Dhanni Mal, Raghubar Dayal, Kehar Singh, Malkhan Singh Raghubir Singh, Rashid Khan, Nanhey Khan, Ram Saran, Parna and Bashir Khan, who were eye-witnesses of the dacoity and who had taken part in the encounter, were examined. Khem Chand, in whose custody the arrested dacoits were put, was also examined. The learned Sessions Judge, after a careful consideration of the evidence of these witnesses, came to the conclusion that a charge under S. 396, Penal Code, was established beyond doubt against both these appellants. He accordingly convicted them under S. 396, Penal Code and sentenced Kaley to death and Atri to transportation for life. He further convicted them under S. 19(f), Arms Act, and sentenced each of them to one year's rigorous imprisonment. There can be no doubt whatsoever that an armed dacoity took place in the house of Raghubar Dayal and Dhanni Mal on the night in question and the two appellants, who were amongst the dacoits, were arrested in the manner proved by the prosecution. Both of them were armed with guns. When the dacoits were being pursued by the villagers while they were retreating with their booty, Kaley shot dead Ratan Singh and Atri appellant fired with his gun and hit Malkhan Singh, causing him gun-shot injuries.

(3) On behalf of Kaley, it has been urged that the offence, that was made out against Kaley, was not one under S. 396 but was one under S. 395, Penal Code, and that the killing of Ratan Singh was not an act which was part and parcel of the dacoity so as to be made punishable under S. 396, Penal Code. It has further been urged that, for that individual act of Kaley, he could have been prosecuted under S. 302, Penal Code, but since there was no charge against him under that section, the sentence of death under S. 396, Penal Code, cannot be maintained.

The first case, on which reliance has been placed for this proposition, is the case of — 'Queen Empress v. Umrao Singh', 16 All 437 (A). There it was laid down that where certain persons were shown to have been concerned in a dacoity in the course of which murder was committed, but it was not shown that they were in the house in which the dacoity was committed at the time when the murder took place and the evidence, if any, pointed to a contrary conclusion, the accused could not properly be convicted under S. 396 but only under S. 395, Penal Code. This declaration was later on distinguished by this Court in — 'Queen Empress v. Teja', 17 All 86 (B), where it was held that when, in the commission of a dacoity, a murder is committed, it matters not whether the particular dacoit charged under S. 396 was inside the house where the dacoity was committed or outside the house, or, whether the murder was committed inside or outside the house, so long as the murder was committed in the commission of that dacoity.

In support of his contention that, in the circumstances of the present case, since there was no charge under S. 302, Penal Code, the sentence of death under S. 396, Penal Code, cannot be maintained, learned counsel for Kaley appellant has relied upon the case of — 'Emperor v. Chandar', 3 Cri LJ 294 (All) (C). There it was laid down that where, after the commission of a dacoity, the dacoits, being interrupted by the villagers, did not get any plunder and they were attempting to escape and one or more of them, in order to facilitate the escape, attacked and killed one of the pursuing party, S. 396, Penal Code, did not apply, but only the person or persons actually taking part in the killing were liable therefor. In that case, a conviction under S. 395, Penal Code, was maintained and for the offence of murder a retrial was directed. The decision in that case appears to us to be distinguishable on facts. Here the dacoits were escaping with the booty and when they were pursued and attacked by the villagers, they turned round and killed one of them and injured several others.

In 3 Cri LJ 294 (All) (C), the decision was correct on facts but the law appears to have been laid down rather too widely.

(4) A Full Bench of the Calcutta High Court in — 'Monoranjan Bhattacharjya v. Emperor', AIR 1932 Cal 818 (D), held that, in order to commit dacoity, it is necessary not only that the dacoit should get the booty away but that he should get away with the booty and as long as he is being pursued in hot haste after the act of the dacoity has just been committed and is in flight for the purpose of completing his offence, the dacoity is not complete and that, therefore, where one of the dacoits stabs and kills a man pursuing him, the murder is committed while committing dacoity so as to be punishable under S. 396 of the Code.

(5) In — .Bishunath v. Emperor', AIR 1935 Oudh 190 (E), it was held that S. 396 applies even where murder is committed for facilitating the escape of the perpetrators of the crime while retreating. A similar view was taken by the Lahore High Court in — 'Karim Bakhsh v. The Crown', AIR 1923 Lah 329 (1) (F), where it was observed that the fact that the murder was committed in the compound of the house raided at a time when the dacoits were making good their escape is not sufficient to take the case out of S. 396.

In the case of — 'Sunder v. Emperor', AIR 1925 Lah 142(2) (G), it was held that where murder is committed by dacoits while retreating or carrying away the stolen property in order to facilitate their escape, it would be murder committed in the commission of the dacoity punishable under S. 396, Penal Code. Upon the facts and circumstances of the present case and the evidence on the record, we are driven to the conclusion that the appellants were rightly convicted under S. 396, Penal Code. The murder was committed by Kaley appellant while the dacoits were retreating and were carrying away the stolen property in order to facilitate their escape. It was at the same time that Atri appellant, when he was chased and followed by the villagers with 'lathis', turned round and fired with his gun and hit Malkhan Singh, causing him the gun-shot injuries. In our opinion, they were rightly convicted and the sentence

of death on Kaley was the proper sentence that could have been passed, and the sentence of transportation for life was the proper sentence against Atri appellant under S. 396, Indian Penal Code. They were also rightly convicted under S. 19(f) of the Indian Arms Act and each of them was properly awarded the sentence of one year's rigorous imprisonment. While awarding sentence to dacoits, a duty lies upon the Court to see that all protection is given to any member of the public who is brave enough to do his duty in trying to arrest dacoits. The fact that murder is committed because the criminal is being brought to bay and in the desire to escape is not an extenuating circumstance. In our opinion, there is no merit in these appeals which deserve dismissal.

(6) As a result we dismiss the appeal of Kaley and we accept the reference and confirm the sentence of death passed against Kaley appellant and we direct that it should be carried out according to law. The appeal of Atri appellant is also dismissed.

(7) Leave to appeal to the Supreme Court is refused.

K.S.B. Appeals dismissed.

AIR 1955 (Allahabad) 422 (V 42 C 127 Aug.)

MOOTHAM C. J. AND MUKERJI J. (22-2-1955)

Sm. Bhagwati Kuer and others, Applicants v. Lal Bahadur and others, Opposite Parties.

Civil Misc. Writ Petn. No. 735 of 1953.

(a) Constitution of India, Art. 226 — Writs of mandamus or prohibition in pending appeal.

The scope of a writ of mandamus never has embraced in its ambit a direction to an inferior Tribunal to decide any cause before it in any particular manner, though that writ may be used to direct a subordinate judicial authority to exercise a jurisdiction vested in it. So also a writ of prohibition cannot be issued so as to interfere in the matter pending before an inferior Tribunal and direct it to decide the appeal in a particular manner. (1875) 1 QBD 201 — 62 LT 570 — (1882) 9 QBD 723, Expl.; AIR 1952 Mad 613, Disting. (Para 6)

Anno: AIR Com.: Const. of India, Art. 226 N. 136, 144.

(b) Constitution of India, Art. 226 — Writ, a discretionary remedy.

The Additional Commissioner against whom a writ is sought to be issued in an appeal pending before him is a Court subordinate to the Board of Revenue; his decisions can be and are made the subject-matter of an appeal to the Board of Revenue. The Board of Revenue which is no party to this petition will not be bound by any direction or order embodied in a writ issued by the High Court to the Additional Commissioner, and in deciding an appeal from the judgment of the Additional Commissioner it might express an opinion which is in conflict with the decision of the High Court. In such a case it is desirable that the possibility of any such difference of opinion should be avoided. Hence, the High Court will, in its discretion, refuse to issue any writ. (Para 11)

Anno: AIR Com.: Const. of India, Art. 226 N. 124, 126.

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 434: 1954 All LJ 121 4
(B) (1875) 1 QBD 201: 45 LJMC 46 7
(C) (1890) 62 LT 570: 6 TLR 248 8
(D) (1882) 9 QBD 723 9
(E) (V39) AIR 1952 Mad 613: 1952-1 Mad LJ 557 10

G. P. Bhargava, for Applicants; Brijlal Gupta, Rama Shanker Prasad and Standing Counsel, for Opposite Parties.

MUKERJI J.:

This is a petition under Art. 226 of the Constitution. The petition originally contained three prayers to which it is, however, unnecessary for us to refer as on 17-2-1955 the petitioner was given leave to amend his petition by adding thereto a fourth prayer, and learned counsel has confined his argument to the relief sought in that prayer. The fourth prayer is:

"That the opposite party No. 3 be directed by a writ of mandamus to decide the appeal pending before him according to the provisions of the U. P. Act 17 of 1939 and he commanded by a writ of prohibition not to apply the provisions of S. 20 of U. P. Act 1 of 1951."

(2) The facts on which this petition was made, briefly stated, were these. On 8-11-1952 petitioner 1 obtained a decree, in a suit under S. 180, U. P. Tenancy Act, 1939, for the ejectment of respondents 1 and 2 from certain plots of land. From that decree these respondents appealed to the Additional Commissioner, Allahabad and Jhansi Divisions, who is the third respondent, and that appeal is still pending.

(3) Respondents 1 and 2 claim to have acquired the rights of an 'adhivasi' under S. 20, U. P. Zamindari Abolition and Land Reforms Act, and that they cannot therefore be ejected from the plots. The petitioners do not challenge the validity of S. 20, but it is argued on their behalf that although the provisions of that section do not (it is said) apply to the facts of this case, they apprehend that the Additional Commissioner will hold otherwise.

(4) In para 7 of the affidavit filed on behalf of the petitioners it is stated that the Additional Commissioner heard the appeal on 18-8-1953 and that he (the Additional Commissioner) had expressed the opinion that he was bound by the provisions of S. 20, U. P. Zamindari Abolition and Land Reforms Act as amended by Act 16 of 1953. The petitioners' case is that this view of the Additional Commissioner was erroneous inasmuch as it has been held by a Bench of this Court in — 'Bikramsingh v. Sunehra', AIR 1954 All 434 (A), that S. 20 is not retrospective. It was further submitted by learned counsel for the petitioners that the Board of Revenue had held in a case that S. 20 was retrospective in its effect, and it was therefore argued that the Additional Commissioner being bound to follow the decisions given by the Board of Revenue in preference to a decision given by

this Court was certainly going to hold that S. 20 applied to the facts and circumstances of the appeal before him and that therefore the petitioners' right was in imminent jeopardy.

(5) The position that obtains in this case therefore is that there is an appeal pending before an appropriate appellate authority which has to decide the appeal in accordance with law. That court has got to decide whether under the circumstances of the case before it S. 20, U. P. Zamindari Abolition and Land Reforms Act applied or not. The decision has not yet been given by that court: the matter is still 'sub-judice' although a preliminary argument had been made before it on 18-8-1953. It may also be that the Additional Commissioner may have expressed a tentative view — for we can say no more than this on the materials before us — that S. 20 applied to the facts and circumstances of the appeal. The question therefore is whether this Court can by means of either of the writs the issuance of which has been sought by the petitioners, namely a writ of mandamus or prohibition, direct the Additional Commissioner to decide the appeal which is pending before him in a particular manner.

(6) The scope of a writ of mandamus never has embraced in its ambit a direction to an inferior Tribunal to decide any cause before it in any particular manner, though the writ of mandamus has undoubtedly been used to direct a subordinate judicial authority to exercise a jurisdiction vested in it. As for a writ of prohibition, it is also not an appropriate remedy available to the petitioners on the facts and circumstances of this case. There is in this case no question of any lack of jurisdiction in the judicial authority that is seized of the matter in appeal. No authority was cited to us at the Bar, and we ourselves are not aware of any authority, on which we could interfere at this stage in the matter pending before the Additional Commissioner and direct him to decide the appeal in a particular manner.

(7) Mr. Bhargava relied on certain English decisions. The first case on which reliance was placed was the case of — 'The Queen v. Adamson', (1875) 1 QBD 201 (B). This is one of the leading cases indicating the scope of the writ of mandamus, and there is nothing in this case which could be of the slightest assistance to learned counsel in support of his contention.

(8) The next case on which reliance was placed was — 'Reg. v. Evans', (1890) 62 LT 570 (C). This case, too, in our judgment, is of no assistance. In this case, like the earlier one, the proposition of law that was enunciated was that where a Court refused to exercise jurisdiction on grounds which were not judicial, that Court, if it was a subordinate court, could be directed by mandamus to exercise its powers in accordance with law. Lord Coleridge who delivered the leading judgment said this:

> "I only desire to guard myself against it being supposed that by sending this case back to the magistrate we give him any hint as to the way in which we think he ought to determine it. He will no doubt give judgment according to the principles of law."

This sentence in the judgment of Lord Coleridge is clearly indicative of the fact that this case could not be pressed into service to support the proposition that a superior Court can, by mandamus, direct a subordinate court to determine a matter in any particular manner.

(9) The other case cited was 'Re Brighton Sewers Act', (1882) 9 QBD 723 (D). This case, too, lays down the same proposition, and can be of no assistance to learned counsel for the petitioners.

(10) Mr. Bhargava lastly relied on a decision of the Madras High Court in — 'Lakshmindra Theertha Swamiar v. Commr., Hindu Religious Endowments, Madras', AIR 1952 Mad 613 (E). The facts of this case were entirely different and there was nothing, in our opinion, in this case which could be of any help.

(11) There is one further aspect of the matter which we consider appropriate to notice, and that is that even if it were possible for us to issue either of the writs prayed for, whether under the circumstances of this case it would be proper, in our discretion, in such matters to do so. As we have noticed, the writ is to issue to the Additional Commissioner who is a court subordinate to the Board of Revenue and whose decisions can be and are made the subject matter of an appeal to the Board of Revenue. The Board of Revenue which is no party to this petition, would not be bound by any direction or order embodied in a writ issued by this Court to the Additional Commissioner, and in deciding an appeal from the judgment of the Additional Commissioner it might express an opinion which is in conflict with the decision of this Court. It is clearly desirable that the possibility of any such difference of opinion should be avoided.

(12) For the reasons given above we see no force in this petition which we dismiss with costs which we assess at Rs. 100/-.

V.S.B. Petition dismissed.

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(3) AIR 1955 (All) 423 (V42 C 128 Aug)

AGARWALA J.

On difference of opinion between

DESAI AND MEHROTRA JJ. (10-2-1955)

State v. Sm. Tugla, Opposite Party.

Criminal Appeal No. 934 of 1952, against order of acquittal passed by Magistrate 1st Class, Allahabad, D/- 26-2-1952.

Penal Code (1860), S. 188 — Order under S. 145 (b), Criminal P. C. if promulgated within S. 188 — 'Promulgate' — Meaning of — (Criminal P. C. (1898), S. 145(b)) — (Words and Phrases — Promulgated)).

Per Agarwala and Desai JJ., Mehrotra J. Contra—In essence the word "promulgate" connotes two ideas: (i) making known of an order, and (ii) the means by which the order is made known must be by something done openly and in public. Private information will not be "promulgation". But the law does not prescribe any particular mode in which an order is made known openly and publicly. It

may be by beat of drum; it may be by publication in Gazette; it may be by reading out an order openly in public. An order duly pronounced in open Court must be deemed to be duly promulgated so far as the parties to the case are concerned. Therefore an order of the criminal court under S. 145(b) having been passed in the presence of the parties, must be deemed to have been duly promulgated within the meaning of S. 188 qua the parties to the litigation in the Court. Case law discussed.

(Paras 6, 29 and 45)

Anno: AIR Man.: Penal Code, S. 188 N. 1.

AIR Com.: Criminal P. C., S. 145 N. 56 Pt. 9; 1953 Mitra: S. 145 P. 472 N. 428 "Effect of order" (Topic discussed in other notes also, in Mitra).

CASES REFERRED: Paras

(A) (V16) AIR 1929 Pat 505: 30 Cri LJ 840 7
(B) (V17) AIR 1930 Cal 63: 31 Cri LJ 945 7, 9
(C) (V26) AIR 1939 Pat 611: 18 Pat 544 9, 25
(D) (V38) AIR 1951 All 828: 1951 All LJ 710: 52 Cri LJ 1508 9, 20
(E) (V21) AIR 1934 Nag 114: 35 Cri LJ 820 9
(F) (1788) 2 TR 667: 1 RR 585 9
(G) (V37) AIR 1950 Nag 158: 51 Cri LJ 1007 10, 19
(H) ('81) 6 Cal 445: 7 Cal LR 350 11, 22
(I) (V36) AIR 1949 Cal 349: 50 Cri LJ 632 11, 13, 18, 22
(J) (V35) AIR 1948 All 50: 1947 All LJ 304: 48 Cri LJ 982 11, 13, 18, 21
(K) (V12) AIR 1925 All 165: 26 Cri LJ 599 11, 23
(L) ('47) 48 Cri LJ 747: 231 Ind Cas 224 (Cal) 18

J. R. Bhatt, A. G. A., for the State; G. P. Bhargava and N. D. Ojha, for Opposite Party.

DESAI J.:

In proceedings under S. 145, Criminal P. C. started by the respondent herself on the allegation that she was in possession of the house in dispute and some landed property and that there was a dispute between her and Sob Nath about them which was likely to cause a breach of the peace, the Sub-Divisional Magistrate, Soraon on 6-7-1950 held that Sob Nath was in possession of the house in dispute and entitled to remain in possession until evicted in due course of law and ordered the respondent not to disturb his possession in the meantime. The propery seems to have been attached under S. 145(4). On the case being decided in favour of Sob Nath, it was released from attachment and possession was given to him by the police on 1-12-50. On 3-11-50 the respondent filed a civil suit regarding the house in dispute. She applied for a temporary injunction and the civil court on 18-11-50 issued an interim injunction that status quo should be maintained.

The order was served upon Sob Nath on 30-11-50 two days before he obtained possession from the police. On 30-1-51 Sob Nath made an application to the Sub-Divisional Magistrate, who had passed the order under S. 145(6), for prosecution of the respondent under S. 188, I.P.C. on the allegation that she entered the house in dispute again and again in spite of the order. The application was sent by the Sub-Divisional Magistrate to the Tehsildar for enquiry and report. He reported that she lived in the same house and that there was every likelihood of a breach of the peace and recommended proceedings under S. 107 of the Code. On receipt of the report the Sub-Divisional Magistrate filed a complaint against the respondent for the offence under S. 188, I.P.C.

(2) The prosecution examined Sob Nath, Brij Mohan, Ram Padarath and H. C. Manzur Alam. H. C. Manzur Alam deposed that he handed over possession over the house to Sob Nath on 30-11-50 under the orders of the Sub-Divisional Magistrate, that he had subsequently met the respondent and informed her of the fact and of the injunction that she should not interfere with Sob Nath's possession. The other three stated about Sob Nath's possession over the house and interference with it by the respondent after 6-7-50. Sob Nath deposed that in the month of March 1951 the respondent quarrelled with him, abused him and threw out his articles from the house and that she goes to the house and quarrels with him every eighth or tenth day.

In cross-examination he deposed that she entered into the house five or seven months after possession was delivered to him and that she frequently went to the house subsequently. There is nothing in his deposition which would make it improper to rely upon it. Brij Mohan deposed that the respondent goes into the house and stays there after closing the door. On one occasion he heard exchange of abuses between the parties. Ram Padarath deposed that the respondent enters into the house, and threatens to live in it. He saw her visit the house ten or twelve times; but no quarrel took place in his presence. On one occasion he saw her throwing away utensils. On the first occasion she lived in the house for three or four days.

(3) The respondent denied having disobeyed the order of the Sub-Divisional Magistrate. She stated that she never entered the house. She examined Ram Prasad, Shitla Din, Basdeo and Dukhi in defence. They supported her statement. When the house was under attachment during the pendency of the proceedings under S. 145 it was entrusted to D. W. Shitla Din. His statement that the house is still in his possession, that it is locked, that he has got the key, that nobody ever took possession of it from him, and that Sob Nath never got possession is a tissue of lies. He himself signed the report prepared by H. C. Manzur Alam about the delivery of possession to Sob Nath.

Ram Prasad is related to the respondent and no reliance can be placed on his negative evidence. He admitted that the police had taken possession of the house from Shitla Din, but added that it is in possession of nobody, is still under attachment and is locked up by the police. He is also a liar. His statement contradicts Shitla Din's and there is no doubt that both of them are telling lies. Basudeo Prasad's statement is also of a negative character. Dukhi stated that the house is locked and is still under attachment; this is also a lie. The Sub-Divisional Magistrate has released the house from attachment and delivered possession of it to Sob Nath.

The civil court did not attach the house, it only ordered that 'status quo' should be maintained. It did not mean that the Sub-Divisional Magistrate could not release the house from attachment or deliver possession of it to Sob Nath. It appears that the respondent in her plaint claimed that she was in possession of the house and wanted her

possession to be maintained; so the order of the civil court that status quo should be maintained meant nothing but that she should be left in possession. That order could be complied with only if she was in possession previously; if she was not, there was no question of her being left in possession.

(4) The trial Court did not go into the question whether the respondent disobeyed the order of the Sub-Divisional Magistrate or not. I find that there was sufficient evidence to prove that she did. She was ordered not to disturb Sob Nath's possession. The possession could be disturbed in many ways; it may be disturbed by Sob Nath's being abused and threatened; or by the respondent's entering into the house or by her throwing away Sob Nath's articles kept inside the house. One of the acts of possession done by Sob Nath was to keep his goods inside the house, and if the respondent threw them away she undid the act of possession. If she quarrelled with him and abused him she certainly interfered with his peaceful possession of the house. She was forbidden to interfere with his possession in any manner. It is not necessary that she should have completely dispossessed or ousted Sob Nath before she could be held to have disobeyed the order. The slightest interference with Sob Nath's possession amounted to disobedience.

(5) Sob Nath was entitled to remain in possession so long as he was not evicted in due course of law. The civil court decreed the suit of the respondent on 13-1-53. She would now be entitled to take possession of the house through Court. But in 1951 there was no order of eviction against Sob Nath. The temporary injunction issued by the civil Court for the maintenance of status quo did not amount to his eviction in due course of law. Maintenance of status quo is quite the opposite of eviction or of delivery of possession. Maintenance of 'status quo' means inactivity or refraining from doing any act, whereas eviction or delivery of possession means the doing of a positive act. Therefore the temporary injunction did not entitle the respondent to disturb Sob Nath's possession.

(6) Section 188, I. P. C. punishes disobedience of a direction given through an order promulgated by a public servant lawfully empowered to promulgate it. If the order issued under S. 145(6) by the Sub-Divisional Magistrate on 6-7-50 was an order promulgated, it was an order promulgated by a public servant lawfully empowered to promulgate it because the Sub-Divisional Magistrate is a public servant and has got the power to pass an order under S. 145(6), Criminal P. C. I have found it proved that the respondent disobeyed the direction contained in the order. On the remaining question whether the order is an order promulgated, I have not the slightest doubt that it is.

(7) The word 'Promulgate' is not defined in the Code. Its meaning according to Murray's Dictionary is:

> "to make known by public declaration, to publish; especially to disseminate (some creed or belief), or to proclaim (some law, decree, tiding)."

Its meaning according to Webster's International Dictionary is:

> "to make known by open declaration, as a law, decree ° ° ° to proclaim; to publish abroad."

The order under Section 145(6) should be in the form

> "It appearing to me, on the ground duly recorded that a dispute likely to induce a breach of the peace necessitated ° ° ° that the claim of actual possession by the said.....is true; I do decide and declare that he is in possession of the said .....and entitled to retain such possession until ousted by decrees of law and do strictly forbid all disturbance of possession in the meantime."
>
> See Form No. XXII, Schedule V of the Code.

The order strictly forbids all disturbance of possession of the person declared to be in possession. It is addressed to the public at large and not to the parties actually before the Court. It is to be obeyed by every one, whether a party to the proceedings or not. Of course, a person who does not know about the order cannot be convicted for disobeying it. Section 188, I. P. C. punishes disobedience of an order by a person if he knows that the order was promulgated. No person who does not know about the promulgation of the order can be punished for disobedience of it. But it should be noted that when he is not punished it is because he commits no offence within the meaning of Section 188, I.P.C. (as he is ignorant of the order) and not because he was not bound by the order and was not required to obey it.

It has been held in — 'Jainath Pati v. Ramlakhan Prasad', AIR 1929 Pat 505 (A) and — 'Satya Charan De v. Emperor', AIR 1930 Cal 63 (B) that such an order binds the whole world. The order is pronounced in open Court. It is not required to be served upon any one, not even the parties against whom it is pronounced. It takes effect as soon as it is passed in open Court. These facts make it an order promulgated. A decree or a temporary injunction issued by a civil Court in a private dispute between a party and party also is issued in open Court but is not addressed to the public at large. Since a decree or injunction binds only the party actually before the Court, it is to be brought only to the notice of the party and does not require to be published abroad or proclaimed. In other words it is not required to be promulgated.

The public may know about it because it is issued in open Court, but it would not thereby become a decree or order promulgated. On the other hand an order under S. 145(6) is not only issued in open Court but also addressed to the public and is meant to be obeyed by it. It is, therefore, proclaimed or published abroad or made known to the public by open declaration. According to the meanings mentioned above, it is an order promulgated. Promulgation does not require publication in newspapers or by posters. If an order is made known by open declaration, it amounts to its being promulgated, whatever be the manner of declaration.

(8) An order passed under Ss. 133 or 144 of the Code is to be served, if practicable, on the person against whom it is made as if it were a summons. If it cannot be so served, it should be notified by proclamation to the public in such manner as the State Government may prescribe and a copy of it should be stuck up at a prominent place (see Section 134). In whatever manner the order issued under S. 144 is served, it is an order promulgated and its disobedience is punishable under S. 188; there is no doubt about this. Even if it is served

like a summons there is no reason why an order issued under S. 145(6) should not be held to be an order promulgated.

An order issued under S. 133 or S. 140 is an order promulgated because its disobedience is punishable under S. 188, I. P. C. as laid down in Ss. 136 and 140 of the Code. When a conditional order is made absolute, the magistrate has to give a notice of it to the person against whom it is made and he must comply with it. Though only a notice of the order is required to be given and that too only to the person against whom it is made, it is treated as an order promulgated. It means that no particular kind of publication is required for promulgation.

(9) There is not a single authority holding that an order under S. 145(6) is not an order promulgated and that its disobedience is not punishable under S. 188, I. P. C. On the other hand there are decisions recognising that disobedience of it is punishable under S. 188, I.P.C. for example — 'Ambika Thakur v. Emperor', AIR 1939 Pat 611 (C), AIR 1930 Cal 63 (B), — 'Jaswant v. State', AIR 1951 All 828 (D) and — 'Emperor v. Zahir-us-Sayed Ali', AIR 1934 Nag 114 (E). In none of these cases was there any discussion about the meaning of the word 'promulgate'. The reason is that it was never contended that such an order was not an order promulgated. There can be no greater proof of the correctness of the finding that such an order is an order promulgated than the fact that not only is there not a single authority to the contrary but also its correctness has never been doubted so far.

Such orders are issued very frequently and their disobedience cannot be said to be rare. The Code of Criminal Procedure and the Indian Penal Code have been in force for more than fifty years. If in all this period of fifty years, it has never been contended that an order under S. 145(6) is not an order promulgated it means that such a contention cannot be advanced with any show of reason. There is a presumption that what has never been done cannot legally be done: Ashurst J. in — 'Russell v. County of Devon', (1788) 2 TR 667 (F).

(10) Under S. 36(4), Legal Practitioners Act a court may by a general or special order exclude from the precincts of the Court any person whose name is included in the list of touts. No particular manner of publication of the order is prescribed. In — 'Chhotu v. King Emperor', AIR 1950 Nag 153 (G) such an order was held to be an order promulgated. The reason given was that the proceedings under the Legal Practitioners Act are quasi criminal. The proceedings under S. 145 are also quasi criminal. But really whether an order is an order promulgated or not does not depend upon whether it is passed in criminal proceedings or civil proceedings. Every order passed in criminal proceedings is not an order promulgated.

(11) In — 'In re Chandra Kanta De', 6 Cal 445 (H), Garth C. J. with concurrence of Mcleod J. held that disobedience of an injunction issued by a civil Court is not an offence under S. 188, I. P. C. and that Section 188 applies to orders made by public functionaries for public purposes and not to an order made in a civil suit between a party and a party. The same view was taken in —'Quinn v. Keshab Chandra Mukherjee', AIR 1949 Cal 349 (I). Similarly, an order made under R. 15 of the Kumaun Nayabad Rules was held in — 'Bishen Datt v. Emperor', AIR 1948 All 50 (J) not to be an order promulgated. It was enough for the purposes of the cases that the particular orders were not orders promulgated, and the Courts were not required to give an exhaustive list of orders promulgated. They were not called upon to, and did not, decide whether an order under S. 145(6) is an order promulgated.

The only case in which the meaning of the word came in for some discussion was — 'Emperor v. Raghunath Vinayak', AIR 1925 All 165 (K). There an oral order was given by a sub-inspector of police to stop music before a mosque and it was disobeyed. When the accused were prosecuted they contended that there must be a written or printed order before it could be held to be promulgated. Their contention was repelled. It was held that the word "promulgate" indicates that there must be some form of publication. This does not mean that there must be publication through newspapers or posters or leaflets. When an order is pronounced in open court it is made public, nothing more need be done to publish it.

(12) An order under S. 145(6) is not capable of execution. The Code of Civil Procedure provides for execution of injunctions, but the Code of Criminal Procedure does not provide for execution of an order under S. 145(6). A disobedience of the order can be punished only under S. 188, I. P. C. There is no other provision under which it can be punished. If the other party commits a criminal trespass, he may be punished under S. 447 or 448, I. P. C., but every disturbance of possession does not amount to criminal trespass and is not punishable as such. If an order could not be enforced and its disobedience could not be punished, it would have been futile for the legislature to provide for the passing of it. The interpretation placed on the order by the trial Court would emasculate S. 145 (6) completely. It would have been no use holding an enquiry if it were to result in the passing of an order which could not be enforced either by execution or by punishment for disobedience.

We must place such an interpretation upon S. 145 (6) as not to render it nugatory and not to defeat the object behind the provisions of S. 145. Merely declaring a party to be in possession would not prevent a breach of the peace; the parties themselves know which of them is in possession and do not stand in need of any declaration from a court in order to know it. Therefore the provision about declaration in S. 145(6) is itself of no assistance in preserving the peace; what is of assistance is the prohibition of all disturbance of the possession. If that prohibition were not to be followed by a punitive action in case of disobedience, the prohibition would be in vain and the order would not have removed in the slightest degree the apprehension of a breach of the peace. If there is any utility behind the provisions of S. 145, it lies in the fact that disobedience of an order under S. 145 (6) is punishable, i.e., punishable under S. 188, I.P.C.

That proceedings can be taken under S. 107, Criminal P. C. is no reply to this argument. The legislature itself has provided for the passing of such

an order as a substitute for, or in addition to, an order under S. 118. An enquiry under S. 145, is simpler than an enquiry under S. 107 of the Code. A person can be bound down under S. 107 only if he is likely to commit a breach of the peace or do any wrongful act likely to occasion a breach of the peace, whereas an order under S. 145(6) can be passed without deciding which party is likely to commit a breach of the peace or do a wrongful act. It may not, therefore, be feasible to start proceedings under S. 107 in every case of an apprehension of a breach of the peace.

(13) The learned Magistrate has relied upon AIR 1948 All 50 (J) and AIR 1949 Cal 349 (I). Neither of them is applicable to the facts of the present case. I do not understand how he observed that S. 188, I. P. C. does not deal with disobedience of an order passed in a civil or criminal proceedings between two parties; neither of the cases relied upon by him lays down that an order passed in a criminal proceeding between two parties is not an order promulgated. Because there are particular men arrayed as parties to a case, it cannot be said that the case is one between a party and a party. Even though individuals are parties to a criminal proceeding the order passed in it may bind the public, for example an order passed under S. 145(6). An order passed in proceedings under S. 133 is an order promulgated though the proceedings are between a party and a party.

(14) It cannot be doubted that the disobedience by the respondent of the order under S. 145(6) not only tended to cause but actually caused annoyance or a risk of annoyance to Sob Nath. She was, therefore, clearly guilty under S. 188, I. P. C. The appeal should, therefore, be allowed and she should be convicted.

MEHROTRA J.:

(15) This appeal has been filed by the State against an order of acquittal passed by a Magistrate, Ist Class, Allahabad, acquitting Smt. Tugla under S. 188, Indian Penal Code.

(16) Srimati Tugla was prosecuted under S. 188, I. P. C. on a complaint filed by S. D. M. Soraon, district Allahabad, on 2-6-1951. The case against Srimati Tugla is that on 6-7-1950 Sri R. K. Chaturvedi, S. D. M., Soraon, passed an order under S. 145 (6), Criminal P. C. in case No. 100 of 1949 Srimati Tugla v. Ram Anand and others under which it was declared that Ram Anand and his son Sobh Nath were entitled to possession over the disputed house and that Srimati Tugla was forbidden from interfering with the possession of Ram Anand and others until ejected from the house by a competent court.

(17) On 30-1-1951 Sobh Nath, son of Ram Anand, made an application to the Sub-divisional Officer, Soraon stating that in spite of the order passed by the Magistrate under S. 145, Criminal P. C., referred to above Srimati Tugla entered the house in dispute with her husband Basdeo and Ram Prasad again and again and uprooted the crop in the fields, owing to which he could not peacefully enjoy the disputed land. This application was sent by the Sub-divisional Officer, Soraon to the Tahsildar, Soraon for enquiry under S. 202, Criminal P. C. The Tahsildar reported that after an enquiry on the spot he was led to the conclusion that both the parties were aggressive and there was every likelihood of a breach of the peace any moment. He recommended action under S. 107, Criminal P. C. The complaint was then filed on 2-6-1951.

(18) The Magistrate acquitted Srimati Tugla holding that the order passed by the Sub-divisional Magistrate on 6-7-1950 is not an order contemplated under S. 188, I. P. C. According to the Magistrate, S. 188, I. P. C. is confined to orders promulgated by public functionaries for public purposes & the order passed by the Magistrate under S. 145(6), Cr. P. C. was not an order promulgated by a public servant. The Magistrate relied on the cases of AIR 1948 All 50 (J); AIR 1949 Cal 349 (I) and — 'Saroj v. Emperor', 48 Cri LJ 747 (Cal) (L). It was also held by the Magistrate on the evidence produced in the case that the disobedience, if any, caused no obstruction, annoyance or injury or risk of obstruction, annoyance or injury to Sobh Nath and others. Counsel for the State has strenuously contended that the order passed under S. 145(6), Criminal P. C. is an order contemplated by S. 188, I. P. C. Section 188, I. P. C. reads as follows:

> 'Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both....."

(19) The question, therefore, to be decided is whether an order passed by the Magistrate in proceedings under S. 145, Criminal P. C. is an order promulgated by a public servant lawfully empowered to promulgate such order. Counsel for the State has relied on the case of AIR 1950 Nag 158 (G). The applicant in this case was declared a tout under S. 36(4), Legal Practitioners Act. Although he was excluded from the precincts of the courts in Nagpur he on 7-10-1946 approached Lalman postman near the Bar room and asked him concerning letters addressed to one Raghunathsingh, attorney to Sri Y. P. Verma, Barrister-at-law. On this he was prosecuted under S. 188, I. P. C. for the breach of the order under S. 36(4), Legal Practitioners Act. It was held that the proceedings under the Legal Practitioners Act are quasi-criminal proceedings, and a person disobeying an order passed by the District Judge under S. 36(4) of the Legal Practitioners Act is liable to be punished under S. 188, Penal Code provided he is aware of the order. This case is not an authority for the proposition that an order under S. 145(6), Criminal P. C. is an order promulgated by a lawful authority within the meaning of S. 188, I. P. C.

(20) The next case relied upon by the counsel for the State is the case of AIR 1951 All 828 (D) to which one of us was a party. In this case, an order was passed in proceedings under S. 145(6), Criminal P. C. to the effect that Niranjan Singh was in possession and prohibiting the other side from interfering with his possession. The prosecution

was launched on the complaint of the Magistrate for the breach of the aforesaid order. It was, however, assumed in this case that an order passed under S. 145(6), Criminal P. C. is an order contemplated under S. 188, I. P. C. No point was raised that the order under S. 145(6) was not promulgated by an authority lawfully entitled to promulgate an order. The point which is now specifically raised was, therefore, not decided in that case.

(21) The cases relied upon by the court below also do not apply to the facts of the present case. In the case of AIR 1948 All 50 (J) the applicant was prosecuted under S. 188, I. P. C. for the breach of an order passed by the Deputy Commissioner in-charge of Kumaun Division in the course of proceedings under R. 15 of the Kumaun Nayabad Rules directing the two applicants to demolish and remove a cowshed which they had built on certain 'benap' land. It was held by a single Judge of this Court that orders contemplated by section 188, I. P. C. are orders made by public functionaries for the public interest. It was observed in this case that an order promulgated by a public servant cannot refer to an order made by a public servant in the course of a civil proceeding between two parties.

(22) In AIR 1949 Cal 349 (I) it was held that S. 188, I. P. C. applies to orders made by public functionaries and for public purposes and not to an order made in a civil suit between party and party. Section 188, I. P C. had no application to a case of disobedience of an interim injunction issued by the court upon an application of the sub-lessee restraining the Sheriff and his men from executing the ejectment decree obtained against the lessees. Reference was made in this case to an earlier case of 6 Cal 445 (H).

(23) In none of these cases, the meaning of the word "promulgated" was considered and they were cases in proceedings — essentially civil court proceedings between the parties. According to the Shorter Oxford English Dictionary the word "promulgate" means "to expose to public view, to make known by public declaration; to publish, to disseminate or to proclaim." The word "promulgate" necessarily implies the idea of publication. It is not necessary that the publication should be in writing. It may be oral but the word "promulgation" is not the same as the making of an order. In AIR 1925 All 165 (K) Walsh A. C. J. held that the word "promulgate" seems to indicate, if not a formal document printed or written, at any rate some form of publication.

This was a case where the applicants were acquitted by the Sessions Judge of Jhansi of the charges under Ss. 151 and 188 of the Indian Penal Code. On 19-11-1923 a Gaoshala procession with a band of musical instruments was passing along a route in front of a mosque and the sub-inspector, who was in-charge of the station, came and addressed the processionists and generally the two accused in the procession asking them to stop the music otherwise there was a likelihood of a breach of the peace. In spite of the order passed by the sub-inspector, the processionists continued to proceed and the band and the music were not stopped by the processionists. On these facts the opposite parties in that case were prosecuted for the breach of the order promulgated by the inspector.

Mr. Justice Sulaiman (as he then was) held that the sub-inspector had no power to pass an order under S. 149, Criminal P. C. and as such there was no breach of any order under S. 188, Penal Code. He, however, held that the applicants had committed an offence under S. 151, I. P. C. and Walsh J. though he felt a doubt about the offence having been made out under S. 188, I. P. C., ultimately agreed with the other learned Judge and held that the applicants were liable to be convicted under S. 151, I. P. C. The observations of Walsh A. C. J. do lend support to the contention of the respondent in this case that the word "promulgated" does not mean merely passing an order by a competent court, but necessarily implies the idea of publication.

(24) Every order passed by a competent court is generally pronounced in court and from the mere fact that an order is communicated in the normal course it cannot be said that such an order is an order promulgated by a public servant lawfully empowered to promulgate. For the applicability of section 188, I. P. C. it is not enough that the order passed by a public servant should be communicated by him but it should be an order which the public servant, who passes such an order, is lawfully empowered to promulgate. There should be a legal duty on an authority or public servant to promulgate such an order. By examining the provisions of S. 144 and a few other sections in the Criminal Procedure Code under which the Magistrates are empowered to pass certain orders it would appear that there are specific provisions in those sections by which a Magistrate in passing an order has to observe certain procedure for communicating such an order.

For orders passed under S. 144, Criminal P. C. it has been expressly laid down that such an order should be in writing stating the material facts of the case and should be served in the manner provided by S. 134, Criminal P. C. Section 134, Criminal P. C. itself lays down the procedure for the service of orders passed under S. 133, Criminal P. C. It has been laid down in S. 134, Criminal P. C. that if an order is not served in accordance with the rules made under S. 134(1) it shall be notified by proclamation, published in such manner as the State Government may by rule direct. To my mind, the orders contemplated under S. 188, I. P. C. are the orders which are not only passed by competent authorities and pronounced but the section refers to orders promulgated by a lawful authority empowered by the law itself to promulgate such an order. It was strenuously urged by the counsel for the State that if orders passed under S. 145(6), Criminal P. C. are excluded from the purview of S. 188, I. P. C., there is no remedy left for the breach of such orders, and a person who may have been restrained under S. 145(6), Criminal P. C. from interfering with possession may disobey that order with impunity.

(25) Our attention has been drawn to the case of AIR 1939 Pat 611 (C). It has been observed at page 618 in this case that the possession of the party which succeeds in proceedings under S. 145, Criminal P. C. cannot be put to an end by the unsuccessful party by mere force. If after an order

under S. 145, Criminal P. C. the losing parties either surreptitiously or forcibly are able to cultivate the lands these would be no more than isolated acts of trespass and offences punishable under S. 188, I. P. C. but not acts amounting to the dispossession of the other side and constituting the juridical possession of the offenders. In this case, the appellant had been convicted under S. 302 read with S. 149, I. P. C. and in the appeal against the conviction the question was as to who were in possession of the disputed plot and were the aggressors. In that connection these observations were made and in my judgment this case is no authority for the proposition that disobedience of order under S. 145, Criminal P. C. is punishable under S. 188, I. P. C. It was no doubt observed in this case at page 618 that:

"The whole object of the section (S. 145, Criminal P. C.) is to stop a breach of the peace by deciding which party is to remain on the land and which party is to seek his remedy in the civil court. Breaches of the peace will continue, and the object of the Legislature will be frustrated if the party who has, on the finding that he is not in possession, been forbidden to disturb the possession of the successful party until eviction in due course of law, is allowed to interfere with the possession of the successful party and to plead once more that whatever the order might have been, he is still in possession or has been able to regain possession by force and thus either compel the successful party to go to the civil court or to coerce a Magistrate to proceed again under S. 145, Criminal P. C. This will be a definite encouragement to disobedience of orders under the section."

(26) In interpreting the language of the section we are not to be guided by these considerations.

(27) Proceedings under S. 145, Criminal P. C. are no doubt for the prevention of breach of the peace but they also authorise the Magistrate to investigate the question of possession and ultimately pass an order under S. 145(6), Criminal P. C. declaring that a party is entitled to possession and forbidding the other party from interfering with his possession. The question of right to possession has finally got to be decided by a competent court. If an unsuccessful party in a proceeding under S. 145, Criminal P. C., takes forcible possession of the property he may be prosecuted under S. 441, Penal Code, for criminal trespass or if there is a likelihood of the breach of the peace the parties can be bound down under S. 107, Criminal P. C.

(28) As I have already pointed out if the word "promulgation" means only communication to the parties to the proceeding then the orders passed in civil proceedings or interim injunctions communicated to the parties to the proceedings will also be covered by the provisions of S. 188, I. P. C. It was argued on behalf of the State that the mere making of an order may in certain cases amount to promulgation. The question as to whether a particular order has been promulgated and the Magistrate passing such an order is lawfully empowered to promulgate will also depend upon the nature of the order. If it is an order passed by a public authority in proceedings against the public in general such an order would be deemed to have been promulgated by the authority concerned. It was contended that an order under S. 145, Criminal P. C. is not necessarily an order against the party alone but it is against the public generally.

(29) Our attention has been drawn to the provisions of S. 145 (3), Criminal P. C. which says that the copy of the order passed shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute, and anybody is entitled to come and object to such an order. But an order passed under S. 145(6), Criminal P. C. is a declaratory order coupled with an order forbearing to disturb such possession and the order is served upon the party concerned alone. Therefore under no circumstances an order passed under S. 145(6), Criminal P. C. can be said to be promulgated against those who had no knowledge of the order at all. No inference, therefore, can be drawn from the nature of the order passed under S. 145(6), Criminal P. C.

(30) It has been next contended by the counsel for the opposite party that from the evidence produced by the prosecution in this case it has not been established as a fact that the opposite party violated the order passed by the Magistrate under S. 145(6), Criminal P. C. From the perusal of the complaint filed by the Magistrate it will appear that the charge against the opposite party was that she in contravention of the orders passed by the Magistrate interfered with the property on several occasions and entered the house. The prosecution produced Brij Mohan, Ram Padarath, Sobh Nath and Manzur Alam constable. Brij Mohan states in the examination-in-chief that Darogha had put Sobh Nath in possession of the house and that Smt. Tugla also goes and lives there. She quarrels and remains in the house after closing the same. She lives there forcibly. In cross-examination, however, he says that he saw the quarrel going on at the door and heard exchange of abuses. No article was taken in his presence.

(31) Ram Padarath states in examination-in-chief that possession had been delivered to Sobh Nath b the sub-inspector and the opposite party comes every month and quarrels. She indulges in 'marpit' and says that she would live in the house. In cross-examination, however, he says that Smt. Tugla entered the house two months after the award of possession by the court. He was not present when she entered the house for the first time. He was not present the second time as well. He saw her only when she left the place. No quarrel took place in his presence. The Musammat threw away 'thalis' etc., in his presence. She had untied the oxen.

(32) Sobh Nath states that the house is in his possession. Six or seven months ago during the Magh, Smt. Tugla quarrelled with him. She called him bad names and threw out the articles belonging to him. She comes and quarrels every eighth or tenth day in the month. The pairokars of Smt. Tugla rush to beat him. In the cross-examination, however, he states that he did not make a report about the threats and trespass into the house. She entered the house five or seven months after he got the possession. She entered the house very early in the morning. She was accompanied with

others. She entered the house while the others remained outside. She remained in the house the whole day and went away in the evening. She came again after eight days along with Basdeo and others but only the Musammat threw away his articles, cot, etc.

(33) The constable Manzur Alam states that he in compliance with the orders delivered the possession of the house which was attached under S. 145, Criminal P. C to Sobh Nath and Ram Anand on 30-11-1950. He handed over the possession in the presence of four or five persons. Smt. Tugla was not there but he met her at Soraon and told her that the possession of the house had been delivered to Sobh Nath in accordance with the order or Deputy Saheb.

(34) The possession, according to the constable, was delivered to Sobh Nath on 30-11-1950. If, as has been stated by Sobh Nath the opposite party entered the house five or seven months after he got possession then she must have attempted to enter the house in March or May 1951 and no complaint was filed till June 1951. It is not the case of Sobh Nath that he was actually dispossessed by the opposite party. He only complained that she quarrelled with him and threw out some of his articles. The mere fact that she occasionally quarrels with him does not prove interference with the possession of Sobh Nath and it cannot be said that she voilated the order passed by the Magistrate.

After the order of the Magistrate on 6-7-1950 it appears that a suit was filed by Smt. Tugla for a declaration that she is entitled to the possession of the house and on 18-12-1950 an interim injunction was issued by the Munsif ordering that the status quo be maintained. It may be that as the suit was pending before the civil court the opposite party thought that she could assert her right to the property. The mere assertion of her right cannot be said to be with an intention to violate the orders passed by the Magistrate. From the evidence I am, therefore, of the opinion that it has not been conclusively established that she disobeyed the orders passed by the Magistrate under S. 145(6), Criminal P. C.

(35) It was next contended by the counsel for the opposite party that as the civil suit was pending and the Munsif had passed an interim order that the status quo be maintained in effect the order of the Magistrate had been superseded. I am not prepared to accept this argument of the counsel for the opposite party. The Magistrate's order could not have been affected by an interim order passed by the Munsif. It may be that after the suit had been finally decreed Sobh Nath could have been evicted from the house under a decree. But that does not mean that the interim order superseded the order passed by the Magistrate.

(36) It was then contended that from the circumstances it will appear that Sobh Nath acted in a high-handed manner and, therefore, this Court will not interfere with the order of acquittal passed by the Magistrate. I do not think that any such consideration is relevant to the decision of the appeal. If I had found against the other contentions raised by the counsel for the opposite party in this case I would have had no hesitation in allowing the appeal but in view of the findings on the questions discussed above I am of the opinion that this appeal should be rejected.

BY THE COURT:

(37) Since there is a difference between us, let this case be laid before the Hon'ble the Chief Justice for obtaining a third Judge's opinion.

AGARWALA J.:

(38) This case came before me on a difference of opinion between my learned brothers Desai and Mehrotra. The facts of the case briefly stated are as follows:

(39) One Ram Bharose had two daughters, Gomta and Narbada and one son Ram Dulare. Ram Dulare died leaving Smt. Tugla as his widow. Ram Bharose owned a house along with his cousin Ram Prasad half and half. Ram Prasad lived in the northern portion of the house while Ram Bharose lived in the southern portion. One Sobnath was the son of Gomta. There was a dispute between Sobnath and Smt. Tugla in respect of the southern portion of the house. Tugla made an application under S. 145, Criminal P. C. in the Court of the Sub-divisional Officer, Soraon, complaining that Sobnath was attempting to dispossess her from the house. The Sub-divisional Officer attached the property and put it in possession of one Sitla Din, Superdar. Ultimately, he decided that Sobnath was in possession at the relevant time and ordered that the property shall be released in favour of Sobnath and forbade Smt. Tugla from interfering with Sobnath's possession unless otherwise ordered by a competent Court. This order was made on 6-7-1950.

It is alleged that a police officer released the house from attachment and put Sobnath in possession on 30-11-1950. This fact is, however, not admitted on behalf of the respondent. Prior to this, however, Tugla filed a suit in the civil Court on 3-11-1950 for a declaration of her right for possession of the house. In that suit she applied for the issue of an interim injunction against Sobnath and against Sitla Din Superdar restraining Sobnath from taking possession of the house and directing Sitla Din not to deliver possession to Sobnath till the decision of the suit. The civil Court issued a temporary injunction on 18-12-1950 in terms of the application, but later on, on 18-1-1951 ordered that if Sobnath was already in possession, he was to remain in possession and the status quo be maintained. Ultimately the civil suit was decreed in favour of Tugla and she was declared to be the owner of the house and entitled to the possession of the same.

(40) But during the pendency of the civil suit, the proceedings which have given rise to this appeal were taken. On 30-1-1951, i.e., after the civil court's order of 18-1-1951, Sobnath complained to the criminal court that Tugla was interfering with his possession over the house. His complaint was that Tugla entered the house in dispute with her husband Basudeo and Ram Prasad again and again. On this complaint being made by Sobnath, the Subdivisional Magistrate, Soraon filed a regular complaint against Tugla in the Court of the Judicial Officer, Soraon at Allahabad on 2-6-1951 under S. 188, I.P.C.

(41) Four witnesses were produced on behalf of the prosecution to prove delivery of possession over

the house to Sobnath and interference by Tugla in the possession of Sobnath. Prosecution witnesses Brij Mohan, Ram Padarath and Sobnath attempted to prove delivery of possession by the police to Sobnath and also Tugla's entry into the house forcibly. Manzur Alam, constable, deposed how he delivered possession to Sobnath. He stated that Tugla was not present at the time, that he obtained key of the house from Sitla Din, the Superdar, and that he got the house opened and put it in possession of Sobnath. But he admitted that he obtained no signatures from Sitla Din and he did not say that Sitla Din was present at the time of the delivery of possession. He also stated that later on in the day he met Smt. Tugla at Soraon and told her orally that possession of the house had been delivered to Sobnath. But he admitted that he did not obtain any signatures of Tugla on the order.

On behalf of the accused Sitla Din Superdar swears that he had still the key of the house in his possession and that no one had taken it from him up to the date of his deposition in Court. He also stated that Tugla lived in the western portion of the house belonging to Ram Prasad and that she did not live in the southern portion. Ram Prasad and Basudeo Prasad were the other two witnesses produced on behalf of the defence. Ram Prasad stated that the southern portion of the house was still locked and was vacant. Basudeo who is the Mukhia of the village and who is 70 years of age and a zamindar-cultivator by occupation stated that Tugla did not go into the attached house. Tugla herself in her statement stated that she did not enter the house.

The prosecution witnesses did not make any distinction between the northern portion and the southern portion of the house. On this evidence the learned Magistrate, without recording a finding as to whether Sobnath was put in possession of the southern portion of the house by the police constable, acquitted Tugla on two grounds: firstly, that the order passed under Section 145, Criminal P. C. could not be said to be an order which was promulgated and therefore no offence under S. 188, I. P. C. which applies to defiance of orders duly promulgated was proved to have been committed, and secondly, that the disobedience of the order did not cause obstruction, annoyance or injury or risk of obstruction or annoyance to Sobnath.

(42) The Government appealed to this Court against the order of acquittal. The matter came up before two learned Judges of this Court who differed in their opinions. Desai J. was of opinion that possession had in fact been delivered to Sobnath, that the order under S. 145, Criminal P. C. having been passed in open Court must be deemed to have been duly "promulgated", that Tugla violated the order by entering the house forcibly which caused annoyance or disturbance to Sobnath and that therefore the respondent was guilty of the offence with which she was charged. On the other hand, Mehrotra J., without recording any definite finding on the question whether possession was delivered to Sobnath, held that there was no disobedience of the order and further that the order had not been 'promulgated' within the meaning of S. 188, I. P. C. and that, therefore, no offence could be said to have been committed by the respondent.

(43) I have heard learned counsel for the parties and my opinion on the various points in dispute is as follows:

(44) As regards delivery of possession to Sobnath, I am not satisfied from the evidence on the record that delivery of possession to Sobnath was made in the knowledge of Tugla. It is admitted by Manzur Alam, P. W. that Tugla was not present at the time of the delivery of possession. His further statement that he met Tugla at Soraon Station and that he orally told her about it cannot be believed in the absence of any signatures of Tugla on the order showing delivery of possession. Further the statement of Manzur Alam that he took the key of the house from Sitla Din is contradicted by Sitla Din and I cannot believe Manzur Alam on this point either, because if Sitla Din had delivered the key to him, then he must have been present at the time of the delivery of possession and Manzur Alam should have taken his signature on the Parvana. Admittedly he did not take any signatures. Consequently I believe Sitla Din when he says that the key was still in his possession and that possession was never taken from him. I am, therefore, unable to hold that the house was properly released in favour of Sobnath by removing Sitla Din from the possession of the house.

It is quite possible that Manzur Alam went to the spot and authorised Sobnath to enter the house and that later on Sobnath did actually enter into the possession of the house. But it is not possible to hold that the property was properly released or that delivery of possession to Sobnath was made in the knowledge of Tugla. I further hold that Tugla did enter the house, but it is not clear whether she entered the southern house which was in dispute. It is possible that she entered the northern portion of the house which was in occupation of Ram Prasad. Since there was only one exit to both the portions, it is possible that Sobnath and Tugla quarrelled over the entry of Tugla into the house. But it is very likely that Tugla having filed a suit in the civil Court and obtained a temporary injunction against Sobnath and Sitla Din was under the 'bona fide' belief that Sobnath had not been actually put in possession of the house by the order of the criminal court, and that Sitla Din was still the Superdar of the house. For this reason I am unable to hold that Tugla knowingly disobeyed any order of the criminal Court.

(45) As regards the question whether the order of the criminal Court under S. 145 was covered by the provisions of S. 188, I. P. C. I am of opinion that qua the parties to the litigation in the criminal Court, the order having been passed in their presence, the order must be deemed to have been duly "promulgated" so far as they are concerned. The word 'promulgate' means "to make known by public declaration, to publish; to disseminate or to proclaim". In essence the word connotes two ideas: (1) making known of an order, and (2) the means by which the order is made known must be by something done openly and in public. Private information will not be "promulgation". But the law does not prescribe any particular mode in which an order is made known openly and publicly. It

may be by beat of drum; it may be by publication in Gazette; it may be by reading out an order openly in public. Any order announced in open Court will be deemed to have been promulgated, but as the Court room is a place where the litigants are expected to go and the public at large is not expected to be present though they have right to go there if they so wish, the open declaration of the order in Court will be deemed to be a notice not to the public at large but to the parties of the case in which the order is passed. An order duly pronounced in open Court must be deemed to be duly promulgated so far as the parties to the case are concerned.

It may further be pointed out that an order under Ss. 145 and 146, Criminal P. C. is intended for the public at large also. Form No. 22, Schedule V of the Criminal Procedure Code clearly shows that to be the case, but in the present case the learned Magistrate confined the order to Smt. Tugla alone, because it was only she who was prevented from interfering with the possession of Sobnath and not the public at large as required by the aforesaid form. Even so, however, the order was duly promulgated so far as Tugla was concerned and if I had been of opinion that Tugla knowingly disobeyed that order I would have held her guilty. The cases on the point have been discussed by my learned brothers and it is not necessary for me to discuss them again.

(46) I would, therefore, hold that the respondent was rightly acquitted by the Court below and the Government appeal should be dismissed.

BY THE COURT:

(47) In view of the opinion of the third Judge we maintain the acquittal of the respondent and dismiss the appeal.

V.R.B. Appeal dismissed.

(S) A.I.R. 1955 (All) 432 (V 42 C 129 Aug)

FULL BENCH—MOOTHAM C. J. AND MUKERJI AND MEHROTRA JJ. (28-3-1955)

Jagannath, Applicant v. Board of Revenue, U. P. Allahabad and others, Opposite Parties.

Writ Petn. No. 796 of 1953.

(a) **Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 180 — Proceeding under pending on 30-6-1952 — Proceeding, if to be decided with reference to any right accrued under U. P. Zamindari Abolition Act — (Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 20) — (Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Rules (1952), Rr. 5(3) and 5A) — (Tenancy Laws — U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order (1952), Cl. 2) — 1954 All LJ 121: AIR 1954 All 434, overruled.**

Notwithstanding anything contained in the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952, a suit, appeal or other legal proceeding under S. 180 of the U. P. Tenancy Act, pending on 30-6-1952, will be decided with reference to any right which may have accrued to either party in the land, the subject-matter of the suit, appeal or other proceedings under the U. P. Zamindari Abolition and Land Reforms Act. 1954 All LJ 121: AIR 1954 All 434, Overruled. (Para 20)

(b) **Interpretation of Statutes — Application of enactment to pending suits — (Civil P. C. (1908), Preamble).**

It is no doubt a general rule that where the intention of the legislature is doubtful, an enactment will not be construed so as to affect vested rights of action; but the matter is one of construction, and if upon a consideration of the enactment as a whole, it is apparent that it was intention of the legislature that the provisions of the Act should be applicable to pending suits, they will be so applied. (Para 7)

Anno: AIR Com.: Civil P. C., Pre. N. 7.

(c) **Tenancy Laws — U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order (1952) (made under S. 342, U. P. Zamindari Abolition and Land Reforms Act 1 of 1951), Cl. 2 — Object of Order — Proceedings to which clause 2 relates — How to be decided.**

The Order was made for one purpose only, as an aid to the transition from the old system to the new, and it must, if possible, be so construed as to be in harmony with the Act under which it is made and not as an Order which confers upon a plaintiff rights which have been taken from him or which deprives a defendant of the benefit of rights with which he has been invested. In other words, the proceedings to which Cl. (2) of this Order refers are to be decided in accordance with the provisions of the Land Revenue Act or the Tenancy Act, as the case may be, read with the provisions of the Zamindari Abolition Act. (Para 14)

(d) **Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 180 — "Otherwise than..... in force" — (Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 20).**

The Zamindari Abolition Act is a part of the law for the time being in force. A defendant to a suit filed under S. 180 is not therefore debarred from contending that he is entitled to possession of the land in suit in accordance with the provisions of that Act. (Para 16)

(e) **Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 20 and 232 — Suit for ejectment under S. 180, U. P. Tenancy Act — Adhivasi, if entitled to set up his rights as such in view of S. 232.**

The fact that specific provision is made in S. 232 for restoration of possession to an Adhivasi is no reason to hold that an Adhivasi is not entitled to set up his rights as such as a defence to a suit for ejectment. (Para 18)

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 434: 1954 All LJ 121 5, 8

(B) (1882) 9 QBD 672: 52 LJQB 44 7

B. L. Dikshit, for Petitioner; S. N. Singh, A. G. and S. C., for Opposite Parties.

MOOTHAM C. J.:

Two questions have been referred to this Full Bench for decision. The circumstances in which the reference has been made are these:

(2) In 1950 or early in 1951 the petitioner, who was the tenant-in-chief of a certain plot of land,

filed a suit under S. 180, U. P. Tenancy Act, 1939, (hereinafter referred to as 'the Tenancy Act') for the ejectment of the third respondent on the ground that he was a trespasser. On 11-5-1951, the petitioner obtained a decree, and thereafter in execution of his decree he recovered possession of the plot. The third respondent appealed, but before his appeal could be heard a vesting order to take effect from 1-7-1952, was made under S. 4, U. P. Zamindari Abolition and Land Reforms Act, 1950, (hereinafter referred to as 'the Act' or 'the Zamindari Abolition Act') which came into force on 26-1-1951.

(3) The Act abolished the zamindari system and made far reaching changes in the system of land tenure. Under S. 20 those persons who on the date immediately preceding the date of vesting, that is on 30-6-1952, were 'inter alia' recorded as occupants of any land (other than grove land or land to which S. 16 applied) in the khasra or khatauni of 1356 Fasli were to be called 'adhivasis' and were, subject to the provisions of the Act, entitled to take or retain possession of such land.

(4) The third respondent was so recorded as occupant of the plot in suit, and on 9-5-1953, the Commissioner allowed his appeal on the ground that under S. 20 he had become an adhivasi and as such was entitled to possession of the plot. The petitioner filed a second appeal to the Board of Revenue which on 28-8-1953, dismissed his appeal.

(5) The petitioner thereupon filed a petition in this Court under Art. 226 of the Constitution in which he prayed that the order of the Board of Revenue be quashed on the ground that it was vitiated by an error of law apparent on the face of the record. His contention was that the provisions of S. 20 of the Act had no application to a pending suit or appeal and he relied on the case of — 'Bikram Singh v. Sunehra', AIR 1954 All 434 (A) in which that view was taken. The Bench before whom this petition came for hearing was of opinion that the decision in Bikram Singh's case (A) required reconsideration, and although that case was distinguishable on the facts from the case before it, inasmuch as the suit in Bikram Singh's case (A) had been filed under S. 175 of the Tenancy Act, the 'ratio decidendi' appeared to apply with no less force to a case in which the suit had been filed under S. 180 of that Act. The Bench has therefore referred to this Full Bench the following questions:

> "(i) Would Section 20 affect the rights of the parties to the suit even though the suit had been filed prior to coming into force of Section 20?
>
> (ii) Whether the provisions of the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952, would make any difference to applying the provisions of Section 20 to pending suits or appeals?"

(6) Section 20 of the Zamindari Abolition Act confers upon the persons referred to therein the status of an adhivasi, and it expressly provides that a person who has acquired that status shall be entitled, subject to the provisions of the Act, to take or retain possession of the land of which he is the tenant or sub-tenant or of which he was recorded as occupant. Section 234 further provides that an adhivasi shall be liable to ejectment from the land held by him only on one or more of the three grounds stated therein.

(7) The question to be determined is whether a defendant in a suit under S. 180, Tenancy Act who has acquired the status of an adhivasi during the pendency of the suit or appeal can set up his right to possession as an answer to the plaintiff's claim. In our opinion, he is entitled to do so. It is no doubt a general rule that where the intention of the Legislature is doubtful an enactment will not be construed so as to affect vested rights of action; but the matter is one of construction, and if upon a consideration of the enactment as a whole it is apparent that it was the intention of the legislature that the provisions of the Act should be applicable to pending suits, they will be so applied.

'Quilter v. Mapleson', (1882) 9 QBD 672 (A) is an instructive case on this point. The plaintiff brought an action to recover the demised property under a proviso of re-entry for breach of a covenant to insure, and he obtained judgment on 4-7-1881. The defendant appealed and obtained a stay of execution. On the 1st January, 1882, the Conveyancing and Law of Property Act, 1881, came into operation and thereafter the appeal was heard. Under the Act of 1881, the Court was given power to grant relief against forfeiture, and the Court of Appeal held that that provision was not confined to breaches taking place after the Act came into force but also to breaches committed before the Act and to proceedings pending when the Act came into operation. Jessel M. R. when delivering his judgment allowing the appeal said

> "We must, therefore, in furtherance of the objects of the Act, hold the enactment to apply to pending proceedings, unless there is something in the words to prevent our doing so."

The Court of Appeal further held that assuming the judgment of the trial Court to have been correct according to law as it then stood, the Court of Appeal could grant to the tenant the relief to which he was entitled according to the law as it stood at the date upon which the appeal was heard. In the case before us the legislature, as part of a radical scheme of land reform, has conferred not only a new status upon certain persons but has vested those persons with rights which are inconsistent with the continued exercise by other persons of rights which they formerly possessed. Prior to 30-6-1952, the petitioner had a legal right to obtain an order for the ejectment of the third respondent; after that date the third respondent obtained prima facie a right to take or retain possession of the land from which the plaintiff sought to have been ejected.

(8) It is strenuously argued for the petitioner that an examination of certain other sections of the Act, and of the Rules made under the Act, makes it clear that it was the intention of the legislature that the right of a plaintiff to eject a tenant under the provisions of the Tenancy Act should not be curtailed; indeed it is said that care has been taken to protect such rights. This argument requires examination as it commended itself to this Court in Bikram Singh's case (A).

(9) Section 6 of the Act (which is a part of Chapter II) states the legal consequences which follow

upon the making of a vesting order, and clause (i) enacts that

> "(i) all suits and proceedings of the nature to be prescribed pending in any court at the date of vesting, and all proceedings upon any decree or order passed in any such suit or proceeding previous to the date of vesting, shall be stayed;"

Section 26 then empowers the State Government to make rules for the purpose of carrying into effect the provisions of Chapter II, and sub-s. (2)(b) provides that, without prejudice to the generality of the power conferred by sub-s. (1), such rules may provide for—

> "(b) the disposal of suits and proceedings stayed under this chapter;"

The other provision of the Act to which it is necessary to refer is S. 342 which empowers the State Government to make, within a limited period, such Orders as are considered necessary to remove difficulties which may arise in relation to the transition from the provisions inter alia of the U. P. Tenancy Act, 1939 to the provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1950.

(10) Rules were made under the Act on 30-6-1952. Rule 4(1) provides that all suits and proceedings whether of first instance, appeal or revision of the nature specified later in the rule, in respect of an area to which a vesting order applied, pending in any court for hearing on the date of vesting shall be stayed. At the end of the rule are set out a number of clauses enumerating the suits and proceedings to which sub-rule (1) refers; and cl. (v) as originally published read thus:

> "Suits, applications and proceedings including appeals, references and revisions under Sec. 180 of the U. P. Tenancy Act, 1939;"

On the 8th October, 1952, the clause was amended by the addition thereto of the words—

> "or of similar nature pending in a civil Court, except where the plaintiff is a tenant or where the land was the sir, khudkasht or grove of an intermediary and in which rights have not accrued to the defendant under Section 16 or any other section of the Act."

The final word "Act" was intended to mean the U. P. Zamindari Abolition and Land Reforms Act and that was made clear by a further amendment published on 11-2-1953.

(11) Rule 5 then made provision for the disposal of suits stayed under Rule 4. All proceedings stayed under clauses (i) to (iii) and (v) of Rule 4 were to abate (sub-rule 1); all proceedings pending in a court of first instance and stayed under clause (iv) of Rule 4 which referred to proceedings under a number of sections of the U. P. Tenancy Act other than S. 180 were to abate (sub-rule 2), but all other proceedings stayed under clause (iv) were to be

> "continued and decided in accordance with the provisions of the U. P. Tenancy Act, 1939, and the U. P. Land Revenue Act, 1901, as may be applicable." (sub-rule 3).

An additional rule, which is of some importance, Rule 5-A, was added on 25-8-1953. That rule reads thus—

> "5-A. Nothing in Rule 4 or 5 shall be construed as depriving any party to the suit or proceeding from any right which may have accrued in his favour in the land, the subject-matter of the suit or proceeding, under the Zamindari Abolition and Land Reforms Act, 1950."

(12) Now the third respondent's appeal to the Commissioner from the order of ejectment obtained by the petitioner was pending when these Rules came into force, and under Rule 4 it was automatically stayed. Before however an order of abatement could be made under Rule 5(1), Cl. (iv) of Rule 4 was amended (on 8-10-1952) with the result that the appeal, the plaintiff being a tenant, ceased to be stayed. No provision was or could be made in the rules for the manner in which suits and proceedings which were not stayed were to be disposed of, and it appears to have been for this reason among others that on 26-8-1952, the Governor promulgated the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order, 1952, clause (2) of which provided that—

> "2. Except as expressly provided in the U. P. Zamindari Abolition and Land Reforms Act, 1950, or under the U. P. Zamindari Abolition and Land Reforms Rules, 1952, every suit, appeal or legal proceedings in respect of any right, privilege, obligation or liability acquired, accrued or incurred under or in pursuance of the U. P. Land Revenue Act, 1901, or the U. P. Tenancy Act, 1939, shall—
>
> (a) where pending on the 30th day of June, 1952, in any Revenue or Civil Court, be continued in such Court; and
>
> (b) where not so pending, may be instituted or commenced in the Court in which it would, but for the enactment of the U. P. Zamindari Abolition and Land Reforms Act, 1950, have been instituted or commenced, and every such suit, appeal or legal proceedings shall be heard, inquired into and decided under and in accordance with the provisions of the U. P. Land Revenue Act, 1901, and the U. P. Tenancy Act, 1939."

(13) The argument is that the provision in sub-rule (3) of Rule 5 and in clause (2) of the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order that the suits and proceedings referred to therein are to be continued and decided in accordance with the provisions of the U. P. Land Revenue Act or the U. P. Tenancy Act, as the case may be, is a clear indication that in the decision of such suits the plaintiff will have the rights accorded to him by such enactments and the defendant is not entitled to rely on any rights which may have been conferred on him by any other Act. Stated baldly the argument means that such suits will be decided as though the Zamindari Abolition Act (which repealed the Tenancy Act and extensively modified the Land Revenue Act) had not been placed on the Statute Book. We do not think this argument is well founded.

(14) In the first place the purpose of the Zamindari Abolition Act, as expressed in its preamble, is to acquire the right, title and interest of intermediaries between the tiller of the soil and the State, and to reform the law relating to land tenures. The Act provides for the vesting of all proprietary rights in the State, and save where land was in the personal cultivation of a 'thekadar' the latter ceases to have any right to hold or possess

such land. It creates new categories of tenure-holders, 'bhumidhars', 'sirdars' and asamis; certain tenants of 'sir', sub-tenants and occupants of land became 'adhivasis'. The whole pattern of land tenure has been changed; new rights have been created and old rights abolished.

The U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order was made for one purpose only, as an aid to the transition from the old system to the new, and we are of the view that the Order must, if possible, be so construed as to be in harmony with the Act under which it is made and not as an Order which confers upon a plaintiff rights which have been taken from him or which deprives a defendant of the benefit of rights with which he has been invested. In other words, we are of opinion that the proceedings to which clause (2) of this Order refers are to be decided in accordance with the provisions of the Land Revenue Act or the Tenancy Act, as the case may be, read with the provisions of the Zamindari Abolition Act.

(15) In the second place Rule 5-A, which we have already quoted, makes it clear that in a suit under S. 175 of the Tenancy Act or under any of the other sections of that Act enumerated in clause (iv) of Rule 4 which are to be continued under Rule 5(3), neither the plaintiff nor the defendant can be deprived of any right which has accrued to him under the Act in the land the subject of the suit. Is it the position therefore that a defendant in a suit under S. 180, Tenancy Act, is deprived of the right to resist the plaintiff's claim on a ground which it would be open to him to advance were the suit under S. 175 of that Act, namely, that he has acquired a right in the land the subject of the suit under the Zamindari Abolition Act? We are unable to believe that such was the intention of the legislature; in our opinion no such distinction was intended to be made.

(16) Thirdly, in a case such as the present in which the suit was filed under S. 180 of the Tenancy Act it was incumbent on the plaintiff to establish that the defendant is in possession, in the words of the section, "otherwise than in accordance with the provisions of the law for the time being in force." We are unable to appreciate why the defendant should be debarred from contending that the Zamindari Abolition Act is part of the law for the time being in force and that in accordance with the provisions of that law he is entitled to possession of the land in suit.

(17) An argument was addressed to us based on S. 6, U. P. General Clauses Act, 1904. The provisions of that section have application however only in the absence of a different intention appearing in the repealing enactment. The section therefore carries the matter no further, as for reasons which we have already given it was in our opinion the intention of the legislature in passing the Zamindari Abolition Act that pending proceedings under the Tenancy Act should be affected.

(18) Finally a reference was made to S. 232 of the Act which provides a procedure according to which an 'adhivasi' may on application being made by him to the Assistant Collector be put in possession of the land of which he is the Adhivasi, and it was contended that the fact that specific provision is made for restoration of possession to an Adhivasi shows that an Adhivasi is not entitled to set up his rights as such as a defence to a suit for ejectment. The argument, in our opinion, is without force. A suit for ejectment presupposes that the defendant is in possession—in which case S. 232 has no application — and the fact that he may have lost possession as a result of the decree of the trial Court cannot mean that he has also lost his right of appeal. It is impossible to hold that one Court can find that the plaintiff is entitled to possession under S. 180, Tenancy Act, and another Court that the defendant is entitled to possession under S. 232.

(19) We are of opinion that the two questions referred to this Bench must be considered together and be answered as follows.

(20) Notwithstanding anything contained in the U. P. Land Tenures (Legal Proceedings) (Removal of Difficulties) Order 1952, a suit, appeal or other legal proceeding under S. 180, U. P. Tenancy Act, 1939, pending on 30-6-1952, will be decided with reference to any right which may have accrued to either party in the land, the subject-matter of the suit, appeal or other proceedings under the U. P. Zamindari Abolition and Land Reforms Act, 1950.

V.R.B. Answer accordingly.

(S) A.I.R. 1955 Allahabad 435 (V 42 C 130 Aug.)

(FULL BENCH)

LUCKNOW BENCH — MOOTHAM C. J., AGARWALA, V. BHARGAVA, M. L. CHATURVEDI AND MULLA JJ. (21-12-1954)

Azmat Ullah and others, Applicants v. The Custodian, Evacuee Property, U. P. Lucknow, Opposite Party.

Civil Misc. Appln. (O. J.) No. 21 of 1953.

Constitution of India, Art. 226 — Mandamus — Order of Custodian General, New Delhi, under S. 27, Administration of Evacuee Property Act (1950) — Allahabad High Court cannot issue writ of mandamus to Custodian of Evacuee Property, U. P. commanding him to treat that order as nullity — (Administration of Evacuee Property Act (1950), S. 27).

No High Court can issue a writ which will be effective beyond the limits of its own territorial jurisdiction. It therefore follows that no High Court can issue a writ to an official who resides beyond the jurisdiction of that Court. High Court cannot do indirectly what it has no power to do directly. Hence Allahabad High Court cannot issue a writ of 'mandamus' to the Custodian of Evacuee Property, U. P., commanding him to treat as a nullity an order made by the Custodian General in New Delhi in the exercise of his revisional powers under S. 27 of the Administration of Evacuee Property Act, 1950, so long as that order is valid & subsisting order: AIR 1953 SC 210 and AIR 1954 SC 207, Rel. on. AIR 1954 Trav-C 131, Explained. AIR 1954 Raj 189 and AIR 1954 Raj 214, Distinguished. (Paras 5, 8, 14)

Anno: AIR Com., Const. of India, Art. 226 N. 41.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 210: 1953 SCR 1144 (SC) 5

(B) (V41) AIR 1954 SC 207: 1954 SCR 738 (SC) 5

(C) (V38) AIR 1951 SC 217: 1951 SCR 344: 52 Cri LJ 736 (SC) 7

(D) (V41) AIR 1954 Trav-C 131: ILR (1953) Trav-C 1145 (FB) 10

(E) (V41) AIR 1954 Raj 189 12

(F) (V41) AIR 1954 Raj 214 12

(G) (V41) AIR 1954 All 433: 1954 All LJ 114 12

N. Banerji and Suraj Mohan Dayal, for Applicants; G. T. Wadhwani and S. S. Dhavan, for Opposite Party.

MOOTHAM C. J.:

The following question has been referred to a Full Bench by two learned Judges of this Court:

"Where the relief claimed is a writ of 'mandamus' relating to property situate within the jurisdiction of one High Court directed to an officer residing within the jurisdiction of that Court and it was that officer who and whose subordinates, also residing within the jurisdiction of the same High Court, originally passed the orders complained of but the writ cannot issue without setting aside, in exercise of the power of 'certiorari', the order passed in appeal or revision by an authority residing outside the jurisdiction of that High Court and within the jurisdiction of another High Court, which is the High Court competent under Art. 226 of the Constitution to issue the writ?"

(2) It is necessary to state shortly the circumstances in which the reference has been made. On 3-9-1949, the Deputy Custodian of Evacuee Property, Gonda, in the exercise of powers vested in him under the United Provinces Administration of Evacuee Property Ordinance, 1949, declared certain persons to be evacuees and their property to be evacuee property. The petitioners now before this Court claimed to be sub-tenants of the evacuee, and they were allowed by the Assistant Custodian to remain in possession of the property upon the first petitioner being appointed supurddar. The Assistant Custodian subsequently formed the opinion that the petitioners' claim to be sub-tenants was fictitious, and he made a report to that effect to the Deputy Custodian who, on 10-5-1952, passed two orders directing that the petitioners be evicted from the property and that the latter be allotted to certain other persons.

Against these orders applications in revision were filed by the petitioners before the Additional Custodian it being asserted on their behalf that they had not been afforded an opportunity of contesting the notice of surrender served upon them under S. 8, Administration of Evacuee Property Act, 1950 (which had replaced the original Ordinance) read with R. 8 of the Rules made under the Act. By an order dated 29-7-1952, both applications were allowed. The orders of 10-5-1952, were set aside, and the Additional Custodian directed possession of the property to be restored to the petitioners. The matter then went to the Custodian General who, by an order dated 21-11-1952, made in exercise of his powers under S. 27 of the Act, quashed the order of the Additional Custodian and restored the two orders of the Deputy Custodian dated 10-5-1952.

(3) The petitioners thereupon filed a petition in this Court under Art. 226 of the Constitution. The only person made the respondent to the petition was "The Custodian, Evacuee Property, U. P., Lucknow", and the prayer was that a

"Writ, direction or order of the nature of 'mandamus', prohibition or 'certiorari' or any of these may be issued, quashing the order of the learned Custodian General so far as it relates to applicants, and a direction be issued to the opposite party to issue a proper notice under S. 8 (4) Evacuee Property Act (to the applicants) and of giving the applicants an opportunity to contest the said notice of eviction after holding that the notice of the learned Custodian General so far as it relates to the applicants is ultra vires and illegal and without jurisdiction."

(4) When the petition first came on for hearing, a preliminary objection was taken by the respondent that as the Custodian General had his office in Delhi and the order which the petitioners sought to have quashed had been passed in Delhi, the Court had no jurisdiction to issue the writs prayed for or any of them. The learned Judges being of opinion that this objection raised an important question of law, accordingly referred to a Full Bench the question which we have already set out.

(5) With great respect we do not think that the question propounded is really the question that arises in this case. It is now clear, and learned counsel for the petitioners concedes, that after the decision of the Supreme Court in — 'Election Commission, India v. Venkata Rao', AIR 1953 SC 210 (A), and — 'K. S. Rashid & Son v. Income Tax Investigation Commission', AIR 1954 SC 207 (B), no High Court can issue a writ which will be effective beyond the limits of its own territorial jurisdiction. It therefore follows that no other High Court can issue a writ to an official who resides within the jurisdiction of this Court. After hearing counsel for the petitioners, the real question which in our opinion arises is whether this Court can issue a writ of 'mandamus' to the respondent, the Custodian of Evacuee Property, U. P., commanding him to treat as a nullity an order made by the Custodian General in New Delhi in the exercise of his revisional powers under S. 27, Administration of Evacuee Property Act, 1950.

(6) We are of opinion both on principle and authority that the answer to this question must be in the negative. It is argued for the petitioners that they have a legal right to contest the notices issued to them under R. 5 read with S. 8(4) of the Act; that that right has been denied by the Custodian General, and that this Court, although it cannot quash the Custodian General's order, can examine that order and, if it finds that it is contrary to law, can issue a 'mandamus' to the Additional Custodian commanding him to ignore the order and proceed on the basis that his own order of 29-7-1952, is a valid and subsisting order. Apart from the technical objection that the Additional Custodian has not been made a party to the petition, we are of opinion that as this Court has no jurisdiction to quash the Custodian General's order it has no power to examine the validity of the order.

(7) In — 'Janardhan Reddy v. State of Hyderabad', AIR 1951 SC 217 (C) the petitioners had been

convicted of certain offences, including murder, and sentenced to death by a Special Tribunal constituted under the Special Tribunals Regulation enacted by the Nizam of Hyderabad. The convictions and sentences were subsequently confirmed by the Hyderabad High Court. After the Constitution came into force the petitioners filed petitions under Art. 32 in the Supreme Court challenging the validity of their convictions. They did not in the petition as originally presented to the Supreme Court apply for the issue of writs of 'habeas corpus', but at a late stage of the hearing an application to amend by including such a prayer was made on their behalf and was allowed. The argument on their behalf was that their detention was illegal from day to day as it was based on an order made without jurisdiction and that that order, even if it could not be quashed, could be ignored as a nullity. The Supreme Court refused to grant the writs, and one of the grounds on which it did so was that the judgment of the High Court affirming the conviction of the petitioners having acquired finality before the coming into force of the Constitution on 26-1-1950, the question of the validity of the convictions could not thereafter be challenged. Their Lordships said, at page 225 of the report:

"Can then a new law or a change in the old law entitle us to reopen a transaction which has become closed and final? It is common ground that the provisions of the Constitution which are invoked here were not intended to operate retrospectively, and therefore something which was legally good on the 25th January, 1950, cannot be held to have become bad on the 26th of January, 1950. If we had no jurisdiction to sit in appeal over the judgment of the Hyderabad High Court, can we now reinvestigate the cases and pass orders which cannot be passed without virtually setting aside the judgments of the High Court which have become final? Can we in other words, do indirectly what we refused to do directly? It is argued that we are asked not to reopen a past transaction but to deal with the present detention of the petitioners i.e., their detention at this moment. But, how can we hold the present detention to be invalid, unless we reopen what could not be reopened prior to 26th January, 1950? This is, in our opinion, one of the greatest difficulties which the petitioners have to face, and it rests not merely on technical grounds but on sound legal principles which have always been, and should be respected."

(8) In our opinion it is no less clear that we cannot do indirectly what we have no power to do directly. We have no power to set aside the Custodian General's order; it is so far as this Court is concerned, a final order. If we examine the grounds of that order for the purpose, should we find the order to be invalid, of declaring it to be a nullity, we are in effect doing indirectly what we cannot do directly.

(9) Until the Custodian General's order be quashed or set aside by a Court competent to do so, this Court must deem the order to be a valid order, and there is consequently no material upon the basis of which we can issue the 'mandamus' which the petitioners seek.

(10) Learned counsel for the petitioners has relied on a decision of the Travancore-Cochin High Court in — 'Thangalkunju Musaliar v. Venkitachalam Potti', AIR 1954 Trav-C 131 (FB) (D) as authority for the proposition that a High Court can issue a writ of mandamus commanding a person within its jurisdiction not to carry out a quasi-judicial order which the Court has no power to quash. In that case the petitioner had applied for a writ of prohibition to prohibit the respondents from holding an inquiry into certain cases on the file of the Income-tax Investigation Commission of Travancore, and from holding an investigation into his income. The first respondent was the Authorised Official and Income-tax Officer on Special Duty, Trivandrum, and the second respondent was the Income-tax Investigation Commission at New Delhi. A preliminary objection was taken that the Court was not competent to entertain the petition in view of the fact that the second respondent was not amenable to its jurisdiction. The Court overruled the preliminary objection, its reason being summarised in the following paragraph:

"The first respondent in this case is a resident within the State of Travancore-Cochin and his office is situate at Trivandrum. All his communications to the petitioner have emanated from within the State and the activities complained about are activities confined to the State. The prayer in the petition is in essence a prayer to paralyse his hands and thus prevent the mischief, and we are of the opinion that by his residence and the location of his office within the State, he is clearly amenable to the jurisdiction of this Court under Article 226 of the Constitution. As a writ against the first respondent if issued is sufficient for stopping completely the mischief complained about, it is unnecessary for us to decide whether a writ can be issued or not as far as the Second respondent is concerned."

(11) The Enactment under which the investigation into the petitioner's income was proposed to be made was the Travancore Taxation of Income (Investigation Commission) Act, 1124. That Act is not available to us and it is somewhat difficult from the report to appreciate precisely the circumstances upon which the judgment proceeds. It appears, however, that by a notification dated 18-10-1951, the first respondent had been appointed by the Central Income-tax Investigation Commission to be an "authorised official" under S. 6 of the Travancore Act, and that the inquiry was being conducted under the provisions of the latter Act. If this be so, it is somewhat difficult to see why it was considered necessary to make the second respondent a party to the petition at all, for the act of this Commission in nominating the respondent would seem clearly to have been an executive act. It appears that the first respondent was purporting to conduct the proposed investigation under powers which he derived from the Travancore Act, and in such circumstances there would seem to be no reason why, if it thought fit, the Travancore-Cochin Court should not (as in fact it did) issue a writ of prohibition to the first respondent. It appears to us that this decision is no authority for the proposition for which it was cited.

(12) The petitioners also relied on two cases of the Rajasthan High Court — 'Har Prasad v. Union of India', AIR 1954 Raj 189 (E) and — 'Barkatali v. Custodian General of Evacuee Property of India',

AIR 1954 Raj 214 (F). In each of these cases, the order of a subordinate officer within the jurisdiction of the High Court had been confirmed by higher authority outside the jurisdiction. The Court each case held that in these circumstances the real order against which relief was sought was the order of the subordinate officer, and that order the Court had jurisdiction to quash under Art. 226. This Court has however held in — 'Mohammad Yusuf v. Custodian General, Evacuee Properties', AIR 1954 All 433 (G) that an order of the Custodian General, even if it does no more than affirm the order of an Assistant Custodian, supersedes the latter order which becomes merged in the former; and it is further to be noted the Rajasthan High Court observed that the legal position would have been different if—as in the petition now before us—the order of the subordinate officer had been set aside by the superior authority. The two Rajasthan cases are therefore clearly distinguishable.

(13) It has not been contended that the Custodian General had no jurisdiction to make his order of 21-11-1952, in the exercise of his revisional powers under S. 27 of the Act; it is not therefore necessary for us to consider the legal issues which would arise were he to act in excess of his jurisdiction.

(14) In our opinion this Court cannot issue a writ of mandamus to the Custodian of Evacuee Property, U. P. commanding him not to give effect to or to treat as a nullity a quasi judicial order made by the Custodian General so long as that order is a valid and subsisting order.

(15) The Petition will now be placed with this opinion before the Bench which made the reference for final hearing.

D.S.P. Answered in negative.

(S) A.I.R. 1955 (Allahabad) 438 (V 42 C 131 Aug.)

DESAI AND CHOWDHRY JJ. (15-2-1955)

The State, Appellant v. Ram Chandra, Respondent.

Govt. Appeal No. 382 of 1951, against order of acquittal of Addl. S. J., Kamaun, D/- 16-10-1950.

(a) Criminal P. C. (1898), S. 56 — "Order in writing" — Arrest without order in writing is illegal.

Where a police officer deputes his subordinate to effect an arrest of an accused without a warrant, then under S. 56 he has to deliver to the officer required to make the arrest an order in writing. And, therefore, for want of such a written order, the arrest of the accused by such an officer is illegal. (Para 8)

Anno: AIR Com.: Cr. P. C., S. 56 N. 4.

†(b) Criminal P. C. (1898), Ss. 54 and 56 — Difference between S. 54 and S. 56.

The essential difference between S. 54 and S. 56, Criminal P. C. is that while the former lays down in what cases may a police officer arrest a person without warrant, the latter prescribes the procedure to be followed in those cases when instead of making the arrest himself, the police officer deputes an officer subordinate to him to do so. The reason for the prescribing of this procedure, appears to be to pin both the superior and the subordinate officer down to their respective responsibilities where the former does not choose to act for himself but through the latter.

There may, however, be a class of cases where, besides being armed with an order contemplated by S. 56, a police officer may also be possessed of the requisite information or requisition under S. 54, in which case his act will be supportable if it could assume legality under either section. (Para 9)

Anno: AIR Com.: Cr. P. C., S. 54 N. 2; S. 56 N. 2.

(c) Criminal P. C. (1898), S. 56 — Illegal arrest under S. 56 when cannot be made legal by applying provisions of S. 54(1) and (9).

When an arrest of an accused person is illegal by reason of non-compliance with the provision of S. 56 in that there was no order in writing, the arrest cannot be made legal by calling in the aid of the provisions of S. 54(1) if in fact the officer making an arrest did not himself purport to act under those provisions in addition to the further fact that he did not possess the requisite information, etc., enabling him to arrest the accused on his own responsibility. AIR 1937 Bom 56, Disting. (Paras 13, 17)

Anno: AIR Com.: Cr. P. C., S. 56 N. 2.

(d) Criminal P. C. (1898), S. 54(9) — "Requisition", meaning of — (Words and Phrases — "Requisition")

Per Desai J.: "The word 'requisition' is of wide import, but I doubt if it includes a verbal order. I would have no hesitation in conceding that it includes a written order in whatever form it may be. But the words "it appears therefrom" in the clause indicate that the requisition must be in writing; the words do not go well with a verbal requisition. However the matter is not free from doubt and I may concede for the moment that the word 'requisition' includes a verbal order also." (Para 15)

Anno: AIR Com.: Cr. P. C., S. 54 N. 11a.

(e) Interpretation of Statutes — To given set of facts, provision, mandatory and non-mandatory, both applying — Mandatory provision should be applied — (Civil P. C. (1908) Pre.)

When two provisions of law apply to a given set of circumstances, one requiring a person to do a certain act and the other imposing no such obligation, the person must do the act because if he were to rely upon the other provisions, he would be infringing, or not complying with, the mandatory provision. By doing the act he would be complying with, or not infringing, either of the two provisions, whereas by not doing the act he would be not complying with one provision at least. Since he must comply with all provisions of law, he must comply with the provision requiring him to do a certain act. (Para 15)

Anno: AIR Com.: C. P. C. Pre. N. 7.

(f) Interpretation of Statutes — General and special provisions — (Civil P. C. (1908), Pre.)

It is one of the principles of interpretation of statutes that if there are two provisions, one of a general nature and the other of a special nature, which govern a particular case, it is the

latter that would govern it and not the former. (Para 16)

Anno: AIR Com.: C. P. C., Pre. N. 7.

CASES REFERRED: Paras

(A) (V4) AIR 1917 All 85: 18 Cri L Jour 666 7

(B) (V24) AIR 1937 Bom 56: 38 Cri L Jour 267 7

J. R. Bhatt, Assist. Govt. Advocate, for the State; P. C. Chaturvedi, for Respondent.

CHOWDHRY J.:

This is an appeal by the State Government against the acquittal of one Ramchandra, alias Sethi, of an offence punishable under S. 224, I. P. C.

(2) It appears that there was a communal riot on the night between 29 and 30-3-1950 in Sani-Udiyar, Patti Malla Kamsyar, district Almora, in which a number of muslims were killed. Harsingh Kanungo received a report of the occurrence on 30-3-1950 at his head-quarters at Bageshwar. It may be mentioned here that a Kanungo is also entrusted with the duties of a Circle Inspector of Police, a Patwari with those of a Sub-Inspector of Police and their peons with the duties of constables in the district of Almora. In this report the respondent was specifically mentioned among those who are said to have committed the murders. Har Singh reached Sani-Udiyar on 31-3-1950 and sent for Dewansingh Patwari from Malla Kamsyar the same day. On 2-4-1950 Harsingh gave a written order, described as Parwana, to Dewansingh directing him to arrest the respondent at Beninag, as he was wanted in connection with the Sani-Udiyar murder case, and to send him to the lock up at Almora.

Taking Bhairab Datt peon with him Dewansingh reached Beninag, and with the help of that peon and another peon Dharmanand, whom he took from Jiwanand Patwari stationed there, he arrested the respondent at about 10 p. m. on 2-4-1950 in the hospital at Beninag. The respondent was kept in the house of Jiwanand Patwari that night. The following morning Dewansingh, Bhairab Datt and Dharmanand started with the respondent, who was handcuffed, for Almora. At village Bans, about 10 miles from Beninag, where they reached at noon, they were attacked by a number of persons and the respondent was rescued. On the intervention of some elders, however, he was restored to the custody of Dewansingh and his peons. As the latter apprehended further danger on their way to Almora they wrote to the Naib Tahsildar Saniudiyar for more help. Shersingh Patwari and Premsingh Malguzar joined them the same night, and the following morning (the morning of 4-4-1950) they were joined by Harsingh Kanungo, Hansa Datt Patwari and Gulabsingh peon.

The whole of this party left Bans on the morning of 4-4-1950 with the respondent in handcuffs and reached village Saliya, about 10 miles from Bans, at noon and halted there at the shop of one Narotam for midday meals. After the rest of the party had taken their meals, and while Gulabsingh and Bhairab Datt were eating, a party of 200 or 250 men arrived from the side of Beninag. The respondent had been put up in the upper storey of Narotam's shop. The crowd of men from Beninag demanded the release of the respondent. Their request was refused. Thereupon they went up to the room in the upper storey of Narotam's shop, pushed Dewan Singh down the stairs and rescued the respondent from the custody of Dharmanand peon. The crowd then took the respondent with them towards Beninag.

(3) Dewansingh submitted a report of the occurrence to the Sub-Divisional Magistrate on 5-4-1950 in which the entire story from the time of the issue of the order for the arrest of the respondent until his rescue at Saliya was described in detail. Bhola Datt Tripathi Naib Tahsildar was entrusted with the investigation of the occurrence at Saliya by the District Magistrate, and the Naib Tahsildar eventually submitted a charge-sheet against 27 men, including the present respondent. Seventeen of them were discharged by the Committing Magistrate, while nine of them were committed to sessions to take their trial for offences punishable under S. 147 and Ss. 225 and 352 read with S. 149, I. P. C. and the respondent was committed to take his trial for an offence under S. 224, I. P. C. The Additional Sessions Judge of Kumaon, by his judgment dated 16-10-1950, acquitted all the ten. The present appeal has been filed against the acquittal of only the respondent Ramchandra alias Sethi.

(4) In the committing court the respondent merely denied that he had escaped from the lawful custody of Dewansingh Patwari at Saliya on 4-4-1950. Before the Sessions Judge he denied that he had been arrested at Beninag & stated that Dewansingh Patwari took him from the hospital at Beninag towards Almora without putting any handcuffs on him on giving it out to him (the respondent) that he was wanted for interrogation by some officers at Almora. With regard to the incident of 4-4-1950 he stated that they all stopped at a shop, that after taking his food he had gone to sleep and was awakened by Dewansingh, that he then found 100 or 125 men collected there, that Dewansingh asked him to go with those men to Beninag as he said that the officers were at Beninag and his statement would be recorded there, and that he then accompanied those people to Beninag. Asked why the prosecution witnesses had deposed against him, he simply stated that none of them had deposed against him. He produced no defence.

(5) The learned Sessions Judge, before whom the identity of the respondent was also questioned, held that the respondent was the person for whose arrest Harsingh Kanungo had issued orders to Dewansingh Patwari, and that the respondent was actually arrested and handcuffed and was being taken to Almora when the aforesaid incident took place at Saliya. He however acquitted the respondent on two grounds: (1) that his arrest was illegal because it was doubtful that any written order for his arrest had been issued and because the prosecution had failed to prove that Dewan Singh had before making the arrest notified to the respondent the substance of the said order or shown it to him, and (2) that the respondent could not be said to have escaped from the lawful custody of Dewansingh because he was an unwilling agent and had to yield to the mob.

(6) So far as the finding of the learned Sessions Judge on the second point is concerned, it is wholly unsupported by the evidence on the record. (After reviewing the evidence his Lordship proceeded): It will be remembered that the statement of the respondent himself is against the theory of his having been an unwilling agent or yielded to the

mob, for he said that he went away with the people to Beninag because he was asked by Dewansingh to do so. There is nothing on the record to support the latter portion of this statement. The earlier portion of it therefore remains, and consequently on his own showing, the respondent willingly went away with his rescuers. It is manifest therefore that the learned Sessions Judge disregarded the statement of the respondent himself and put an entirely wrong interpretation on the testimony of the prosecution witnesses, and that the only proper conclusion which he should have drawn from the testimony of those witnesses and the statement of the respondent was that the respondent did escape at Saliya from the custody of those who had arrested him for an offence punishable under S. 302, I. P. C.

(7) As regards the finding based on an interpretation of S. 56, Criminal P. C. the learned Assistant Government Advocate argued that the finding of the learned Sessions Judge that no written order had in fact been issued by Harsingh Kanungo to Dewansingh Patwari was wrong, that it was not necessary for Dewansingh to have shown the written order to the respondent at the time of his arrest because he was not required by the respondent to do so, and that the omission on the part of Dewansingh to notify to the respondent the substance of the written order before making his arrest was an irregularity which was cured by S. 537, Criminal P. C. In support of the last contention he cited — 'Rangpal v. Emperor', AIR 1917 All 85 (A). In the alternative, he contended that even if there was no written order, as required by section 56, Criminal P. C., the arrest was legal under either the first or the ninth clause of sub-s. (1) of S. 54, Criminal P. C. And in this connection he cited the ruling reported as — 'Keshavlal Harilal v. Emperor', AIR 1937 Bom 56 (B).

(8) So far as the argument in connection with S. 56, Criminal P. C. is concerned, it is not necessary to express any opinion on the point of whether an omission to notify the person arrested of the order for his arrest is an irregularity covered by S. 537, Criminal P. C., for the finding of the learned Sessions Judge that no written order appeared in fact to have been issued by Harisingh Kanungo to Dewansingh Patwari seems to be correct. The evidence on this point consists of the statements of Harisingh and Dewan Singh. The written order in question, dated 2-4-1950, which is an order in pencil on a plain piece of paper, was also filed. Dewansingh has admitted in cross-examination that this written order was with him all the time and that he gave it to the Prosecuting Inspector in the Committing Magistrate's Court before he entered the witness-box. That is how the written order came to be filed in Court. Dewansingh admitted that he made no entry as to the receipt of this written order from Harisingh on 2-4-1950 in his register of Amad-tamili. He explained this omission by adding that he had taken over charge as Patwari of Malla Kamsyar on 30-3-1950 and that it was only on 7 or 8-4-1950 that he got the necessary papers from his predecessor-in-office. This is not a satisfactory explanation since he should have made the necessary entry after he had received the register on 7 or 8-4-1950.

Dewansingh further admitted that at the time of the issuing of the order Harsingh did not obtain his signature on any register as proof of the order having been issued. Harsingh Kanungo also admitted in cross-examination that he maintains a Tamili register but that the written order in question was not entered in it or any other register. It may be that ordinarily it is not necessary for a police officer issuing such an order, or for one receiving it, to make an entry in any register, but from the answers given by Dewansingh and Harsingh in their cross-examination it would appear that the practice, so far at least as Almora district is concerned, was that such entries were made in registers. If this was not so, the District Government counsel should have clarified it by a re-examination of the witnesses; but this was not done.

Furthermore, it is admitted by both these witnesses that when Dewansingh submitted to Harsingh a memo of the search of the accused and a report as to the execution of the order for his arrest, the written order in question was not returned with the papers. Nor was the written order attached even to the report which Dewansingh submitted to the Sub-Divisional Magistrate on 5-4-1950. There is no endorsement on the back of the written order about its having been executed by Dewansingh. All these omissions are contrary to the ordinary procedure adopted in the matter of execution of orders or warrants of arrest. The learned counsel for the respondent pointed out in this connection the opening words of the said report dated 5-4-1950 submitted by Dewansingh to the Sub-Divisional Magistrate. These words are "As ordered by the Peshkar I arrested the accused Ramchandra Sethi." He argued that the description Peshkar did not apply to Harsingh Kanungo but to the Naib Tahsildar, and that therefore the prosecution case that a written order had been issued to Dewansingh by Harsingh was incorrect.

This argument has however no force since a perusal of the rest of the report shows that Har Singh has been specifically described in it as Peshkar. This much however is clear that there is no specific mention in this report of a written order having been issued to Dewansingh at any time. In view of these circumstances, the conclusion arrived at by the learned Sessions Judge that the written order was a spurious document and had been prepared at the time when Dewansingh was entering the witness-box does not seem to be incorrect. It follows therefore that for want of a written order, as provided by S. 56, Criminal P. C., the respondent's arrest by Dewansingh was illegal.

(9) The argument of the learned Assistant Government Advocate in the alternative under S. 54, Criminal P. C. is also unsupportable. The essential difference between Ss. 54 and 56, Criminal P. C. is that while the former lays down in what cases may a police officer arrest a person without warrant, the latter prescribes the procedure to be followed in those cases when instead of making the arrest himself, the police officer, provided he is an officer in charge of a police station or a police officer making an investigation under Chap. 14 of the Code, deputes an officer subordinate to him to do so. The reason for the prescribing of this procedure, though it is quite unnecessary to probe into it, appears to be to pin both the superior and the subordinate officer down to their respective responsibilities where the former does not choose to act for himself but through the latter.

Thus, in the matter of making an arrest without warrant a police officer may in one case derive his authority under the one but not the other of the two sections while in another case he may derive it under both the sections, depending upon the circumstances of each case. If he acts on his own initiative and not in execution of an order from one of the officers mentioned in S. 56, he acts within the four corners of S. 54 and the legality or otherwise of his action must be judged in accordance with the provisions of that section and that section alone. If, on the other hand, he acts in execution of an order of the said nature without being possessed of the requisite information or requisition to enable him to act on his own under S. 54, he can only act legally if he complies with the provisions of S. 56. There may, however, be a class of cases where, besides being armed with an order contemplated by S. 56, a police officer may also be possessed of the requisite information or requisition under S. 54, in which case his act will be supportable if it could assume legality under either section. The police officer in the aforesaid Bombay case cited by the learned Assistant Government Advocate had such a dual authority.

(10) In the said Bombay case a cartman was charged with having caused hurt to a child by rash and negligent driving. The Police Sub-Inspector who had got information of the occurrence, went to the dispensary where the child had been taken. While he was recording there the statement of the child's father, he was informed in the presence of two constables, that the cartman had refused to stop when asked to do so. Thereupon, the police Su' -Inspector ordered the constables to go and arrest the cartman. One Keshav Lal physically prevented the constables from arresting the cartman and was therefore convicted under S. 353, I. P. C. It was urged in revision against the conviction before the High Court that as the constables were acting under the order of their superior officer the case fell under S. 56, and advantage could not be taken of the provisions of S. 54, but as the constables had no written order, as required by S. 56 the arrest was illegal.

Repelling this contention it was held by Broomfield and Wassoodew JJ., that S. 56 did not limit the statutory power of making the arrest which the constables had under S. 54 independently of S. 56 inasmuch as they were present when the complaint was made to the police Sub-Inspector at the dispensary of the cartman being concerned in the cognizable offence under S. 338, I. P. C., irrespective of the fact that they had also been ordered by the Police Sub Inspector to effect the arrest of the cartman. It was therefore held that the arrest by the constables was legal and the petitioner had been rightly convicted for an offence under S. 353, I. P. C.

(11) It was argued in the present case that if it were thus possible to fall back upon S. 54 to legalise the act of a police officer when it was otherwise illegal under S. 56, the provisions of the latter section would be rendered nugatory. That is however not a correct view of the matter, for as adverted to above, in certain cases a police officer may only act on the authority of an order under S. 56 because he may not have the requisite information etc., to enable him to act under S. 54. The falling back on S. 54 is thus not a matter of arbitrary choice but depends, as already remarked, on the facts and circumstances of a particular case.

(12) It may also be mentioned that cl. (9) added to sub-s. (1) of S. 54 by the Criminal Procedure Code, Amendment Act 18 of 1953 is not interchangeable with the provisions of S. 56(1) since the former relates to a police officer acting for himself on receipt of a requisition from another police officer, but the latter to his acting as a subordinate officer on being ordered to do so by one of the superior officers mentioned in the section. Whatever else may be a requisition under the said clause, this much at least is certain that an order by one of the said superior officers to a subordinate officer cannot be one, for the Legislature would not make two separate provisions under the same Act if both meant the same thing.

(13) In the light of the above interpretation of the provisions of Ss. 54 and 56, Criminal P. C., the arrest of the respondent by Dewansingh Patwari cannot be supported either under the first or the ninth clause of sub-s. (1) of S. 54, Criminal P. C. It cannot be supported under the former clause since there is nothing on the record to show that he possessed the requisite information etc., enabling him to arrest the respondent on his own responsibility. He was not in Sani-Udiyar when the murders are said to have been committed there on the night between 29 and 30-3-1950. He was also not present when the report of this occurrence was made to the Sub Divisional Magistrate. In fact, there is nothing on the record to show that Dewansingh had received the requisite information about the said occurrence in Sani-Udiyar at any stage before he was ordered by Harsingh on 2-4-1950 to arrest the respondent.

Indeed, Dewansingh himself never purported to have acted on his own accord on any such information, as is provided by cl. (1) of S. 54(1). On the contrary, he purported to act specifically under the authority of an order of Harsingh who was making an investigation into the case. That being so, Dewansingh could not also be said to have acted, for reasons recorded above, under cl. (9) of S. 54(1). It follows therefore that the arrest of the respondent was illegal under S. 56, and that the facts of this case do not justify the arrest being legalised under the first or the ninth clause of S. 54(1), Criminal P. C. The finding of the learned Sessions Judge therefore that the respondent had not committed an offence punishable under S. 224, I. P. C. was correct. The present appeal should accordingly be dismissed and the order of acquittal of the respondent for the said offence maintained.

DESAI J.:

(14) I agree with my learned brother that the finding of the trial court that no written order was issued by Harsingh to Dewansingh for the arrest of the respondent is justified by the circumstances of the case and cannot be upset in Government appeal. Section 56, Criminal P. C. requires that when an officer-in-charge of a police station or an investigating officer requires any subordinate officer to arrest without a warrant any person who can lawfully be arrested without a warrant, he must deliver to him an order in writing specifying the person to be arrested and the offence for which the arrest is to be made and the subordinate officer

must, before making the arrest, notify to the person to be arrested the substance of the order, and if so required by him, show him the order.

As Dewansingh was not armed with a written order, he could not act under S. 56. He had power to arrest the respondent without a warrant only if he was handed over a written order by Harsingh; in the absence of a written order he could not possibly exercise the power conferred upon him by S. 56. He was undoubtedly ordered by Har Singh to arrest the respondent; he himself did not profess to proceed to arrest him on his own initiative in exercise of the powers conferred by S. 54 of the Code, and the circumstances also do not favour the view that he intended to exercise the powers conferred by S. 54. But the order of Harsingh was verbal and not written and under the law could not authorise Dewansingh to arrest the respondent. If still Dewansingh proceeded to arrest the respondent, the arrest was illegal and the respondent committed no offence by freeing himself from Dewansingh's custody.

(15) Dewansingh could not arrest the respondent even under the powers conferred by S. 54. He had no information that the respondent was concerned in any cognizable offence; he was not investigating the offence supposed to have committed by the respondent. No complaint had been made to him, and he had received no information, that he had committed a cognizable offence. He had no reason to suspect that he might have committed a cognizable offence. He could not, therefore, arrest him without a warrant under cl. (1) of the section. The only other clause of the section that might possibly apply is cl. (9) under which person, for whose arrest a requisition has been received from any police officer can be arrested without a warrant, provided that the requisition shows that the person might lawfully be arrested without a warrant by the officer issuing the requisition. The word 'requisition' is of wide import, but I doubt if it includes a verbal order. I would have no hesitation in conceding that it includes a written order in whatever form it may be.

But the words "it appears therefrom" in the clause indicate that the requisition must be in writing; the words do not go well with a verbal requisition. However the matter is not free from doubt and I may concede for the moment that the word 'requisition' includes a verbal order also. Consequently Dewansingh could plead that on account of the requisition received by him from Harsingh, the respondent became a person who could be arrested without a warrant by him. If there were no other facts or circumstances, I would have agreed with the learned Government Advocate that Dewansingh could lawfully arrest the respondent without a warrant. But there are the additional facts that Harsingh was an officer incharge of a police station or a police officer making an investigation and that Dewansingh was an officer subordinate to him which attract the applicability of S. 56. Harsingh was bound to pass an order in writing and hand it over to Dewansingh and Dewansingh could not arrest the respondent in any other manner.

It is a mandatory provision that when a station or investigating officer requires any subordinate officer to arrest a person without a warrant, he must deliver to him an order in writing. It follows that such an officer cannot verbally require a subordinate officer to arrest a person without a warrant; if he could do so, the effect of the word 'shall' in the section would disappear. It is not open to him to have recourse to cl. (9) of S. 54 and issue a verbal requisition to the subordinate officer. He certainly has not been given discretion in the matter or provided with the alternative means of achieving his object. Section 54 only enumerates persons who can be arrested without a warrant; it does not lay down duties of police officers, nor even rights except where they can be implied from the liability of the person to be arrested without a warrant. Thus cl. (9) confers a right upon a police officer, who has received a requisition from another for the arrest of a person who can be arrested without a warrant by the latter, to arrest the person without a warrant corresponding to the liability of the person to be arrested without a warrant; but the latter police officer is not under any obligation to issue a requisition.

The clause does not lay down that he shall issue a requisition just as S. 56 lays down that a station or investigating officer shall deliver a written order to the subordinate officer. It is true that when a police officer wants another of equal status or of lower status but not subordinate to him to arrest without a warrant a person (who can be arrested by himself without a warrant), he will naturally have to ask or require the other to do so and that amounts to his issuing a requisition. But the necessity of issuing a requisition arises not on account of a statutory provision of law, but because in the very nature of things he cannot help issuing a requisition. It is also true that S. 56 uses the word 'shall' because it insists upon a particular kind of order to be issued to the subordinate officer whereas cl. (9) does not require any particular kind of requisition.

The fact, however, remains that the Legislature has contemplated that if a station or investigating officer requires a subordinate officer to arrest a person without a warrant, he must issue a written order to him. This mandatory provision must have priority over the non-mandatory provision in the ninth clause; it is not open to a station or investigating officer to adopt the procedure of cl. (9) by merely issuing a requisition to the subordinate officer, because by doing so he would be not complying with the mandatory provision of S. 56. It is obvious that when two provisions of law apply to a given set of circumstances, one requiring a person to do a certain act and the other imposing no such obligation, the person must do the act because if he were to rely upon the other provision, he would be infringing, or not complying with, the mandatory provision. By doing the act he would be complying with, or not infringing, either of the two provisions; whereas by not doing the act he would be not complying with one provision at least. Since he must comply with all provisions of law, he must comply with the provision requiring him to do a certain act.

Therefore it was not open to Harsingh (who was a police officer making an investigation and who wanted the respondent to be arrested without a warrant) to issue a mere requisition to Dewansingh (who was a police officer subordinate to him) under cl. (9); he was bound by S. 56 to issue a written

order instead. This means that Dewansingh could not arrest the respondent without a warrant under cl. (9); if he could arrest him, he could arrest him under S. 56 only. Of course if he had received a reasonable complaint or a credible information or had reason to suspect that the respondent was concerned in a cognizable offence, he could arrest him without a warrant under cl. (1). The reason for this difference is that though a station or investigating officer cannot issue a requisition under cl. (9) when he must issue a written order under S. 56, he may refrain from issuing either a requisition or a written order, and that he would not prevent the subordinate officer from arresting the person against whom he has received a reasonable complaint or a credible information or whom he suspects of having been concerned in a cognizable offence. The power conferred upon him under cl. (1) is derived from his possession of a complaint, knowledge or suspicion, whereas the power conferred by cl. (9) is derived by him from a requisition and depends upon the legality of the requisition. If the requisition is illegal, because the officer issuing it had no right to issue it, it confers no power upon him to arrest the person.

(16) The officer to whom a written order is issued under S. 56 is bound to comply with it, whereas the officer to whom a requisition is issued under cl. (9) is not bound to comply with it — he has a right to arrest the person mentioned in the requisition but is not bound by any law to do so. Clause (9) contemplates the issue of a requisition to an officer of equal status or even of higher status; S. 56, on the other hand, expressly deals with the issue of a written order to a subordinate officer. That is why in cl. (9) the word used is "requisition" and in S. 56 "order". The provision in cl. (9) is a general provision; that in S. 56 is a special provision dealing not with any police officer who can arrest a person without a warrant but with a particular police officer, e.g., a station officer or an investigating officer, and not with any police officer who may be required to arrest but with a particular police officer, e.g., a subordinate officer.

It is one of the principles of interpretation of statutes that if there are two provisions, one of a general nature & the other of a special nature, which govern a particular case, it is the latter that would govern it & not the former. A written order is undoubtedly a requisition and if it were possible to apply either S. 56 or cl. (9) to a case in which a station or investigating officer requires a subordinate officer to arrest a person without a warrant, it would be open to the subordinate officer not to comply with the order by contending that it is a requisition issued under cl. (9) and he is not bound by any law to execute it, and also not to notify the person to be arrested the substance of the order and not to show the order to him even if he wants to see it one and the same contention (sic). The Legislature could not have allowed a subordinate officer to circumvent the mandatory provisions of S. 56 by having recourse to the provision of cl. (9) like this; in other words the Legislature did not contemplate the applicability of cl. (9) to a case which can be governed by S. 56.

(17) My conclusions, therefore, are that Harsingh could get the respondent arrested by Dewansingh only by issuing a written order to him and not by issuing a requisition to him, that even if the verbal order given by him to Dewansingh could be deemed to be a requisition, it would be a requisition beyond his power and could not authorise Dewansingh to arrest the respondent, that Dewansingh could not arrest the respondent under his own powers because he did not have the necessary complaint, information or suspicion and that he himself did not profess to act under S. 54. The respondent's arrest was, therefore, unlawful and he committed no offence by rescuing himself.

(18) I agree with my learned brother that the appeal should be dismissed.

V.S.B. Appeal dismissed.

(S) A.I.R. 1955 (Allahabad) 443 (V 42 C 132 Aug.)

AGARWALA J.

On difference of opinion between

DESAI AND MEHROTRA JJ. (10-2-1955)

Pershadi, Appellant v. The State, Respondent.

Criminal Appeal No. 970 of 1951, against order of Temporary S. J., Aligarh, D/- 25-8-1951.

(a) Criminal P. C. (1898), S. 423 — Appeal from acquittal and conviction — Distinction.

(Per Desai J.): The approach in a Government appeal is different from that in an appeal by prisoner. The appellate Court will attach considerable importance to the fact that two of the assessors and the Sessions Judge were also convinced of the guilt of the accused. AIR 1954 SC 39, Disting. (Para 13)

Anno: AIR Com.: Criminal P. C., S.423 N. 15, 20.

(b) Evidence Act (1872), Ss. 25, 27 — Confession to police officer — Fact discovered in consequence of information.

(Per Agarwala J.): The accused was arrested at his house. On his way to the police station he informed the police officer that he would produce the clothes of the deceased. The police officer stated that the accused had also confessed his guilt and that he had also said that he had placed the clothes in a pit above a brick-kiln.

Held that the statement that the accused had confessed his guilt was not admissible but the other statement that he had placed the clothes in a pit, was admissible. As however the statement of the police officer on this point was not supported by any other witness, probably because no questions were put to the witnesses about it the statement could not therefore, be said to have been proved in the case and must be ignored. (Para 39)

Anno: AIR Man.: Evidence Act, S. 25 N. 3; S. 27 N. 3.

(c) Criminal P. C. (1898), S. 367 — Circumstantial evidence — (Evidence Act (1872), S. 3) — (Penal Code (1860), S. 300). 29 Cri LJ 252 (Lah), Dissented from.

(Per Agarwala J.): The accused was in the service of one Shankar Lal, the father of the deceased, who carried on a Halwai shop at Hathras. An iron safe containing cash was stolen away from the shop of Shankar Lal and so he lodged a report of theft in the police

station on 1-11-1950, under S. 457, I. P. C. implicating the accused as also one Charna. Charna was arrested and sent to jail, while the accused was put up in the lock up and released later on furnishing security. While the accused was in the lock up he told one Ramnath and one Jwala Prasad that when he would go out of the jail he would take revenge on Shankar Lal. After his release from the lock up he again repeated the threat in the presence of one Zahar Mal.

A month later i.e., on 2-12-1950, Chiman Lal, i.e., the deceased who was only a lad of six years, left his father's shop at about 5 P. M. for home which was at a distance of about a furlong. But the poor lad never reached his house. When Shankar Lal came back to the house at about 6 P. M. he did not find Chiman Lal there. On 9-12-1950, Gyanchand, a resident of village Jogia which was just adjacent to the village of the accused, went to his well and found that some bad smell was coming out of the well. He saw a corpse floating in the water. He then informed the Choukidar and showed him the corpse. The chaukidar at once went to the police station and lodged a report. The accused was arrested on 11-12-1950. The accused took the police party to the top of a brick-kiln, removed earth from the pit and took out the clothes of the deceased in the presence of the police officer and three witnesses. The accused however denied in Court that he was in the service of Shanker Lal at all or was prosecuted for theft or concealed the clothes or knew the deceased boy or pointed out the clothes and recovered them from the pit.

Held that the accused had a motive for the crime. He had been implicated in a theft case by Shankar Lal, father of the deceased. He, therefore, bore enmity against Shankar Lal. Secondly, the accused held out a threat against Shankar Lal saying that he would take revenge against him. Thirdly, the accused had access to the deceased and could have induced him to go along with him and had an opportunity of killing him. Fourthly, the clothes of the deceased were handed over by the accused to the police. He, therefore, knew that the clothes belonged to the deceased & also knew the place where the clothes were hidden. Fifthly, the accused falsely denied several facts which had been conclusively established. None of these five facts taken singly was sufficient to hold the accused guilty of the murder of the deceased. But in the cumulative effect of all the facts led to the irresistible inference that it was the accused who had removed the clothes from the person of the deceased, was privy to the murder of the deceased and hid the clothes at the top of the brick-kiln. The accused was therefore guilty of the offence under S. 302, Penal Code with which he was charged. 29 Cri LJ 252 (Lah), Dissented from.

(Paras 44, 45, 46, 47, 48, 49, 56)

Anno: AIR Man.: Evidence Act, S. 3 N. 6.

AIR Man.: Penal Code, S. 300 N. 45.

AIR Com.: Criminal P. C.: S. 367 N. 6.

(d) Evidence Act (1872), S. 114 — Threat — Inference.

(Per Agarwala J.): Holding out of a threat of doing injury to another furnishes ground to presume that he who threatened the act was the perpetrator or instigator. (Para 50)

Anno: AIR Man.: Evidence Act, S. 114 N. 18.

(e) Evidence Act (1872), S. 3 — Circumstantial evidence — (Criminal P. C. (1898), S. 367).

(Per Agarwala J.): The rule as to circumstantial evidence is that it must be consistent, and consistent only with the guilt of the accused, and if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. Any hypothesis or explanation tending to show his innocence must be 'rational' because an irrational or unnatural or a highly improbable explanation will not be taken into consideration. The law does not demand the impossible to be proved by the prosecution. The test is of probabilities upon which a prudent man may base his opinion. (Paras 52, 53)

Anno: AIR Man.: S. 3 N. 6.

AIR Com: Criminal P. C., S. 367 N. 6.

(f) Evidence Act (1872), Ss. 101 to 103 — Benefit of doubt — (Criminal P. C. (1898), S. 367).

(Per Agarwala J.): One of the well-known maxims of criminal trials is that it is better that ten guilty persons be acquitted rather than one innocent person be convicted. This maxim is often misunderstood. It means nothing more than this that the greatest possible care should be taken by the Court in convicting an accused. The presumption is that he is innocent till the contrary is clearly established. The burden of proof of proving that the accused is guilty is always on the prosecution. If there is an element of reasonable doubt as to the guilt of the accused, the benefit of that doubt must go to him. The maxim merely emphasises these principles in a striking fashion. It does not mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty if the evidence, on the whole, points to the only conclusion, on which a prudent man can act, that the accused is guilty. (Para 53)

Anno: AIR Man.: Ss. 101 to 103 N. 3, 4.

(g) Evidence Act (1872), S. 114, Illus. (a) — Possession of property — Presumption. AIR 1945 Bom 292 and AIR 1954 Mad 152, Dissented from.

(Per Desai J.): The meaning of illustration (a) to S. 114 of the Evidence Act is not that the presumption is in the alternative; its plain meaning is that both the presumptions are possible and that which should be adopted in a case depends upon the circumstances. If the interval between the theft and the accused being found in possession is very small, the presumption can be that he is the thief. If on the other hand, the interval is relatively large, the presumption can be that he is the receiver. If the interval is very large, the Court may not draw any presumption. It is for the Court, after considering the circumstances of the case, to

decide which of the two presumptions to draw and the Court is not required to record conviction in the alternative for theft or for receiving in every case. Possession is not an essential ingredient of the offence of murder and if a person cannot be convicted under S. 411, I. P. C. (because he is not found to be in possession), it does not follow that he cannot be convicted under S. 302, I. P. C. also.

If a person receives other articles, he may not suspect that the owner has been murdered, but if he receives clothes, and clothes of no particular value, he cannot pretend not to know that the owner has been murdered. Other articles may be stolen on account of the value but used clothes of no particular value would not be stolen by anyone. Under S. 114 it is left to the wise discretion of the Court whether to draw the presumption of complicity in the crime from the recent possession of the fruits of the crime. The question is essentially one of fact and no hard and fast rule can be laid down. To say that unless there is evidence that the accused was seen near the place of the murder at or about the time of it, he cannot be convicted of the murder merely on account of his possession of the property removed from the deceased at the time of the murder, is fettering the discretion of the Court. Circumstances of no two cases can be exactly alike and the drawing, or the refraining from drawing, the presumption of guilt in one case is no precedent for drawing, or refraining from drawing, the presumption in another case. AIR 1945 Bom 292 and AIR 1954 Mad 152, Dissented from. (Paras 22, 23, 25)

Anno: AIR Man.: Evidence Act, S. 114 N. 7.

(h) Evidence Act (1872), S. 114, Illus. (a) — Refusal or failure to offer explanation — AIR 1941 Bom 139, Doubted.

(Per Desai J.): It cannot be held that no adverse inference can be drawn against the accused from his failure or refusal to offer an explanation, or acceptable explanation, and that his failure or refusal does not make the incriminating fact of possession more incriminating. Illustration (a) in S. 114 itself speaks of want of explanation as a circumstance to be taken into account. The failure or refusal to offer an acceptable explanation is itself a circumstance, that is to be taken into consideration. As regards the effect of the failure or refusal to offer an explanation, the law makes no distinction between the inference of theft and that of murder.

In every case in which an inference of theft can be made, an inference can also be made of murder, if it was committed in the same transaction as the theft, and this is a sound law; if the theft and the murder are both committed in one transaction and a person found in possession of the stolen goods soon after the theft can be presumed to have committed it, there is no reason why he should not be presumed to have committed the murder as well. If he offers an acceptable explanation which suggests that he did not commit the theft and the murder both or that he committed the theft but not the murder, the position may be different but when he offers no explanation, if one presumption can be drawn, the other also must be drawn. AIR 1941 Bom 139, Doubted. (Para 27)

Anno: AIR Man.: Evidence Act, S. 114 N. 7.

(i) Evidence Act (1872), S. 114 Illu. (a) — Refusal or failure to explain.

(Per Desai J.): The argument that the accused refuses to offer an explanation on the grounds that he is not bound to explain and that the onus lies upon the prosecution to prove his guilt has in most cases no factual basis. In most cases he does not refuse to offer an explanation; instead he denies the very existence of the circumstantial evidence.

The accused did not say that he was not bound to open his lips or to help the prosecution in proving his guilt; he did not refuse to offer an explanation. On the other hand, he denied the circumstantial evidence altogether, suggesting that there was nothing which he had to explain. Held that in such a case, it was not open to the Court to assume that he had refused to offer an explanation on the ground that he had a right to keep silent. A Court is not justified in assuming a fact even in favour of an accused, when there is nothing to support the assumption. (Para 30)

Anno: AIR Man.: Evidence Act, S. 114 N. 7.

(j) Evidence Act (1872), Ss. 101 to 103, 114 — Inference of guilt — Burden of proof — Failure to offer explanation.

(Per Desai J.): When the inference of guilt from the proved incriminating (i.e., circumstantial) facts is a more natural and probable hypothesis than the other, the onus of offering an explanation for the incriminating facts lies upon the accused. If he does not offer any explanation, or falsely denies the very existence of the incriminating facts it is itself a circumstantial fact against him, even if the Court is in a position to imagine an explanation. The guilt is the legitimate inference from the incriminating facts and the added circumstantial fact of failure or refusal to offer an explanation for the incriminating facts because it is not reasonable or rational to say that the accused would fail or refuse to offer an explanation consistent with his innocence if he could. It is immaterial in such a case whether the Court can imagine an explanation or not. If the inference of guilt from the proved incriminating facts is a less natural or probable hypothesis, than the other, the Court cannot draw it and the accused must be acquitted whether he offers any explanation or not. If the inference of guilt from the proved incriminating facts is as much a natural or probable hypothesis as any other, the accused may be called upon to explain and if he fails or refuses, the Court may treat it as an additional circumstantial fact and infer his guilt. Or it may take judicial notice of the other hypothesis even without any explanation by the accused and acquit him. (Para 31)

Anno: AIR Man., Evidence Act, Ss. 101 to 103 N. 3, 4; S. 114 N. 7.

(k) **Criminal P. C. (1898), S. 342 — When questions should be put — AIR 1954 Mad 152, Dissented from.**

(Per Desai J. :) When an accused is examined under S. 342 it is done "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him", and not because a 'prima facie' case has been made out against him. It would, therefore, be fallacious to contend that unless the circumstantial evidence itself makes out a 'prima facie' case against him, he cannot be asked to explain the incriminating circumstances. He can be questioned at any stage of the trial and whether a 'prima facie' case is made out against him or not is seen after his examination. The answers that he gives to the questions are to be taken into consideration along with the prosecution evidence and then it is to be decided whether a 'prima facie' case is made out against him and a charge is to be framed. His failure or refusal to explain the adverse circumstances thus comes in logical sequence before the decision whether a 'prima facie', case is made out against him or not. There is a distinction between his being called upon to explain and his proving innocence on rebuttal of the 'prima facie' case made out against him. AIR 1954 Mad 152, Dissented from. (Paras 32, 33)

Anno: AIR Com., Cr. P. C., S. 342 N. 9, 14, 15.

(l) **Evidence Act (1872), S. 3 — Suspicion and proof.**

(Per Desai J. :) Unless it is explained how and where to draw the line between proof and suspicion no useful purpose is served, and no guidance whatsoever is given to lower Courts, by the remark that suspicion is not proof. One test for judging whether the circumstantial evidence creates suspicion only or proves the guilt is whether it is reasonably consistent with his innocence or not. If it is, it only creates a suspicion against him. (Para 35)

Anno: AIR Man., Evidence Act, S. 3 N. 5, 6.

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(A) (V20) AIR 1933 Mad 233: 56 Mad 231: 34 Cri LJ 481 — 5, 6, 24, 27, 55
(B) (V13) AIR 1926 Mad 638: 27 Cri LJ 394 — 5, 55
(C) (V41) AIR 1954 Mad 152: 1954 Cri LJ 115 — 6, 23, 27, 33, 55
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(F) 39 NY 245 — 15
(G) (1893) 151 US 396: 38 Law Ed 208 — 15
(H) (1911) 1911 AC 47: 80 LJ KB 689 — 16
(I) (V32) AIR 1945 Bom 292: 47 Cri LJ 51 — 18, 22
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(V) ('13) 14 Cri LJ 49: 18 Ind Cas 337 (Mad) — 23
(W) (V30) AIR 1943 Bom 458: 45 Cri LJ 221 — 23
(X) (V39) AIR 1952 All 776: 1952 Cri L Jour 1585 — 23
(Y) (V36) AIR 1949 Nag 277: 50 Cri LJ 713 — 24
(Z) (V17) AIR 1930 Cal 379 (2): 31 Cri LJ 1229 — 24
(Z1) (V37) AIR 1950 Mad 309: 51 Cri LJ 497 — 24
(Z2) (V41) AIR 1954 SC 28: 1954 Cri LJ 257 (SC) — 24, 29, 51
(Z3) (1895) 162 US 613: 40 Law Ed 1090 — 25, 29
(Z4) (V32) AIR 1945 All 19: 46 Cri LJ 233 — 33
(Z5) (V13) AIR 1926 Lah 139: 27 Cri LJ 400 — 55
(Z6) (V14) AIR 1927 Lah 541: 28 Cri LJ 641 — 55

Suresh Narain Mullah, for Appellant; J. R. Bhatt, Asst. Govt. Advocate, for the State.

MEHROTRA J. :

Appellant Pershadi has been convicted under S. 302, Penal Code by the Sessions Judge of Aligarh for having committed the murder of Chimman Lal aged about six years and sentenced to transportation for life.

(2) Chimman Lal was the son of Shanker Lal Halwai of village Ramanpur, which is at a distance of eight furlongs from the town of Hathras. The accused is the appellant Pershadi, who was employed as a servant at the house of Shankar Lal. The prosecution case is that about a month before the murder of Chimman Lal a small iron safe containing cash kept in the Halwai shop of Shanker Lal was stolen in the night. A report was lodged by Shanker Lal of this theft in the police station on 1-11-1950 under S. 457, I. P. C. against the appellant and one Charna. Charna was sent to jail but the appellant Pershadi was arrested, put up in the lock-up and released subsequently on furnishing security. After his release the appellant pointed out the place where the safe had been kept and Shanker Lal got back the stolen property. Finally, however, both Pershadi and Charna were convicted under S. 381, I. P. C. but they were ordered to be released on executing bonds and producing sureties to appear before a Magistrate whenever called within a period of three years.

It is alleged by the prosecution that while Pershadi was in the lock-up he told Ram Nath (P. W. 6) and Jwala Pershad (P. W. 10) that when he would come out of the jail he would take revenge on Shanker Lal. After his release from the lock-up he is alleged to have made a similar statement to Zahar Mal (P. W. 4). On 2-12-1950, after about a month of this incident, Chimman Lal, as

usual, left the shop of his father at about 5 p.m. for the house which is at a distance of about one furlong from the shop. Shanker Lal on reaching his house at 6 p.m. did not find Chimman Lal there. He made a search of the boy whole night. He also went to the house of the accused but no satisfactory answer was given by the appellant to Shanker Lal on that date. Shanker Lal, therefore, lodged a report at the police station Hathras at 9 a.m. the next day, i.e. 3-12-1950. In this report he stated that his child had disappeared and mentioned the clothes which he had been wearing at the time of leaving the shop.

Nobody is suspected in this report. On 9-12-1950 when Gian Chand, who is a resident of village Jogia adjacent to the village of the accused, went to his well where he had fixed his Persian wheel and felt some foul smell coming out of the well. He saw a corpse floating in the water. He sent for Lohrey chowkidar and showed him the corpse. Then both of them went to the police station where a report was lodged by the chowkidar. Kishan Singh, Second Officer, Police Station, Hathras, went to the well and the dead body was recovered from the well. At that time there was only one black pyjama on the person of the dead body. Pooran Mal, father of Shanker Lal, was then called at the well and he identified the body to be of Chimman Lal. Inquest report was prepared by Kishan Singh and the dead body was removed to the police station, Hathras. At the police station Shanker Lal also identified the dead body to be that of his son Chimman Lal. The post mortem examination of the dead body was conducted by Sri J. L. Jagota, Medical Officer in-charge Hathras Hospital. The post mortem report shows that the fingers of the hands and toes of the feet were shrunk and there was mud present.

The sutures of the skull bones were separated, the body was highly decomposed and swollen and foul odour was coming and skin peeling off. No injuries were found on the person of Chimman Lal. In the report the doctor stated that no opinion could be given for the cause of death as the body had been highly decomposed. From the evidence of Shanker Lal, who identified the dead body, and that of the doctor it is clear that Chimman Lal died because either he was thrown into the well by somebody or he accidentally fell into the well.

(3) The appellant was arrested by Kishan Singh, Second Officer, on 11-12-1950 at his house on suspicion. While he was being taken to the police station it is stated by Kishan Singh, Second Officer that the appellant said that he would point out the clothes of Chimman Lal which he had placed in a pit of a brick-kiln. The appellant was then taken by the Second Officer, Kishan Singh to a temple of Chamars in village Ramanpur close to the brick-kiln and in the presence of Santoshgir, the pujari of that temple, Bhoorey Lal (P. W. 3) of Ramanpur who was present when Pershadi was arrested and who accompanied the Sub-Inspector, and Kishori Lal (P. W. 8) the Head Master of the Ramanpur School, the appellant removed the earth from a hole and took out the clothes Exts. 1 to 5.

The fact that the clothes were recovered by the accused from the pit is fully established by the testimony of three witnesses, Bhoorey Lal, Kishori Lal and Santoshgir. The identification proceedings regarding the clothes were held on 4-1-1951 by Sri Jagat Behari Lal Mathur, Magistrate (P. W. 9) and the clothes Exts. 1 to 5 were identified by Shanker Lal. Shanker Lal has also proved that some of the clothes were the clothes which the deceased was wearing when Chimman Lal left the shop in the evening of 2-12-1950. Lalloo Mal, brother of Shanker Lal, has also proved that these clothes were of Chimman Lal. One Lala Babu Versheny (P. W. 7), Assistant Sales Tax Officer, Hathras, who knew Chimman Lal, had also identified clothes Exts. 1 to 5 to be of Chimman Lal deceased. He also identified these clothes before the Magistrate.

(4) According to the prosecution the motive for the crime is that Shanker Lal got the appellant implicated in the theft case and that the appellant had taken his revenge. The appellant somehow or other managed to take the deceased with him on 2-12-1950 while returning to his house and after taking off his clothes threw Chimman Lal into the well. The appellant in his statement denies to have removed Chimman Lal on 2-12-1950 and having thrown him into the well. He also denies that he was ever in the service of Shanker Lal and that he stated to Zahar Mal, Ram Nath and Jwala Pershad that he would take revenge on Shanker Lal. He also denies that he told the Sub-Inspector that he would point out the clothes and that he never took the Sub-Inspector to the brick-kiln and produced the clothes. There is no direct evidence on the record to prove that the appellant took away the deceased with him on 2-12-1950 and threw him into the well. There is no evidence that he was seen in the company of the child any time in the evening of the 2nd December and that he was seen near the well after the disappearance of the child.

The contention of the prosecution is that the fact that the clothes were produced by him from the pit is direct evidence of the knowledge on the part of the appellant that the clothes belonged to the deceased and that they were kept in the pit from where they were recovered. It has been further contended that in the absence of any reasonable explanation on the part of the accused as to how he acquired the knowledge that the clothes were at the spot from where they were recovered and the fact that a month before the occurrence he had stated to some of the prosecution witnesses that he would take revenge, the only presumption which can be raised in the circumstances is that he committed the murder of the child by throwing him into the well after removing the clothes from his body. In my opinion this evidence does not conclusively establish the fact that the appellant threw the child into the well and obtained the clothes after removing them from his body before he had been thrown into the well.

The Sessions Judge has held that :

"When things which were on the murdered person's body at the time when he was murdered are traced to person accused of murder and he admits having concealed those things and points out those things to reliable witnesses but fails to give any explanation for their possession, these

are important factors in coming to an inference that the accused took part in the murder."

He has further held that:

"If a person is found soon after the murder of another person in possession of property which was on the person of the deceased when seen alive, an inference might be drawn that the accused obtained possession of the property after having murdered the deceased provided the other circumstances do not go to prove the innocence of the accused and provided further that the accused is unable to give any satisfactory explanation of how he came into possession of that property."

(5) He has relied upon the case of — 'Narayana v. King Emperor', AIR 1933 Mad 233 (A) for the propositions stated above. In the Madras case relied upon by the Sessions Judge the evidence against the appellant was that after the arrest the appellant stated in the presence of the Sub-Inspector and another independent witness, that he had hidden ornaments worn by the deceased at a particular place. His statement was recorded by the Sub-Inspector and the articles were produced by the appellant. Apart from the evidence referred to above there was the evidence that on the evening previous to the night of the occurrence the deceased was called from her mother's house on the pretext that the appellant was calling her. In these circumstances the Madras High Court held that the production of the ornaments by the appellant and the failure on his part to give a satisfactory explanation as to how he acquired knowledge of the articles being buried gave rise to a reasonable presumption that the appellant had obtained possession of the ornaments after having murdered the deceased.

In an earlier case of the same Court — 'In re Sogiamuthu Padayachi', AIR 1926 Mad 638 (B), it was observed by Spencer (Officiating C. J.) that :

"When the charge is that the accused committed murder or theft in a building or both, it is not legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property, and when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused they cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered."

(6) Both these cases were considered in a later case by the same Court — 'In re Singaram', AIR 1954 Mad 152 (C). In that case a Bench of the Madras Court disagreeing with the proposition laid down in the case in AIR 1933 Mad 233 (A), held that:

"The mere possession by an accused person of articles which were on the person or in custody of a murdered man at the time of his murder without any explanation for such possession cannot lead to an inference that he took part in the murder or that he was privy to it. The presumptions mentioned in the illustration to S. 114, Evidence Act cannot be stretched to that extent. One can very well imagine a case where a jewel on the person of a murdered individual came to be in the possession of another without any kind of reasonable explanation being offered by that individual. The fact that no rational explanation is possible, or that the explanation offered is unacceptable, should not militate against the innocence of the individual with regard to the offence of murder. Something more is necessary than mere possession of articles .....

Unless some kind of connecting link, however remote it may be, is made out between the movements of the deceased and the accused, at or about the time of murder even if no reasonable explanation can be suggested or invented by the Court for the possession by the accused of the stolen articles, it would be unsafe to convict the accused person of the offence of murder."

(7) The two earlier Madras cases were also considered by a Bench of the Bombay High Court in the case — 'Basangouda v. Emperor', AIR 1941 Bom 139 (D), where it was laid down that:

"The rule as to circumstantial evidence is that it must be consistent, and consistent only with the guilt of the accused, and if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. No doubt one of the circumstances, which has to be taken into account is the fact that the accused had offered no explanation, or has offered a particular explanation; but it must be borne in mind that in this country the accused cannot go into the witness-box, and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him.

It is clearly the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence, and the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is, he is not justified in convicting. A reasonable explanation of the evidence should not be rejected because it was not offered by the accused. The Court is competent to invent possible explanation and to speculate when the accused's statement does not explain the evidence against him, as to the possible hypothesis that may be made out in favour of the accused."

(8) In a recent case — 'Trimbak v. State of Madhya Pradesh', AIR 1954 SC 39 (E), their Lordships of the Supreme Court observed as follows:

"When the field from which the ornaments were recovered was an open one, and accessible to all and sundry, it is difficult to hold positively that the accused was in possesion of those articles. The fact of recovery by the accused is compatible with the circumstance of somebody else having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of these articles."

(9) In this case the accused had been charged under S. 411, Penal Code. The case of the prose-

cution was that the appellant along with other persons committed dacoity in the house of one Namdeo Motiram on the night of 11-12-1950, and thereby committed an offence punishable under S. 395, I. P. C. The defence was a complete denial of the charge. The property in this case had been recovered on being pointed out by the accused. The Magistrate acquitted the appellant and in appeal the High Court agreed with the finding of the trial court and held that the appellant was not guilty of an offence under S. 395, I. P. C. but convicted him under S. 411, I. P. C. for receiving the stolen property. The matter came up before the Supreme Court on special appeal.

The Supreme Court referred to the finding of the High Court in these terms:

"The learned Judges in the High Court, however, took the view that the ornaments belonging to the complainant were taken out by the respondent from the field of Namde Anand and that the respondent having given no explanation regarding his knowledge of the place from which the ornaments were taken out, it must be presumed that he must have kept the ornaments there. It was further held that the fact that the field did not belong to the respondent and that the place was accessible to others would not show that the ornaments were not in his possession but were kept by someone else, in the absence of a statement from the respondent explaining the circumstances under which he came to know about the ornaments."

This line of approach by the High Court was not approved by their Lordships of the Supreme Court.

(10) It was contended by the counsel for the State that the existence of a motive and the threats given by the appellant may lead to a reasonable inference that the knowledge of the fact that the clothes which the deceased was wearing at the time of his disappearance, were concealed in a brick-kiln, was due to the murder having been committed by the appellant. The motive alleged in this case is that sometimes prior to the occurrence the appellant had been prosecuted at the instance of the father of the deceased and convicted. I do not think that this can be a good ground for the murder of the child. If the appellant had any grievance he had one against his father and there was no reason why he should have murdered the innocent child. As regards the evidence of threat the witnesses have deposed that after the release from the lock-up the appellant gave out that he would take revenge on Shanker Lal and would injure him. The appellant never said that he was going to murder the child.

It is no doubt true that by the murder of the child Shanker Lal has been injured but the appellant when giving threat could not have contemplated to murder the child who had no hand in prosecuting the appellant. It will not be reasonable to infer from the threat given by the appellant that the murder was result of the appellant's decision to take revenge upon his father. It is also admitted that at the time of the occurrence the appellant was not in the employment of Shanker Lal. The mere fact that sometimes back the appellant was in the service of Shanker Lal and he knew the child does not conclusively prove that he on the evening of the occurrence was able to persuade the child to go with him and took him away. There is no evidence on the record to prove that at any time in the evening the appellant was seen in the company of the child or that any time after he had been removed from the service, he was seen near the house of Shanker Lal talking to the child. It cannot be assumed that the appellant alone was in a position to take away the child and had motive to commit the murder of the child.

(11) In my opinion in the absence of any evidence to the effect that the appellant was seen in the company of the deceased prior to the occurrence or other circumstances to connect him with the crime no reasonable presumption can be drawn against the appellant from the mere fact that the clothes that the deceased was wearing when he disappeared were produced by the appellant and that he offered no satisfactory explanation as to how he acquired the knowledge of those articles being kept there. From the fact that he had konwledge of the clothes it would not be a reasonable presumption in the absence of any other circumstance to draw that the appellant got these clothes after having committed the murder of the deceased.

(12) In my opinion, therefore, there is no evidence against the appellant and he has been wrongly convicted by the Sessions Judge and is entitled to an acquittal. I would, therefore, allow the appeal, set aside the conviction and order the appellant to be released forthwith unless required in connection with any other case.

DESAI J.:

(13) I regret, I am unable to agree with my learned brother. The circumstantial evidence that has been produced in the case convinces me beyond any reasonable doubt of the guilt of the appellant. I attach considerable importance to the fact that two of the assessors and the learned Sessions Judge were also convinced. The case might have been different if the appellant had been acquitted by the trial court and we had to decide on an appeal by the Government whether to convict him. The approach in a Government appeal is different from that in an appeal by a prisoner; the difference was stressed by the Supreme Court very recently in 'AIR 1954 S. C. 39 (E)', referred to by my learned brother. One cannot be certain of what the result of Trimbak's appeal to the Supreme Court would have been if he had been convicted by the trial court and his appeal dismissed by the High Court. But if one reads between the lines of the judgment of the Supreme Court, one may say that the Supreme Court would have found nothing wrong in the judgment of the High Court. The present appeal is from conviction and not from acquittal. Therefore, it is not governed by the decision of the Supreme Court in Trimbak's case (E).

Moreover, in Trimbak's case (E) the crucial question was whether the accused was in possession or not. Unless he was in possesssion, there could be no conviction under S. 411, I. P. C. Possession is not an essential ingredient of the offence under S. 302, I. P. C. The appellant can be convicted of murder even though he was not in possession of any property of the deceased. Therefore, the prosecution had not to prove that he was in possession

of some property of the deceased. Of course, if he was in possession of any property of the deceased, it would be evidence against him, but that evidence is by no means essential in a case of murder.

(14) There are five circumstantial facts against the appellant, (1) motive, (2) threats, (3) opportunity, (4) knowledge of the fact that the clothes that the deceased was wearing at the time of his disappearance were found concealed in a brick-kiln and (5) subsequent conduct.

(15) There is documentary evidence in support of the motive. Shankar Lal, the father of the deceased boy, made a report against the appellant on 1-11-50. The appellant was prosecuted at the instance of Shankar Lal and convicted by a Magistrate in March 1951. The appellant had the hardihood of saying before the learned Sessions Judge that he was never in the service of Shankar Lal and that he did not know whether he was prosecuted by him and convicted by a Magistrate. The prosecution and conviction could have given rise to such an emotion in the mind of the appellant as would drive him to commit the murder of Shankar Lal's son. That it did is proved by his own admission to Ram Nath, Jwala Prasad and Zahar Mal P. Ws. Ram Nath and Jwala Prasad deposed that, when the appellant was put in the lock-up, he told them that he would take vengeance upon Shankar Lal for falsely implicating him in the case. They are the persons in whose presence the police recovered the property said to have been stolen from Shankar Lal's possession by the appellant; so they had accompanied the police and the appellant to the police station and there the appellant had talked with them.

When the appellant was released on bail, he told Zahar Mal that he had been falsely implicated by Shankar Lal and that, when he was acquitted, he would take revenge upon him. None of these witnesses was on bad terms with the appellant, and there is nothing improbable in the evidence. There is thus no reason for disbelieving their evidence which proves that the appellant had a design for taking revenge upon Shankar Lal. The evidence tending to show the existence of a motive is admissible because "if clearly shown, it may help to confirm the conclusion reached from all the other evidence that accused has committed the offence charged." This rule is especially applicable where the evidence against the accused is largly or entirely circumstantial. See '40 Corpus Juris Secundum, Paragraph 227 and the foot-note at page 1152.' It is stated in Phipson on Evidence, '9th Edition, page, 153, that when A is charged with the murder of B, the fact that he had a motive for killing B along with the fact that he made preparations for it and had made an earlier attempt on his life, is relevant to show that he murdered B. Wigmore on Evidence, 'Vol. 1, Paragraph 118, page 558, quotes Woodruff J.' stating in — 'Kennedy v. People,' 39 N. Y. 245 (F), that

> "proof of motive tends in some degree to render the act so far probable as to weaken presumptions of innocence and corroborates evidence of guilt."

He also quotes Harlan J. stating in — 'Pointer v. United States', (1893) 151 US 396 (G), that motive is pertinent, however, only in so far as it tends to furnish evidence indicative of guilt to be considered and weighed in connection with the other evidence, which "may be so weak that, without a disclosed motive, the guilt of the accused would be clouded by a reasonable doubt." Thus the existence of motive lends support to the other evidence and helps in removing the doubt, if any is left by the other evidence.

(16) That the boy was murdered is proved and admits of no controversy. There is no evidence that he wore any ornaments at the time when he disappeared and that the ornaments were missing from his corpse. Shankar Lal made a simple report of his disappearance without suspecting anybody. Had the boy been wearing ornaments at the time when he disappeared, he would have mentioned the fact in the report & would have suspected that some foul deed had been committed for the sake of the ornaments. It is obvious that the boy was not murdered on account of his property. He, being only six years old, could not have given any provocation to any one on account of which he could be murdered. The record is completely silent about any reason for his being murdered other than the desire on the part of the appellant to take revenge upon Shankar Lal. One way of taking revenge upon him was to kill his son.

The facts that the appellant had expressed his intentions of causing an injury to Shanker Lal and that an injury was caused to him lead to the presumption that it was the appellant who did the injury.

> "When one threatens to do an injury to another, and that or a similar injury afterwards happens, this furnishes ground to presume that he who threatened the fact was the perpetrator or instigator"; Chief Justice Swift, Evidence, 136: quoted by Wigmore in paragraph 105 at page 538.

In — 'R. v. Ball', 1911 AC 47 (H), Lord Atkinson observed at p. 68 that

> "previous acts or words of the accused showing motive and enmity towards the deceased, are evidence not only of malice, but also that the accused killed the deceased."

This case makes it clear that in a trial of A for the murder of B the fact that A was heard to declare that he would be revenged on B is relevant to show that he murdered B.

> "Previous threats by accused to kill deceased may be shown for the purpose of identifying accused as the person who did the killing." see 40 Corpus Juris Secundum, "Homicide", Paragraph 236.

(17) The appellant had been employed by Shanker Lal and the deceased must have been well acquainted with him. The deceased could willingly go with him on being offered some inducement or excuse. It is true that the appellant had been removed from service after his release on bail in the previous case. But the fact that he was no longer in Shanker Lal's employment was not bound to prevent the boy, who was so small, from being swayed by his inducement. The boy disappeared when he was going from his shop to his house. The time was about 5-30 p.m. It is not the case of any one that any force or compulsion was used in order to make him deviate from the route to his house; he must have been kidnapped by a person known to him and not by a stranger with whom he would

not have gone readily or voluntarily. Moreover, nobody would have suspected anything in the boy, going in the appellant's custody even if he had been discharged from service a few days previously. It is true that another person might have kidnapped him; but, as remarked by Wigmore (Vol. 1, paragraph 131, page 563), he is "at least within the limited number of persons who could have done it, and thus is fit to become a subject for further investigation."

(18) Now, I come to the most important evidence, namely, that of the recovery of the boy's clothes with the help of the appellant. There is ample evidence to prove that the appellant told the investigating officer that he would point out where the boy's clothes were, that he took him, Ghurey Lal and Kishori Lal to a brick-kiln in village Ramanpur, where the appellant resides and which is two fields away from Hathras where Shanker Lal resides, that he took out five clothes from a pit above the kiln and handed them over to the investigating officer and that they belonged to the boy and were worn by him when he was last seen alive. The station officer, Ghurey Lal, Santosh Gir, Kishori Lal, Shanker Lal and Lallu Mal have given evidence about these matters. The first four deposed about the recovery; Kishori Lal was the Head Master of the school in that village. There is nothing to shake the credit of these witnesses. Shanker Lal and Lallu Mal (who is his brother) deposed that the clothes belonged to the boy; their evidence is supported by their having identified them without any mistake in the presence of a magistrate.

Shanker Lal further deposed that the boy was wearing these clothes when he left his shop on the day of his disappearance. He was also wearing pyjamas but they were found on his corpse. Some of the recovered clothes are mentioned in the report of the disappearance made by Shanker Lal on 3-12-50 at 7-30 a.m. It is not disputed that the clothes did not belong to the boy or that he was not wearing them when he was last seen alive. It appears that the appellant told the investigating officer that he had removed the clothes from the corpse of the boy before throwing it into a well, but actually no question was put to anyone of the recovery witnesses about this statement of the appellant. The whole of it was admissible in evidence under S. 27 of the Evidence Act and the prosecution ought to have led evidence about it. It is unfortunate that the provisions of S. 27 of the Evidence Act are not properly understood by the police, the prosecution counsel and even magistrates and judges with the result that important evidence is not brought on record and miscarriage of justice results. Had the prosecution proved that the appellant told the station officer that he had hidden the clothes of the boy in a pit in a certain brick-kiln, the case against him would have been much stronger.

It was stated in — 'Chavadappa Pujari v. Emperor', AIR 1945 Bom 292 (I), that the statement of an accused to a police officer that he has concealed the property in a particular place and would produce it, is admissible and that if the property is discovered in consequence of it, it would be evidence of his possession even though it was kept or concealed in another man's property because unless he had possession he would not have concealed it there. It was pointed out that if he, without stating that he had concealed it merely produced it, from a place to which other people could have access, it would not be sufficient to establish his possession over it, but at the most would show his knowledge that it was concealed there. A statement "I have concealed the knife in such and such a place" is admissible but not the words "with which I stabbed the deceased." In — 'R. v. Gould', (1840) 9 Car & P 364 (J), the statement of the accused to the police that he had thrown a lantern into a pond in a certain field (from which it was subsequently recovered by the police), was admitted in evidence by the House of Lords.

In — 'The State v. Lehna Singh', AIR 1953 Punj 101 (K), the statement of Lehna Singh to the police that he had concealed a rifle in a manure heap lying outside his house (from where it was taken out by himself subsequently), was held admissible in evidence. It is high time that the State agents, who conduct prosecution in magistrates' courts and Sessions Courts, understood the provisions of S. 27 of the Evidence Act thoroughly and prevented the escape of guilty persons through their own ignorance of the law.

(19) Coming now to the statement actually proved to have been made by the appellant, it must be conceded that after the decision in 'Trimbak's case (E)', the appellant cannot be held to be in possession of the clothes. But it undoubtedly proves that the appellant knew that the clothes that the boy was wearing at the time of his disappearance were concealed in a pit in a brick-kiln in his own village. That is itself an incriminating fact, though, standing alone, it may not suffice to prove that he himself murdered the boy and concealed his clothes. It certainly takes us to him as the subject of investigation and throws upon him the burden of explaining how he acquired the knowledge. He might have acquired it in any of the following ways. He might have acquired it because he himself killed the boy and concealed the clothes, or somebody else killed the boy either in or without his presence and he removed the clothes from the corpse and concealed them, or he saw somebody concealing them, or he accidentally dug the ground and found them buried there. Or he might have acquired it from another person. His guilt, if any, depends upon the manner in which he acquired the knowledge. If he acquired it in the manner first described, he would be guilty of murder and, if he acquired it in the manner last described, he would be guilty of no offence.

The law prevents us from taking into consideration what the appellant told the investigating officer about the means of his acquisition of knowledge. Wigmore criticises this law as illogical and unsound (vide paragraphs 856 to 858); but that is the law and we are bound to obey it. In the Magistrate's court the appellant denied having pointed out the place where the clothes were buried. In the Sessions Court also he denied the fact. He was specifically asked whether they were recovered in his presence and he gave the absurd answer that he did not know. The memo of recovery prepared by the investigating officer bears his thumb-mark, but he denied having put his thumb-mark on it.

Thus instead of explaining how he acquired the knowledge, he simply denied his acquisition of it. It leads to the inference that he could offer no explanation consistent with his innocence. If he had accidentally dug the ground in the pit and found the clothes buried there, or had seen somebody burying the clothes there, or had heard from somebody, I can think of no reason for his refusal or failure to say so. He had absolutely nothing to lose by saying so.

I consider it quite irrational to say that even if he had acquired the knowledge innocently, he would have remained quiet and not disclosed the means of the knowledge. Because he could offer no plausible explanation consistent with his innocence, he felt obliged to deny the possession of the knowledge altogether. When he was prepared to show the place of concealment and also to take the clothes out of it, he would not have failed to explain how he discovered the place of concealment, if he could explain it without any danger to himself. It is no use arguing that he was not bound to explain and that no onus lay upon him except of rebuttal. He did not refuse to explain; he did not impliedly or expressly say that he was not bound to explain and that it was for the prosecution to prove his guilt. He did not take his stand on any right, existing or supposed. What he did was to deny the very occasion for his being called upon to explain by denying the possession of the knowledge. Moreover, one does not always do what one is bound to do, nor does one always refrain from doing what one is not bound to do. The conduct of a man is governed not only by his legal rights and duties but also by human nature.

The appellant might not have been bound to open his lips; but, when his life was in danger, he would not have remained silent on the basis of his right to keep silent, if he could utter some words in order to save his life. Having regard to the human nature which is one of the factors to be considered by a court under S. 114 of the Evidence Act, I have no hesitation in saying that the failure of the appellant to explain how he knew that the clothes were buried inside the pit points to his guilty knowledge. I do not say at this moment that it proves him to be the murderer, but it does point to his being the murderer or an accessory after the murder. Even apart from the silence of the appellant, there are good reasons to think that he acquired the knowledge criminally. He would not have been exploring the pit in a brick-kiln and would not have come upon the place of concealment accidentally. It is also not likely that he would have accidentally seen somebody hiding the clothes there. The pit is above a brick-kiln and I do not think people would be walking through it. It would be too much of a coincidence if he, who had resolved to take revenge upon the boy's father, soon after saw someone burying the boy's clothes, or dug the ground and found them buried there.

(20) As between the remaining two inferences, one that the appellant himself murdered the boy and removed the clothes and the other that somebody else murdered him and he removed the clothes or helped the former in removing and concealing them, the former is the inference that is consistent with the proved facts. The appellant himself would have chosen the lesser evil by stating that somebody else murdered the boy and he concealed the clothes if that were the fact and he would not, by remaining silent, have incurred the risk of his being held to be the murderer when, by merely saying that he was only an accessory after the murder, he could avoid that finding. When one takes into consideration the circumstances mentioned above, viz. the motive, the design and the opportunity, along with the fact of the appellant's own silence, one should not have the slightest doubt in coming to the conclusion that he murdered the boy. I would consider any other conclusion to be against commonsense.

(21) Pointing out property of the deceased may be said to have the same evidentiary value as pointing out of the corpse. There are authorities laying down that the mere pointing out of a corpse is not enough to prove the offence of murder against the accused; see, for example, — 'Gulab v. Emperor', AIR 1923 Lah 315 (L); — 'Sulakhan Singh v. Emperor', AIR 1926 Lah 138 (M); — 'Abdul Jalil v. Emperor', AIR 1939 Cal 539 (N); — 'Farzand Ali v. Emperor', 29 Cri LJ 252 (Lah) (O); — 'Bhai Khan v. Emperor', AIR 1922 Lah 189 (P) and — 'State Govt., M. P. v. Ramkrishna', AIR 1954 SC 20 (Q). All these cases are distinguishable from the instant case. In 'Gulab's (L)' and 'Sulakhan Singh's (M)' cases, the evidence of motive was very slender; there was no evidence of design or threat nor of opportunity. In 'Farzand Ali's case (O)', there was motive and the accused was convicted under S. 201, I. P. C. though not for murder. In the case of 'Ramkrishna (Q)', the corpse was found buried in the house of Limsey himself; but the cause of death was not ascertained, there was quite a distinct probability of the death being the result of drinking and smoking ganja, the matter went before the Supreme Court in an appeal by the State from acquittal by the High Court and the Supreme Court observed that the utmost that could be said was that if they had tried the case, they might have come to a different conclusion.

(22) On the other hand, in — 'Mangal Singh v. Emperor', AIR 1937 Lah 127 (R), Mangal Singh was convicted of murder by a Bench of the Lahore High Court on the evidence that he knew the place of burial of the deceased, that he told lies regarding the movements of the deceased, that he went out ostensibly in search of the deceased but did not return and failed to explain his conduct, and that he had a motive. The decision was upheld by the Privy Council in — 'Mangal Singh v. King Emperor', AIR 1937 PC 179 (S). In 'Trimbak v. State of M. P. (E), and 'Chavadappa Pujari v. Emperor (I)', the main evidence against the accused was that he knew where the property stolen from the deceased was buried and that evidence was held to be insufficient to find him guilty of being in possession of stolen property. The former case was under S. 411, I. P. C., and the other under S. 395, I. P. C., or S. 412, I. P. C., in the alternative.

In the other it was observed:

"The presumption would, therefore, be that a person in recent possession of articles seized in a dacoity is either a dacoit or receiver of stolen property. It is important to note that this presumption is not of one definite offence but of an

alternative offence, because possession of stolen property by itself is not sufficient to prove participation in the offence of theft. It can only go to corroborate other independent evidence of theft. If there is no such evidence, the conviction may be of the alternative offence and the punishment only for the lower offence of possession under S. 72, Penal Code."

This suggests that when the only evidence is of possession, the Court must record conviction in the alternative and cannot record conviction for theft. The law regarding the presumption to be drawn from recent possession of the fruits of crime has been settled long ago and there are numerous decisions in this country, in England and in America laying it down and I have ever understood it to be as interpreted in the above case. With great respect to the learned Judges, I differ from that interpretation which is not supported by any authority. The meaning of illustration (a) to S. 114, Evidence Act, is not that the presumption is in the alternative; its plain meaning is that both the presumptions are possible and that which should be adopted in a case depends upon circumstances. If the interval between the theft and the accused being found in possession is very small, the presumption can be that he is the thief. If, on the other hand, the interval is relatively large, the presumption can be that he is the receiver. If the interval is very large, the Court may not draw any presumption.

Wigmore writes in para 152—

"On a charge of taking goods, the fact that A was found, subsequently to the taking, in possession of the goods taken is relevant to show that he was the taker. It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this."

In — 'R. v. Langmead', (1864) 9 Cox CC 464 (T), Blackburn J. says:—

"he is called upon to account for having it, and on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, 'according to the circumstances'." (Emphasis supplied).

The phrase is similar to the phrase used in illustration (a). The underlined words (here in ' ') make it clear that it is for the Court, after considering the circumstances of the case, to decide which of the two presumptions to draw and that the Court is not required to record conviction in the alternative for theft or for receiving in every case. Possession is not an essential ingredient of the offence of murder and if a person cannot be convicted under S. 411, I. P. C. (because he is not found to be in possession), it does not follow that he cannot be convicted under S. 302, I. P. C. also.

(23) In — 'Mirza v. Emperor', 27 Cri LJ 993 (Lah) (U); — 'Moyila Kurmiah v. Emperor', 14 Cri LJ 49 (Mad) (V) — 'Bhikha Gober v. Emperor', AIR 1943 Bom 458 (W), AIR 1954 Mad 152 (C), and — 'State v. Shankar Prasad', AIR 1952 All 776 (X), it was stated that the mere possession of property stolen from the deceased is not enough for convicting the possessor for the murder. In the case of 'Moyila Kurmiah (V)', there was absence of motive for the heinous crime of murder and of evidence to prove that the deceased was wearing at the time of her murder the ornaments subsequently recovered from the possession of the accused who was her own husband and it was not improbable that the deceased committed suicide and there was nothing suspicious in her ornaments being found in the accused's possession. In the case of 'Bhikha Gober (W)', he pointed out the ornaments belonging to the deceased which were concealed in a hedge near his field, but at the trial denied having pointed them out. A bench of the Bombay High Court convicted him under S. 411, I. P. C., instead of S. 302, I. P. C. There was absolutely nothing to connect him with the murder and it was thought that he might have acquired the ornaments from the murderer or might have robbed the deceased before she was murdered by someone.

In the absence of evidence to prove that he had a design, and had also threatened, to murder the deceased, the Court held that the only inference that could be drawn was that he knew that the property had been stolen, whether or not he knew that the owner had been murdered. In the present case, it cannot be said that the appellant did not know that the owner of the clothes had been murdered. If a person receives other articles, he may not suspect that the owner has been murdered, but if he receives clothes, and clothes of no particular value, he cannot pretend not to know that the owner has been murdered. Other articles may be stolen on account of the value but used clothes of no particular value would not be stolen by anyone. The decision, therefore, has no application to the facts of the instant case. The facts in the case against 'Shankar Prasad (X)' were that one B was murdered in a dharamshala and his goods were stolen, that there was evidence to the effect that Shankar Prasad and others were seen with the deceased on the previous evening, that Shankar Prasad and others were seen going out of the dharmashala late in the night, and that the appellant pointed out some of the goods of the deceased. The evidence about Shankar Prasad having been seen in the dharamshala was not believed.

Far from there being any evidence of malice, the evidence was that relations between him and the deceased were very intimate. In these circumstances, it was held by a bench of this Court that the mere fact that he was in possession of the deceased's property does not prove his complicity in the murder. This Court set aside 'Shankar Prasad's (X)' conviction under S. 302, I. P. C., and ordered him to be retried for the offence of S. 411, I. P. C. The premise that "the only evidence against the accused is recovery of stolen property" stated at p. 782 does not exist when there is evidence of design, threat and opportunity. The observation of Govinda Menon J. in 'In re Singaram (C)', quoted by my brother Mehrotra, was obiter dictum. The facts there were that a Swami was seen alive on a day at 9 p.m. wearing a gold chain and gold rings, that next morning he was found murdered in his hut and his ornaments missing and that Singaram was found in possession of the ornaments. It was also proved that he and the other accused were seen in the vicinity of the hut where the Swami

was sleeping about the time when he was murdered.

The learned Judges upheld the conviction of both the accused under S. 302, I. P. C. They found the evidence sufficient to connect them with the murder of the Swami. They were not concerned with the question what they would have done if the evidence against the accused in the case were less than what it was. There was evidence to connect the accused with the deceased immediately before his death; and the learned Judges' observation at p. 155 that

> "the presumption from the possession of articles belonging to the deceased by accused persons immediately after the murder or robbery should be drawn only where some more evidence is present to show that the accused persons were seen with the deceased immediately before his death or that the deceased was last seen alive in the company of the accused persons",

was nothing but obiter dictum. Because such evidence is found in many cases, or is of some value, it cannot be laid down as a law that without it there can be no conviction.

Equally obiter was the observation at p. 156 that

> "unless some kind of connecting link, however remote it may be, is made out between the movements of the deceased and the accused, at or about the time of murder, *** it would be unsafe to convict the accused person of the offence of murder."

Moreover, as I would show subsequently, this law is against authorities and views of experts and is not supported by reason. The accused were seen near the hut of the Swami at about midnight. It is not known at what time the Swami was murdered; he was seen alive at 9 p.m. on the previous evening and found murdered at 6 a. m. He was, therefore murdered some time between 9 p.m. and 6 a.m. and it cannot be assumed that he was murdered at about midnight and that the accused were seen near his hut at or about the time of his murder. When a case rests upon circumstantial evidence, it means that nobody has seen the crime being committed and that one cannot say definitely at what time it was committed. There are thus practical difficulties in proving that the accused was seen near the place of the crime at or about the time when it was committed unless his being seen within some hours of the commission of it is deemed to be equal to his being seen at or about the time.

I do not think it reasonable to infer from a person's being seen near the place of murder three hours before or after the commission of murder that he was concerned in the murder; the interval is too long for any connection between him and the murder to be inferred from it. There is nothing in this piece of evidence that would make the rest of the circumstantial evidence conclusive, if otherwise it was not.

(24) There are cases in which persons have been convicted of murder on the strength of their being found in possession of property stolen from the murdered and the decisions are supported by experts in the law of evidence. In AIR 1933 Mad 233 (A), decided by Sir Owen Beasley C. J. and Reilly J., the only evidence against Narayana was that he stated that he had hidden the ornaments of the murdered girl in a fort and the recovery of them from the fort on his pointing out the place of concealment. Though there was no evidence of any malice against the murdered girl or of any design to murder her or of his being seen near the place of murder at the time when it was committed, he was convicted of murder. He offered no explanation for his knowing that the ornaments were concealed in the fort. In 29 Cri LJ 252 (Lah) (O), Nabi Bux was convicted of murder on the evidence that he took the police to a field and dug out from it the ornaments worn by the murdered girl. Basangouda, whose case (D) has already been referred to was convicted of murder on similar evidence coupled with his failure to explain his possession. Beaumont, C. J., could not conceive of any rational explanation of the evidence consistent with Basangouda's innocence.

It was theoretically conceivable that somebody else committed the murder and robbery and that he was in turn robbed by Basangouda or he handed over the ornaments to him; but the learned Chief Justice did not consider it a rational explanation because, to quote his own words at p. 143:

> "If that were the explanation, it is almost inconceivable that the accused would not have given it and mentioned who it was who gave him the property."

In — 'Ramprashad Makundram v. The Crown', AIR 1949 Nag 277 (Y), the learned Judges followed — 'Narayana v. King Emperor (A)', and convicted Ramprashad under S. 302, I. P. C., on the basis of his being found in possession of the ornaments belonging to the murdered woman and blood stains on his dhoti; the explanation that he offered for his possession of the ornaments was not accepted by the learned Judges. They observed, at p. 280, that:

> "the possession of the ornaments by the accused soon after her death is undoubtedly a very strong piece of evidence against the accused."

Then there is the case of — 'Emperor v. Chintamani Shahu', AIR 1930 Cal 379 (2) (Z), in which Chintamoni was convicted of murder and robbery on account of his being found in possession of the murdered woman's ornaments. In — 'In re Vankataswami', AIR 1950 Mad 309 (Z1), unexplained possession of an ornament worn by a murdered woman was held to be evidence not only of theft or robbery but also of the murder itself, if the possession could not reasonably be got without committing the murder. In — 'Sunderlal v. State of M. P.', AIR 1954 SC 28 (Z2), Sunderlal was found in possession of ornaments of the deceased on the very day on which the dead body of the deceased was discovered. His explanation for the possession was found to be untrue and he was seen going in the company of the deceased on the previous day; on this evidence he was convicted under S. 302, I. P. C., and his conviction was confirmed by the Supreme Court.

(25) The law regarding the inference that can legitimately be drawn from the recent possession of the fruits of crime is same in India as in England and in America. Wat is stated in illustration (a) of S. 114 Evidence Act is nothing but a re-production

of the law stated by English and American Jurists. Naturally the inference to be drawn depends entirely upon reason, experience, human conduct and human nature and would not differ from Nation to Nation or Country to Country. It is stated by Taylor in his Treatise on Evidence, paragraph 127A, that the possession of stolen property soon after the commission of theft raises a prima facie presumption that the possessor was either the thief, or the receiver, according to the other circumstances of the case and that the presumption, when unexplained either by direct evidence, or by the character and habits of the possessors, or otherwise, is usually regarded by the jury as conclusive. In paragraph 127C it is stated that the presumption is not confined to charges of theft, but extends to all charges, however penal, including the charge of murder. The same law is stated by Greenleaf on Evidence, Vol. 1, paragraph 34.

According to Kenny, the possessor of goods recently stolen may fairly be regarded as either the actual thief or else a guilty receiver and that

> "his possession raises also—but less strongly—a presumption of his guilty connection with any further crime that accompanied the theft, e.g., a burglary, an arson, or a murder"; See Outlines of Criminal Law, Fifteenth Edition, p. 391.

Phipson says in his Law of Evidence, 9th Edition, p. 40, that if the recent possession of stolen property by the accused is not explained, or, if though reasonably explained, the explanation is disbelieved, it raises a presumption of fact that he is the thief or receiver and that he may be found guilty by the jury. He says on page 138 that, "the possession of property connected with the transaction is often a highly incriminating fact", and on page 139 that, "the inference of complicity from possession of articles connected with a crime applies also to other criminal charges." Wigmore writes:

> "Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime." Vol. I, paragraph 153.

He adds that such possession is receivable to show the commission of a murder.

In — 'Wilson v. United States', (1895) 162 US 613 (Z3), C. J. Fuller approved of the above-mentioned statement of the law by Greenleaf and of the probable presumption of complicity in the murder arising out of the possession soon after the murder of the property apparently taken from the deceased at the time of his death. It will be noticed that these jurists do not attach any condition to the drawing of the presumption of complicity in the murder; they stop at laying down that the presumption is of fact, or a prima facie presumption or refutable; they did not go further and lay down that the presumption cannot be drawn unless a certain fact is proved in addition.

Even under S. 114, Evidence Act, it is left to the wise discretion of the Court whether to draw the presumption of complicity in the crime from the recent possession of the fruits of the crime. The question is essentially one of fact and no hard and fast rule can be laid down. To say that unless there is evidence that the accused was seen near the place of the murder at or about the time of it, he cannot be convicted of the murder merely on account of his possession of the property removed from the deceased at the time of the murder, is fettering the discretion of the Court. Circumstances of no two cases can be exactly alike and the drawing, or the refraining from drawing, the presumption of guilt in one case is no precedent for drawing, or refraining from drawing, the presumption in another case. Greenleaf writes in Vol. III, paragraph 31:

> "On this subject no certain rule can be laid down of universal application; the presumption being not conclusive but disputable, and therefore, to be dealt with by the jury alone, as a mere inference of fact. Its force and value will depend on several considerations."

(26) Though possession of the knowledge that an article is kept at a certain place is not the same as possession of it, and though a person cannot be convicted under S. 411, I. P. C., merely on its being proved that he knew where the stolen property was concealed, the inference to be drawn from his possession of the knowledge can be the same as that to be drawn from his possession of the article itself. A person who steals another's property may retain it in his own possession or may conceal it in a place not in his occupation. Similarly a person who murders and robs another of his property may retain it in his own possession or hide it in a place not in his occupation. In other words, whether the person has the property in his own possession or knows where it is concealed, he might have been the actual thief or the actual murderer. There is no reason for saying that if the person is in possession, he may be presumed to be the thief but if he is not in possession and only knows the place where it is concealed, he cannot be presumed to be the thief.

The inference of being the thief is drawn from the fact of possession on account of certain connection between the possession and the stealing; the same connection may exist between the knowledge of the place of concealment and the stealing, or if it is accompanied by murder, of the murder. When the person himself does not say, and there is also nothing to indicate, that he learnt that the property was concealed in a certain place either because he heard about it from another person or saw another person hiding it there or he accidentally came upon the place of hiding, there is no justification for refusing to draw, from the possession of the knowledge of the place of hiding, the presumption that one would draw from the fact of possession.

(27) There is a considerable amount of confusion in the law about calling upon the accused to explain his possession and the effect of his refusal to explain or offering a false explanation. It has been argued that even if no explanation is furnished by the accused, he cannot be found guilty if the Court itself can conceive of an explanation. It has also been argued that unless a prima facie case is made out against an accused, he cannot be asked to explain. As a corollary it has been argued that no adverse inference can be drawn against him from his failure or refusal to offer an explanation, or acceptable explanation, and that his failure or re-

fusal does not make the incriminating fact of possession more incriminating. There is no substance at all in the last two arguments. The first argument found favour with the learned Judges who decided the case against Basangouda (D), but I am doubtful of its soundness.

In the case of Narayana (A), Reilly J. stated:

"There may be a hundred possible explanations other than that he himself was the original thief. But it is not for the Judge or Jury to invent or imagine such explanation. It is for the accused person to give his explanation, if he has one. (page 240). * * * It is not the law that the Judge or Jury must be certain that no other explanation of the facts is possible before they find the accused guilty. * * * * All the facts proved must be clearly in their minds, including the very important fact that the accused person has offered no explanation of his possession of the stolen things. * * It is not required that they should be satisfied that no other conceivable explanation is consistent with the facts. * * * * One of the facts before them, which it is their duty to take into account, is the fact that he has offered no explanation." (page 241).

Beaumont C. J. disagreed with those observations in Basangouda's case (D). He conceded that one of the circumstances to be taken into account is the fact that the accused offered no explanation or offered a particular explanation. He stated that an accused is not bound to give any explanation at all, that relying upon the law (that circumstantial evidence must be consistent only with the guilt of the accused and must not be consistent with any rational explanation indicating innocence of the accused) he may not open his mouth because of the evidence being consistent with the guilt of somebody else, that the fact that he does not open is mouth cannot be used against him and that it is the duty of the Court to invent possible explanation. Really there was no necessity for the learned Chief Justice's making these observations; he held the circumstantial evidence to be consistent only with the guilt of Basangouda. He found that there was no rational explanation for the possession of the stolen property and therefore there arose no question of the Court's duty to take into consideration, rational explanations even if not offered by the accused. The observations were obiter dicta. Moreover, the observation that an accused is not bound to offer any explanation and that the fact that he does not open his mouth cannot be used against him is hardly consistent with the observation that one of the circumstances to be taken into account is that he has offered no explanation.

In — 'In re Singaram (C)', the learned Judges disagreed with the observations of Reilly J. and Beaumont C. J. and observed at p. 155:

"One can very well imagine a case where a jewel on the person of a murdered individual came to be in the possession of another without any kind of reasonable explanation being offered by that individual. The fact that no rational explanation is possible or that the explanation offered is unacceptable, should not militate against the innocence of the individual with regard to the offence of murder. Something more is necessary than mere possession of articles."

As I stated earlier, this observation was not necessary for the decision of the case and therefore loses much of its force. The law is that circumstantial evidence must be inconsistent with every rational hypothesis of innocence of the accused. It is not required to be inconsistent with every imaginable or conceivable hypothesis of innocence. Were it so, no conviction would at all be possible on circumstantial evidence. It is always possible to imagine facts consistent with the innocence of the accused. Even in a case where there is direct evidence against an accused, it is possible to imagine that the evidence is false; in the case of circumstantial evidence, the scope for this imagination is even greater because not only can the witnesses who depose about the circumstantial facts be imagined to be false but also it can be imagined that somebody else committed the offence and fabricated the circumstantial evidence against the accused.

So long as a Court has to depend upon testimony, it can always imagine that the testimony is false and that the crime was committed by another person. But certainly the law does not require or even permit a Court to indulge in such imagination. The observation of Govinda Menon J. that

"the fact that no rational explanation is possible, or that the explanation offered is unacceptable, should not militate against the innocence of the individual with regard to the offence of murder"

at page 155 is against the established law and, I say with respect, is not sound. It is pointed out by Stephen that the caution against the admission of circumstantial evidence must not be excessive, as when some maintain that there should be no conviction unless guilt be the only possible inference from the circumstances, see Kenny's Outlines of Criminal Law, Fifteenth Edition, page 401. The only important restrictions on basing conviction for homicide on circumstantial evidence are, as pointed out by Kenny, that the fact that there has been a death must be proved fully and that the possession must be recent.

Illustration (a) in S. 114 itself speaks of want of explanation as a circumstance to be taken into account. So do all the writers on the law of evidence. As regards the effect of the failure or refusal to offer an explanation, the law makes no distinction between the inference of theft and that of murder. In every case in which an inference of theft can be made, an inference can also be made of murder, if it was committed in the same transaction as the theft, and this is a sound law; if the theft and the murder are both committed in one transaction and a person found in possession of the stolen goods soon after the theft can be presumed to have committed it, there is no reason why he should not be presumed to have committed the murder as well. If he offers an acceptable explanation which suggests that he did not commit the theft and the murder both or that he committed the theft but not the murder, the position may be different but when he offers no explanation, if one presumption can be drawn, the other also must be drawn. It is an arbitrary rule that there can be no presumption of murder in the absence of evidence

that the accused was seen near the place of the murder and theft at or about the time when they were committed. Why he can be presumed to have committed the theft, but not the murder, in spite of there being no evidence to prove his presence in the vicinity is beyond my comprehension.

> "The kinds of evidence to prove an act vary in probative strength, and the absence of one kind may be more significant than the absence of another; but the mere absence of any one kind cannot be fatal"; see Wigmore, paragraph 118.

When it is stated by some Judges that mere possession of stolen property is not sufficient for an inference of murder, they only reiterate what Greenleaf says in paragraph 31, Vol. III. According to him the force and value of the evidence of recent possession depend on several considerations. "If the fact of possession stands alone, wholly 'unconnected with any other circumstances', its value or persuasive power is 'very slight';" (because there are several hypotheses which can explain his possession such as planting, picking up the article on its being thrown away by the real culprit, taking it from the real culprit in order to restore it to the owner, etc.) and

> "it will be necessary, therefore, for the prosecutor to add to the proof of other circumstances, indicative of guilt; ° ° ° ° such as the previous denial of the possession, by the party charged, or his refusal to give any explanation of the fact, or giving false or incredible accounts of the manner of the acquisition; ° ° or that he was seen, ° ° near the place, and at or near the time when the crime was committed; or other circumstances, naturally calculated to awaken suspicion against him and to corroborate the inference of guilty possession."

This exposition of the law by Greenleaf ought to remove many false notions. It shows that the failure or refusal to offer an acceptable explanation is itself a circumstance, that when one speaks of "mere possession", it means the absence of that circumstance or any other, that the presence of the accused near the place of occurrence at or near the time when it took place is only one of the circumstances which can be availed of and that motive, design and opportunity naturally calculated to awaken suspicion against him and to corroborate the inference of guilty possession may suffice.

(28) The logical process involved in the admission and consideration of circumstantial evidence is explained by Wigmore in paragraph 32 et seq. The test for the admissibility of evidence to prove a circumstantial fact is that

> "the evidentiary fact will be considered when, and only when, the desired conclusion based upon it is a more probable or natural, or at least a probable or natural hypothesis, and when the other hypotheses or explanations of the fact, if any, are either less probable or natural, or at least not exceedingly more probable or natural" (paragraph 32, page 421). "Where even the possibility of a single other hypothesis remains open, Proof fails, though it suffices for Admissibility if the desired conclusion is merely the more probable, or a probable one, even though other hypotheses, less probable or equally probable remain open. It is thus apparent that, by the very nature of this test or process, a specific course is suggested for the opponent. He may now properly show that one or another of these hypotheses, thus left open, is not merely possible and speculative, but is more probable and natural as the true explanation of the originally offered evidentiary fact" (Paragraph 34, page 423).

When a person is found in recent possession of stolen goods, several hypotheses can explain the fact of his possession;

> "nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this."

(29) Kenny states that

> "an amount of testimony which is not sufficient to rebut the presumption of innocence entirely (i.e., to shift the burden of proof so completely as to compel the prisoner to call legal evidence of circumstances pointing to his innocence), may yet suffice to throw upon him the necessity of offering, by at least an unsworn statement, some explanation. If he remain silent and leave this hostile testimony unexplained, his silence will corroborate it, and so justify his being convicted" (page 388).

On page 395 he includes the accused's false statements and his silence among the principal forms of circumstantial evidence. In — 'Mangal Singh's case (R)', Young C. J. stated that the want of explanation of a very suspicious circumstance is itself circumstantial evidence. The Courts "regard false statements in explanation or defence made, or procured to be made, as in themselves tending to show guilt" as stated by Fuller C. J. in (1895) 40 Law Ed 1090 at p. 1095 (Z3).

In 'Basangouda's case (D)', the learned Chief Justice remarked that if the accused had an innocent explanation, "it is almost inconceivable that the accused would not have given it and mentioned who it was who gave them the property." "The silence of one of the discovery of property recently stolen in his possession & under his exclusive control, raises the presumption that it came into his hands unlawfully."; 22 Corpus Juris Secondum, paragraph 597. 'In AIR 1954 SC 28 (Z2)', Sunder Lal was convicted because he could not offer a satisfactory explanation for his possession of the ornament worn by the murdered man. There is, therefore, not the slightest doubt that the failure or refusal of the accused to give a reasonable explanation for his possession of stolen property is an important circumstance indicative of the possession being criminal.

(30) The argument that the accused refuses to offer an explanation on the grounds that he is not bound to explain and that the onus lies upon the prosecution to prove his guilt has in most cases no factual basis. In most cases he does not refuse to offer an explanation; instead he denies the very existence of the circumstantial evidence. In the present case, the appellant did not say that he was not bound to open his lips or to help the prosecution in proving his guilt: he did not refuse to offer an explanation. On the other hand, he denied the circumstantial evidence altogether,

suggesting that there was nothing which he had to explain. In such a case, it seems to me, it is not open to Court to assume that he had refused to offer an explanation on the ground that he has a right to keep silent. I would go further and call it illegal. It is the Court's duty to see that justice is done in every case; justice consists in punishing the guilty and acquitting the innocent. A Court is not justified in assuming a fact even in favour of an accused, when there is nothing to support the assumption. The saying that it is better to acquit ten guilty men than to convict one innocent man might have had its use in old days when the punishments were severe, the accused suffered from many disadvantages and it was not so difficult to bring the guilty to book.

The principle that criminal Courts should bear in mind is, in the words of C. B. Pollock:

> "To make a comparison between convicting the innocent man and acquitting the guilty is perfectly unwarranted. There is no comparison between them. Each of them is a great misfortune to the country and discreditable to the administration of justice. The only rule that can be laid down is that in a criminal trial you should exert your utmost vigilance and take care that if the man be innocent he should be acquitted, and if guilty that he should be convicted." (quoted in Donough's Principles of Circumstantial Evidence, 1918, 158).

(31) From the above discussion of the law the following propositions emerge as laying down the correct law:

(1) Circumstantial evidence to justify conviction must be inconsistent with any reasonable or rational hypothesis of guilt of the accused.

(2) When the inference of guilt from the proved incriminating (i.e. circumstantial) facts is a more natural and probable hypothesis than the other, the onus of offering an explanation for the incriminating facts lies upon the accused. If he does not offer any explanation, or falsely denies the very existence of the incriminating facts it is itself a circumstantial fact against him, even if the court is in a position to imagine an explanation. The guilt is the legitimate inference from the incriminating facts and the added circumstantial fact of failure or refusal to offer an explanation for the incriminating facts because it is not reasonable or rational to say that the accused would fail or refuse to offer an explanation consistent with his innocence if he could. It is immaterial in such a case whether the Court can imagine an explanation or not.

(3) If the inference of guilt from the proved incriminating facts is a less natural or probable hypothesis than the other, the Court cannot draw it and the accused must be acquitted whether he offers any explanation or not.

(4) If the inference of guilt from the proved incriminating facts is as much a natural or probable hypothesis as any other, the accused may be called upon to explain and if he fails or refuses, the Court may treat it as an additional circumstantial fact and infer his guilt. Or it may take judicial notice of the other hypothesis even without any explanation by the accused and acquit him. The instant case falls under proposition (2).

(32) When an accused is examined under S. 342, Criminal P. C., it is done

> "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him",

and not because a prima facie case has been made out against him. It would, therefore, be fallacious to contend that unless the circumstantial evidence itself makes out a prima facie case against him, he cannot be asked to explain the incriminating circumstances. He can be questioned at any stage of the trial and whether a prima facie case is made out against him or not is seen after his examination. The answers that he gives to the questions are to be taken into consideration along with the prosecution evidence and then it is to be decided whether a prima facie case is made out against him and a charge is to be framed. His failure or refusal to explain the adverse circumstances thus comes in logical sequence before the decision whether a prima facie case is made out against him or not.

(33) The law is that the accused is only asked to explain the adverse circumstances he is not required to prove his innocence until a prima facie case is made out against him. There is a distinction between his being called upon to explain and his proving innocence on rebuttal of the prima facie case made out against him; see — 'Jagannath v. Emperor', AIR 1945 All 19 (Z4). Kenny writes on page 392 with reference to the presumption arising out of the recent possession of the fruits of crime that,

> "this presumption does not displace the presumption of innocence so far as to throw upon the accused the burden of producing legal proof of the innocent origin of his possession. He merely has to state how it did originate. If his account is given at, or before, the preliminary examination, and is minute and reasonably probable, then he must not be convicted unless the prosecution can prove the story to be untrue. If it is no explanation or gives an explanation which is disbelieved by the Court, the Court would convict him, though it is not bound to do so. The presumption, not being one of law, does not need sworn evidence to rebut it and the accused's unsworn explanation suffices;" see foot-note 6 on page 391.

Calling upon the accused to explain his recent possession of the fruits of the crime was erroneously confused with calling upon him to prove his innocence in — 'In re Singaram (C)'.

(34) The evidence of conduct against the appellant consists of his failure to offer any explanation for his knowing that the boy's clothes were concealed in the brick-kiln and of the answer given to Shanker Lal in the course of the search of the boy. I have already dealt with his failure to explain. When Shanker Lal, searching for the boy, asked the appellant about him, he told him that he had thrown him in a fire-place. I do not think any inference of guilt can be drawn from that reply which could have been given by him out of anger even if he had been innocent.

(35) The evidence discussed above is inconsistent with any reasonable hypothesis of the appellant's

innocence and proves beyond reasonable doubt his guilt. It cannot be said that the learned Sessions Judge went wrong in presuming the guilt from it. It is often remarked by Judges that suspicion is not proof or that the evidence does not go beyond creating a suspicion against the accused. With great respect to them I think that the remark is generally unnecessary. When a subordinate Court convicts an accused, it does it on the ground that the evidence proves the case against him and not on the ground that it creates a suspicion against him. The superior Court may think that the evidence does not prove the case and only creates a suspicion against him. But unless it is explained how and where to draw the line between proof and suspicion no useful purpose is served, and no guidance whatsoever is given to lower Courts, by the remark that suspicion is not proof. No Court has ever attempted to explain how and where to draw the line between suspicion and proof. One can be cent. per cent. sure of the innocence of an accused (as where the person alleged to have been murdered by him is proved to be alive), but one can never be cent. per cent. sure of the guilt of an accused. Absolute certainty of guilt is unknown.

One may be 99.99 per cent. certain but not 100 per cent. Therefore, in every conviction there is some uncertainty. In suspicion there is more uncertainty than in conviction. Nobody can lay down the minimum percentage of uncertainty for conviction. So nobody can say that it is wrong to convict if the certainty of the guilt is less than 95 per cent.; nor can anyone say that if the certainty is of less than 95 per cent., it only amounts to suspicion. One test for judging whether the circumstantial evidence creates suspicion only or proves the guilt is whether it is reasonably consistent with his innocence or not. If it is, it only creates a suspicion against him. In the present case the circumstantial evidence is not reasonably consistent with the appellants' innocence. Not only is it consistent with his guilt, but also it is not consistent with his innocence. Had he been innocent, instead of the circumstances that he falsely denied his pointing out the place of the concealment of the boy's clothes and that he could not explain at all how he discovered the place of concealment, there would have been some other circumstance. The appellant is, therefore, proved to be guilty of murder and was rightly convicted.

(36) Even if it be said that the utmost that is proved is that the appellant himself buried the boy's clothes or helped someone else to bury them, he is guilty under S. 201, I. P. C. The boy's clothes were concealed in order to conceal the evidence of the boy's murder. He is in no case innocent of very offence.

(37) I would dismiss the appeal.

AGARWALA J. (On difference between Desai and Mehrotra JJ.):

(38) This case comes before me on a difference of opinion between my learned brothers Desai and Mehrotra. The facts of the case are as follows:

(39) Appellant Parshadi has been convicted under S. 302, Penal Code, for having committed the murder of Chimman Lal, a lad of six years of age on or about 2-12-1950 and has been sentenced to transportation for life. The appellant Parshadi is a resident of village Ramanpur, which is at a distance of eight furlongs from the town of Hathras. He was in the service of Shankar Lal, father of the deceased, who carried on a Halwai shop at Hathras. An iron safe containing cash was stolen away from the shop of Shankar Lal and so he lodged a report of theft in the police station on 1-11-1950, under S. 457, I. P. C., implicating the appellant Parshadi as also one Charna. Charna was arrested and sent to jail, while the accused Parshadi was put up in the lock up and released later on furnishing security. The next day he pointed out the place where the safe had been kept and Shankar Lal got back the stolen property. Ultimately in 1951 both Parshadi and Charna were convicted under S. 381, I. P. C., but they were ordered to be released on executing bonds and producing sureties to appear before the Magistrate whenever called upon to do so within a period of three years.

While the appellant was in the lock up he told Ramnath (P. W. 6) and Jwala Prasad (P. W. 10) that when he would go out of the jail he would take revenge on Shankar Lal. After his release from the lock up he again repeated the threat in the presence of Zahar Mal (P. W. 4). A month later i.e., on 2-12-1950, Chimman Lal, deceased left his father's shop at about 5 p. m. for home which was at a distance of about a furlong. But the poor lad never reached his house. When Shankar Lal came back to the house at about 6 p. m. he did not find Chimman Lal there. He made a search for the boy. He went to the appellant also but got no satisfactory reply from him. Then he lodged a report at the police station Hathras about the disappearance of the child at 9 a. m. the next day i.e., on 3-12-1950. In the report he did not mention that he suspected any particular person.

On 9-12-1950, Gyanchand, a resident of village Jogia which is just adjacent to the village of the accused, went to his well where he had fixed his Persian wheel and found that some bad smell was coming out of the well. He saw a corpse floating in the water. He then informed Lohrey, Choukidar and showed him the corpse. The chaukidar at once went to the police station and lodged a report. Kishan Singh, Second Officer, police station, Hathras, went to the well and took out the dead body. There was only one black pyjama on the person of the dead body. Pooran Mal, father of Shankar Lal was called at the well and he identified the body to be of Chimman Lal. The dead body was then sent to the police station Hathras and was identified there again by Shankar Lal, to be that of his son. The post mortem report showed that the fingers of the hands and toes of the feet were shrunk and there was mud present, the sutures of the skull bones were separated, the body was highly decomposed and swollen and foul odour was coming out and the skin was peeling off. No injuries were found on the person of the deceased.

The doctor could not give any opinion as to the cause of death due to the decomposition of the body. On 11-12-1950, Parshadi appellant was arrested at his house. On his way to the police station Parshadi informed the police officer that he would produce the clothes of the deceased. The police officer stated that Parshadi had also confes-

sed his guilt and that he had also said that he had placed the clothes in a pit above a brick-kiln. The statement that Parshadi had confessed his guilt, was not admissible but the other statement that he had placed the clothes in a pit, was admissible. Unfortunately the statement of the police officer on this point was not supported by any other witness, probably because no questions were put to the witnesses about it.

The statement that the accused stated to the police officer that he had placed the clothes in a pit above the brick-kiln cannot, therefore, be said to have been proved in the case and must be ignored. The appellant took the police party to the top of the brick-kiln, removed earth from the pit and took out the clothes in the presence of the police officer and three witnesses who have been believed by the Court below and by my learned brothers.

(40) The prosecution case was that it was Parshadi who on account of the fact that Shanker Lal had implicated him in a theft case, took with him the deceased when the latter was returning to his house and after murdering him, took off his clothes and threw the dead body into the well from which it was recovered.

(41) In defence Parshadi denied that he was in the service of Shanker Lal at all or was prosecuted for theft or concealed the clothes or knew the deceased boy or pointed out the clothes and recovered them from the pit. These denials were obviously false. He also denied that he murdered the boy and concealed his clothes in the pit.

(42) There is no direct evidence of the murder and the case has to be decided on circumstantial evidence. It was the month of December when the incident happened and the weather was very cold. Therefore it would be unreasonable to suppose that the clothes had been taken off by the boy himself of his own volition and that he accidentally fell into the well. I think the only reasonable inference is that he was deliberately thrown into the well by the person who had taken off his clothes with a view to murder him and then the murderer concealed the clothes at a place from where no one was likely to find them out. Thus it may be safely presumed that the boy had been murdered.

(43) The next question is whether the appellant murdered him. The facts which have been proved without any shadow of doubt are these:

(44) Firstly that the appellant had a motive for the crime. He had been implicated in a theft case by Shankar Lal, father of the deceased. He, therefore, bore enmity against Shankar Lal.

(45) Secondly that the appellant held out a threat against Shankar Lal saying that he would take revenge against him. Revenge is very often taken against an enemy, not necessarily by causing any physical injury to him but by causing physical injury to a near or dear one of his. Experience shows that very often this is done by murdering the son of one's enemy.

(46) Thirdly, that the appellant had access to the deceased and could have induced him to go along with him and had an opportunity of killing him. The appellant was the servant of the deceased's father for sometime past and though he had been dismissed and at the time of the incident a case was going on against him at the instance of the deceased's father, yet the appellant because of his past action with the family of the deceased, could have very well persuaded the deceased to accompany him on some pretext or allurement and having regard to the fact that the deceased was only six years of age, could have very easily killed him.

(47) Fourthly, that the clothes of the deceased were handed over by the appellant to the police. He, therefore, knew that the clothes belonged to the deceased and also knew the place where the clothes were hidden.

(48) Fifthly, the appellant falsely denied several facts which have been conclusively established, namely that he was ever in the service of Shankar Lal, that Shankar Lal had implicated him in a theft case, that he knew the deceased, that he pointed out the clothes of the deceased to the police at the top of the brick-kiln. Because of these denials he could not give any satisfactory explanation as to how he came to know of the clothes being hidden at the place from where they were recovered.

(49) None of these five facts taken singly is sufficient to hold the accused guilty of the murder of the deceased. But in my judgment the cumulative effect of all the facts leads to the irresistible inference that it was the appellant who had removed the clothes from the person of the deceased, was privy to the murder of the deceased and hid the clothes at the top of the brick-kiln.

(50) Holding out of a threat of doing injury to another furnishes ground to presume that he who threatened the fact was the perpetrator or instigator. This was so held by Chief Justice Swift, see Wigmore on the Law of Evidence, para. 105 at p. 538. In 40 Corpus Juris Secondum, title "Homicide", paragraph 236, it has been stated:

> "Previous threats by accused to kill deceased may be shown for the purpose of identifying accused as the person who did the killing," though standing by itself mere threat cannot be substantive evidence of murder."

(51) The mere fact that the accused pointed out the clothes and did not give satisfactory explanation as to how he acquired the knowledge of the place from where the clothes were taken out would not have been sufficient to show that the accused had hidden the clothes at that place, as was held in AIR 1954 SC 39 (E). But here there are additional facts which were not present in Trimbak's case (E). It should be noted that not only did the accused not offer an explanation as to his knowledge of the place where the clothes were hidden but that he made utterly false statements denying all knowledge about the recovery of the clothes, his implication in the theft case, his service with Shankar Lal and his acquaintance with the deceased. These facts tend to show that the accused had a guilty mind.

It is quite true as Sir Beaumont C. J. observed in AIR 1941 Bom 139 (D) that

> "in this country the accused cannot go into the witness-box and is not bound to give any explanation at all. The fact that he does not open his mouth cannot be used against him. It is clearly

the duty of counsel in defending an accused to point out that the evidence is quite consistent with an explanation which fits in with the accused's innocence and the Judge is bound to ask himself whether there is any rational explanation of the evidence which is consistent with the innocence of the accused, and if there is, he is not justified in convicting him. A reasonable explanation of the evidence should not be rejected because not offered by the accused."

But at the same time his Lordship further observed:

"No doubt one of the circumstances, which has to be taken into account, is the fact that the accused has offered no explanation, or has offered a particular explanation."

This view is fortified by the decision of the Supreme Court in AIR 1954 SC 28 (Z2). Therefore it is clear that the fact that the accused has offered no explanation as to how he came to the knowledge of the place where the clothes were hidden and of the owner of the clothes has to be taken into consideration, although no conviction can be based merely upon it.

(52) The rule as to circumstantial evidence, as has been repeatedly pointed out, is that it must be consistent, and consistent only with the guilt of the accused, and if the evidence is consistent with any other rational explanation, then there is an element of doubt of which the accused must be given the benefit. Any hypothesis or explanation tending to show his innocence must be 'rational' because an irrational or unnatural or a highly improbable explanation will not be taken into consideration. The law does not demand the impossible to be proved by the prosecution. The Indian Evidence Act applies to civil and criminal trials. The words 'proved' or 'disproved' are defined in S. 3 of the said Act. "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." "A fact is said to be disproved when, after considering the matter before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist." "A fact is said not to be proved when it is neither proved nor disproved."

(53) These definitions clearly show that the test is of probabilities upon which a prudent man may base his opinion. It is often said that one of the well-known maxims of criminal trials is that it is better that ten guilty persons be acquitted rather than one innocent person be convicted. This maxim is often misunderstood. It means nothing more than this that the greatest possible care should be taken by the Court in convicting an accused. The presumption is that he is innocent till the contrary is clearly established. The burden of proof of proving that the accused is guilty is always on the prosecution. If there is an element of reasonable doubt as to the guilt of the accused, the benefit of that doubt must go to him. The maxim merely emphasises these principles in a striking fashion. It does not mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty if the evidence, on the whole, points to the only conclusion, on which a prudent man can act, that the accused is guilty.

(54) Various alternative hypotheses have been discussed by my learned brother Desai and I do not wish to repeat what he has said as I agree with him on this point. Before me learned counsel for the appellant has suggested another hypothesis that Charna, the co-accused and the appellant in a theft case, might have murdered the deceased and hidden the clothes. But this hypothesis is not at all reasonable having regard to the facts that Charna had not threatened revenge against Shankar Lal, that he was a resident of village Sikurpur, police station Sasni while the clothes were recovered near the village Nagla Ramanpur where the appellant resides. Further it does not appear that Charna was out of jail at the time of murder. The evidence on the record shows that both of them were arrested when a report against them for theft was made by Shankar Lal. Parshadi was released that very day in the night while Charna was sent to jail. The murder and the hiding of the clothes could not have been done by Charna as suggested by the learned counsel for the appellant.

(55) The cases cited at the Bar have been discussed by my learned brothers. No case has been cited in which all the facts which have been proved in the present case were established and yet an inference of guilt was not drawn. In 29 Cri LJ 252 (Lah) (O), Farzand Ali was not convicted of murder because the only evidence against him was considered to be of motive and of pointing out of the corpse of the deceased. It may, however, be pointed out with respect that the case was wrongly decided because in addition to the evidence of motive and of pointing out of the corpse, there was evidence of Farzand Ali having said that he had thrown the dead body at the place. This was overlooked by the Court. Nabi Baksh the other accused in the case was not convicted of the murder because the only evidence against him was that the ornaments were recovered from his field.

In — 'Shahdad Khan v. Emperor', AIR 1926 Lah 139 (Z5), there was no threat or motive established as in the present case. In — 'Basant Singh v. Emperor', AIR 1927 Lah 541 (Z6), the only evidence was that the deceased was last seen with the accused and that the accused had motive of murder. In AIR 1926 Mad 638 (B), the only evidence was the unexplained possession of the stolen property and it was held that on this finding the accused could not be convicted of murder unless the Court was satisfied that the possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. In AIR 1954 Mad 152 (C), the same view was expressed. This case seems to have dissented from the view taken in an earlier Madras case, AIR 1933 Mad 233 (A). But the other facts proved in the present case were not established in the Madras cases. It is not necessary to pronounce an opinion as to the correctness or otherwise of the view taken in the Madras cases of Sogiamuthu (B) and of Singaram (C) referred to above.

(56) For all these reasons I am of opinion that the accused was guilty of the offence with which he was charged and I agree with the conclusion reached by my brother Desai. I would, in agreement with him, dismiss the appeal.

BY THE COURT:

(57) In view of the opinion of the third Judge we maintain the appellant's conviction and sentence and dismiss his appeal. He must surrender himself to undergo the sentence.

(58) We certify this as a fit case for appeal to the Supreme Court.

D.H.Z. Appeal dismissed.

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RAGHUBAR DAYAL J.

Kali Charan, Applicant v. State, Opposite Party.

Criminal Misc. Cases Nos. 1352, 1353 to 1357 and 1697 to 1720 of 1951.

(a) Constitution of India, Art. 22(1) — Grounds for arrest.

The mention in warrant about the accused being wanted in a case for certain offences is sufficient compliance with the requirements of sub-s. (1) of Art. 22. The ground for arrest is simply an order of the Court which is passed in a case relating to a certain accusation against the person arrested. (Para 15)

(b) Criminal P. C. (1898), Ss. 75, 177 — Power of Magistrate to issue warrant of arrest.

The warrants for arrest of the accused wanted in cases before Magistrate in other Districts and in connection with the crimes said to be committed in districts other than a certain district should be issued by the Magistrates of those districts and not by the Magistrate of that District. (Para 16)

Anno: Cr. P. C., S. 177 N. 1, 4.

(c) Criminal P. C. (1898), S. 54 — Arrest without requisition from police of another District.

Offences under Ss. 420 and 471, Penal Code being cognizable the police of a certain place can arrest a person on receiving from the police of other districts requisition for arresting him showing the offence or other cause for which the arrest was to be made, if it appeared therefrom that the person might lawfully be arrested without a warrant by the Officer who issued the requisition. But in the absence of any information or requisition any arrest by the police without any warrant of the Magistrate concerned will be illegal. (Para 17)

Anno: Cr. P. C., S. 54 N. 11a.

(d) Criminal P. C. (1898), S. 167 — Magistrate having no jurisdiction — Remand for more than 15 days.

The Magistrate of Farrukhabad who has no jurisdiction to try the Cases of Madras and places other than Farrukhabad has no jurisdiction to remand the accused to custody for a period longer than 15 days in the whole. (Para 19)

Anno: Cr. P. C., S. 167 N. 7, 9.

(e) Criminal P. C. (1898), Ss. 170, 344 — Power under S. 344 when can be exercised — Jurisdiction of Magistrate.

Section 344 gives the power of remand to the Court and not to any Magistrate as such. This means that the power under this section can be exercised by a Court. This would be in the nature of things after the Court had taken cognizance of the offence. As cognizance of an offence can be taken by a Magistrate having jurisdiction, to inquire or try it, it is only such Magistrate who can act under S. 344. The remand under S. 344 can be given after the police had obtained sufficient evidence. It is to be given after the submission of police report in writing that the Court should take cognizance of the offence against the accused. Such report might not be a report contemplated under S. 173 which report is to be submitted after the completion of the investigation. The purpose of forwarding the accused to a Magistrate under S. 170 is not to obtain remand under S. 344, merely, but is for the Magistrate to take cognizance of the offence. The existence of sufficient evidence is a condition precedent for the police acting under section 170 and for making a request to the Magistrate to take cognizance of the offence. AIR 1924 Cal 614, Rel on. AIR 1949 Cal 143 and AIR 1931 All 617, referred. (Paras 20, 21, 24, 25, 27)

Anno: Cr. P. C., S. 170 N. 2; S. 344 N. 2.

(f) Criminal P. C. (1898), S. 179 — Offences under Ss. 420, 468, 471 and 474, Penal Code — Applicability of section.

Offences under Ss. 420, 468, 471 and 474, Penal Code would be complete the moment they are committed at any place. Such consequences at other places which would be the result of such conduct cannot be an ingredient of these offences and hence S. 179 cannot apply. AIR 1934 All 499, Rel. on. (Para 29)

Anno: Cr. P. C., S. 179 N. 3, 4.

(g) Criminal P. C. (1898), S. 182 — Offences under Ss. 420, 468, 471 and 474, Penal Code.

The offences under Ss. 420, 468, 471 and 474, Penal Code are not such which can be committed in more than one place and therefore S. 182, Criminal P. C. would not apply.

CASES REFERRED: Paras

(A) (V18) AIR 1931 All 617: 1931 All LJ 617: 32 Cri LJ 1045 25
(B) (V11) AIR 1924 Cal 614: 26 Cri LJ 68 26
(C) (V36) AIR 1949 Cal 143: 50 Cri LJ 231 26
(D) (V21) AIR 1934 All 499: 56 All 1047: 35 Cr LJ 982 (FB). 29

P. C. Chaturvedi, for Applicant; A. K. Kirty for the Government Advocate, for the State.

ORDER: These are 30 cases on the applications by Kali Charan under Ss. 491 and 498, Criminal P. C. The facts appearing from the affidavits and the papers sent by the Additional District Magistrate, Farrukhabad are as follows.

(2) Kali Charan applicant was arrested at Sikandrabad district, Bulandshahr on the 9th of January 1951 in connection with 3 warrants issued from the court of Shri R. K. Garg, Judicial Officer, Farrukhabad on the report of Shri Zahir Hussain, Inspector, C. I. D., I. B., Uttar Pradesh, Lucknow in three cases under Ss. 420, 468, 471, 474 and 120B, I. P. C. relating to crimes Nos. 90, 91 and 92 of police station Kotwali, Fatehgarh. The Sessions Judge, Bulandshahr released him on interim bail directing him to present himself at Fatehgarh within a week. The applicant complied with the order and Shri R. K. Garg, City Magistrate, Fatehgarh then ordered his release on the 18th of January in each case on bail on his executing a personal bond for Rs. 10,000/- with two sureties each in the like amount in spite of objections of the police that two dozen cases were under investigation against him. The result was that the applicant had to furnish surety worth Rs. 60,000/- to get his release in the three cases. He furnished the required security which after due verification was accepted by Shri R. K. Garg on the 29th of January 1951. On the 30th of January 1951 an application for cancellation of bail was presented to the same Magistrate. It was prayed that the accused be not released on bail. The Magistrate refused to cancel bail. This application is in file No. 5 against Behari Lal co-accused.

(3) The same day, i. e., on the 30th of January another application by Shri Zahir Hussain, Inspector, C. I. D. was presented to the same Magistrate. This application purported to be an application in case 'State v. Behari Lal alias Mukat Lal and others'

and after praying for remand of Behari Lal up to the 12th of February 1951 stated in paragraph 2:

"Kalicharan, Hemchandra and Ram Narain are also in jail under remand and they have also to be put up for identification. Therefore it is further requested that a remand upto 12-2-1951 may also be kindly sanctioned for these three accused." On this report Shri R. K. Garg granted remand. This started the series of unjustified remands which were granted on the 15th and the 26th of February, 14th and 28th of March, 11th and 26th of April, 10th and 18th of May and 5th and 18th of June 1951. It is noticeable that the remand on the 26th of April was granted even in the absence of any report from the Inspector of the C. I. D. who presumably was in charge of the investigation. The remand was granted on the report of the court-moharrir which was just submitted to the Magistrate by the Special Prosecuting Officer. The Court-moharrir's report simply stated that remand had not been received and it is hoped that 14 days' remand be given. It was very irregular of the Magistrate to grant remand on such a report.

(4) How Kali Charan happened to be in jail as mentioned in this application is a mystery. No application by the police is on either of the two records, viz., Case No. 1 against Kali Charan and Case No. 5 against Behari Lal in which file the remand orders against Kali Charan had been passed. It is alleged in the affidavit by the applicant that before he could be really released on the furnishing of the required security in the three cases of Farrukhabad district he was ordered to be detained in custody in connection with three other cases for similar offences which were crimes Nos. 173 of 1949 of district Mathura, crime No. 25 of 1950 of Madras and crime No. 20 of 1950 of Madras. No information about this seems to have been given to Shri R. K. Garg who granted bail, as the order-sheet dated the 2nd of February in file No. 1 against Kali Charan shows that he had been released on bail. These warrants have not been submitted to this Court. The three warrants for interim custody dated the 18th of January 1951 which are signed by V. D. Chaturvedi, another Judicial Officer of Fatehgarh have been received. Two of them purport to be from the court of the Collector, Mathura and the third from the Collector, Fatehgarh. These give no date of appearance. The file against Kali Charan or Behari Lal contains no papers making a request for the issue of these warrants. It is not clear why Shri Chaturvedi signed these warrants and how they happened to be put up before him when Shri Garg was dealing with the cases.

(5) On the 13th of February an application was filed in the court of the Additional Magistrate, Fatehgarh on behalf of Kali Charan saying that when the release warrant reached the jail the jail authorities refused to release him on the plea that he had been arrested in some other case or cases. This would be on the 27th of January 1951 as Shri R. K. Garg accepted the sureties that day and he must have issued the release warrants that day. This means that Kali Charan did not know of his arrest and detention in connection with three other cases and that the proceedings in those three cases were not taken in a straightforward and fair manner, an inference which finds support from the fact already mentioned that these detention warrants were not signed by Shri R. K. Garg but by Shri Chaturvedi who probably knew nothing about the case of Kali Charan and about his being ordered to be released on bail. It was further alleged in this application that Kali Charan's applications for bail in the other three cases were rejected by the Sessions Judge due to want of particulars. It was prayed that Kali Charan be supplied with full particulars of the case in which he was under arrest, then the Additional District Magistrate called for a report from the Prosecuting Inspector. The prosecuting Inspector submitted his report which after perusal was ordered to be filed by the Additional District Magistrate on the 15th of February. This report is interesting and may be quoted here. It is:

"This Kali Charan with some others has committed offences under Ss. 420, 468, 474 and 120B, I. P. C. in U. P., C. P., Bombay, Madras and other States. The complicity of this Kalicharan is believed in three cases of Farrukhabad, two of Mathura, 3 of Jhansi and 2 of Agra, two of Jabbalpur, 16 of Madras.

Kali Charan has been arrested in connection with all these cases. 24th February 1951 has been fixed for the identification of this accused, and three others who have been arrested in this connection. After the identification proceedings I will be in a position to say that in how many of these cases he would be dealt with.

These are inter-provincial cheats and the cases against them are being investigated by the C. I. D. of the different States.

The money involved in these cases is said to be about Rs. 40,00000/-. They are regular cheats and they practise cheating even in obtaining the release on bail. Behari Lal brother of this Kali Charan had gone underground in 1947 after obtaining his release on bail."

The report evaded the crucial information which was sought in the application filed on behalf of Kali Charan. It gave no particulars of the cases in which he had been arrested. It should have been said that he was arrested in connection with such and such crimes and under the orders of such and such officer or court. Instead of giving the particulars of the three cases in connection with which he was supposed to be in detention the report repeated all the general allegations which were urged before Shri R. K. Garg in connection with the submission for refusing bail. The most unfortunate part of this report is mis-statement of fact and that is that Kali Charan had been arrested in connection with all these cases. Upto the 14th of February, when this report was written, only six warrants had been issued against the accused. He was ordered to be released on bail in three of those cases. Therefore his detention was in connection with three cases whose precise details the Prosecuting Inspector should have given. It is wrong to say that Kali Charan had been arrested in connection with the 28 cases detailed in the first paragraph of the report. It is very unfortunate that the Additional District Magistrate and Shri R. K. Garg to whom this report with the order of the Additional District Magistrate seems to have been sent did not catch the inaccuracy of statements and that the latter was not reminded of his own order to release Kali Charan in three of these cases and his not issuing any orders for arrest or detention in connection with the other cases.

(6) Kali Charan, however, seems to have managed to secure particulars of the cases and to have successfully applied for bail. The Sessions Judge ordered his release on similar bail on the 4th of May 1951. He was, however, unable to file the necessary sureties for a further sum of Rs. 60,000/- and had to remain in jail.

(7) The applicant therefore has filed six miscellaneous cases Nos. 1352 to 1357 of 1951.

(8) On the 7th of May Kali Charan was again served with warrants in connection with 24 other cases. These cases relate to crimes of Madras, Coimbatore, Cochin, Travancore, Calicut, Banglore, Jessore, Mathura and Jhansi. These warrants have also been not received by this Court. Instead the

Court has got 24 warrants for interim custody. They purport to emanate from the courts of the Collectors of the districts to which the cases relate. They are addressed to the jailors of the same districts and not to the jailor of Farrukhabad jail. They mention the court of the District Magistrate of the district in which the accused was to be produced and by mistake mention the District Magistrate of Mathura in 4 warrants which related to the cases of Madras. They are all signed by Shri V. D. Chaturvedi, Judicial Officer. No date for appearance of the accused is fixed in any of these warrants. No application for the issue of the warrants of arrest or for the issue of interim warrants of custody is on the record. What I have said in connection with the issue of the other 3 warrants applies equally well to the issue of these warrants. This second attempt of the police in securing detention orders against the accused soon after he was ordered to be released by the Sessions Judge is a very strong corroboration of the suggestion for the accused which can be accepted without much difficulty that the conduct of the police was mala fide and was solely directed to keep the accused in jail in spite of orders of competent courts for his being released from custody. Such an inference is further strengthened from the fact that if all those cases were the result of a conspiracy for which a charge under section 120B was framed there would be only one case under section 120B and not 30 cases and that the other individual incidents could have been tried in the same case. There, therefore, did not exist any justification for the issue of 30 separate warrants concerning each incident.

(9) In each of these cases the Sessions Judge required Kali Charan, by his order dated the 16th of July, to furnish security in personal bond of Rs. 10,000/- with sureties each for Rs. 5,000/-. Thus he had to furnish a further security of a total amount of Rs. 2,40,000/-. He was unable to furnish the required security and therefore filed the other 24 cases on the 18th of July 1951.

(10) Of these thirty cases, three, viz., Criminal Misc. No. 1355 of 1951, Criminal Misc. No. 1356 and Criminal Misc. No. 1357 of 1951 did not relate to any illegal detention or to any excessive bail. In fact, these applications related to the three cases of the Farrukhabad district itself in which the accused had already secured order for his release on the furnishing of the necessary security. These cases were instituted merely to get, if necessary, such order of bail which may avail the applicant in all these 30 cases without in any way making it impossible for him to furnish bail and thus to create a situation in whcih the order for his release on bail be not effective. In view of the opinion I have formed about the validity of the arrest and detention of the application with the other 27 cases I need say no more about these three cases as no action is necessary in these cases.

(11) It is said in the affidavit filed in the first six cases that the case for the prosecution is that a bogus unregistered firm by the name Ramaswarup Govindram was brought into existence at Farrukhabad whose proprietors were alleged to be two fictitious persons Govind Ram and Gopal Das. The said firm sold many forged and bogus railway receipts with respect to pulses and other grains which were alleged to have been booked to the various firms in different parts of the country. The 27 cases mentioned above are alleged to be in connection with these 27 transactions. It is alleged that the applicant and other persons were responsible for these crimes. It was further alleged in the affidavit that on the prosecution allegations the case against the applicant would be a case of conspiracy and would be one case with regard to all the transactions. Therefore only one bail should have been demanded. A counter-affidavit was filed on behalf of the State in cases Nos. 1352 to 1354 of 1951. Therein it was mentioned as regards the case that the accused was a member of a gang of inter-provincial cheats who were accused in over two dozen cases of cheating, it is said, by forging railway receipts and cashing them through banks involving several lacs of rupees and that different cases were being investigated by different officers and could not be considered as one case.

(12) Similar allegations were made in the affidavit filed with the later 24 cases. The State did not file any counter-affidavit in them.

(13) Two points are urged for the applicant. One is that his arrest and detention in these 27 cases under the orders of the City Magistrate, Farrukhabad are illegal. The other is that if his detention is not illegal the bail required is of such an excessive amount that it is impossible for the applicant to furnish it and that therefore in order to make the bail order an effective one the amount of bail required should be appreciably reduced. I need not say anything on the second question as I agree with the first contention.

(14) It may be mentioned here that during the hearing it became necessary to get a knowledge of the facts relating to the arrest and remands in greater detail and with greater precision. The necessary papers were summoned from the Magistrate. The files sent here do not contain any papers which can be of great help in this connection and do not include the warrants issued for the arrest of the applicant in the 27 cases relating to crimes in districts other than Farrukhabad. The arguments continued several days and though someone connected with the investigation came to help the State counsel, neither a counter-affidavit giving full facts was filed by the State nor the State counsel seems to have been posted up with those facts. The result is that the Court does not know anything precise about the cases against the applicant, about the places where reports against the applicant were lodged, the action taken by the police or the Magistrate in the various places and the communications which the respective police or the Magistrates of those places sent to the police or the Magistrate at Farrukhabad. The importance of such information would be apparent from what will follow. I cannot help remarking that this omission on the part of the State is not a matter for credit to the prosecution specially in a case concerning the deprivation of a person of personal liberty.

(15) The first contention for the applicant is that the applicant was not furnished with the grounds of his arrest and that the non-furnishing of the grounds amounted to contravention of sub-s. (1) of Article 22 of the Constitution. On this point I am inclined to the view that the mention in the warrant about the accused being wanted in cases for certain offences is sufficient compliance with the requirements of sub-section (1) of Art. 22 of the Constitution. The ground for arrest is simply an order of the court which is passed in a case relating to a certain accusation against the person arrested. I, therefore, do not see any force in this contention.

(16) The other contention is that the warrants for arrest of the accused in connection with the crimes said to be committed in districts other than Farrukhabad should have been issued by the Magistrates of those districts and could not have been issued by the City Magistrate at Farrukhabad. The warrants actually issued against the applicant are not before the Court, but the allegation to this effect in the affidavit of the applicant has not been controverted in the counter-affidavits filed in the

three cases or by any counter-affidavit in the other 24 cases. This allegation should therefore be accepted that the warrants were issued by the City Magistrate, Farrukhabad. Obviously the City Magistrate, Farrukhabad had no jurisdiction to issue warrants for the arrest of a person wanted in cases pending before Magistrates in other districts and in connection with crimes committed in those districts.

(17) Offences under sections 420 and 471, I. P. C. being cognizable the police of Farrukhabad could arrest the applicant on receiving from the police of the various districts requisition for arresting him showing the offence or other cause for which the arrest was to be made, if it appeared therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition. There is nothing on the record to show that any such requisition was received by the police. There is also not on the record any such matter from which it can be inferred that the Farrukhabad police knew that the applicant had been concerned in any cognizable offence committed in other district or that there was a reasonable complaint or credible information or reasonable suspicion against him of having been so concerned. In the absence of any such information any arrest by the police of Farrukhabad without any warrant of the Magistrate concerned will also be illegal. It follows therefore that even if it be assumed that the arrest of the applicant was not under any warrant signed by the City Magistrate, Farrukhabad in connection with crimes committed in districts other than Farrukhabad but was by the police of Farrukhabad, the arrest and the consequent detention would not be legal.

(18) Even if it be assumed that the arrest in connection with such cases was not illegal, it is argued, the detention of the applicant after the 15 days of his arrest, i.e., after the 2nd of February 1951 and again after the 22nd of May 1951, would be illegal as a remand for further detention had not been ordered by the Magistrate having jurisdiction in these cases but by the City Magistrate of Farrukhabad who certainly had no jurisdiction to try cases of districts other than Farrukhabad.

(19) The various sections justifying the detention of a person arrested are Sections 61, 167 and 344, Criminal P. C. Section 61 simply provides for detention in the custody of a police officer for a period not longer than 24 hours and directs that the detention should not exceed this period in the absence of a special order of a Magistrate under section 167, Criminal P. C. Under section 167, Criminal P. C. the Magistrate to whom the accused is forwarded can authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days in the whole irrespective of the fact whether that Magistrate has or has not jurisdiction to try the case. If such Magistrate has no jurisdiction and considers further detention unnecessary he is to forward the accused to the Magistrate having jurisdiction. It is only under this section that a Magistrate having no jurisdiction to try a case can authorise detention. The City Magistrate, Farrukhabad who had no jurisdiction to try the cases of Madras and places other than Farrukhabad had therefore no jurisdiction to remand the accused to custody for a period longer than 15 days in the whole, and that therefore the remand to custody of the accused by the City Magistrate, Farrukhabad for a period subsequent to the 2nd February and again subsequent to the 7th of May 1951 was illegal as the last batch of 24 warrants was executed on the 7th of May.

(20) Section 344, Criminal P. C. is the other section which authorises a Magistrate to remand the accused if in custody. This section is:

"(1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may, if it thinks fit by order in writing stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation: If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand."

It is to be noted that this section gives the power of remand to the Court and not to any Magistrate as such. This means that the power under this section can be exercised by a court. This would be in the nature of things after the court had taken cognizance of the offence. The same should appear from the provision that primarily this section authorises a court to postpone commencement of or adjourn any inquiry or trial in certain circumstances and as a corollary when the court does any of these things, it was given the power to remand the accused by warrant if in custody. The stage of the inquiry or trial will also arrive after the court had taken cognizance of the offence. It should appear, therefore, that in view of what is said in sub-section (1) of section 344, Criminal P. C. the power of remanding the accused to custody under this section is to be exercised by a court after it had taken cognizance of the offence.

(21) The explanation to S. 344, Criminal P. C., mentions that a remand, when there be already sufficient evidence against the accused and there would be chances of securing further evidence, would be on a reasonable cause. It is not said in the explanation that during the course of mere police investigation prior to its submitting a report for the purpose of the court taking cognizance against the accused remand can be ordered under the provisions of S. 344, Criminal P. C., of course the conduct of the police in trying to secure further evidence would be a part of the investigation. There is nothing in the Code to suggest that the police cannot investigate an offence after it has submitted a report for the Magistrate to take cognizance of an offence against the accused. It follows, therefore, that submission of such a report and the continuation of the investigation are not inconsistent and that both the steps can be taken provided the court does not pass any final order in the case till the investigation has been completed. If a Magistrate can grant remand under S. 344, Criminal P. C., during the course of police investigation and in the absence of a report by the police for taking cognizance of the offence, I am of opinion that the strict condition in S. 167, Criminal P. C., that the Magistrate to whom the accused is forwarded by the police can remand him to custody for a period not longer than 15 days in the whole, would be nullified. The whole scheme of these sections relating to remands seems to be that for the purpose of investigation the remand should ordinarily be for a period not longer than 15 days and that when remands for a longer period are found to be necessary by the police it should approach the Magistrate having jurisdiction over the case and that that Magistrate on receipt of such report should decide judi-

cially whether further remand be given or not. The moment he decides judicially, the Magistrate may be said to act as a court and may also be said to have taken cognizance of the offence. He can therefore act under S. 344, Criminal P. C. As cognizance of an offence can be taken by a Magistrate having jurisdiction, to inquire or try it, it is only such Magistrate who can act under S. 344, Criminal P. C. In this view of the matter also the City Magistrate, Farrukhabad could not have granted the remand for the custody of the accused under S. 344, Criminal P. C., as he had no jurisdiction over these cases.

(22) It is not necessary that cognizance of an offence be taken on a police report contemplated by S. 173, Criminal P. C., after the completion of investigation.

(23) Sections 169 and 170, Criminal P. C., provide for the steps to be taken by the police officer with respect to an accused in custody. The expressions used in these sections are different from the expressions used in S. 173 of the Code which provides for what the investigating officer is to do after the completion of the investigation. It follows, therefore, that those two sections do not necessarily refer to the stage after the completion of the investigation though it may be that in some cases the contingencies referred to in this section may synchronise with completion of the investigation. These two sections will not come into play if the accused be not in police custody and had been either released on bail or had been confined in jail. S. 169 provides that if upon investigation it appears to the investigating officer that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate such officer shall if such person is in custody release him on his executing a bond with or without sureties, to appear if and when so required before a Magistrate empowered to take cognizance of the offence on police report and try or commit him for trial. This bond is taken, I suppose, for the contingency that the Magistrate may not accept such report and may like to proceed against the accused on the basis of the evidence collected by the police but considered insufficient by it. If the accused be not in police custody but be in jail, the police will have to request the Magistrate to order his release.

(24) Section 170 of the Code is:

"(1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or commit him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond, to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) ....

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report."

The accused is to be forwarded to a Magistrate empowered to take cognizance of the offence upon a police report when there be sufficient evidence or reasonable ground about his having committed the offence. The police officer is also required under sub-s. (2) to send weapons or other articles to the Magistrate and to bind over the witnesses for their appearance before the Magistrate as they be directed in the bond and to give evidence against the accused. The relevance of such a provision is not apparent from the present section but becomes obvious when what used to be sub-s. (4) of this section till 1926 be considered. The repealed sub-section was:

"The day fixed under this section shall be the day whereon the accused person is to appear, if security for his appearance has been taken, or the day on which he may be expected to arrive at the Court of the Magistrate, if he is to be forwarded in custody."

This should mean that the provision of S. 170 originally contemplated commencement of the proceedings against the accused when he appeared before the Magistrate either in custody or on bail. In view of the provisions of S. 170, Crimianl P. C., the accused was to be before the Magistrate and the witnesses were to be there. The only object contemplated by the section could be that the Magistrate was to start the case against the accused on the police report. Though not expressly provided for in S. 170, Criminal P. C., it can be presumed in the natural course of things that the investigating agency which had already obtained sufficient evidence would ultimately submit a charge sheet against the accused. The possibility of subsequent release without charge sheet could not be contemplated in the presence of sufficient evidence with the police. It may also be noted that S. 190, sub-s. (1) Cl. (b) as existing upto 1928 authorised the Magistrate concerned to take cognizance of any offence upon police report of such facts and did not restrict his power to take cognizance to the police report in writing. That may be a reason why no mention of the submission of a report is made in S. 170. The Magistrate could take cognizance on receiving a report by the police to the effect that such and such accused is being forwarded as sufficient evidence has been obtained against him about his committing a certain offence and that witnesses have been bound over to appear before the Magistrate on such and such date. I am, therefore, of opinion that the forwarding of the accused to the Magistrate under S. 170 of the Code of Criminal Procedure was for the purpose of the Magistrate taking cognizance against the accused and that it was in such a contingency that the Magistrate was to grant further remand under S. 344, Criminal P. C., in order that further evidence might be secured against the accused. If the period of 15 days allowed to the police for investigation under S. 167, Criminal P. C., did not result in its obtaining sufficient evidence against the accused it would not justify the remand of the accused to custody on the basis of the provisions of section 170 or section 344, Cr. P. C. The accus-

ed must be released from custody. At best he may be released on obtaining a bond from him for appearance whenever required, though a bond without any definite date for appearance would be valueless. I am, therefore, of opinion that remand under S. 344, Criminal P. C., can be given by a Magistrate having jurisdiction over the case and after the police had obtained sufficient evidence. I would also add that it is to be given after the submission of police report in writing that the court should take cognizance of the offence against the accused. Such report might not be a report contemplated under S. 173, Criminal P. C., which report is to be submitted after the completion of the investigation.

(25) I have been referred to — 'King Emperor v. Sooba', AIR 1931 All 617 (A). In this case the contention that a police investigation could in no case involve the detention of the accused in custody for more than fifteen days, was not accepted. It was also not accepted that a Magistrate could not take cognizance of the offence under Cl. (b) of S. 190 (1) in order to remand the accused to custody under S. 344, Criminal P. C., until a report prescribed under S. 173, Criminal P. C., had been forwarded. It was observed at page 618:

"This question of procedure has been argued at length before me, and it must be admitted that the law, as laid down in the Code of Criminal Procedure, is not altogether free from ambiguity." It was further observed at page 619:

"If the investigation is not complete and the report is not ready, but the accused may be forwarded on reasonable ground of suspicion, for what purpose is he forwarded? Clearly I think for the purpose set forth in S. 344, that the court may remand the accused to custody if it considers that there are reasonable grounds for doing so."

What I have said above is not in conflict with what is laid down in this case, except that I am of opinion that the purpose of forwarding the accused to a Magistrate under S. 170, Criminal P. C., is not to obtain remand under S. 344, Criminal P. C., merely, but is for the Magistrate to take cognizance of the offence. He may or may not commence inquiry or trial till investigation be completed. There can be no unreasonableness in the Magistrate's taking cognizance of the offence after sufficient evidence has been obtained. Reasonableness of taking cognizance in the presence of reasonable grounds about the accused having committed the offence may be not so apparent. To my mind there can be such reasonable grounds for suspicion only when there is some good evidence against the accused. That evidence may not be considered sufficient by the police to bring home the guilt to the accused. But the police can never be the final judge of the sufficiency of the evidence obtained during the investigation. Sufficiency of evidence to bring home the guilt to the accused would be determined by the court. I, therefore, see no unreasonableness in the Magistrate's taking cognizance of the offence even in cases in which sufficient evidence had not been obtained by the police if such evidence had been obtained which furnished reasonable ground for considering that the accused had committed the offence or reasonable ground for prosecuting the accused for the commission of the offence. We are familiar with such provisions in the Code which justify a Magistrate framing a charge on the basis of prima facie evidence. Further, if the purpose of S. 170, Criminal P. C., was merely to send the accused for obtaining remand there could not have been any point in taking bonds from witnesses to appear before the Magistrate on a certain date as provided in sub-s. (2) of S. 170, Criminal P. C.

(26) The view I have expressed above finds support from what is expressed in — 'Bholanath Das v. Emperor', AIR 1924 Cal 614 (B). It may be mentioned that doubt about the correctness of this view was expressed in the Superintendent and Remembrancer of Legal Affairs, Government of West Bengal v. Bidhindra Kumar Roy', AIR 1949 Cal 143 (C).

(27) It may further be mentioned here that in none of the cases for remand it had been mentioned that the police was in possession of sufficient evidence against the accused. The existence of sufficient evidence is a condition precedent for the police acting under S. 170, Criminal P. C., and for making a request to the Magistrate to take cognizance of the offence. It is said in paragraph 10 of the affidavit in Miscellaneous Case No. 1698 of 1951 that so far 76 witnesses have been produced for the purpose of identifying the applicant in connection with the various offences, that 30 of them were from the Farrukhabad district and that not a single witness could identify the applicant. Similar assertion was made in para. 10 of the affidavit filed in Criminal Miscellaneous case No. 1352 of 1951 with the difference that up to that time 64 witnesses had been produced. The counter-affidavit filed in that case did not question this statement. In fact the learned counsel appearing for the State did not question the accuracy of the fact that no witness could identify the applicant. It appears from the statements of the learned counsel for the State that the case against the applicant would depend on the evidence that signatures on certain documents were of Kali Charan. So far the prosecution is not in possession of the expert's opinion on the point. It would appear therefore that there is no evidence against the applicant so far in possession of the investigating officer and that therefore the various remands given by Shri R. K. Garg who could not have applied his mind to the facts of the case as the case diaries were not submitted to him and the accused was not summoned to state what objection he had to granting further remands and the application requesting for remand just mentioned that further dates for identification had been fixed without intimating what the result of the previous identification proceedings had been, were illegal. It follows, therefore, that even if it be held that Shri R. K. Garg, Magistrate, Farrukhabad could have granted remands under S. 344, Criminal P. C., in connection with these cases relating to places other than Farrukhabad he had no material before him on which the remand orders can be said to have been given after due deliberation and that the remand orders in the absence of any evidence against the accused were absolutely unjustified.

(28) It is conceded by the learned counsel for the State that the various offences under investigation against Kali Charan could be tried only at the places where those offences were committed and that those offences could be tried at Farrukhabad in view of these offences being along with an offence under S. 120B, I. P. C., as some acts in furtherance of the conspiracy were done at Farrukhabad. It may be so. But, as already indicated, the offence of conspiracy cannot give rise to 30 cases of conspiracy. In that view of the matter there can be only one case against Kali Charan. Already three cases have been registered against him at Farrukhabad and he has been ordered to be released on bail in these three cases. No more cases could have been registered against him with respect to the same conspiracy and no more warrants of arrest or detention could have been legally issued against him.

(29) It was further argued for the State that the court at Farrukhabad could have jurisdiction over these cases of other places in view of Ss. 179 and 182, Criminal P. C. The various offences under investigation against the accused would be complete the moment they were committed at any place. Such consequences at other places which could be the result of such conduct cannot be an ingredient of those offences and therefore S. 179, Criminal P. C., cannot apply in view of — 'Kashi Ram v. Emperor', AIR 1934 All 499 (D). The offences under Ss. 420, 468, 471 and 474, I. P. C., are not such which can be committed in more than one place and therefore S. 182, Criminal P. C., would not apply.

(30) I am, therefore, of opinion that the detention of the applicant in connection with the 27 crimes alleged to have been committed in places other than Farrukhabad is illegal. I, therefore, order that he be released from custody which is in connection with these cases. I make it clear that his release from custody in connection with the three cases of Farrukhabad district will be in pursuance of the bail already furnished by him.

(31) A copy of this judgment be sent to the Chief Secretary to the Government for information and such action as be considered necessary.

D.H.Z. Order accordingly.

(S) AIR 1955 ALLAHABAD 468 (V 42 C 134 Aug.)

RAGHUBAR DAYAL AND M. L. CHATURVEDI JJ. (12-4-1955)

Ram Kirpal Chhakkar and another, Petitioners v. Union of India, through the Ministry of Defence and another, Opposite Parties.

Civil Misc. Writ Nos. 1005, 1006 and 1008 of 1953.

†(a) **Constitution of India, Arts. 226 and 300 — Territorial jurisdiction of High Courts — Writ against Union of India.**

If a Tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within those territorial limits so as to affect the rights of parties therein, it cannot be said that such Tribunal or authority must be regarded as 'functioning' within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Art. 226. AIR 1953 SC 210, Foll. (Para 6)

It is true that under Art. 300 of the Constitution the Government of India may be sued in the name of the Union of India, but under Art. 226, which is the specific Article dealing with the matter, the writs can be issued to the Government, and, even supposing that the respondent described in the petition has been rightly described as the Union of India, the real party is the Government of the Union to whom the writ is to be issued. The name may be of the Union, but the party, for all practical purposes, is the Government and there cannot be much doubt that the Government of the Union is located at the capital of the Union at New Delhi. The name 'Union of India' has been applied to a combination of the territories which together comprise the Union, and the Union of India, as such, cannot be said to be located at any place other than where its Government is located for the purposes of issuing or serving upon it any writ to be issued under Art. 226. (Para 13)

But supposing that the writ should be in the name of the Union under Art. 226, it has to be taken to be in substance a writ against the Government or a member of the Government. The distinction between the State and the Government is that the State, to use the term employed in political science, is the body politic and the Government is merely the aggregate of the instrumentalities employed by such body in performing its functions. (Para 14)

The mere fact that the Constitution of India does not itself lay down where the seat of the Government of the Union of India will be does not mean that the Government of India has a seat throughout the territory of India and not at any particular place. (Para 15)

The word 'Government' has a wider connotation as well of including all the departments by which a country is governed, namely, the executive, the legislative and the judicial. But as far as Art. 226 is concerned the Government there refers not to the legislative or judicial departments but merely to the executive department. (Para 15)

One important circumstance is that the Courts do not issue writs and injunctions which they have no power to enforce. If a writ or injunction is disobeyed, the only way to enforce it is to take proceedings against the guilty party for disobedience of the order. If that party is outside the jurisdiction of the Court, then the Court has no power to enforce obedience of the injunction or writ issued by the Court, and Courts, therefore, do not issue writs where they have no power to enforce their obedience. If a writ is issued to some Officer at New Delhi and he ignores it, the Allahabad High Court cannot proceed in contempt against such Officer, as he is outside the jurisdiction of the Court. (Para 16)

Where, therefore, the order that was sought to be quashed purported to have been issued from the Government of India, Ministry of Defence, New Delhi, and was signed by an Assistant Secretary to the Government of India, and the directions prayed for were commands to be issued to the Union of India besides the prayer to quash the order and the respondent to the petition was the Union of India through the Ministry of Defence, Government of India, New Delhi,

Held that the High Court could not issue any writ or direction to the Government or to the Union of India. AIR 1953 All 477 (FB), held impliedly overruled by AIR 1953 SC 210. (Paras 3, 17)

Anno: AIR Com., Const. of India, Art. 226 N. 26; N. 41 Pts. 2, 6 and 7.

(b) Constitution of India, Art. 77 (3) — Government in Sub-Article means executive. (Para 15)

Anno: AIR Com., Const. of India, Art. 77 N. 2.

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 477: ILR (1953) 2 All 289 (FB) 4, 11, 12

(B) (V40) AIR 1953 SC 210: 1953 SCR 1144 (SC) 6
(C) (V41) AIR 1954 SC 207: 1954 SCR 738 (SC) 9
(D) (V41) AIR 1954 All 726: 1954 All LJ 447 10
(E) (V41) AIR 1954 All 522: 1954 All LJ 264 10
(F) ('54) Misc. No. 170 of 1954, D/- 6-9-1954 (Bom) 11
(G) (V41) AIR 1954 All 433: 1954 All LJ 114 11

S. S. Dhawan, for Appellants; Standing Counsel, for Opposite Parties.

M. L. CHATURVEDI J.:

These four writ petitions do not indicate the provision of law under which they have been made, but the cases have been argued on the assumption that these petitions have been made under Art. 226 of the Constitution and they will be dealt with as such.

(2) The different petitioners in all these petitions were on the roll of Civilian Staff of the Defence Ministry, Government of India, and were serving under the Central Ordnance Depot., Agra. They were previously discharged from service, but were afterwards either reinstated or re-employed, and in June 1953 they were working under the Ordnance Depot. There appears to have been a difference of opinion as regards the status and emoluments of the petitioners between the Ministry of Defence, Government of India, and the Audit Department. Ultimately the Union of India, by their letter dated 26-6-1953, communicated their decision to the effect that some of the personnel would be regarded as "reinstated", some as "re-employed" and certain others were kept under consideration.

The petitioners had been treated as having been re-employed. The petitioners sent representations objecting to their being treated as re-employed personnel, but the representations proved to be of no avail. The present petitions were filed on 2-12-1953 and the main prayers contained in them are that this Court may issue writs or orders quashing the order of the Union of India dated 26-6-1953 in so far as it relates to the petitioners, and for the issue of other writs or directions commanding the Union of India to recall its decision treating the petitioners as 're-employed' persons and to treat them henceforth as 'reinstated' persons. Respondent 1 to the petitions is the Union of India through the Ministry of Defence, Government of India, New Delhi, and respondent 2 is the Commandant, C. O. D., Agra.

(3) It is not necessary to mention the facts of the cases in any detail, because the learned Standing Counsel took a preliminary objection to the hearing of these petitions, and, after hearing learned counsel for both the parties at length, we have come to the conclusion that the preliminary objection has to be given effect to. The preliminary objection is to the effect that the Government of the Union of India is located at Delhi, outside the jurisdiction of this Court, and this Court cannot issue any writ or direction to the Government or to the Union of India, as prayed for in these petitions. The order, that is sought to be quashed, purports to have been issued from the Government of India, Ministry of Defence, New Delhi, and is signed by an Assistant Secretary to the Government of India, and the directions prayed for are commands to be issued to the Union of India, besides the prayer to quash the order. It is not the case that the order is void.

(4) The learned counsel for the petitioners tried to meet this objection by saying that the Union of India is different from the Government of the Union, and it is located throughout the territory comprised within the Union, that is, the territory composed of the different States that form part of the Union. It is argued that, because of the provisions of Art. 300 of the Constitution, the Government of the Union is to be sued in the name of the Union and a writ also, therefore, has to be issued to the Union and not to any member of the Government of the Union. It is said that there are only two criteria for determining the location of an entity like this and they are the extent of its territory and the area over which it functions. In the alternative it is urged that even the Government of the Union is located everywhere in India, and the position here is different from that in America or Australia because, under the Constitutions of those countries, the seat of the Government of the United States of America is in Columbia and that of the Commonwealth of Australia in New Southwales.

The Indian Constitution has not located the seat of the Government at any one place in the territory of India and it must, therefore, be taken that the seat of the Government of the Indian Union is located at every place, which is within the territory comprised in the Indian Union. The learned counsel for the petitioners also referred to a Full Bench decision of this Court in — 'Maqbulunnissa v. Union of India', AIR 1953 All 477 (A). This case will have to be considered in detail hereafter but the decision of the Full Bench in short is to the effect that the Union of India can be said to be within the territorial jurisdiction of the Allahabad High Court, as it has been given authority throughout the length and breadth of the country. If this case could still be said to be good law, we would have been forced to refer the question for decision by a larger Bench, but the question we propose to consider first is whether it has been expressly or impliedly overruled by the subsequent decisions of the Supreme Court.

(5) The Full Bench case, mentioned above, arose out of an application filed under Art. 226 of the Constitution praying for the issue of a writ in the nature of mandamus directing the Union of India and another to forbear from giving effect to the order asking the petitioners to leave India or from getting that order executed by the subordinate officers. A preliminary objection was raised that this Court had no power or authority to issue a writ or direction to the Union Government as that Government was not situate within the jurisdiction of this Court. The Full Bench overruled the contention on the grounds that the Indian Constitution is of a quasi-federal character, and the Union Legislature has been given powers with regard to subjects enumerated in lists 1 and 3 throughout the territory of India, that the Government of the Union has executive powers co-extensive with that of the Legislature, so both the Legislature of the

Union and the Government of the Union function throughout the territory of India, that the jurisdiction of this Court to intervene under Art. 226 does not depend upon where the headquarters or the capital of the Government is situate but upon the fact of the effect of the act done by the Government and that (in the words of the Full Bench),

> "obviously, therefore, the reasonable interpretation to place upon Art. 226 of the Constitution is to make the test of residence of the applicants and the effect of the order on the applicants the supreme test in deciding whether the Court has or has no jurisdiction in dealing with the writ application".

The learned Judges also mentioned that the use of the words 'any Government' in Art. 226 of the Constitution, indicated that more than one Government could function within the same territory, and also that the other interpretation would mean that all writ petitions, seeking orders to be issued to the Government of India, would have to be filed only in one High Court, namely, the High Court of East Punjab.

(6) We now proceed to consider what view the Supreme Court has taken with respect to the above grounds, which are the basis of the decision of the Full Bench of this Court. In the case of — 'Election Commission India v. Saka Venkata Rao', AIR 1953 SC 210 (B), the relevant facts are that the respondent Saka Venkata Rao was declared elected to the Madras Legislative Assembly and he took his seat as a member of the Assembly on 27-6-1952. Before the elections were held, Venkata Rao had applied to the Election Commission for exemption from the disqualification that attached to him by virtue of the provisions of S. 7 (b), Representation of the People Act, 1951. The Commissioner rejected his application for exemption and communicated their order to the respondent by means of a letter dated 13-5-1952, but it was not received by him. A communication to the same effect was also sent to the Speaker of the Assembly and he on 3-7-1952 read out this communication. The Speaker then referred the question to the Governor of Madras, who forwarded the case to the Election Commission for its opinion.

Venkata Rao challenged the competency of the reference, and the Chief Election Commissioner went down to Madras and heard Venkata Rao's counsel and the Advocate-General of Madras on 21-8-1952. On the same date the respondent filed an application in the High Court of Madras under Art. 226 of the Constitution with a prayer that a writ of mandamus or prohibition be issued directing the Election Commission to forbear from proceeding with the reference made by the Governor of Madras. On receipt of the rule nisi the Commission objected to the jurisdiction of the Court to issue the writs prayed for. The Madras High Court overruled the preliminary objection and issued a writ prohibiting the Commission from proceeding with the enquiry in regard to the question referred to it by the Governor. An appeal against this order was filed before the Supreme Court by the Election Commission and their Lordships had to consider whether the High Court at Madras had any jurisdiction to issue a writ to the Election Commission. In the course of their judgment they laid down,

> "But wide as were the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be 'within those territories', which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories....."
>
> "These writs were thus specifically directed to the persons or authorities against whom redress was sought and were made returnable in the Court issuing them and, in case of disobedience, were enforceable by attachment for contempt. These characteristics of the special form of remedy rendered it necessary for its effective use that the persons or authorities to whom the Court was asked to issue these writs should be within the limits of its territorial jurisdiction. We are unable to agree with the learned Judge below that if a Tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within those territorial limits so as to affect the rights of parties therein, such Tribunal or authority must be regarded as 'functioning' within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Art. 226."

The last sentence clearly overrules the main argument of the Full Bench. The argument of the learned counsel for Venkata Rao, that the question referred for decision to the Election Tribunal related to Venkata Rao's right to sit and vote in the Legislative Assembly at Madras, and the parties to the dispute also resided in the State of Madras, was overruled on the ground that the cause of action which attracted jurisdiction in suits was based on statutory enactment and could not apply to writs issuable under Art. 226 which made no reference to any cause of action, or where it arose but insisted on the presence of person or authority within the territory. The other argument that it could not have been contemplated that an inhabitant of the State of Madras, feeling aggreived by a threatened interference with the exercise of his rights in that State by an authority located in Delhi, should seek his remedy under Art. 226 in the Punjab High Court, was overruled on the ground that an argument of inconvenience like this could not override the language of the Article, which was reasonably plain and it was idle to speculate as to what was or was not contemplated. In the end their Lordships allowed the appeal and dismissed the petition filed under Art. 226 of the Constitution.

(7) A resume of the grounds on which the above decision was based would go to show that all the arguments on which the Full Bench decision of this Court was based were repelled by the Supreme Court, excepting perhaps the small point about the use of the words 'any Government' in Art. 226. It is possible to contemplate more than one Government being located within the jurisdiction of the same High Court, and as far as the Punjab High Court is concerned, it is obvious that the Govern-

ments of the State of Punjab and of the Union of India are both located within jurisdiction of that Court. The expression obviously could not mean "every Government" in India. Full Bench did not attach much importance to the use of those words, and the argument based on their use cannot have any effect in view of the decision of the Supreme Court.

(8) For the reasons given above, we have come to the conclusion that the Full Bench case of the Allahabad High Court, mentioned above, has been impliedly overruled by the later Supreme Court decision.

(9) To the same effect is another decision of the Supreme Court reported in — 'K. S. Rashid & Son v. Income-tax Investigation Commission', AIR 1954 SC 207 (C). In this case it was held that the Punjab High Court had jurisdiction to issue a writ to the Income-tax Investigation Commission in Delhi, though the assessees were residents of U. P. and the original assessments against them were made by the Income-tax Authorities in this State.

(10) We respectfully agree with the Division Bench decision of this Court in the case of — 'Kesar Sugar Works Ltd. v. Union of India', AIR 1954 All 726 (D), where it was held that this Court had no jurisdiction to quash an order issued by the Ministry of Food of the Union Government. To the same effect is the decision of a single Judge in — 'Tej Bhan Madan v. Government of India', AIR 1954 All 522 (E), where the learned Judge held that the High Court of Allahabad had no jurisdiction to entertain a petition praying for the issue of a writ of mandamus where the order challenged was an order passed at New Delhi by the Deputy Secretary to Government of India.

(11) A similar point came up for consideration before a learned single Judge of the High Court at Bombay in — 'P. N. Films Ltd. v. Union of India', Misc. No. 170 of 1954, D/- 6-9-1954 (Bom) (F). The learned Judge took a view similar to the one that this Court took after the decision of the Supreme Court in the case of the Election Commission mentioned above. But in the course of the judgment the learned Judge referred to the Full Bench decision of this Court in the case of Maqbulunnissa (A), and then considered it to be a matter of some comment that in a subsequent Division Bench case of this Court, a contrary view was taken to that taken by the Full Bench without referring to the Full Bench case. The Division Bench case referred to is the case of — 'Hafiz Mohammad Yusuf v. Custodian General Evacuee Properties, New Delhi', AIR 1954 All 433 (G).

In this case the petitioner had prayed for the issue of a writ of certiorari to quash certain orders passed by the Assistant Custodian, the Additional Custodian and the Custodian General and, on a preliminary objection being raised to the maintainability of the petition, it was held by this Court that the orders of the Assistant Custodian and the Additional Custodian merged in that of the Custodian General, and as the office of the Custodian General was located outside the State of U. P., this Court could not issue any writ to the Custodian General. No relief in that case was sought against the Union of India or against the Government of the Union of India. A relief was sought against an order passed by the Custodian General whose office, like that of the Election Commission, was located in Delhi.

The case, therefore, could not be distinguished from the Supreme Court case of the Election Commission, mentioned above. The decision of the Full Bench was on a very different question, that is, whether the Union Government is subject to jurisdiction of this Court or not. The clear distinction, mentioned above, was perhaps not brought to the notice of the learned Judge, otherwise he might not have considered it necessary to comment upon the omission to mention the Full Bench case in the subsequent Division Bench case.

(12) After the two decisions of the Supreme Court, the learned counsel for the petitioners dropped the line of argument on which the Full Bench of this Court had based its decision and his main contention was, as mentioned above, that the Union of India and the Government of the Union of India must be taken to be located everywhere in the territory of India. In the Full Bench case of Maqbulunnissa (A)', the learned Judges have mentioned at more than one place that the mere fact that the Government of the Union of India is situate in Delhi and that the capital of India is at Delhi does not mean that the Government of the Union is not subject to the jurisdiction of this Court. At one place they say,

> "We do not think that it can be said that the Union Government functions only in Delhi merely because its capital is situate at Delhi."

At another place,

> "To hold that the jurisdiction of this Court does not extend to the Union Government as it has its capital at Delhi and must be deemed to have its domicile at Delhi would be to place the Union Government not only with respect to the rights conceded in Part III but for any other purpose, also, beyond the jurisdiction of all State High Courts except the Punjab High Court."

And at a third place,

> "In our opinion, the jurisdiction of this Court to intervene under Art. 226 depends not upon where the Headquarters or the capital of the Government is situate but upon the fact of the effect of the act done by Government."

The above quotations would show that the Full Bench case does not, in any way, help the petitioners in their contention that the Government of the Union is actually located at any place other than Delhi. On the contrary, it would appear that in the opinion of the Full Bench the Government of the Union was located at the capital at Delhi.

(13) The learned counsel for the petitioners drew our attention to a passage at p. 48 of Cooley on Constitutional law, Edn. 4, Chap. IV, Para. 1, where the learned author said that the natural classification of governmental powers was divided into legislative, executive and judicial; and also to a passage at p. 1616, Art. 1058, Vol. III, of Willoughby on the Constitution of the United States, Edn. 2, where the legislative, executive and judicial departments are all spoken of as departments of the Government. He also referred to Art. 1 of the Constitution wherein it is laid down that India shall be a Union of States and the territory of India shall comprise the territories of the States and those specified in

Part D of Sch. 1, and such other territories as may be acquired.

The argument is that as the Union comprises the States, therefore, it is located in all those States, and as under Art. 300 of the Constitution the Government of the Union is to be sued in the name of the Union, the respondent is the Union and not the Government. In the alternative it is urged that if the real party is the Government of the Union, the Government also is situated throughout the territory of the Union. It is true that under Art. 300 of the Constitution the Government of India may be sued in the name of the Union of India, but Art. 226, which is the specific Article dealing with the matter, says, in so many words, that writs, directions or orders may be issued,

> to any person or authority, including in appropriate cases any Government....."

The writs, therefore, can be issued to the Government, and, even supposing that the respondent described in the petition has been rightly described as the Union of India, the real party is the Government of the Union to whom the writ is to be issued. The name may be of the Union, but the party, for all practical purposes, is the Government and we think that there cannot be much doubt that the Government of the Union is located at the capital of the Union at New Delhi. The order dated 26-6-1953, sought to be quashed, is signed by an Assistant Secretary to the Government of India in the Ministry of Defence, New Delhi, and the commands sought to be issued can only be effective if they are served on the appropriate officer of the Government of the Union.

In form, the command may be issued to the Union, but, in substance, it has to be issued to the Government or to an Officer of the Government. The important question, therefore, is to see where the Government of the Union is located. The name 'Union of India' has been applied to a combination of the territories which together comprise the Union, and the Union of India, as such, cannot be said to be located at any place other than where its Government is located for the purposes of issuing or serving upon it any writ to be issued under Art. 226.

(14) The learned counsel further contended that no writ can be issued to the President, though all executive action has to be taken in the name of the President, and from this he inferred that the writ cannot be issued to any Minister of the Government or to any of his Secretaries, but it can only be issued to the Union. We are not inclined to hold that no writ can be issued to the Ministers or the Secretaries of the Government. But supposing that the writ should be in the name of the Union under Article 226 of the Constitution, it has to be taken to be in substance a writ against the Government or a member of the Government. The distinction between the State and the Government has been brought out clearly by W. F. Willoughby in the introduction to his book 'The Government of Modern States' at p. 5, and the learned author says:

> "Of these distinctions, much the most important is that between the State and Government. The State, to use the term employed in political science, is the body politic. The Government is merely the aggregate of the instrumentalities employed by such body in performing its functions."

(15) For reasons peculiar to the United States of America and the Commonwealth of Australia, those States have their specified seats of Government at Columbia and New South Wales respectively, and the mere fact that the Constitution of India does not itself lay down where the seat of the Government of the Union of India will be does not mean that the Government of India has a seat throughout the territory of India and not at any particular place. The capital of India was shifted to Delhi in 1911 and after India was declared to be a Republic in 1950, Delhi has continued to be the seat of the Government of India, and it is common knowledge that the Government of the Union is located at Delhi.

The word 'Government' has a wider connotation as well of including all the departments by which a country is governed, namely, the executive, the legislative and judicial. But as far as Art. 226 is concerned, we have no doubt that the Government there refers not to the legislative or judicial departments but merely to the executive department. Under Art. 77(3), the President has been authorised to make rules for the more convenient transaction of the business of the Government of India and for the allocation among the Ministers of the said business. The Government in this sub-article obviously means the executive and in the book styled "General Rules and Orders under the Constitution", which has been published by the Manager of Publication at Delhi, a mention is made of the different Ministries of the Central Government, from pp. 113 to 145 and at certain other places as well. These Ministries are located at Delhi and the Government of the Union of India must also be held to be located there.

(16) One important circumstance is that the Courts do not issue writs and injunctions which they have no power to enforce. If a writ or injunction is disobeyed, the only way to enforce it is to take proceedings against the guilty party for disobedience of the order. If that party is outside the jurisdiction of the Court, then the Court has no power to enforce obedience of the injunction or writ issued by the Court, and Courts, therefore, do not issue writs where they have no power to enforce their obedience. If a writ is issued to some officer at New Delhi and he ignores it, this Court cannot proceed in contempt against such officer, as he is outside the jurisdiction of the Court. This also points to the conclusion that this Court should not issue any writ or direction to the officer or the Authority whose office is located at Delhi.

(17) For the reasons given above, we think that the preliminary objection raised in these petitions has to be given effect to with the result that these petitions should fail. They are accordingly dismissed with costs.

V.R.B. Petitions dismissed.

(S) AIR 1955 ALLAHABAD 273 (V 42 C 135 Sept.)

RAGHUBAR DAYAL J.

on difference of opinion between

DESAI AND BEG JJ. (8-2-1955)

State of Uttar Pradesh, Appellant v. Christopher Tobit and others, Respondents.

Criminal Appeal No. 165 of 1955, against order of acquittal passed by Temporary Civil and S. J., Gorakhpur, D/- 24-7-1953.

(a) Criminal P. C. (1898), S. 419 — "Copy of the judgment" means certified copy of the judgment.

Per R. Dayal J. (agreeing with Beg J.): Section 419, Criminal P. C., requires the memorandum of appeal to be accompanied by a certified copy of the judgment or order appealed against.

The Court to whom the memorandum of appeal is presented should be in a position to know that what accompanies the memorandum of appeal is a true transcript of the original judgment. This means that the appellant should satifsy the Court or should prove to the satisfaction of the Court that the copy accompanying the memorandum of appeal reproduces correctly what is contained in the original judgment. And taking into consideration the provisions of Ss. 64, 65 and 76, Evidence Act, it follows that when the appellant has to prove to the satisfaction of the Court what the judgment appealed against is, he must produce a certified copy of the judgment.

(Paras 34, 49, 50)

Per Desai J. (Differing): In the absence of any such qualification as "certified", "authenticated" or "granted by the court", it cannot be said that the word copy in S. 419, C. P. C. means "certified copy". Case Law Ref.

(Para 47)

Anno: AIR Com., Cr. P. C., S. 419, N. 2.

(b) Limitation Act (1908), S. 5 and Art. 157 — Appeal by Government from an order of acquittal — Appeal filed on last day of limitation — Memorandum of appeal not accompanied with certified copy of judgment of trial court — Delay in filing such copy without any explanation — Delay in filing application under S. 5 — Belated explanation offered disclosing case of gross negligence at every step — Delay not condoned. (Paras 36, 37, 38)

Anno: AIR Com.: Lim. Act, S. 5 N. 10, 26.

CASES REFERRED: Paras

(A) ('90) 12 All 129: 1890 All WN 39 (FB) 15
(B) (V18) AIR 1931 All 364: 32 Cri L Jour 864 27
(C) (V24) AIR 1937 Pat 534: 39 Cri L Jour 103 27
(D) ('86-87) 14 Ind App 71: 14 Cal 486 (PC) 31
(E) (V10) AIR 1923 Lah 150 (1): 71 Ind Cas 825 31
(F) (V13) AIR 1926 Lah 404: 94 Ind Cas 2 31, 46
(G) (V16) AIR 1929 Lah 771: 123 Ind Cas 874 33, 46
(H) ('54) Criminal Appeal No. 1454 of 1954, D/- 3-11-1954 (All) 38
(I) (V3) AIR 1916 Mad 1165: 31 Ind Cas 924 46
(J) ('31) 132 Ind Cas 3: 32 Pun LR 127 46

D. P. Uniyal, Dy. Govt. Advocate, for Appellant.

BEG J.:

Eight persons were charged under Ss. 147, 323, 325, and 326 read with S. 149, Penal Code. They were tried by Shri Balram Sinha, Temporary Civil and Sessions Judge of Gorakhpur, in respect of the aforesaid offences. The trial court acquitted all of them by its order dated 24-7-1953.

(2) On 25-1-1954 the Government filed an appeal in this Court against the said order of acquittal. Along with the memorandum of appeal, the Government did not file a certified copy of the judgment of the trial court. A typed copy of the judgment was, however, annexed to the memorandum of appeal. On the same day the office made a report that the copy of the judgment filed along with the petition of appeal was not a certified one. A certified copy of the judgment was, however, filed by the appellant on 25-2-1954, after the period of limitation for filing the Government appeal had already expired. This copy was accepted by the Court on 25-2-1954. (Note: This order of the Court appears to have been erroneously dated as 25-1-1954). The appellant was allowed three days' time for making an application under S. 5, Limitation Act for condoning the delay in furnishing the copy and filing the appeal.

On 27-2-1954, the applicant filed an application under S. 5, Limitation Act praying that the delay in filing the certified copy of the judgment of the trial Court and in filing the appeal be condoned. This application was ordered to be put up before a Division Bench for necessary orders. It was accordingly placed before us for orders. At the time of the hearing of the application, the learned counsel for the appellant, however, took up the position that the typed copy of the judgment of the trial court filed along with the memorandum of appeal constituted a sufficient compliance with the requirements of law. He argued that S. 419, Criminal P. C. did not require that the copy of the judgment filed along with the memorandum of appeal should be a certified one. He, accordingly, contended that the appeal was filed within limitation. The matter has been argued ex parte before us by the counsel for the State, as no notice has so far been issued to the opposite party.

(3) Having heard the learned counsel for the State, I find myself unable to agree with this plea. This petition of appeal was filed under S. 419, Criminal P. C. which provides as follows:

> "Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under S. 367."

It is argued on behalf of the State that all that the above section requires is that the memorandum of appeal should be accompanied by "a copy of the judgment or order appealed against." It does not say that the copy that should accompany the memorandum of appeal should be a certified copy. It is contended that a typed copy filed along with the memorandum of appeal is a copy of the judgment and its filing, therefore, would be a sufficient compliance with the requirements of law.

(4) In this connection two facts might be noted at the very outset. The first is that in these proceedings the petition of appeal is presented before a Court of law viz., the appellate Court and the second is that after its presentation the appellate Court is required to peruse it and, after applying its mind to the merits of the case to pass neces-

sary orders on it. This is apparent from S. 421, Criminal P. C. which lays down that:

"On receiving the petition and copy under S. 419 or S. 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily; provided that no appeal presented under S. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so."

This section requires the Court to peruse the judgment and to dismiss the appeal summarily, if in its opinion no sufficient grounds are made out for interfering with the judgment or order appealed against. The Court is, therefore, required to apply its mind to the contents of the judgment at the very moment that it receives the petition of appeal with a copy of the judgment attached thereto. It is not possible for the Court to perform this task unless it is satisfied in respect of the correctness of the copy. The Court has power to dismiss the appeal summarily and without even calling for the record if it is of opinion that no sufficient grounds have been made out for interfering, but before it does so, it should give a reasonable opportunity to the appellant or his pleader of being heard in respect of the same. For this purpose also it is necessary for the appellant or his pleader to present a copy of the judgment of the trial court in a form which would enable the appellant or his pleader to refer to its contents.

It is apparent that neither the Court can look at the document for the above purpose, nor can the appellant refer to it for the aforesaid purpose unless there is a guarantee that the copy filed is a correct copy and the Court is satisfied that the contents of the document purporting to be the judgment of the lower Court is a correct copy of the original judgment. If at this preliminary stage the appellate Court is satisfied that a sufficient prima facie case is made out for interfering with the judgment of the trial Court, then the appellate Court takes further action under S. 422, Criminal P. C. which lays down as follows:

"If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Provincial Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under S. 411-A, Subs. (2) or S. 417, the Appellate Court shall cause a like notice to be given to the accused".

I find it difficult to understand as to how it is possible for the Court to act at all on a copy of the judgment unless it is first satisfied that the document purporting to be a copy of the judgment is in fact a correct copy of the same. The preliminary proceedings that take place under S. 421, Cr. P. C. on receipt of the memorandum of appeal and which require the Court to apply its mind and to reject the appeal summarily under that section or to issue notice to the other party under S. 422, Cr. P. C. are highly important proceedings. The fate of the entire case might hang on this preliminary order as the Court is entitled to reject it summarily if the appellant is unable to satisfy it at that stage that there are sufficient grounds for interference.

(5) Apart from the initial order of rejection or admission of appeal, which is to be passed by the Court after it peruses the contents of the judgment of the lower Court and applies its mind to it, certain important proceedings of a supplementary nature might also have to be taken in connection with the case at the time of the receipt of the memorandum of appeal by the Court. Thus, for example, in cases of appeal by the accused, an application for bail or stay of execution of the order might be filed before the Court. If the appeal is by the Government, there might also be the usual prayer in the said appeal as there is in the present one, that "warrants be issued for the arrest of the accused pending the disposal of the appeal". The orders by the Court in connection with these supplementary proceedings may be orders that vitally affect the parties and I cannot see how it is possible for the Court to pass them unless the Court is satisfied in law that the document placed before it is a correct copy of the original judgment.

(6) It may be relevant at this stage to note that the corresponding provision in the Code of Civil Procedure is a similar one. It is contained in O. 41, R. 1, which runs as follows:

"1 (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively".

(7) Order 41, R. 3, Civil P. C. entitles the Court to reject the memorandum of appeal where it is not properly drawn up and makes it incumbent on the Court to record the reasons for such rejection. It also authorises the Court to return it to the appellant, if necessary, for the purpose of being amended within a time to be fixed by the Court. Order 41, R. 11 empowers the Court to dismiss the appeal summarily even without sending for the record of the lower Court and without issuing notice to the other party.

(8) Order 41, R. 5, Civil P. C. lays down that a Court may pass a stay order after the appeal is preferred from the decree, if sufficient grounds are made out for ordering stay of the execution of the decree. Under sub-cl. (4) such stay orders may be passed ex parte pending the hearing of the application.

(8a) Apart from the incidental orders relating to the appeal, the Court has to be satisfied that the appeal itself is prima facie within the period of limitation prescribed by law.

(9) Section 3, Limitation Act runs as follows:

"Subject to the provisions contained in Ss. 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation: (omitted.....)".

(10) It will be impossible either for the office to report on the question of limitation or for the Court to determine this question unless it is satisfied that a correct copy of the judgment is filed along with the memorandum of appeal.

(11) Section 5, Limitation Act prescribes the conditions under which the Court may condone the delay in filing the appeal.

(12) Section 12(2), Limitation Act provides:

"In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of the judgment, the day on which the judgment complained was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded".

(13) A reference to the endorsement made at the back of the certified copy of the judgment by the copying department is necessary to enable the Court to determine the amount of time which the appellant is entitled to exclude under the aforesaid provision. It is difficult to understand as to how it is possible to compute the time to be excluded in case an uncertified copy of the judgment is allowed to be filed.

(14) Further in civil cases the important question of court-fee will have to be determined at the very inception. Section 4, Court-fees Act provides:

"No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original jurisdiction:

or, in the exercise of its extraordinary original criminal jurisdiction;

or, in the exercise of its jurisdiction as regards appeals from the judgments (other than judgments passed in the exercise of the ordinary original Civil jurisdiction of the Court) of one or more judges of the said Court, or of a division Court;

or, in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;

or, in the exercise of its jurisdiction as a Court of reference or revision;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document".

(15) A memorandum of appeal is a document that is clearly covered by S. 4, Court-fees Act. In — 'Balkaran Rai v. Gobind Nath Tewari', 12 All 129 (FB) (A), which is a Full Bench decision of the Allahabad High Court it was held that an appeal is not presented within the meaning of S. 4, Limitation Act (15 of 1817) unless it is accompanied by copies required by the Code, and that a memorandum of appeal is a document within the meaning of S. 4, Court-fees Act, and therefore, cannot be filed or recorded in or received by the High Court unless and until the proper court-fee in respect of it is paid and further it is of no validity until it is properly stamped.

(16) Unless, therefore, the Court is satisfied that the amount of court-fee paid on the document is correct and as required by law, the Court is prohibited from receiving it or entertaining it or acting upon it in any way. A reference to judgment and decree might also be necessary in civil cases for determining correctly the question of valuation on which may depend the initial question of jurisdiction of the Court before which the memorandum of appeal is presented.

(17) I have adverted to the above consideration by way of instances of important acts which the Court is called upon to perform on the presentation of the memorandum of appeal before it. Most of them have to be performed before the notice is issued to the other side. I fail to understand how it is possible for the Court to perform all these acts unless it has before it a copy which is recognized in law to be a correct copy of the judgment.

(18) On behalf of the appellant it is said that the fact that the Court is allowed to dispense with the copy of the judgment in certain cases shows that its production was not considered absolutely necessary, and therefore, an uncertified copy might be enough. I do not think that the latter is a necessary corollary of the former. It may be that the Courts are given this discretion because in certain exceptional cases e.g. in cases of connected appeals arising out of the same judgment, a certified copy of the judgment filed in the case is already before the Court, hence under those special circumstances a party might be exempted from furnishing a further copy of the same in another case, because it is not considered necessary by the Court. There might be certain other circumstances of an exceptional type which may induce the Court to forego its production on the ground that the Court does not regard it as necessary in that case. But from that it does not follow that in a case where the Court does regard it as necessary, it should content itself with a document before it which has no value in the eye of law and is, for all intents and purposes, a waste paper until it is proved.

(19) On behalf of the appellant it is said that the appellant does not derive any benefit from these proceedings and so there is no occasion for his being called upon to prove any document, nor does the law cast any such burden on him. To my mind this argument is misconceived. The appeal is obviously filed for the benefit of the appellant. There is already a judgment of the lower Court against him and the purpose of the appeal is to have it modified or set aside. It is to his interest to see that it is not summarily rejected at the time of its presentation. In his own interest he may further pray for certain incidental orders in connection therewith, for example, order relating to bail in criminal appeal or orders relating to stay of execution in civil appeals. It is, therefore, the appellant's duty to see that the appeal is presented in a form that makes the memorandum of appeal not merely maintainable but also entertainable so

as to save the appeal from suffering the fate of summary rejection at the hands of the Court.

It is further for the appellant to present the judgment of the lower court in such a form as to entitle him to invite the court to apply its mind to the contents of the judgment in question and to satisfy the Court on merits that it deserves an order of admission, and such further incidental or consequential orders for which the appellant prays in connection therewith. Further it is for the appellant to satisfy the Appellate Court that the appeal does not deserve to be thrown out on the preliminary ground of limitation and is also a document on which the necessary court-fee has been paid to enable the Court to entertain or to receive it. The appellant must, therefore, do all this in his interest to save the fate of summary rejection which must inevitably await an appeal which is defective in form or devoid of merits.

(20) It is suggested on behalf of the appellants that even if the Appellate Court wants to be satisfied that the copy filed by appellant is a true copy, it can examine the appellant or any witness who has prepared it or compared the same with the original. I find no provision either in the Code of Criminal Procedure or in the Code of Civil Procedure laying down that the Court should resort to a procedure of this nature at that stage. Both the Civil Procedure Code as well as the Criminal Procedure Code have specifically laid down in detail the form and the stages at which the Court is enjoined to take evidence or allow parties to adduce it. The fact that in neither of them is the production of any evidence of this nature provided at that stage can only be taken as indicative of the fact that in neither of them was the production of such evidence at that stage contemplated. Even if the Court had any such inherent power, there appears to be no reason why the Court should invoke it at all in order to help a party that has not cared to help the Court.

(21) Moreover, the adoption of such a procedure would obviously result in a good deal of inconvenience and waste of time of the Court. Witnesses will have to be produced to prove that the uncertified copy filed is a correct copy of the original. Further, if such evidence were to be taken, it would be proper in fairness to the other party that a notice should be issued to it in order to enable it to have an opportunity of cross-examining the witnesses and also to produce evidence in rebuttal if necessary. Even after all this amount of labour and time has been put into the task of the discovery of the fact whether copy is correct, it might turn out in the end that the copy produced has some mistakes. This might again give rise to a multiplicity of legal questions relating to their effect on the case. On the one hand it might be argued for the appellant that the law on this point should be liberally construed and mistakes being merely of a clerical type, there has been substantial compliance with the provisions of law.

On the other hand it might be argued for the respondent that the law on the point should be strictly construed; and, in any case, the mistakes being of a material type, the law has not been complied with. Thus the Court would at the very inception be involved in a maze of technicalities and complications entailing an enormous amount of unnecessary work. A cumbersome procedure of this nature would not only lead to inconvenience but would also result in a good deal of confusion at an initial stage. It is bound, at any rate, to delay justice in a manner so as to defeat it. It will further result in a waste of time of the Court unwarranted by the exigencies of the situation. In fact the time actually spent in admission of most of the appeals might far exceed the period taken in their disposal by the Court on merits. Such a procedure is, therefore, neither feasible nor practicable.

(22) Further, it would also not be legal as the procedure of proving the correctness of the copy of the judgment by oral evidence is not warranted by the provisions of Evidence Act. Under S. 61, Evidence Act "the contents of a document may be proved either by primary or by secondary evidence".

(23) Section 62, Evidence Act provides that "primary evidence means the document itself produced for the inspection of the court."

(24) According to S. 63(i) secondary evidence means and includes certified copies given under the provisions of the Evidence Act. Under S. 64, Evidence Act documents must be proved by primary evidence except in the cases enumerated thereafter.

(25) Section 65, Evidence Act runs as follows:

'Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

((a) to (d) omitted.)

(e) when the original is a public document within the meaning of S. 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence."

(g) (omitted.)

In case (e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible."

(26) In my opinion the above provisions of S. 65, Evidence Act have an important bearing on the point under consideration and their effect is clearly to cut out all kinds of evidence whether oral or documentary for the purpose of proving the existence, condition or contents of public document whose original is not proved to have been destroyed or lost or unavailable except a certified copy of the document itself.

(27) According to S. 74(3), Evidence Act documents forming the acts or records of the acts of public officers, legislative, judicial and executive, would be included in the category of public documents. A judgment or decree of a court of law would, therefore, be a public document under S. 74, Evidence Act. A reference in this connection might be made to the case — 'Ladli Prasad v. Emperor', AIR 1931 All 364 (B), in which Young J., considering the above question after referring to S. 74, Evidence Act observed as follows:

"It is clear therefore that a judgment of a Court is a public document within the meaning of S. 74." The ruling reported in — 'Nand Kumar v. Emperor', AIR 1937 Pat. 534 (C), would also support the same view.

(28) Section 76, Evidence Act defines certified copies of public documents as follows:

"Every Public officer having the custody of a public document which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal and such copies so certified shall be called certified copies."

(29) Section 77, Evidence Act lays down that:

"Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

(30) Section 79, Evidence Act lays down that the Court shall presume every document purporting to be a certified copy duly certified by the officer authorized in that behalf to be genuine. The effect of this provision of law would be that once a certified copy of the judgment is produced in Court, it would have to be presumed as genuine and would prove itself. No further proof of its genuineness would be needed as the certificate appended to it would in law itself constitute a sufficient guarantee of its correctness as a copy.

(31) Section 91, Evidence Act lays down that:

"When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

A reference to Ss. 367 and 424 Cr. P C. and O. 21, Rr. 3, 4, 5 and 6, Civil P. C. would show that judgments of criminal courts and judgments and decrees of civil courts are required by law to be reduced to the form of a document. If S. 91, Evidence Act is read with S. 65(e) and (f) of the said Act, it must necessarily follow that a judgment of a Court can only be proved by means of a certified copy of the same and by no other mode. If any authority were needed for this proposition, a reference might be made to the cases — 'Krishna Kishori Chowdhrani v. Kishori Lal Roy', 14 Ind App. 71 at p. 74 PC (D), where their Lordships of the Privy Council while considering this question made the following significant observations:

"There are, however, cases under that Act in which secondary evidence is admissible, even though the original is in existence. One of the cases is under Section 65, letter e. 'When the original is a public document within the meaning of Section 74;' and another under letter f, 'when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence.' But in either of those cases 'a certified copy of the document, but no other kind of secondary evidence is admissible.'"

The ruling reported in — 'Ram Lal v. Ghanasham Dass', AIR 1923 Lah 150 (1) (E), would also bear out the same proposition. It would not be correct to invoke — 'Chhota Lal Amba Prasad v. Basdeo Mal Hiralal', AIR 1926 Lah 404 (F), in aid of the contrary proposition, for it appears that in that case a copy of the judgment was applied for by the appellant and the report was that the record of the file could not be traced. It was, therefore, covered by the exception relating to loss, destruction or non-availability of the original. Further the question in that case arose in a Second Appeal and the unattested copy that was filed was a copy of the judgment not of the lower appellate Court but of the first court, and the judgment of the Court shows that, under the circumstances, it did not think it necessary and must be taken to have dispensed with its production observing thus:

"It is true that up to date no attested copy has been placed on this record but the appellant is ready to do so. I see no reason to call upon him to put such an attested copy upon the record and overrule the objection."

(32) On behalf of the appellant a reference is made to certain provisions of the Civil Procedure Code and the Code of Criminal Procedure where a reference to a copy is made and yet a copy in such cases need not be a certified copy. Thus, for example, S. 87, Criminal P. C. provides that where a person is absconding, a proclamation in that regard might be issued by the Court and a copy thereof might be affixed to some conspicuous part of the house. Similarly S. 134, Criminal P. C. provides for affixation of a copy of an order of the Court in some fit place for conveying the information to a person to whom it is addressed. Other instances of a similar nature are cited.

In my opinion, however, such instances are distinguishable from a case under S. 419, Criminal P. C. or O. 41, R. 1, Civil P. C. In the instances cited the acts of the court are more or less of a ministerial type. In any case they are certainly not cases in which a court of law is required by the statute to apply its mind to the contents of the copy in question and, after considering the merits of the case, to pass judicial orders of a vital nature on its basis as in the present case. The anology of such instances to the present case, therefore, breaks down and it would be a mistake to place the present case on a par with them.

(33) In — 'Reasat Ali Khan v. Mahfooz Ali Khan', AIR 1929 Lah 771 (G) a Bench of the Lahore High Court held that under the corresponding provisions of the Code of Civil Procedure i.e. Order 41, R. 1 and O. 42 the word 'copy' means copy duly certified under the provisions of the Evidence Act and thus rendered capable of production before a Court of law for examination. I find myself in full agreement with the view taken in that case.

(34) To my mind, in interpreting the provision of law in question it is not proper to tear out the word 'copy' from S. 419, Criminal P. C. and to construe it as a solitary word standing by itself in a dictionary divorced from its entire context and shorn of all its surroundings. In my opinion the word in question should be given a legal and a rational meaning in the light of the surrounding context provided by its setting in S. 419, Criminal

P. C. and its legal purpose. It should further be construed so as to make S. 419, Criminal P. C. consistent and workable along with Ss. 421 and 422, Criminal P. C. which follow on the heels of S. 419 and shed further light on its meaning.

Further it cannot be ignored that the sections in question in the Criminal and Civil Procedure Codes relate to presentation, rejection or admission ot memorandum of appeals by courts of law and in the very process of effectuating this purpose, the relevant provisions of the Evidence Act, the Limitation Act and other relevant Acts are automatically attracted. Lastly, considerations of convenience, feasibility and practicability are also relevant in this regard and if they point to the same conclusion they cannot legitimately be ignored in the construction of a statute. Viewing the matter in this background, I am of opinion that the word 'copy' in S. 419, Criminal P. C. should be interpreted to mean a certified copy.

(35) I would, therefore, hold that this memorandum of appeal is time barred and must be rejected unless the appellant is able to satisfy the Court that he had sufficient cause for not preferring the appeal along with a certified copy of the judgment as required by the law within the six months period of limitation and the delay in filing the appeal is condoned.

(36) Having gone through the grounds given by the appellant in his application for condonation of delay, I am of opinion that the application should not be allowed. In view of the argument advanced before this Court one would expect that the main ground of the appellant seeking the condonation of delay would be that having regard to the wording of S. 419, Criminal P. C., the appellant's counsel was of opinion that a typed copy of the judgment would constitute a sufficient compliance with the provisions of law. Curiously enough the very ground that was advanced so vehemently before the Court is conspicuous by its absence in the application for condonation of delay. It must, therefore, be taken that the delay in filing the appeal was not due to any misapprehension on the part of the appellant or his counsel regarding the provisions of law on the point and they were fully aware of the fact that it was necessary to file a certified copy of the judgment along with the memorandum of appeal.

Under the circumstances, it was incumbent on the appellant-petitioner to give some other satisfactory explanation as to why a certified copy of the judgment was not filed along with the memorandum of appeal. No such explanation is forthcoming either in the application or in the affidavit. The judgment by the trial Court in the present case was delivered on 24-7-1953. The affidavit which is filed along with the application under S. 5 states that on 23-1-1954, a letter No. 812/VII-AC 198.53 ('53 appears to be a mistake for '54) dated Lucknow, 22-1-1954, was received from the Secretary to Government, Uttar Pradesh in the Judicial Department saying that the Governor had been pleased to order that an appeal should be filed in this Court against the said judgment. The affidavit further states that in the said letter it was stated that the limitation for filing the said appeal was to expire on 24-1-1954.

Paragraph 5 of the said affidavit states that no certified copy of the judgment of the trial Court was sent along with the said letter of the Judicial Secretary, but only a plain copy of the judgment of the trial Court was sent along with it. One would have expected that the application or the affidavit would specify some reason as to why a certified copy of the judgment was not applied for even though almost the entire period of nearly six months had expired since the delivery of judgment by the trial Court. There is absolutely no cause assigned for it in either the application or the affidavit.

(37) The memorandum of appeal is signed and dated 23-1-1954 which shows that it was ready on that date yet it was not presented till after court hours to the Joint Registrar on 26-1-1954. Even then no application for condonation of delay under S. 5, Limitation Act was made with it. Nor did the memorandum of appeal contain any prayer to the effect that time be given for filing a certified copy of the judgment. The order-sheet shows that on 9-2-1954, two weeks' time was allowed for filing a certified copy of the judgment together with an application under S. 5, Limitation Act. This two weeks' time expired on 23-2-1954 and the office report of that date shows that neither a certified copy of the judgment nor an application under S. 5 was filed even within the aforesaid period of two weeks, and three days further time was allowed. Certified copy of the judgment was filed on 24-2-1954, but even on that date the application under S. 5, Limitation Act was not filed at all.

(38) The application for condoning the delay in filing the certified copy of judgment was made on 26-2-1954, without assigning any reason for it and without an affidavit. Subsequently, two applications for condoning the delay under S. 5, Limitation Act appear to have been made. One of them is dated 27th February and the other is undated. None of them appear to have been presented in the office till 1-3-1954. The grounds for condonation are given in the affidavit attached thereto. The endorsement on the certified copy of the judgment would show that the copy was applied for on 12-2-1954. The appeal in the High Court was filed on 25-7-1953. There is absolutely no explanation as to why no application for certified copy was made until 12-2-1954.

Paragraph 6 of the affidavit vaguely states that the application for a certified copy was made after the judicial record of the case was received in the High Court office to enable this Court to judge how far the applicants were diligent in applying for a certified copy of the judgment. Even if the record of the case was not received in the High Court there was nothing to prevent the applicant from giving an application for a certified copy of the judgment in the lower court. The endorsement on the certified copy of the judgment further shows that the certified copy was ready for delivery on 20-2-1954. Therefore, the delivery of the certified copy of the judgment could have been taken on that date or on 21-2-1954, and the certified copy of the judgment could have been filed in court on 20th February or, in any case, on 21-2-1954. The endorsement, however, shows that the delivery of the certified copy of the judgment which was ready on 20-2-1954, was not taken till after

three days i.e., on 23-2-1954. In such cases every day's delay has to be accounted for and there is absolutely no explanation why this three days' time was allowed to elapse.

Even if the delivery of the certified copy of the judgment was taken on 23-2-1954, it might have been filed on that date but the certified copy of the judgment was not filed in Court till 24-2-1954. There is again no explanation at all for this further delay in filing the certified copy of the judgment in Court. In the application under S. 5, Limitation Act a ground for condonation of delay is that the office of the Government Advocate was not responsible for that delay. As mentioned above there is no adequate explanation why no application was made by the office till 12-2-1954, or why no delivery of the certified copy of the judgment was taken by the office of the Government Advocate on 20-2-1954, on which date the certified copy of the judgment was ready and as to why the said delivery was deferred till 23-2-1954. As already mentioned there is no explanation why if the delivery was taken on 23-2-1954, the certified copy of the judgment was not filed till 24-2-1954.

There is further no explanation as to why an application for condoning the delay in filing the certified copy of the judgment and in filing the application under S. 5 was itself delayed inspite of Court's orders, and no application under S. 5, Limitation Act was presented till 1-3-1954. This Court, however, is not concerned with the question whether the office of the Government Advocate was or was not responsible for the delay in the matter. The delay has got to be explained on behalf of the petitioner to the satisfaction of the Court. No such explanation has been offered. On the other hand the explanation that is offered discloses a case of gross negligence at every step. Even if the office of the Government Advocate was not responsible for the delay in applying and obtaining a certified copy of the judgment there is absolutely no reason why the authorities concerned did not apply and obtain a certified copy of the judgment prior to the date on which the appeal was filed and before 22-1-1954 when the letter was issued by the Judicial Secretary for filing of the appeal.

This initial delay by the authorities concerned and the complete absence of any explanation in this regard is itself sufficient to justify a dismissal of the application and it is not at all necessary to probe further into the matter. Unfortunately this is not the first time that a delay of this nature has occurred. On facts more or less similar we have already dismissed an appeal recently, vide 'Criminal Appeal No. 1454 of 1954 State v. Shah Mohd., decided by my learned brother and myself on 3-11-1954 (H)' and there appears to be no reason to accord a different treatment to this application. Unfortunately cases of this type are increasing and it is presumed that in such cases an application on behalf of the Government under S. 5 would be granted. The law has already allowed an extended period of six months to the Government for appeal as against a limited period of sixty days allowed to a private indivdual. The period of limitation is deliberately made longer by the legislature in the case of the Government considering that the matter has to go through various stages before a decision on the question is taken. For this reason the law has very properly made no difference between the mode of approach by the Court to an application under S. 5 by the Government and by a private party.

(39) For the above reasons I am of opinion that the application to condone the delay must be dismissed and the memorandum of appeal rejected.

DESAI J.:

(40) This appeal was filed within time. But the memorandum of appeal was accompanied by a copy of the judgment appealed from which was not certified to be a true copy. It is laid down in S. 419, Criminal P. C., that—

> 'Every appeal shall be made in the form of a petition.....and every petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against."

was contended by Sri D. P. Uniyal that full compliance with the provision was made. His argument was that this provision does not require a certified copy to accompany a memorandum of appeal.

(41) The fundamental question is what is meant by the word "copy" used in S. 419? That it means an imitation, transcript or reproduction of an original cannot be doubted, but does it also mean "certified copy" or "attested copy" or "authenticated copy"? According to none of the dictionaries including law lexicons does the word mean a certified copy. According to Bouvier "copy" means "a true transcript of an original writing." He interprets "examined copies" as those which have been compared with the original or with an official record thereof. Tomlins says that "copy" is "in a legal sense the transcript of an original writing; as the copy of a patent, of a charter, deed, etc.," and the same meaning is given by Wharton. I have also consulted Murray's and Webster's Dictionaries and Corpus Juris Secundum, Vol. 18, page 130. None of these authorities includes among the various meanings of the word "certified or attested or authenticated copy". The idea of correctness is there but not of the guarantee that it is correct. The word has no legal or technical meaning; Burrows and Mozley do not even notice the word. There is, therefore, no doubt that the word, without any adjective such as "certified", "examined", "authenticated" or "attested", does not mean a certified copy; so long as a document reproduces a judgment letter by letter, it is its copy and according to all canons of interpretations of statutes, if it accompanies a memorandum of appeal S. 419 is duly complied with.

No question of construction or interpretation arises because the word "copy" has only one meaning in this context and the court's duty is to understand it in that meaning. The court is called upon to construe a word only if its meaning is uncertain or ambiguous, then it can consider the Legislature's intention, practice and other facts; but when a word has only one meaning or its meaning is certain, the court's duty is exhausted by giving that meaning to it. Had the word thus two meanings, (1) "a reproduction of the original" and (2) "a transcript or re-production of an original or attested to be true", then only would the question arise which of the meanings the word bears in a parti-

cular context. "A transcript or re-production of an original, certified or attested to be true" is not one of the meanings of the word according to any authority and, therefore, there is no ambiguity in the meaning of the word.

If a copy is required to be certified, the Legislature must say so expressly; otherwise it is impossible for a court to say that a copy is not a copy unless it is certified or attested to be true. A certified copy is nothing but a copy bearing a certificate of its being signed by some official; the certificate merely guarantees that it is a true copy. The word "certified" is an adjective which qualifies the word 'copy". There are some copies which are certified copies and there are others which are not; but all are copies.

(42) The word "copy" is used in the Code in several sections and there is no indication that in any of them it means "certified copy". If the word does not mean "certified copy" in some sections, it follows that it does not mean "certified copy" in S. 419 also. Sections 87 and 134(2) provide for the affixation of a copy of a proclamation to some conspicuous place. Section 145(3) provides for the service of a copy of an order. There is nothing to suggest that these copies must be certified copies. Section 162 provides for furnishing the accused with a copy of a statement made to the police. Sections 165(5), 167(1) and (4), 373, 379, 422 and 539 (b) provide for sending copies of certain documents to certain officers of the State; they are not required to be certified copies.

Under S. 210 a copy of the charge should be given to the accused. Sections 371 & 548 lay down that a copy of the judgment or the heads of charge or of an order or of any deposition should be furnished on demand to the accused or any other person affected by the judgment or order. Here also the word "certified" is not used with the word "copy". Section 521 refers to destruction of copies of obscene or libellous documents; here there can possibly be no question of the copies being certified copies. On the other hand, where a certified document is required to be issued or given, the Code specifically provides for it. Sections 425 and 442 provide for the appellate courts' or revision courts' certifying their judgments to the subordinate courts. Section 428 requires a subordinate court to certify the evidence to the appellate court. Section 511(a) and (b) require the production of certified extracts of previous convictions.

(43) The word "copy" is used in several provisions of the Code of Civil Procedure also. Under O. 7, R. 17 a copy of an entry in the account-book is to be filed with a plaint and it is for the court to examine and compare it with the original. Obviously, the copy that is required to be filed is not a certified copy; that is why it is the court's duty to compare it with the original. Similarly in O. 13, R. 5 it is laid down that, when an original account-book is produced in evidence, a copy of the relevant entry in it should be furnished; and the court will compare and certify it; here also the word "copy" cannot possibly mean "certified copy". Order 20, R. 20 and O. 41, R. 36 expressly require certified copies of judgments and decrees to be furnished to the parties on their application. Even if the word "certified" was not used in these provisions, the copy issued by the Court would bear a certificate of correctness. But the use of the adjective makes it clear that a "copy" does not mean "certified copy" even when it is furnished to a party on his application.

Order 21, R. 11(3) authorises the Court to require an applicant for execution of a decree to produce "a certified copy of the decree". Rule 14 of the same order authorises the court to require the applicant to produce a certified extract from a register maintained by the Collector. The use of the word "certified" suggests that the Legislature thought that if it were not used, it would be sufficient compliance if an uncertified copy was produced. Order 41, R. 1, which is a provision corresponding to S. 419, Criminal P. C., simply speaks of a copy of the judgment or order. When it is compared with the other provisions which expressly speak of "certified" copy and extract, it becomes obvious that it does not require a certified copy of a judgment or decree. Otherwise it is not understood why the Legislature did not use the word "certified" there as it has done in other provisions. Order 41, R. 37 requires a certified copy of the judgment to be sent to the lower court. Order 45, R. 8 refers to an authenticated copy.

(44) In view of the Legislature's using the word "copy" in some provisions and the words 'certified copy" or "authenticated copy" in other provisions, there is no justification for interpreting the word "copy" as "certified copy". The Code of Criminal Procedure does not require certified copies of judgments to be furnished to the parties on their application as the Code of Civil Procedure does; but that makes no difference because the copies furnished by criminal Courts would necessarily bear the certificate of correctness. Thus the copies of judgments and decrees that are furnished to the parties by the Courts are certified copies. But there is no provision in either of the Codes enjoining upon the parties to file those very copies with the memoranda of appeal.

In the absence of any provision making it incumbent upon an appellant to file with his memorandum of appeal a copy of the judgment or decree obtained from the Court itself, the fact that Courts are required to furnish certified copies does not lead to the inference that only certified copies should be filed with memoranda of appeal. Under S. 12, Limitation Act the time requisite for obtaining a copy of the decree or order appealed from should be excluded when computing the period of limitation. This may suggest that the copy is to be obtained from a court and that consequently it must be a certified copy. But this provision cannot be construed to make it obligatory upon an appellant to file with the memorandum of appeal a copy obtained from Court.

If a copy is obtained from Court, the time requisite for obtaining it will be excluded. If a copy made privately is filed with a memorandum of appeal, no time may be excluded or the appellate Court may decide in some way that so much time was required in obtaining the privately prepared copy. The appellate Court would not be justified in refusing to accept the memorandum of appeal on the ground that it is accompanied by a privately prepared copy and that the Limitation Act makes no provision for determining how much time was

required for obtaining it. How an appeal should be filed and what documents are to accompany a memorandum of appeal are matters of procedure to be found in the Code of Civil Procedure and not in the Limitation Act.

(45) A certified copy is a creation of the Evidence Act. Secondary evidence may be given of the contents of a public document such as a judgment, an order or a decree. Secondary evidence of a public document is its certified copy. Every public officer having the custody of a public document, which any person has a right to inspect, is bound to

> 'give that person on demand a copy of it° ° ° ° together with a certificate written at the foot of such copy that it is a true copy of such document ° ° ° ° and such certificate shall be dated the subscribed by such officer with his name and his official title ° ° ° °, and such copies so certified shall be called certified copies;" see S. 76.

This provision makes it clear that a certified copy is a particular kind of a copy, e.g., a copy bearing a certificate of its being true. The certificate is not required to convert the document into a copy; it is a copy, if it is a re-production of the original letter by letter, whether somebody certifies it to be a true copy or not. Therefore, a certificate of correctness is not a necessary requirement of a copy.

Where only a copy is required to be produced, it is not open to a Court, which has got no legislative powers, to say that it must be a certified copy. If a certified copy is required, it is for the Legislature to say so. It is provided in S. 77, Evidence Act that certified copies may be produced in proof of the contents of the public documents. This does not mean that a copy of a judgment, decree or order that is required under the Codes to be filed with a memorandum of appeal should be a certified copy. The copy of a judgment, order or decree that is required to be filed with a memorandum of appeal is not required to be filed in proof of the contents of the judgment, order or decree. There is no question of producing any evidence in proof of anything in an appellate proceeding. Moreover, there is no question of proving anything at the time of filing an appeal. The appellate Court has the power of dispensing with a copy of a judgment, etc. Had it been required for proving something, there would have been no provision for its being dispensed with. There must be some reasons for the provision that a copy of the judgment etc., must accompany a memorandum of appeal, but proving the contents of the judgment etc., is not one of them.

It is not laid down in any law that an appellant must prove the contents of the judgment etc., from which he files an appeal. He challenges the correctness of the judgment etc. He wants it to be set aside. When he does not want to derive any benefit from it, there is no occasion for his being called upon to prove its contents. It is for the appellate court to decide whether he has a right to file an appeal or not. If subsequently it is discovered that he had no right to appeal, his appeal would be dismissed on that ground. If an appellate court must see a copy of a judgment etc., in order to ascertain whether the appeal lies at all, or is filed within time, or is filed in the proper court, it can ascertain it as much from an ordinary copy as from a certified copy. If it wants to be satisfied that the copy is a true copy, it can examine the appellant or any witness who has prepared it. That a copy is a true copy can be proved b any person who has prepared it or who compares it with the original. There is nothing in the law to bar a copy from being proved to be a true copy in this manner. Neither S. 65 nor S. 77 bars its proof.

It should be noted that the question is of proving a copy to be correct and not of proving the contents of a judgment etc., and the contents of a judgment etc., cannot be proved except by a certified copy, but the correctness of a copy can be proved by oral evidence of anyone who has prepared or compared it. If an appellant seeks an interim relief during the pendency, of an appeal, the appellate Court may not grant it unless it is satisfied by proper evidence that a particular judgment has been passed against him and for this purpose may call upon the appellant to produce a certified copy of it. But that would be subsequent to the filing of the appeal. The practice is that appellants file certified copies of judgments, orders or decrees with memoranda of appeal. But that is not because the law requires certified copies but because generally only certified copies are available to them.

A party who inspects a record is prohibited from making a copy. He can, therefore, have a privately prepared copy only if it is prepared from a certified copy or is prepared as the judgment is being delivered in open Court. There is a danger in his filing a privately prepared copy of the judgment etc., because if it is found to be incorrect, that is, if it is not an exact copy, the appeal may be rejected on the ground that the memorandum was not accompanied by a copy. In any case, whether the copy required to be filed with a memorandum of appeal should be a certified copy or may be an uncertified copy, depends upon the provisions of law and not upon the practice.

(46) There is no reported case interpreting the words "a copy" occurring in S. 419, Criminal P. C., but the same words occurring in O. 41, R. 1 of the Code of Civil Procedure have been interpreted in AIR 1929 Lah 771 (G), to mean a certified copy. In that case a privately prepared copy of a judgment was filed with a memorandum of appeal and it was contended that it was a sufficient compliance with the provision of O. 41, R. 1. The learned Judges rejected the contention, observing that they were called upon to examine a copy of the judgment appealed from with a view to ascertain whether the conclusions arrived at by the subordinate Court were correct, that in order to do so it was necessary for them to see the judgment itself because S. 91, Evidence Act forbade the admission of oral evidence to prove the contents of a document, that consequently the original judgment or secondary evidence (which undoubtedly consists of only a certified copy) should be filed with a memorandum of appeal, and that the word "copy" in the provision clearly means a copy duly certified under the provisions of the Evidence Act.

With great respect to the learned Judges I cannot agree with the reasons given by them. An

appellate Court is not required to decide at the moment when an appeal is filed whether the conclusions of the subordinate Court were correct or not. If a memorandum is accompanied by an uncertified copy and the copy does not satisfy the appellate court that the conclusions of the subordinate court were erroneous, it would dismiss the appeal. If it thinks that the conclusions might be erroneous, it would issue notice to the respondent and, if the copy was not correct, the respondent would bring the fact to its notice. The reference to Ss. 91 and 76, Evidence Act was unnecessary. If the Legislature thought that a memorandum of appeal should be accompanied by some document showing the contents of the judgment appealed from, it has itself laid down that a copy of the judgment would do. So even if there were a question of producing evidence to prove the contents of a judgment, the Legislature has provided that a copy of the judgment would be sufficient evidence.

The provisions of the Evidence Act cannot override the provision that any copy of the judgment would do to prove its contents. The learned Judges have not discussed the meaning of the word "copy" at all; they appear to have held that "copy" means a copy duly certified under the Evidence Act merely because of their opinion that a memorandum must be accompanied by such a copy. This is hardly distinguishable from judicial legislation. The learned Judges did not take into consideration the previous decision, albeit of a single Judge, of the same High Court, viz., AIR 1926 Lah 404 (F). A memorandum of second appeal was accompanied by an uncertified copy of the first court's judgment, the excuse given being that an application for a certified copy of it had failed because the trial court's record could not be traced. Addison J. ruled that "there has been a sufficient compliance with the law in these circumstances. The words "in these circumstances" create a difficulty inasmuch as they show that an uncertified copy can be filed if the original judgment is lost or misplaced.

Whether the word "copy" means a certified copy or any true reproduction of the original does not depend upon whether the original is available or lost. The proposition that a document is a copy of another if the latter is lost or destroyed, and is not a copy of it if it is available is not supported by law or reason. The availability or non-availability of a document may affect the mode of proving its contents, but it cannot have any bearing on the question whether another document is a copy or not. In — 'Ramakrishna Pillai v. Muthuperumal Pillai', AIR 1916 Mad 1165 (I), it was assumed by the learned Judges that O. 41, R. 5 requires a certified copy. The question before them was not whether the word "copy" means a certified copy or any true reproduction of the original. They had to decide whether the copy should be a printed copy or not. The High Court of Rangoon has amended O. 41, R. 1 and provided for the filing of certified copies of the judgment and decree appealed from. The obvious inference from this is that in the absence of the word "certified" any uncertified copy would do. The question raised and decided in — 'Sher Dil Khan v. Samundar Khan', 132 Ind Cas 3 (Lah) (J) was quite different. No other cases were referred to us.

(47) My conclusion is that in the absence of any such qualification as "certified", "authenticated" or "granted by the Court", it cannot be said that the word copy in S. 419 of the Code of Criminal Procedure means "certified copy". The appeal was, therefore, presented in the manner laid down in that section within time.

(48) I agree with my brother Beg that if the appeal was incomplete, no case is made out for extending the benefit of S. 5, Limitation Act to the State and that this application for the same deserves to be dismissed. (On difference between the two Judges the case was laid before a third Judge whose judgment is as follows):

RAGHUBAR DAYAL J.:

(49) The sole point before me for expressing an opinion is whether S. 419, Criminal P. C., requires the memorandum of appeal to be accompanied by a certified copy of the judgment or order appealed against or by uncertified copy of the judgment or order appealed against.

(50) It is not disputed that the dictionary meaning of the word "copy" is "a true transcript of an original writing". It follows, therefore, that the copy accompanying the memorandum of appeal should be a true transcript of the original judgment.

The Court to whom the memorandum of appeal is presented should be in a position to know that what accompanies the memorandum of appeal is a true transcript of the original judgment. This means that the appellant should satisfy the court or should prove to the satisfaction of the court that the copy accompanying the memorandum of appeal reproduces correctly what is contained in the original judgment.

Section 64, Evidence Act provides that documents must be proved by primary evidence except in the cases thereafter mentioned. Section 65, cl. (e), Evidence Act allows secondary evidence, which includes certified copies, to be given of the existence, condition or contents of a public document. It is further provided in S. 65 that a certified copy of the document but no other kind of secondary evidence is admissible. What is a certified copy is defined in S. 76, Evidence Act. It follows that when the appellant has to prove to the satisfaction of the Court what the judgment appealed against is, he must produce a certified copy of the judgment. I am, therefore, of opinion that the word "copy" in S. 419, Criminal P. C. must mean a certified copy.

(51) I order that the aforesaid opinion be laid before the Court concerned.

BY THE COURT:

(52) In view of the opinion of the third Judge, we hold that the memorandum of appeal was not accompanied by a copy within the meaning of S. 419, Criminal P. C. By the time a copy was filed in the appeal, the period of limitation had already expired and we have rejected the application for extension of the period of limitation. Consequently, we hold that the appeal was time barred and dismiss it as such.

(53) We certify that this is a fit case for appeal to the Supreme Court.

V.S.B. Appeal dismissed.

(S) AIR 1955 ALLAHABAD 483 (V 42 C 136 Sept.)

DESAI AND BEG JJ. (4-3-1955)

Ram Charan and others, Applicants v. Debi Dayal Dubey, Opposite Party.

Contempt Misc. Case No. 21 of 1954.

(a) Constitution of India, Art. 215 — Contempt of High Court — Disobedience to injunction order.

The applicants instituted a suit in the Court of the Civil Judge, Etawah, against "the Municipal Board of Etawah through the Chairman, Municipal Board, Etawah, "for injunction to restrain the Board from constructing shops at the back of the applicant's shops. During the pendency of the suit the Civil Judge had granted a temporary injunction restraining the Board on account of which the work of constructing the shops had remained stayed. The temporary injunction came to an end on the suit being dismissed by the Civil Judge. The Board resumed the construction and on the first appeal being admitted on 27-4-1954, the applicants applied to the High Court for a temporary injunction to restrain the Board from making any further construction during the pendency of the appeal. A notice of the injunction was issued to the Board and during its pendency the High Court passed an ex parte injunction on 7-6-1954 restraining the Board and its servants etc., from making any constructions of any kind on the land till further orders. The applicant no. 1 obtained from the High Court a certified copy of the injunction order and the applicant No. 2 approached the opposite-party, the President of the Board, with an application to which the certified copy was attached, on 9-6-1954 and requested him to stop further constructions in obedience to the injunction. The President read the application and the copy of the Order but refused to act on them on the ground that he was not bound to do so until the injunction Order was served upon him through Court. On 16-6-1954 the notice of injunction and the injunction order were sent through a process-server to the President outside office but after reading them he refused to accept them contending that they were not addressed to him in his personal capacity and, therefore, could be served on him only in office of the Board. On the next day, i.e., 17-6-1954, the process-server accompanied by the applicant No. 1 again went to the Board's office in the morning but found the opposite party and the executive Officer absent and the clerks refused to accept the order. Consequently, the process-server and the applicant met the opposite party, who again refused to accept the order and angrily asked them to clear out saying that the order could be served only in the office of the Board and not elsewhere. The order was ultimately served on the President on 19-6-1954 with effect from which the construction work was immediately stopped. The question was whether the President was guilty of contempt for disobeying the injunction order from 9-6-1954 to 19-6-1954 during which period the construction work continued.

Held (i) that on the facts of the case the President of the Board was guilty of contempt of Court. The President, in spite of knowing on June 9, 16 and 17, 1954, that the Board had been restrained from continuing further construction, disobeyed the injunction, even though he was bound to comply with the injunction by getting the construction work stopped. Moreover without just cause, he refused to accept service of the injunction order and also interfered with the process-server's duty of serving it upon him. (Para 13)

(ii) that as there was no actual intention to disobey the injunction it was not necessary to pass a sentence of imprisonment but that a sentence of fine of Rs. 100 would meet the ends of justice. (Para 14)

(iii) The contention that it was the Municipal Board that committed contempt, or that it was the Municipal Board that could be punished for contempt, and not the President could not be accepted. It was true that the injunction was against, and was to be obeyed by, the Board. It was also true that there was no necessity of adding "through the Chairman, Municipal Board, Etawah" in the title of the suit. But the fact remains that the word "Board" includes the President and that the necessary action was to be taken by the President. Whoever might have been the defendant, the notice and the order had to be served upon a human being because no process can be served upon anyone who has no physical existence. The injunction had to be obeyed also by a human being because all physical acts and omissions must be done by human beings. Therefore, the injunction order in its very nature had to be served upon a human being and that was the opposite party. Whether the Municipal Board also became guilty of contempt or not, there was no doubt that the opposite party became guilty of contempt when he did not obey the injunction order. It is immaterial in which capacity he was required to obey it. It is also immaterial whether he can recover the penalty, which he is ordered to pay on the contempt being established, from the Municipal Board; the Court has no concern with those matters. Whether the penalty, which the Court may impose on the contempt being established, should ultimately be paid by the opposite party or the Board is a matter between the opposite party and the Board. The opposite party would be bound to pay the penalty in the first instance even if he is entitled to recover it from the Board later. (Para 12)

Anno: Const. of India, Art. 215 N. 3.

(b) Contempt of Court — What amounts to — Disobedience to injunction order — Knowledge of order if sufficient — Mens rea — Wilful disobedience what amounts to — Absence of personal interest how far relevant — (Constitution of India, Art. 215) — (Contempt of Courts Act (1952), S. 1).

What is required in order to make a person bound by an injunction order is not that the order is served upon him in a formal manner through Court but that he becomes aware of its being passed. An order takes effect as soon as it is passed; its efficacy

is not postponed till the service of it in a formal manner. If the person bound by the order is not punished for not complying with it at the moment of its being passed, it is merely because he is not aware of the fact that it is passed. In other words a person who knows that an order binding him to do a certain act is passed cannot disobey it on an excuse that the order is not served upon him formally. (Para 8)

Of course it may happen that when a person bound by an order is shown a document purporting to be a copy of it, he is not certain whether it is a genuine copy; if he in fact entertains such a doubt it may be said that he is not bound to take notice of the copy and comply with the order. (1884) 25 Ch D 778 — (1882) 30 WR 564 — AIR 1924 Mad 393 and (1879) 13 Ch D 110, Ref. to. (Para 8)

A person might have been under a misapprehension about his liability and might have bona fide thought that he was not bound to comply with the order merely because he becomes aware of its existence through some source and that he becomes bound only when the order is served upon him through Court; but his liability is a question of law and he cannot plead ignorance of law. Absence of mens rea does not include ignorance of law. He would be guilty of contempt even though he did not have an actual intention of disobeying the order or committing contempt of Court. (Para 8)

Whatever mens rea is required to constitute the offence of contempt of Court is present in the deliberate doing of an act which, the contemner knows, he is forbidden to do, there is no mens rea in his doing the act. If the act was done by him accidentally, then also there is no mens rea. The dictum that wilful disobedience of injunction is a contempt only means that if there is a wilful disobedience of injunction, contempt is committed; it does not mean that contempt cannot be committed in any other manner. Moreover, what is meant by wilful disobedience is nothing but deliberate disobedience and not disobedience with a particular motive. It is the act of disobeying the injunction that must be done wilfully or deliberately; it is not the requirement that it must be done with a criminal intention or motive. It is never practicable to prove the actual intention behind an act; a Court can approach the question only objectively and is forced to presume the intention from the act done on the maxim that every man is presumed to intend the probable consequences of his act. AIR 1953 All 153, Ref. to. (Para 8)

The fact that the contemner had no personal interest in the matter would be relevant in deciding whether he acquired knowledge of the order or not. It can be argued from the fact that he had nothing to gain by not complying with the order, that the reason for not complying with the order was that he really had no knowledge about the passing of the order. But once it is proved that he had the knowledge whether he had personal interest in not complying with it or not becomes irrelevant. (Para 8)

Anno: AIR Com., Constitution of India, Art. 215 N. 3; AIR Man., Contempt of Courts Act, S. 1 N. 3.

(c) Contempt of Court — Refusal to accept or evade service of injunction order — (Contempt of Courts Act (1952), S. 1) — (Constitution of India, Art. 215).

Refusal to accept, or evade service of, a summons may not be contempt, but refusal to accept, or evade service of, an injunction order is contempt, because there is a fundamental difference between a summons and an injunction order. A summons (issued in a civil proceeding) does not require obedience. The party summoned is at liberty not to appear in Court because the proceeding can still be taken ex parte against him. An injunction requires obedience and since there can be no obedience unless the contents of the order are brought home to the person, the injunction must be accepted when offered. To refuse to accept an injunction order is to interfere with the course of justice by refusing to acquire the knowledge without which the Court's order cannot be complied with. (1710-48) 93 ER 462 — (1773) 21 ER 355 and AIR 1926 Cal 701, Rel. on. (Para 11)

Anno: AIR Com., Const. of India, Art. 215 N. 3; AIR Man., Contempt of Courts Act, S. 1 N. 3.

CASES REFERRED: Paras

(A) (1884) 25 Ch D 778: 53 LJ Ch 295 8
(B) (1882) 30 WR 564: 51 LJ Ch 414 8
(C) (V11) AIR 1924 Mad 393: 45 Mad LJ 742: 25 Cri LJ 753 8
(D) (1879) 13 Ch D 110: 49 LJ Bk 1 8
(E) (V40) AIR 1953 All 153: 1953 Cri LJ 402 8
(F) (V32) AIR 1945 Lah 206: 47 Cri LJ 115 8
(G) (V28) AIR 1941 Pat 185: 42 Cri LJ 225 8
(H) (1910) 1910-2 Ch 190: 79 LJ Ch 519 8, 12
(I)('42) 1942 Oudh WN 6 8
(J) (1949) 336 US 187: 93 Law Ed 599 8
(K) (1710-48) 1 Strange 185: 93 ER 462 11
(L) (1773) 21 ER 355: Dick 477 11
(M) (V13) AIR 1926 Cal 701: 53 Cal 401 11
(N) (V39) AIR 1952 Cal 919: 56 Cal WN 387: 1953 Cri LJ 136 12
(O) (V5) AIR 1918 Cal 988: 19 Cri LJ 530 (SB) 12

M. N. Shukla, for Applicant; A. P. Pandey, for Opposite Party.

DESAI J.:

This is an application for contempt proceedings against Sri Debi Dayal Dubey, President of the Municipal Board, Etawah; he is alleged to have disobeyed an injunction issued by this Court.

(2) The applicants instituted a suit in the court of the Civil Judge, Etawah, against "the Municipal Board of Etawah through the Chairman, Municipal Board, Etawah", for injunction to restrain the Board from constructing shops at the back of the applicants' shops nos. 32 to 54 except nos. 33, 39 and 43, situated in Humeganj Market of Etawah. The land in dispute was a strip 10 feet wide at the back of the shops and the Board was constructing shops to be let out to refugees on rent. The

applicant's contention was that the land belonged to them and not to the Board. The suit was contested by the Board which claimed ownership in itself over the land. It was dismissed by the Civil Judge and the applicants filed First Appeal No. 146 of 1954 in this Court on 27-4-1954. During the pendency of the suit, the Civil Judge had granted a temporary injunction restraining the Board on account of which the work of constructing the shops had remained stayed. The temporary injunction came to an end on the suit being dismissed by the Civil Judge.

The Board resumed the construction and on the first appeal being admitted on 27-4-1954, the applicants applied to this Court for a temporary injunction to restrain the Board from making any further constructions during the pendency of the appeal. A notice of the injunction was issued to the Board and during its pendency this Court passed an ex parte injunction on 7-6-1954 restraining the Board and its servants etc., from making any constructions of any kind on the land till further orders. The applicant no. 1 obtained from this Court a certified copy of the injunction order and the applicant no. 2 approached the opposite party, the President of the Board, with an application to which the certified copy was attached on 9-6-1954 and requested him to stop further constructions in obedience to the injunction. The President read the application and the copy of the order but refused to act on them on the ground that he was not bound to do so until the injunction order was served upon him through court.

This Court sent out the notice to show cause and the injunction order on 14-6-1954 for service. The injunction order was addressed to "The Municipal Board, Etawah, through the Chairman, Municipal Board", and expressly restrained "you, your servants, workmen and agents from making any constructions of any kind on the land in suit till further orders". The injunction order reached the office of the Civil Judge, Etawah, who was to serve it on 16-6-1954. The same day he entrusted the service to a process-server Mangal Singh, who at once went to the office of the Board to effect service, but since it was past noon, he was informed that the President had left the office. Thereupon the process-server accompanied by the applicant no. 1 at 1.30 p.m. went to Bharat Press where the opposite party works and met him and showed him the injunction order (and also the notice). He read them but refused to accept them contending that they were not addressed to him in his personal capacity and, therefore, could be served on him only in the office of the Board.

On the next day, i.e., 17-6-1954, the process-server accompanied by the applicant no. 1 again went to the Board's office in the morning but found the opposite party and the executive officer absent and the clerks refused to accept the order. Consequently, the process-server and the applicant went again to Bharat Press and met the opposite party, who again refused to accept the order and angrily asked them to clear out saying that the order could be served only in the office of the Board and not elsewhere. Thereupon the process-server wrote out a report mentioning the facts and submitted it to the Civil Judge, who on 18-6-1954 ordered him to try again. Consequently, on 18-6-1954 the process-server and the applicant went again to the Board's office but were informed that the opposite party, the executive officer and the head clerk were all absent from the office. They at once went to Bharat Press and found the premises locked and were informed in writing by a neighbour that the opposite party had gone out somewhere. The process-server reported the matter in writing on 18-6-1954 to the Civil Judge.

The learned Civil Judge ordered on 19-6-1954 that another process-server should be sent and that if the President and the executive officer still refused to receive the documents, the service should be done by affixation. The order and the notice were then handed over to another process-server Sita Ram, who on 19-6-1954 went to the office of the Board and served the order and the notice upon the opposite party through his clerk. On the same day, the opposite party ordered the executive officer to take necessary action at once. The executive officer on the same day wrote to the in-charge overseer asking him to order the contractor at once to stop the work in accordance with the injunction order. On 21-6-1954 the contractor informed the executive officer that on receipt of his order on 19-6-1954 at 6 p.m. he immediately stopped all construction work, mentioned the state of the constructions at the time of stopping further work and inquired of the numbers of the shops in dispute so that the construction work on the land in front of the other shops might go on. It may be mentioned here that the Municipal Board is constructing 65 shops in a row and only 20 of them are in dispute and the injunction order related to the construction work going on at the back of them only.

(3) The case of the applicants is that the Board did not obey the injunction order and continued the construction work upto 8-7-1954. They described the condition of the constructions on 9th June, on 21st June and on 5th July. They further alleged that on 7th July, 1954, one of the applicants again went to the spot and asked the contractor to stop the construction but he refused to listen to him and abused him on account of which the applicant filed a report at the police station. The applicants, therefore, moved this Court for punishing the opposite party for contempt of court by refusing to accept the service of the notice and the injunction order and refusing to stop the construction on the land in dispute in spite of the knowledge of the injunction order.

(4) The opposite party denied the allegations. He denied that the certified copy of the injunction order was shown to him by the applicant on 9-6-1954, that the process-server attempted to serve the order and the notice upon him on 16-6-1954 and 17-6-1954 and that he refused to accept the notice and the order on those dates and asserted that he became aware of the injunction order for the first time on 19-6-1954 when it was served upon him in the office of the Board, that at once he directed the executive officer to order the contractor to suspend the construction, and that the contractor was informed of the order the same day and suspended construction work at once. He referred to the contractor's report about the state of the work as it existed on 19-6-1954, a reference to which has been made above. In the end the

opposite party assured the Court that at no stage did he ever think of circumventing the injunction order issued by the Court.

(5) In the rejoinder one of the applicants averred that the counter-affidavit does not contain facts, that the opposite party definitely intended to defy the injunction order and to expedite the construction before the injunction order was made absolute and that a summary of the injunction order was was published in the Leader also.

(6) There is no satisfactory proof of the Board's making any construction after 19-6-1954. The allegations in the affidavit that the construction continued even upto 5-7-1954 are counter-balanced by the opposite party's reply that on 19-6-1954 the construction was stopped. Once the injunction order was served upon the opposite party, we do not think that the Board would have continued the construction because we have no reason to think that the Board had an intention to commit contempt of court by disobeying the injunction. The reason why the opposite party refused to accept service of the injunction order earlier was that he would have been obliged to stop further construction as soon as the service was effected. It is the case of the applicants themselves that in order to construct as much as possible the opposite party evaded service of the injunction order. We, therefore, accept the statement of the opposite party that no further construction was done after the service of the injunction order upon him on 19-6-1954.

(7) We have also no reason to doubt that the construction work continued on the land in dispute upto the evening of 19-6-1954 and that it was not stopped either on 9-6-1954 or even on 16-6-1954. It is not the case of either party that it stopped on any of those dates. The evidence of the applicant is that it continued right upto 5-7-1954 whereas the opposite party's evidence is that it was stopped on 19-6-1954. The report of the contractor himself is to the effect that immediately on receipt of the executive officer's orders in the evening of 19-6-1954 he stopped all construction work including that on the land in dispute. There is thus a clear admission of the opposite party that the construction continued upto the 19th June, 1954. In the affidavit the state of the construction on 9-6-1954 is described and its correctness is not challenged in the counter-affidavit. The contractor's report describes the state of construction at the time of stopping all further construction; the latter shows more construction than the former, proving that the construction continued beyond 9-6-1954. We, therefore, find that the injunction order was disobeyed upto 19-6-1954.

(8) The next question is whether the disobedience of the injunction order upto 19-6-1954 amounts to contempt; the answer depends upon whether the Board was bound to comply with the injunction order earlier. The Board could not be bound to obey it unless it knew of its existence; an order, in order to be complied with, must be communicated to the person who is to comply with it. A person who is not aware of the existence of the order cannot be held liable for not complying with it. The case of the applicants is that the opposite party became aware of the injunction order on 9-6-1954, again on 16-6-1954 and once again on 17-6-1954, whereas that of the opposite party is that he did not become aware of it prior to 19-6-1954.

Having regard to the circumstances of the case we have not the slightest doubt that the evidence of the applicants is to be preferred to that of the opposite party. In the first place, there was no reason for the applicants to come to Court with an absolutely false case that the opposite party had committed contempt; there is no allegation of any personal animosity between them and the opposite party. Once an allegation of deliberate disobedience of the order was made against the opposite party, the opposite party would have a strong reason for denying it even though it was true. It would be in his own interest to deny it. The applicants were naturally anxious to have the construction stopped as early as possible. Their suit was for injunction and the object behind it might have been defeated if, before it was decided, the construction had been completed. It was, therefore, in the applicants' own interest to see that the injunction order was served as early as possible upon the opposite party.

That explains why they obtained a copy of the injunction order from this Court; once they obtained it, it stands to reason that they approached the opposite party, showed it to him and asked him to stop further construction. There would have been no other object behind their obtaining an urgent copy of the order from this Court. The question whether the opposite party was bound to act upon the injunction order which was not served upon him through court but was only shown to him by an interested party is not quite free from difficulty. But it seems to us that what is required in order to make a person bound by an order is not that the order is served upon him in a formal manner through court but that he becomes aware of its being passed. An order takes effect as soon as it is passed; its efficacy is not postponed till the service of it in a formal manner. If the person bound by the order is not punished for not complying with it at the moment of its being passed, it is merely because he is not aware of the fact that it is passed. In other words a person who knows that an order binding him to do a certain act is passed cannot disobey it on an excuse that the order is not served upon him formally.

In — 'United Telephone Co. v. Dale', (1884) 25 Ch D 778 (A), Pearson J. emphatically denied it to be, and refused to act upon, the rule that

> "in no case will the Court enforce obedience to its injunction by means of a committal to prison, simply upon the ground that the order has not been served, when it appears beyond all doubt or dispute that the defendant is aware that the injunction has been granted, and that it is the intention of the plaintiff to enforce it."

He relied upon — 'Avory v. Andrews', (1882) 30 WR 564 (B), in which Kay J. answered the defendants' objection that the order had not been served upon them by saying, "But you did know of it". On page 787 he asked,

> "What is the necessity for serving an order upon a defendant, if he knows perfectly well without that service what it is which he is bound to obey?"

In — 'Ponnuswami Iyer v. Ganapathi Iyer', AIR 1924 Mad 393 (C), a Magistrate was held bound to obey an order of the High Court notwithstanding that there was no formal communication thereof to him from the High Court. In — 'Ex parte Langley', (1879) 13 Ch D 110 at p. 119 (D), it was observed by Thesiger L. J. that

> "under certain circumstances, a telegram may constitute such a notice of an order of a Court as to make a person who disregards the notice and acts in contravention of the order, liable for the consequences of a contempt of Court."

Of course it may happen that when a person bound by an order is shown a document purporting to be a copy of it, he is not certain whether it is a genuine copy; if he in fact entertains such a doubt it may be said that he is not bound to take notice of the copy and comply with the order. In 'Langley's case (D)', he bona fide believed that he was not bound to act upon the telegram which he had received because there had been no proceedings which could justify him in stopping the sale; so he was not held guilty of contempt. But in the present case the opposite party did not doubt the genuineness of the certified copy shown to him on 9-6-1954 and really had no reason also to doubt it. If he refused to stop the construction because he was not certain that the copy was genuine or that the injunction order really had been passed by this Court, he was the best person to depose about the doubt in his mind, but he never pleaded in counter-affidavit that he had any such doubt. He might have been under a misapprehension about his liability and might have bona fide thought that he was not bound to comply with the order merely because he becomes aware of its existence through some source and that he becomes bound only when the order is served upon him through court; but his liability is a question of law and he cannot plead ignorance of law: — 'Lal Behari v. State', AIR 1953 All 153 (E).

Absence of mens rea does not include ignorance of law. He would be guilty of contempt even though he did not have an actual intention of disobeying the order or committing contempt of court.

> "It has been held repeatedly that a person may be guilty of contempt even though there was no intention to commit contempt. The question in such cases is not what was the intention of the offender but what was the effect of the publication";

per Bhandari J. in — 'Emperor v. V. Khushal Chand', AIR 1945 Lah 206 at p. 209 (F). In — Superintendent and Remembrancer v. Murali Manohar Prasad', AIR 1941 Pat 185 (G), Harries C. J. pointed out at page 194 that,

> "It has always been laid down in England, and indeed in this country, that the writer of an article can be guilty of contempt without intending to interfere with the due course of justice. An article written with the deliberate intention of interfering with the due course of justice would be an extremely serious matter meriting very serious punishment. He can however be guilty of writing an article which tends to interfere with the course of justice without intending so to interfere. The test has always been not what the writer intended but what effect the words would have upon readers."

Whatever mens rea is required to constitute the offence of contempt of court is present in the deliberate doing of an act which, the contemner knows, he is forbidden to do. If he did not know that he was forbidden to do, there is no mens rea in his doing the act. If the act was done by him accidentally, then also there is no mens rea. Sri A. P. Pande referred us to the dictum that wilful disobedience of injunction is a contempt. The dictum only means that if there is a wilful disobedience of injunction, contempt is committed; it does not mean that contempt cannot be committed in any other manner. Moreover, what is meant by wilful disobedience is nothing but deliberate disobedience and not disobedience with a particular motive. It is the act of disobeying the injunction that must be done wilfully or deliberately; it is not the requirement that it must be done with a criminal intention or motive. It is never practicable to prove the actual intention behind an act; a court can approach the question only objectively and is forced to presume the intention from the act done on the maxim that every man is presumed to intend the probable consequences of his act.

In 'Lal Behari v. State (E)', it was held by a Bench of this Court that no mens rea is required for an offence of contempt of court; what was meant is that no criminal intention or motive behind the deliberate doing of an act is required. If accidentally a person disobeys an injunction, it can be said that there is no wilful disobedience by him and he cannot be committed for contempt. The expression "wilful disobedience" was explained by Warrington J. in — 'Stancomb v. Trowbridge Urban Council', 1910-2 Ch 190 (H). On page 194 he observed:

> "If a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order. I think the expression 'wilfully' in Order XLII, R. 31, is intended to exclude only such casual or accidental and unintentional acts....."

In — 'Emperor v. Debi Prasad Sharma', 1942 Oudh WN 6 (I), a Bench of this Court approved of the statement in Tek Chand's Law of Contempt that "motive of the contemner cannot be considered in determining his guilt". In — 'McComb v. Jacksonville Paper Co.,' (1949) 336 US 187 (J), Douglas J. said at p. 191:

> "The absence of wilfulness does not relieve from civil contempt. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently."

Sri A. P. Pande contended that the opposite party had no personal interest in the matter. The fact would be relevant in deciding whether he acquired knowledge of the order or not. It can be argued from the fact that he had nothing to gain by not complying with the order, that the reason for not complying with the order prior to 19-6-1954 was that he really had no knowledge about the passing of the order. But once it is

proved that he had the knowledge whether he had personal interest in not complying with it or not becomes irrelevant. He might have thought that he was not bound to comply with the order unless it was served through Court or served upon him in the Board's office. He might have also thought that it was a question of prestige, or desired to complete the construction of the shops as early as possible because the Board had borrowed a large amount of money from Government and expected to make good income from rent of the completed shops. He had opposed the application for interim injunction and filed a counter-affidavit in support of his objection. We, therefore, do not agree that the opposite party could be said to have no interest in continuing the construction even after knowing about the injunction.

(9) That the process-server attempted to effect service of the order upon the opposite party at his house on June 16 and 17 and that he read the order and refused to accept it is proved to our satisfaction by the affidavit and the circumstances. There was no reason for the applicant, who swore the affidavit to fabricate an absolutely false case against the opposite party. Neither he nor the process-server would have dared to make such serious allegations against the opposite party if there were no basis. It is a strong piece of circumstantial evidence that the allegations were made against the opposite party without the least delay. The matter was brought to the notice of the Civil Judge on 17th June by the process-server himself; we do not see why he should have gone out of his way to support the applicants and make absolutely false allegations against such a responsible person as the Chairman of a Municipal Board.

The notice and the injunction had to be served upon the opposite party and, therefore, the process-server must have taken them for service. That he went to Bharat Press on the 18th June is supported by an endorsement of the neighbour that the opposite party had gone away somewhere. The applicants themselves were interested in having the injunction served as quickly as possible and, therefore, some of them must have accompanied the process-server on June 16 and 17 as affirmed in the affidavit. There is nothing to contradict the statement that the process-server did not meet the opposite party in the office in the morning of June 16 and 17; the opposite party has not affirmed in his counter-affidavit that he was in the office on those dates in the morning. Nor has he affirmed that he was not in Bharat Press in the afternoon. We do not think that the process-server and the applicant would have taken the risk of the opposite party's proving conclusively that he was not present in Bharat Press on June 16 and 17 and, therefore, could not possibly have been offered the notice and the order.

The applicants did not want the opposite party to be prosecuted for contempt by making a false allegation that he refused to accept the order; they simply brought the matter to the notice of the Civil Judge so that he might have the order served. If no attempt had been made at all to serve the order, there was no point in moving the Civil Judge. We do not see anything suspicious in the process-server's going again to the office and to Bharat Press on June 17 and on June 18. As on June 16 the opposite party refused to accept the order in Bharat Press, the process-server went next morning to the Board's office. But when he did not find him there, he went again to Bharat Press hoping that the opposite party might accept the order even though he had refused to accept it on the previous day. On that occasion, the opposite party lost temper and turned out the process-server and the applicant who had accompanied him. Still the process-server went to Bharat Press on the 18th June because he was ordered by the Civil Judge to make another attempt. When he failed to servo the order in the Board's office, he felt obliged to go to Bharat Press.

We do not see any force in the contention of Sri A. P. Pande that the applicants were not suffering any irreparable loss by the construction going on and would not have made such a determined effort to serve the order upon the opposite party. On behalf of the applicants, it was said that their business was suffering on account of the construction going on their land which was used by them for parking their carts. That the process-server went on 19th June is not in dispute. Nor can it be disputed that the Civil Judge had been approached twice by the applicants, once on June 17 and then on June 18 or 19. Therefore, the fact that the applicants were making a determined effort to serve the order cannot be gainsaid. We are satisfied that what the applicants have affirmed in their affidavit is true.

(10) On the question of law there was no dispute. Though the injunction order was to be served upon the Municipal Board through the President, it was not required by any law to be served in the office of the Board. The service had to be effected on the president and could be effected wherever he was found. The opposite party did not cease to be the President of the Board outside the premises of the Board. If the order was served upon him in the office of the Board, he could have passed the necessary orders there and then; if on the other hand, it was served upon him at his home or in some other place, he might not be able to pass the necessary orders there and then and some time might elapse before the orders were communicated to the executive officer for compliance. No blame would have been attached to him if some time had elapsed before his passing the orders or his communicating the orders to the executive officer on account of his being away from the office at the time of the service; but he would not have been justified in refusing service on the ground that he was not in the Board's office. Even if he could validly refuse service on that ground, the fact still remains that he became aware of the passing of the injunction order and became at once bound to obey it regardless of whether he accepted the order or not.

(11) Whatever might have been the reason for the opposite party's refusing to accept the order in Bharat Press, he is guilty of contempt of court by not obeying it at once. We also consider that he is guilty of contempt of court by refusing to accept the order on an untenable ground and particularly on 17-6-1954 when he not only refused to accept the order but also lost temper and asked the process-server and the applicant to clear out.

Refusal to accept, or evade service of, a summons may not be contempt, but refusal to accept, or evade service of, an injunction order is contempt, because there is a fundamental difference between a summons and an injunction order. A summons (I am dealing with a summons issued in a civil proceeding) does not require obedience. The party summoned is at liberty not to appear in court because the proceeding can still be taken ex parte against him. An injunction requires obedience and since there can be no obedience unless the contents of the order are brought home to the person, the injunction must be accepted when offered. To refuse to accept an injunction order is to interfere with the course of justice by refusing to acquire the knowledge without which the court's order cannot be complied with. It has been held to be a contempt of court to threaten and impede service by a process-server; see — 'Dominus Rex v. Jones', (1710-48) 1 Strange 185 (K); — 'Williams v. Johns', (1773) 21 ER 355 (L); and — 'V. M. Bason v. A. H. Skone', AIR 1926 Cal 701 (M). In the first case, treating process-server of a court contemptuously was held to be a contempt, in the second case illtreating a process-server and asking him to eat up the subpoena was held to be a contempt and in the third case abusing and assaulting a process-server while serving a notice was held to be a contempt.

(12) The last contention of Sri A. P. Pande was that it was the Municipal Board that committed contempt, or that it was the Municipal Board that could be punished for contempt, and not the opposite party. The argument was based upon the fact that the Municipal Board was the defendant and was to be restrained from continuing construction and not the President. The Municipal Board is a juristic person which could sue and be sued in its own name and it was urged that the addition of the words "through the Chairman, Municipal Board, Etawah" was unnecessary. It is true that the injunction was against, and was to be obeyed by, the Board. It is also true that there was no necessity of adding "through the Chairman, Municipal Board, Etawah" in the title of the suit. But the fact remains that the word "Board" includes the President and that the necessary action was to be taken by the President. Whoever might have been the defendant, the notice and the order had to be served upon a human being because no process can be served upon anyone who has no physical existence. The injunction had to be obeyed also by a human being because all physical acts and omissions must be done by human beings. Therefore, the injunction order in its very nature had to be served upon a human being and that was the opposite party. Whether the Municipal Board also became guilty of contempt or not, there is no doubt that the opposite party became guilty of contempt when he did not obey the injunction order. It is immaterial in which capacity he was required to obey it. It is also immaterial whether he can recover the penalty, which he is ordered to pay on the contempt being established, from the Municipal Board; this Court has no concern with those matters. Whether the penalty, which this Court may impose on the contempt being established, should ultimately be paid by the opposite party or the Board is a matter between the opposite party and the Board. The opposite party would be bound to pay the penalty in the first instance even if he is entitled to recover it from the Board later.

Sri A. P. Pande relied upon — 'Tarafatullah Mandal v. S. N. Maitra', AIR 1952 Cal 919 (N). The facts in that case, however, are different. In acquisition proceedings, the High Court issued a writ of mandamus requiring the Government to refrain from taking certain steps and yet those steps were taken. Consequently, the State as represented by the Secretary of the department concerned and certain officers were proceeded against in contempt. It was held that the Secretary of the department could not be guilty of contempt. The State is not a body corporate; it is not a minor or a deity and cannot be represented by anyone such as a Secretary of a department in criminal or even in civil proceedings. A Municipal Board cannot be placed on the same footing as the State. It is a corporation which can be represented through its President. A Secretary of a department is only a servant, and not an agent, of the State. In any case, the State does not consist of the Secretaries of the departments just as a corporation consists of its directors or share-holders or a Municipal Board consists of its President and members. Therefore, though a Secretary of a department, who has himself not committed contempt of court, cannot be committed for contempt a president of a Municipal Board can be.

It was established in that case that if a corporation disobeys an injunction, its officers, whose duty it was to obey it, can be committed to prison; contempt proceedings can be taken against the particular officer whose duty it was to pass the necessary orders. In the present case it was the duty of the opposite party to pass the necessary orders on becoming aware of the injunction issued by this Court. There is no substance in the plea of Sri A. P. Pande that the necessary orders were to be passed by the executive officer or the Public Works Committee and that the President was not responsible for complying with the injunction. As a matter of fact, the opposite party himself has not pleaded that he was not required to take any action in respect of the injunction. On the other hand he pleaded compliance with the injunction immediately on becoming aware of it and has actually passed the necessary orders. He had simply to order the executive officer to pass necessary orders on the injunction. That was the order passed by him on 19-6-1954 and that was the order he was required to pass on 9-6-1954 or on 16-6-1954.

Under S. 51 (6) of the Municipalities Act, it is the president's duty to watch the executive action of the Municipal Board. Even if there exists in the Board a Public Works Committee, it exists only for certain purposes and not for the purpose of complying with court's orders. Sri A. P. Pande conceded that there cannot be a corporation within a corporation; so the Public Works Committee as such could not have been restrained by an injunction and it cannot be argued that it was for the Public Works Committee to comply with the injunction. In '1910-2 Ch 190 (H)', it was pointed out on page 194 that

"in the case of a corporation it cannot be done by the corporation itself, at any rate in the case

of such a corporation as an urban district council. Such a body can only act by its agents or servants".

'In re Tarit Kanti Biswas', AIR 1918 Cal 988 (O), every director was held liable for the publication in a newspaper of an article amounting to contempt of court.

(13) We find that the President, in spite of knowing on June 9, 16 and 17, 1954, that the Board had been restrained from continuing further construction, disobeyed the injunction, even though he was bound to comply with the injunction by getting the construction work stopped. We also find that he, without just cause, refused to accept service of the injunction order and also interferred with the process-server's duty of serving it upon him. We, therefore, find him guilty of contempt of court.

(14) Since we find that he did not actually intend to disobey the injunction issued by the court, we do not think it necessary to send him to jail. We order him to pay a fine of Rs. 100/- and also pay the applicants their costs and the Government Advocate his fee, which we assess at Rs. 300/-.

K.S.B. Contemner fined.

(S) AIR 1955 Allahabad 490 (V. 42 C. 137 Sept.)

BRIJ MOHAN LALL J. (11-4-1955)

Maloji Rao Narsingh Rao, Applicant v. Sankar Saran and others, Opposite parties.

Extraordinary Misc. No. 1 of 1954.

Civil P. C. (1908) Ss. 2(5), 13, 43, 44 — Foreign Court — Submission to jurisdiction — Execution of decree in foreign State — (Constitution of India, Art. 261(3) — (Territory of India) — (General Clauses Act (1897) S. 6(c)). AIR 1950 Cal 12; AIR 1951 Punj 255 and AIR 1953 Punj 24 Dissented from.

A court can exercise jurisdiction over foreigners if they reside within its jurisdiction or (residing outside) submit to its jurisdiction, and if neither of these two conditions exists, the decree passed against a foreigner is an absolute nullity outside the country of the forum by which it was pronounced. Within that country it will be a good decree if there is a special local legislation empowering the court to exercise such jurisdiction. If there is no such special local legislation, the decree will be a nullity even within the country in which the court passing it is situate. (Paras 17, 18)

Held that the ex parte decree passed on 18-11-1948 by the District Judge of Gwalior against the defendants who were residents of U. P. and who had not submitted to its jurisdiction was a decree of a foreign Court and not of a court situate within the territory of India within the meaning of Art. 261(3) of the Constitution. The decree was a nullity and could not be executed in U. P. Sections 43 and 44, Civil P. C. were inapplicable to the case. The judgment-debtors had a right to question the decree on the ground that the court passing it was not a court of competent jurisdiction.

This right of the judgment-debtors had remained intact notwithstanding the facts that Gwalior and Madhya Bharat had acceded to the Indian Union, that since the coming into force of the Constitution Gwalior and Madhya Bharat had become part of the Indian Union and that courts in Gwalior had long ceased to be foreign courts. The validity or otherwise of a decree is to be judged with reference to the date on which it was a nullity on that date; it cannot be made a valid and executable decree by reason of subsequent events.

The judgment-debtors, who never submitted to the jurisdiction of the court which passed the decree, could still treat the decree as a nullity and it could not be executed against them. AIR 1950 Cal 12, AIR 1951 Punj 255 and AIR 1953 Punj 24 Dissented from. (Paras 15, 20, 22 and 41)

Anno: AIR Com., C. P. C., S. 2(5) N. 1; S. 13 N. 12, 19; S. 43 N. 2, 3; S. 44 N. 2, 4.
AIR Man. G. C. Act, S. 6 N 3.

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G. N. Kunzru and A. N. Kaul, for Applicant; G. S. Pathak, J. Swarup and Satish Chandra, for Opposite party.

JUDGMENT: On 15-5-1947 Brigadier-General Raj-Rajendra Sardar Maloji Rao Narsingh Rao Shitole instituted a suit in the Court of the District Judge of Gwalior for the recovery of a sum of Rs. 6,92,236-15-0. It was alleged that the late Munshi Iswar Saran of Allahabad had been his agent for a certain purpose and had died without rendering account. His three sons were impleaded as defendants and a decree for the above sum was sought against them. Summonses were served on the defendants on 18-11-1947, but none of them put in appearance in the Gwalior court. An 'ex parte' decree was passed against them on 18-11-1948.

(2) On 14-9-1951 the District Judge of Gwalior transferred the decree to the District Judge of Allahabad for execution. On 16-10-1951 an execution application was presented in the court of the Civil Judge at Allahabad for the recovery of a sum of Rs. 8,98,257-7-0 by attachment and sale of certain items of immoveable property situate at Allahabad.

(3) The defendants filed an objection on 8-2-1952 in the court of the Civil Judge at Allahabad. They contended that the court of the District Judge of Gwalior was a "foreign court" and its judgment was a "foreign judgment". They pleaded that they had

never submitted to the jurisdiction of the District Judge of Gwalior and the said judge was therefore not competent to pass a decree against them and the decree was consequently not executable. Lastly, it was pleaded that the property sought to be attached did not form part of the assets of the late Munshi Iswar Saran.

(4) With the consent of the parties, the execution case, including the objection filed by the judgment-debtors, was transferred to this Court under S. 24, Civil P. C.

(5) The following issues were framed:

1. Whether the court of the District Judge of Gwalior was a foreign court

(a) on the date of the institution of the suit, or
(b) on the date of the decree.

2. If the aforesaid court is held to be a foreign court, did the defendants submit to the jurisdiction of that court? If not, is the decree binding on them?

3. Whether the decree passed by the District Judge of Gwalior on 18-11-1948 is executable in Uttar Pradesh?

4. Whether the properties sought to be attached form part of the assets of the late Munshi Iswar Saran?"

FINDINGS

(6) Issue No. 1: Section 2(6), Civil P. C. defines "foreign judgment" as the "judgment of a foreign court". This definition has remained unaltered at all material times, but it is noteworthy that the meaning of the term "foreign court" which forms a component part of this definition has undergone changes from time to time. This term, i.e. "foreign court" has had no less than four different definitions from the date of the suit till now. It is, therefore, necessary to examine all these definitions.

It is true that, for the purposes of deciding this issue, the first two definitions only need be considered. But, in order to appreciate the arguments advanced by the learned counsel on either side on other issues, it will be necessary to refer to the third and the fourth definitions also. Consequently, I propose to scrutinise and examine all the four definitions.

(7) The definition of the term "foreign court" is contained in S. 2(5), Civil P. C. This definition stood, on the date of the suit, as follows.

"'foreign court' means a court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Central Government or the Crown Representative."

(8) In order to fully understand this definition, it is necessary to form an idea as to what British India was at that time. The definition of this term, i.e. "British India" is contained in S. 3(5) General Clauses Act (10 of 1897). For different periods the term "British India" meant different territories. For the period commencing from 1-4-1937, and ending with 14-8-1947, the term "British India" meant "All territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces."

Sections 46 and 94, Government of India Act, 1935, enumerated respectively as to what the Governors' Provinces and the Chief Commissioners' Provinces were. The territory of Gwalior was not included in either of the aforesaid two descriptions. The entire Gwalior state was ruled by a Maharaja. It will, therefore, follow that the court of the District Judge of Gwalior where the suit in question was instituted was a court situate beyond the limits of British India which had no authority in British India and was not established or continued by the Central Government or the Crown Representative. It was consequently a "foreign court" as the definition then stood.

(9) A change was introduced in the definition of the term "foreign court" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, which came into force on 23-3-1948. By this Order the following definition of the term "foreign court" was substituted in place of the old definition, viz.

"'foreign court' means a court situate beyond the limits of the Provinces which has no authority in the Provinces and is not established or continued by the Central Government."

The term "Provinces" is defined in S. 3(45), General Clauses Act (10 of 1947) and means "a Presidency, a Governor's Province, a Lieutenant Governor's Province or a Chief Commissioner's Province".

(10) It has not been contended before me that Gwalior fell under any one of the aforesaid categories. A Maharaja still ruled there. It is true that an Instrument of Accession had been executed by him under S. 6, Government of India Act sometime between 3-6-1947 and 15-8-1947, but the sovereignty still vested in the Maharaja. Later Gwalior, Indore and several other states formed, with the consent and approval of the Government of India, a union known as the Union of Madhya Bharat with the Maharaja of Gwalior as its Rajpramukh. This new Union acceded to the Government of India on 13-9-1948, i.e. before the decision of the suit.

(11) The learned counsel for the parties differed as to the status of the Rajapramukh and the state of Madhya Bharat. Arguments were advanced as to whether or not Gwalior or Madhya Bharat was a sovereign state. I am, however, of the opinion that the political structure of the state of Gwalior or Madhya Bharat is irrelevant for the purposes of determining whether or not the Gwalior court was a "foreign court". This question is to be determined with reference to the definition, cited above, which was in force on the date of the decree.

Since it is nobody's case that Gwalior fell within the definition of a "Province", it is obvious that the court of the District Judge of Gwalior was a "foreign court" within the meaning of the definition (quoted above) which was in force on the date of the decree.

(12) The next change in the definition of the term "foreign court" was introduced on 26-1-1950 when the Constitution came into force. The President of India, acting under Art. 372(2) of the Constitution, issued the Adaptation of Laws Order, 1950. As a result thereof, the following definition of "foreign court" was substituted in place of the old definition, viz.

"'foreign court' means a court situate beyond the limits of the States which has no authority in the States and is not established or continued by the Central Government."

The same Order amended the Code of Civil Procedure also and inserted S. 2(21) which contained the definition of "State". It ran as follows:

"'State' means a Part A State or a Part C State, and 'States' means all the territories for the time being comprised within Part A states and Part C States."

(13) It will thus appear that Part B States were excluded from the definition of the word "State" by this amendment. S. 1(3) Civil P. C. was also amended with the result that the said Code was extended to all territories but not to the territories of Part B

States. The area comprised in Part B States is mentioned in Sch. I, Part B, Constitution of India, and includes Madhya Bharat. The result, therefore, was that notwithstanding the fact that Madhya Bharat (including Gwalior) became part of the Union of India and notwithstanding the fact that the territories thereof became part of "territory of India" as defined by Art. 1(3) of the Constitution, the courts in Madhya Bharat continued to be "foreign courts". It may also be pointed out that although Art. 261(3) - to be referred to in greater detail hereafter - permitted the decrees passed after 26-1-1950 by courts in, 'inter alia', Madhya Bharat to be executed "in any part of the territory of India", the definition of "foreign court" was so framed as to make the courts in Madhya Bharat foreign courts. Thus, notwithstanding the political unification of India, the courts in Madhya Bharat were not treated as domestic courts.

(14) The next and the last change in the definition of the term "foreign court" came over on 1-4-1951 when the Code of Civil Procedure (Amendment) Act (2 of 1951) came into force. By this amending Act the Code of Civil Procedure was extended to Part B States also, and the following definition of the term "foreign court" was substituted in place of the definition previously in force, viz.

"'foreign court' means a court situate outside India and not established or continued by the authority of the Central Government."

It was then, for the first time, that the courts of Madhya Bharat ceased to be foreign courts. This completes the history of the definition of the term "foreign court". The effects of these changes will be discussed hereafter.

(15) For the reasons stated above, I hold that the court of the District Judge of Gwalior was a foreign court both on the date of the institution of the suit and on the date of the decree.

(16) Issue No. 2: It will be more convenient to split up this issue in two parts. For the present I propose to deal with the first part only, viz. whether the defendants submitted to the jurisdiction of the Gwalior court. The second part viz. whether the decree of the District Judge of Gwalior is binding on them, can more appropriately be discussed with the next issue.

(17) The parties are agreed that the judgment-debtors objectors do not reside and none of them has ever resided in the territory of Gwalior or Madhya Bharat. It is, further, common ground between the parties that the judgment-debtors objectors do not own and have never owned any property in the aforesaid territory. There is also agreement between them on the question that the defendants objectors never put in appearance in the court of the District Judge of Gwalior. They throughout ignored that court and proceedings pending therein. In the circumstances, I have no hesitation in holding that the defendants objectors never submitted themselves to the jurisdiction of the court of the District Judge of Gwalior.

(18) Issue No. 3 and Second Part of Issue No. 2: The question that arises for decision is as to how far the judgment of a foreign court is enforceable against the objectors. Section 13(a), Civil P. C. makes the judgment of a foreign court binding between the parties, provided, inter alia, it has been pronounced by a court of competent jurisdiction. The law on the question of competence of a court to decide cases against foreigners is contained in the famous Privy Council case of — 'Sirdar Gurdyal Singh v. Rajah of Faridkote', 21 Ind App 171 (PC) (A). The rules laid down by the Privy Council in that case are that a court can exercise jurisdiction over foreigners if they reside within its jurisdiction or (residing outside) submit to its jurisdiction, and if neither of these two conditions exists, the decree passed against a foreigner is an absolute nullity outside the country of the forum by which it was pronounced.

Within that country it will be a good decree if there is a special local legislation empowering the court to exercise such jurisdiction. If there is no such special local legislation, the decree will be a nullity even within the country in which the court passing it is situate.

(19) Mr. Gopinath Kunzru, the learned counsel for the decree-holder, states that S. 18(1)(c), Gwalior (not Madhya Bharat) Civil P. C. contained a provision which conferred jurisdiction on Gwalior courts against absent foreigners. Even if it be so, the decree of a Gwalior court may be executable within the limits of that territory. But I am not called upon in this case to decide whether or not the decree in question is executable in Gwalior. The point that has arisen for decision before me is whether the said decree can be executed in the State of Uttar Pradesh. On this point the Privy Council case says beyond doubt that the decree is a nullity in this State.

(20) It remains to see whether there is any other law which takes this case out of the operation of the rules laid down by the Privy Council. The first provision of law to be examined in this connection is Art. 261 (3) of the Constitution. It runs as follows:—

"Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law."

The territory of India is defined, as already stated, in Art. 1(3) of the Constitution. This definition came into existence when the Constitution came into force on 26-1-1950. Before that date there was no "territory of India" as understood by this definition. Therefore, the decree which was pronounced in this case before 26-1-1950 was not a decree passed by a court situate within the territory of India.

This view is supported by a decision of the Supreme Court in the case of — 'Janardan Reddy v. The State', AIR 1951 SC 124 (B). In that case the petitioners had approached the Supreme Court with a prayer to grant them special leave to appeal under Art. 136(1) of the Constitution against a judgment of the Hyderabad High Court delivered prior to 26-1-1950. This Article empowers the Supreme Court to grant such leave to appeal against any judgment, decree, determination, sentence or order in any cause or matter passed or made "by any court or tribunal in the territory of India". The Supreme Court held that the judgment of the Hyderabad High Court delivered prior to 26-1-1950 was not a judgment by a court in the territory of India. Adopting this view, it is obvious that the cases to which Art. 261(3), Constitution of India will apply are the cases decided after 26-1-1950. The present case, as already stated, was decided much earlier than that date, and the decree-holder cannot, therefore, take advantage of Art. 261(3) of the Constitution.

(21) The above view, about the interpretation of Art. 261(3) of the Constitution, has been taken by almost every High Court in India, and all the cases to be referred hereafter, whether cited on behalf of the decree-holder or the judgment-debtors, contain a discussion of Art. 261 of the Constitution and adopt the view that this Article does not apply

retrospectively to decrees passed prior to the coming into force of the Constitution.

(22) It is next to be seen whether Ss. 43, 44 and 44A, Civil P. C. enable the decree-holder to put the decree in execution in the State of Uttar Pradesh. As already stated, the execution application was made in October 1951, i.e., after the coming into force of the Code of Civil Procedure (Amendment) Act (2 of 1951). After this amendment S. 44 relates to revenue court decrees and is, therefore, inapplicable. Section 43 provides that:

"Any decree passed by any civil court established in any part of India to which the provisions of this Code do not extend, or by any court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the court by which it was passed, be executed in the manner herein provided within the jurisdiction of any court in the territories to which this Code extends."

Since the Code of Civil Procedure extended on the date of the execution application to the State of Madhya Bharat, S. 43, as it stood on the date of the execution application, was also inapplicable. But S. 43, as it stood prior to the amendment brought about by Act 2 of 1951, was in the following form:

" Any decree passed by
(a) a civil court in a Part B State, or
(b) a civil court in any area within Part A State or within Part C State to which the provisions relating to execution do not extend
or
(c) a court established or continued by the authority of the Central Government outside India, may, if it cannot be executed within the jurisdiction of the court by which it was passed, be executed in manner herein provided within the jurisdiction of any court in the States."

In view of this section, as it stood prior to the amending Act 2 of 1951, the decree-holder had a right, subject to the safeguards hereinafter mentioned, to put the decree in execution in the State of Uttar Pradesh. Since Act 2 of 1951 repealed this provision and substituted another in its place, the repeal did not take away the right which the decree-holder had acquired prior to the repeal. This right was reserved by S. 6(c), General Clauses Act. But it is to be seen what that right was. The right was that the decree-holder could make an application to any court in the State of Uttar Pradesh for execution. But, at the same time the judgment-debtors had a right to plead that the decree which was being enforced against them was not a decree of a competent court. Section 44, Evidence Act gives a right to a party to show that any judgment which is relevant or which the other party has proved against him was delivered by a court not competent to deliver it. This right had not been taken away by S. 43, Civil P. C.

A similar case was considered in — 'Sheo Tahal Ram v. Binaek Shukul', AIR 1931 All 689 (C). In that case a decree had been obtained by a plaintiff in the erstwhile Banaras State against a person who was a resident of Mirzapur within British India. The decree was ex parte and the defendant had not submitted to the jurisdiction of the Banaras court. It was put in execution in Mirzapur under S. 44, Civil P. C. which at that time corresponded to S. 43, as it stood prior to 1951.

It was held by a Bench of this Court that, notwithstanding the provisions of S. 44 which enabled the decree-holder to put the decree in execution the judgment-debtor had a right to plead that the court which passed the decree was a court without jurisdiction and, if he succeeded in proving that, the decree could not be executed. The Court gave effect to the plea that the Banaras court was a foreign court and it had no jurisdiction to pass a decree against an absent foreigner when the latter had not submitted to its jurisdiction.

The same principle applies here. Therefore, one arrives at the conclusion that, although the decree-holder, by virtue of S. 43, Civil P. C., as it stood prior to the amendment of 1951, could put the decree in execution, the judgment-debtors could successfully plead that the decree sought to be executed against them was not a decree of a competent court and was therefore not executable in the State of Uttar Pradesh.

(23) Reference was also made to S. 20 of the Amending Act 2 of 1951. This section repeals certain laws which were in force in Part B States. But, while repealing those laws, it preserves the right which had been acquired by any party under the laws so repealed. This section cannot be availed of by the decree-holder because the laws of Part B States which were repealed did not confer any right on the decree-holder to execute the decree in the State of Uttar Pradesh.

(24) I am, therefore, of the opinion that neither S. 6(c), General Clauses Act nor S. 20, Civil P. C. (Amendment) Act (2 of 1951) is of any help to the decree-holder. Nor do Ss. 43 and 44, Civil P. C. help him. It was conceded before me that S. 44A, Civil P. C. also cannot be availed of by the decree-holder because Madhya Bharat is not a "reciprocating territory".

(25) On the contrary, the judgment-debtors can take advantage of S. 6(c), General Clauses Act. They can argue that the Amending Act 2 of 1951 has repealed the definition of 'foreign Court' and has substituted a new definition bringing the Gwalior court to the level of a domestic court, as distinguished from a foreign court. They can claim that under S. 6(c), General Clauses Act they retain the right which they formerly possessed, viz., that of treating the decree passed by the Gwalior court as a nullity. This was a vested right of which they could not be deprived. The judgment-debtors had not put in appearance in the Gwalior court because they felt secure that, as the law then stood, the decree passed by that court would be a nullity.

If it is now held that that decree has become final and binding, it will mean that they have been denied an opportunity of meeting the decree-holder's claim on merits. Obviously it could not have been the intention of law to bring about such drastic changes and to deprive the judgment-debtors of the valuable right of meeting the decree-holder's claim on merits. I am, therefore, of the opinion that the right to treat the decree as a nullity, which has been described in some of the cases to be discussed hereafter as an immunity from the decree, has been kept intact by virtue of S. 6(c), General Clauses Act.

(26) It was next argued that S. 6(c), General Clauses Act will apply if a right has been taken away by the repeal of an Act but will not apply if it has been taken away by an Act of State. It was contended that the accession of Madhya Bharat to India and the unification of India as a result of the Constitution have brought about the end of the aforesaid immunity and therefore S. 6 (c), General Clauses Act will not apply. This contention is incorrect.

As has been pointed out above, the courts in Gwalior or Madhya Bharat continued to be foreign courts notwithstanding the accession of Madhya Bharat to India and notwithstanding the unifica-

tion of India brought about by the Constitution. In spite of the unification of India and accession of Madhya Bharat to India the court in Gwalior continued to be a foreign court and the judgment-debtors' right of immunity from the decree of the Gwalior court remained intact. It was because of the Code of Civil Procedure (Amendment) Act (2 of 1951) that the Gwalior court ceased to be a foreign court.

It is, therefore, obvious that the right of treating the decree as a decree of domestic court which the decree-holder now puts forward is a right given by the repeal of an Act and not by an Act of State. This aspect of the case appears to have been overlooked in most of the rulings cited by the learned counsel for the decree-holder which shall be discussed hereafter.

(27) The learned counsel for the decree-holder cited the case of — 'Lachmeshwar Prasad v. Keshwar Lal', AIR 1941 FC 5 (D). What was decided by their Lordships of the Federal Court in that case was that, if the law changes during the pendency of an appeal, the appellate court can take notice of the change and can mould the relief so as to conform to the amended law. But this case is no authority for the proposition that an execution court can ignore a decree passed by a trial court and can say that, in view of the altered circumstances, the decree which was a nullity on the date on which it was passed has become a valid and good decree afterwards.

(28) The next case cited by the learned counsel for the decree-holder was the Full Bench case of — 'Bhagwan Shankar v. Rajaram', AIR 1951 Bom 125 (E). It approved of an earlier Bombay decision in the case of — 'Chunnilal Kasturchand v. Dundappa Damappa', AIR 1951 Bom 190 (F). In the Full Bench case a decree was passed by a court at Sholapur in Bombay Presidency (within British India) against a resident of Akalkot (a native State). Later on Akalkot merged in the Bombay Presidency. The question that arose for decision was whether that decree could be executed within the jurisdiction of Akalkot court after merger. In that case also the judgment-debtors had not submitted themselves to the jurisdiction of the court which had passed the decree. The Full Bench of the Bombay High Court held that S. 20(c), Civil P. C. was a special local legislation within the meaning of the term as used by their Lordships of the Privy Council in the aforesaid case 21 Ind App 171 (PC) (A) that the decree, though passed against an absent foreigner by the Sholapur court, was executable within the jurisdiction of the country in which that forum was situate and that since the territorial jurisdiction of that State had been enlarged so as to include the territory of the former native State, the decree could be executed.

This case is clearly distinguishable on facts. Had the district of Allahabad merged in the state of Gwalior and had it become the territory of Gwalior, this ruling would have been applicable. This ruling is no authority for the proposition that the decree can be executed in the court which was outside the jurisdiction of the territory in which the court passing the decree was situate.

The present one is a converse case. Here the decree is sought to be executed not within the State in which the court passing the decree was situate but in a different State. Moreover, the two States still retain their separate existence. The present case is not a case of merger. Gwalior State has at no stage merged with the State of Uttar Pradesh. I am, therefore, of the opinion that this decision is clearly distinguishable and does not help the decree-holder.

(29) The next case relied upon by the learned counsel for the decree-holder was a Full Bench decision of the High Court of Rajasthan in — 'Radheyshiam v. Firm Sawai Modi', AIR 1953 Raj 204 (G). In that case a decree had been passed by a court situate in Jaipur State against a defendant who was a resident of Dholpur State. The defendant had not submitted to the jurisdiction of the court passing the decree. The decree was passed against an absent foreigner and was therefore a nullity on the date on which it was passed. Later on both the States merged in the State of Rajasthan and became part of one State. Their Lordships expressed themselves at p. 208, second column, para. 11, as follows:

"In our opinion, the courts at Dholpur and the courts at Jaipur are now courts of the same State and if a decree passed by a Jaipur court is executable within the jurisdiction of the Jaipur court it cannot be held to be inexecutable at Dholpur if it is transferred by the Jaipur court to the Dholpur court for execution under the provisions of the Civil Procedure Code. Both Dholpur and jaipur are parts of the same State and it would be absurd to regard a decree executable in one district of the State not executable in its other district."

It would, therefore, follow that the ratio of the decision was that the two different States had become part of one State, or, to put it in the language of their Lordships, different districts of the same State. Such is not the state of affairs in the present case. Here Madhya Bharat and Uttar Pradesh continue to be two different entities. This ruling is thus clearly distinguishable.

(30) Another authority relied upon by the learned counsel for the decree-holder was the case of — 'Patel Kala Bechar v. Patel Mohan Bhagwan', AIR 1953 Sau 16 (H). That case is exactly similar to the Rajasthan case just discussed. In that case the decree had been passed by a court situate in Vala State against a defendant who was a resident of Bhavnagar State. On the date of the decree the defendant was a non-resident foreigner and the decree was one which could not be executed against him outside the jurisdiction of the State whose court had passed the decree. But later on both the States had merged in the State of Saurashtra and had become different districts of the same State. For the reasons already stated, this case is also distinguishable.

(31) Another case on which reliance was placed by the learned counsel for the decree-holder was that of — 'Dominion of India v. Hiralal', AIR 1950 Cal 12 (I). In that case a decree had been passed by the Munsif of Jamalpur on 15-5-1947. Jamalpur was a part of British India on the date on which the decree was passed. As a result of the partition of the country, Jamalpur fell within Pakistan. After 15-8-1947, the decree-holder sought to execute the decree against the judgment-debtor in Calcutta. The decree was held not excutable. The reason given by the Court was that Pakistan was not a "reciprocating territory" and since no notification had been made permitting the execution of decrees of one Dominion in the other, the decree-holder could not put the decree in execution against the judgment-debtor. Incidentally, it was remarked that the crucial date on which the status of a court is to be looked at is the date of the execution of a decree. It was held that notwithstanding the fact that the court of the Munsif of Jamalpur was a domestic court on the date on which the decree was passed it had become a foreign court on the date on which the decree was sought to be executed.

(32) Before commenting on this case, it is necessary to refer to another very similar case which

followed it. This latter case is reported in — — 'Saidul Hamid v. Federal Indian Assurance Co., Ltd., New Delhi', AIR 1951 Pun 255 (J). In this case the decree was passed by the commercial Subordinate Judge, first class, Lahore on 27-6-1947 i. e., before partition. It was sent for execution to Delhi. A learned single Judge of the Punjab High Court who decided this case followed the Calcutta case and held that, notwithstanding the fact that the court which passed the decree was a domestic court on the date of the decree, it had become a foreign court since then and, since no notification had been made under S. 44A, Civil P. C., permitting the execution of decrees of one Dominion in the other, the decree could not be executed.

(33) Both these cases can be dealt with together. They are no longer good law in view of a later pronouncement of their Lordships of the Supreme Court in — 'Kishori Lal v. Shanti Devi', AIR 1953 SC 441 (K). In that case a wife had obtained an order under S. 490, Criminal P. C. against her husband for the payment of a certain amount of maintenance to her from the court of a magistrate at Lahore. This order was obtained before the partition of the country. Their Lordships of the Supreme Court held that, even after partition, this order could be enforced. Their Lordships observed at p. 442 as follows:

"An order which was good and competent when it was made and which was passed by a tribunal which was domestic at the date of its making and which could, at that date, have been enforced in an Indian Court, does not lose its efficacy by reason of the partition."

In view of this principle, I have no hesitation in saying that the view taken by the learned Judges who decided the Calcutta and Punjab cases is no longer good law and does not help the decree-holder.

(34) Another case relied upon by the learned counsel for the decree-holder was that of — 'Dalel Singh v. Sm. Dhan Devi', AIR 1953 Pun 24 (L). In that case the decree had been passed by the Nabha High Court and it was sought to be executed in British India. Falshaw J., who decided that case, relied on the Bombay Full Bench case of AIR 1951 Bom 125 (E). As already stated, that case was totally inapplicable because there the decree was sought to be executed within the territory of the State whose court had passed the decree. The case before Falshaw J. was a converse case. The learned Judge remarked that the Bombay case was a "sufficient authority for the proposition that the State of affairs at the time of the execution of the decree is to be taken into consideration" (pp. 26-27).

As already stated, this principle has been negatived by their Lordships of the Supreme Court. I am, therefore, of the opinion that this case also carries no weight.

(35) The next case relied upon by the learned counsel for the decree-holder was a Full Bench case of — 'Brajmohan Bose v. Kishorilal Kishanlal', (S) AIR 1955 Madh-B 1 (M) which approved of an earlier decision of that Court reported in — 'Firm Lunaji Narayan v. Purshottam Charan', AIR 1953 Madh-B 225 (N). In the Full Bench case the decree had been passed in 1941 by a court situate at Kasganj in Uttar Pradesh against a defendant who was a resident of Gwalior State and who had not submitted to the jurisdiction of that court. The decree was transferred on 8-2-1950 to a court in Gwalior for execution and it was held executable.

The learned Judges relied on the Bombay Full Bench case of AIR 1951 Bom 125 (E) which, as already stated, was a converse case and was therefore distinguishable. Again in para. 40, p. 12 of the judgment, it was held that the validity of the decree was to be determined by reference to the law in existence on the date the Court was called upon to execute the decree. This is just contrary to what the Supreme Court has held in the aforesaid case of AIR 1953 SC 441 (K).

Next, it was stated in para. 42 that:

"When the sovereign who protected the defendant merged his territories and agreed that his subjects should be treated as subjects of the sovereign in whose territory this decree was passed, the immunity which was attached to the person by reason of the defendant being a subject of different sovereign completely disappeared."

This statement, again, is inapplicable to the facts of the present case because there has been no merger. This Full Bench case is, therefore, distinguishable.

(36) The next case relied upon by the decree-holder was that of — 'Ramdayal v. Shankarlal', AIR 1952 Hyd 80 (FB) (O). This case is also based on the case of AIR 1951 Bom 125 (E) which, as already stated, is distinguishable. The question before the Full Bench was whether the court of Special Judge, Akola, was a court established by the Hyderabad Government. The learned Judges stated on p. 84 as follows:

"The first thing to be considered in this connection is that due to the accession of this State to the Indian Union there has been a change of status. This State (Hyderabad) is now an integral part of the Indian Union and it is no longer a foreign territory or State. Therefore the question referred to us, viz., 'whether the Special Judge's court of Akola is a foreign court or a court of the Hyderabad State' need not be considered in detail as all the courts of this State have become courts of the Indian Union. As such, the 'Akola court being a part of the Indian Union the contention that it is a foreign court can no longer hold ground."

It is obvious that the learned Judges were labouring under the impression that after 26-1-1950 all courts in the Indian Union were domestic courts. This assumption, it may be pointed out with respect, is incorrect. I have pointed out above that, notwithstanding the creation of the Indian Union, courts in Part B States continued to be foreign courts till 31-3-1951. This case also is no authority for holding that the decree-holder can execute the decree in the State of Uttar Pradesh.

(37) The next case cited on behalf of the decree-holder was that of — 'Moosakutty Hajee v. Pylotu Joseph', AIR 1952 Trav-C 89 (P). It is not necessary to discuss the facts of this case because it was overruled by a Full Bench of that Court in — 'P. C. Vareed v. Gopalbai Bahubai Patel', AIR 1954 Trav-C 358 (Q). In this Full Bench case a decree had been passed by a court in Coimbatore in the State of Madras on 24-10-1949 against a defendant who was a resident of Cochin and who had not submitted to its jurisdiction.

It was held that after 26-1-1950 the decree could not be executed in the courts of Travancore-Cochin. This case supports the view that a decree which was a nullity on the date on which it was obtained continues to be so notwithstanding political changes and redistribution of territories.

(38) Another case which supports this view is that of — 'Firm Shah Kantilal v. Dominion of India', AIR 1954 Cal 67 (R). In that case the court of Okhamandal in the erstwhile Baroda State had passed a decree against the Dominion of India as owning the East Indian Railway. The said defendant had never submitted to its jurisdiction. After the date of the decree the State of Baroda merged with the Bombay Presidency. The decree was then sought to be executed in Calcutta. It was held that it was not excutable. In this case

also the test applied was as to what was the nature of the decree on the date on which it was passed. It was held that if it was not executable on that date it could not be executed subsequently.

(39) Another case which lays down the same principle is that of — 'Premchand v. Danmal', AIR 1954 Raj 4 (S). There a decree had been passed by a court at Kurnool, which is in Andhra State and which at that time formed part of Madras State. The defendant was a resident of Sirohi, a State in Rajasthan. In other words, he was an absent foreigner and had not submitted to the jurisdiction of the court which passed the decree. When an attempt was made to execute the decree against him in the State of Rajasthan it was held that the decree was not executable.

(40) The case of — 'Subbaraya Setty and Sons v. S. K. Palani Chetty and Sons', AIR 1952 Mys 69 (T) also lays down the same principle. In that case a decree had been passed on 28-3-1949 by a court in Coimbatore in Madras Presidency against a defendant who was a resident of Arsikere in Mysore State. He had not submitted to the jurisdiction of the Coimbatore court. It was held that the decree could not be executed, notwithstanding the fact that Mysore State had become part of the Indian Union.

(41) As a result of all these authorities, I have come to the conclusion that the decree passed by the District Judge of Gwalior against the defendants-objectors on 18-11-1948 was a nullity and could not be executed in Uttar Pradesh and that the judgment-debtors had a right to question the decree on the ground that the court passing it was not a court of competent jurisdiction. This right of the judgment-debtors had remained intact notwithstanding the facts that Gwalior and Madhya Bharat have acceded to the Indian Union, that since the coming into force of the Constitution Gwalior and Madhya Bharat have become part of the Indian Union and that courts in Gwalior have long ceased to be foreign courts.

The validity or otherwise of a decree is to be judged with reference to the date on which it was passed and if it was a nullity on that date it cannot be made a valid and executable decree by reason of subsequent events. The judgment-debtors, who never submitted to the jurisdiction of the court which passed the decree, can still treat the decree as a nullity. I hold that it cannot be executed against them.

(42) Issue No. 4: Parties were not called upon to lead evidence on this issue. No finding is therefore recorded thereon.

(43) As a result of the findings on issues Nos. 1, 2 and 3, the objection is allowed with costs. The execution application is dismissed.

D.H.Z. Order accordingly.

(S) AIR 1955 (Allahabad) 496 (V 42 C 138 Sept.)

V. BHARGAVA J. (23-2-1955)

Sharda Prasad Srivastava, Applicant v. Accountant General, Uttar Pradesh, Allahabad, Opposite Party.

Civil Misc. Writ No. 1087 of 1954.

(a) Constitution of India, Art. 311 — Applicability — Termination of service on one month's notice under contract — Article does not apply.

Under Art. 311, no limitation is placed on the power of termination of service which does not amount to dismissal or removal. Dismissal and removal are special types of termination and it is only if the authorities decide to take action for dismissing or removing a civil servant that it is necessary for them to comply with the requirements of Art. 311. If services are sought to be terminated under such circumstances that there is no dismissal or removal brought about, Art. 311 does not apply at all. (Para 5)

Where the services of a temporary Government servant or terminated after one month's notice in accordance with the terms of his contract of service, such termination of service does not amount to dismissal or removal within Art. 311 of the Constitution. AIR 1953 SC 250 — AIR 1951 All 793 and AIR 1954 All 5, Rel. on. (Para 5)

(b) Constitution of India, Arts. 311 and 226 — Temporary employee of Government — Contract to terminate service on notice — Validity.

The Government is free to make special contracts of service with temporary employees provided that such conditions of services are not inconsistent with the Constitution. AIR 1953 SC 250, Rel. on. (Para 6)

The power of an employer to terminate the services of an employee after one month's notice is not a power that needs to be regulated by any definite principles. Such a power does inherently vest in an employer, and the employee accepts to be governed by it when he voluntarily accepts the employment. A condition in a contract of service of a temporary Government servant entitling the Government to terminate his services after one month's notice is therefore, valid and binding on the employee who has accepted it. (Para 6)

Anno: AIR Com.: Const. of India, Art. 226 N. 34(f).

(c) Constitution of India, Art. 141 — Decision of Supreme Court — Authority of — Grounds not taken in Supreme Court.

A decision given by the Supreme Court is clearly a declaration of law applicable to the case and is consequently binding on the High Court under Art. 141. The law declared by the Supreme Court is binding whether the declaration is made after discussing all possible aspects or without doing so. For instance, once the Supreme Court has declared that a particular contract of service is valid, it is not open to the High Court to examine the validity of such a contract even on any ground which may not have been considered by the Supreme Court. AIR 1953 SC 250, Ref. (Para 6)

Anno: AIR Com.: Const. of India, Art. 141 N. 4, 7.

(d) Constitution of India, Arts. 14, 311 — Temporary Government servant — Termination of service after notice according to contract — No discrimination.

As between persons not similarly situated no question of discrimination can arise. (Para 7)

Where the services of a temporary Government servant are terminated in accordance with one of the conditions embodied in his contract of service which is a valid contract, it is not open to him to contend that the action taken is void on the ground of discrimination in enforcement of different contracts. Further, whenever there is a possibility of discrimination in any statute, rule or contract which is not permissible under Art. 14 of the Constitution, that statute, rule or contract itself would become void and in a case where it is not open to the Court to hold that the contract is void, such a ground cannot be taken into consideration. (Para 7)

Anno: AIR Com.: Const. of India, Art. 14 N. 1, 42.

(e) Constitution of India, Art. 311 — Contract entitling termination of service without assigning reason — Assigning reason — Effect of.

Where the Government is entitled under the contract of service to terminate the services of an employee after certain notice, even without assigning any reason for the termination, the existence of a reason for termination of the service does not convert the termination of service into an order of dismissal or removal. The termination remains a termination under the terms of the contract. AIR 1954 SC 369, Rel. on. (Para 9)

Further, the existence of reasons for termination of the service is no ground for holding that the services could not be, or were not, terminated in accordance with the conditions incorporated in the contract of service and the mere fact that these reasons happened to be incorporated in the notice terminating service can make no difference. (Para 9)

(f) Constitution of India, Art. 226 — Petition under — Scandalous allegations without justification — Effect of.

A person who comes to invoke the discretionary power under Art. 226 of the Constitution must come with clean hands and must not try to throw mud on others without sufficient grounds and unless he is prepared to substantiate his allegations. If he does so he is not to be heard. (Para 10)

Held on facts that though the allegation in support of the petition was not directed against any particular officer, such scandalous insinuations against the officers should not have been made without any justification and that by itself would be a ground for refusing to entertain this writ petition. (Para 10)

Anno: AIR Com.: Const. of India, Art. 226 N. 42.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 250: 1953 SCR 655 (SC) 5, 6
(B) (V38) AIR 1951 All 793: 52 Cri LJ 1450 5, 9
(C) (V41) AIR 1954 All 5: 1953 All LJ 459 5, 9
(D) (V41) AIR 1954 SC 369: 1955 SCR 26 (SC) 6, 9

S. C. Khare, for Applicant; N. D. Pant, for Opposite Party.

ORDER: Sharda Prasad Srivastava has prayed for the issue of a writ of certiorari under Art. 226 of the Constitution quashing the order dated 21-9-1954 removing the petitioner from service passed by the opposite party, the Accountant General, Uttar Pradesh, Allahabad.

(2) The petitioner was appointed as a temporary upper division clerk in the office of the Accountant General, Uttar Pradesh, Allahabad in August 1950, he having applied for appointment to that post in response to an advertisement in the press inserted by the opposite party. According to the petitioner, the advertisement contained no condition that, after selection to the post and after working therein, the continuance of the petitioner's service was conditional on appearing and passing in a departmental examination.

Nor was any such condition incorporated in the letter of appointment or in the contract of service which the petitioner was required to sign. The petitioner goes on to state that some time about the middle of the year 1953 the form in which the advertisement used to be issued was changed and it was specifically mentioned therein that the passing of the departmental examination would be a condition for confirmation after recruitment. But this condition did not exist at the time when the petitioner applied for appointment and was given the appointment.

The petitioner claimed that from the date of his appointment he had been conscientiously and satisfactorily performing his duties and there had been absolutely no grievance against his work or conduct by the officers supervising his work and that the petitioner had also passed the Efficiency Test. Some time in the year 1950 departmental instructions were issued prescribing a departmental examination. But, according to the petitioner, the Comptroller and Auditor General of India while on tour at Allahabad gave out to understand that the examination was merely nominal and optional and that it had been introduced purely for the purpose of increasing the initial pay from Rs. 85/- to Rs. 100/- in the prescribed scale.

The first departmental examination was held in January 1951 and in subsequent years it used to be held twice every year. The petitioner appeared in the examination in November 1951 and again in May, 1952, but was declared to have failed. On 21-9-1954 a notice was served on the petitioner under the signature of the opposite party informing him that, as he had failed to pass the Departmental Confirmatory Examination within the prescribed period, his services were being terminated.

The petitioner's case is that a large number of other temporary clerks who had also failed to pass the examination were retained in service and this discrimination was brought about by the opposite party in enforcing the terms of the contract of service. The petitioner further complains that he was not given any opportunity to show cause under Art. 311 of the Constitution against his proposed removal.

He has also mentioned certain circumstances indicating that the departmental examination which used to be held was not fair and proper and there were possibilities of manipulation of the results. Another grievance made by the petitioner is that he was not allowed to apply for employment in other offices with the result that he became overage for service in any other government post and yet he was being removed from this service. On the basis of these facts the petitioner sought the relief mentioned above.

(3) On behalf of the opposite party a counter affidavit was filed. But it does not appear to be necessary to give all the facts given in that affidavit. Some of the facts mentioned will, however, be helpful. The counter affidavit gives a copy of the advertisement which was issued in September 1950 for recruitment of upper division clerks. Obviously this was not the advertisement in response to which the petitioner applied for a post and received the appointment. On behalf of the opposite party it has been suggested that the advertisement to which the petitioner responded was in similar terms.

The petitioner has not produced the actual advertisement to which he had responded and consequently I have to proceed on the basis that that advertisement was similar in terms. After the advertisement, an actual offer of appointment was sent to the petitioner by a letter a copy of which has also been filed with the counter affidavit. This offer clearly mentioned that the post was temporary and was liable to be terminated with one month's notice on either side. Subsequently the petitioner was required to sign an agreement copy of which has also been filed. Under this agreement, the petitioner clearly stated that he had understood that his employment under the Government was temporary and that his services may be terminated after a notice for a period of not less than thirty days and without any reasons being assigned.

It has been pointed out in the counter affidavit that under the contract of service of the petitioner the petitioner's services were liable to be termi-

nated on one month's notice without giving any reasons at all and it was in exercise of this power that the opposite party terminated the services of the petitioner. The petitioner's contention that he was removed from service is not correct. On the question of discrimination, it has been stated in the counter affidavit that the cases of the various persons who were holding temporary posts were considered individually on merits by the Comptroller and Auditor General or by the 'Accountant General.

In considering their cases, regard was had to the entries in their character rolls and the marks obtained by each employee in the examinations in the various subjects and in deserving cases services were retained and further chances were given. So far as permission to apply for appointment in other departments was concerned, it is stated that the question of forwarding such applications of temporary employees was regulated by departmental orders and policy. It was also denied in the counter affidavit that the departmental examination was held in such a manner that the results could be manipulated.

(4) The petitioner filed a rejoinder affidavit contesting some of the facts given in the counter-affidavit. The main point brought out in this rejoinder affidavit which needs mention is that, according to the petitioner, he became a quasi-permanent government servant after having held a temporary post for a period of three years, so that his services could not be terminated by one month's notice under his contract of service and thereafter his conditions of service were to be regulated by the rules applicable to permanent civil servants employed in the Accountant General's Office. It was contended that a quasi permanent Government servant could not be removed from service by merely a month's notice.

In the rejoinder affidavit the petitioner further gave facts to strengthen his argument that there has been discrimination without any basis by the opposite party in terminating the services of some of the temporary upper division clerks while the services of others were not terminated under similar circumstances.

(5) The principal point that has been argued by learned counsel for the petitioner is that the contract of service, by which the petitioner was appointed as a temporary upper division clerk on the condition that his services could be terminated on one month's notice without assigning any reason, was void as it tended to defeat the provisions of Art. 311 of the Constitution. Firstly, it appears to me that no question at all arises of such a contract defeating the provisions of Art. 311 of the Constitution.

Under Art. 311 limitations were placed on the power of dismissal, removal and reduction in rank only. No limitation was placed on the power of termination of service which did not amount to dismissal or removal. Dismissal and removal are special types of termination and it is only if the authorities decide to take action for dismissing or removing a civil servant that it is necessary for them to comply with the requirements of Art. 311.

If services are sought to be terminated under such circumstances that there is no dismissal or removal brought about, Art. 311 of the Constitution does not apply at all. In the present case the services of the petitioner were terminated after one month's notice in accordance with his terms of contract of service. Such termination of service does not amount to dismissal or removal. This view of mine is in line with a decision of the Supreme Court in — 'Satish Chandra v. Union of India', AIR 1953 SC 250 (A) and two division Bench decisions of this Court, viz., — 'Jayanti Prasad v. State Uttar Pradesh', AIR 1951 All 793 (B) and — 'M. R. Bakshi v. K. N. Saxena', AIR 1954 All 5 (C).

(6) The next question whether the contract of service of a temporary employee under which the appointment can be terminated by one month's notice is a valid or void contract cannot be gone into by me in view of the decision of the Supreme Court in 'Satish Chandra Anand's case (A)' mentioned above. That was a case where a person was first employed on a contract for five years. Subsequently his employment was renewed on the condition that he agreed to be governed by the Central Civil Services (Temporary Service) Rules, 1949. That person accepted the appointment on this condition.

One of the rules which thus became applicable was R. 5 under which the services of a temporary Government Servant, who was not in quasi permanent service, were liable to termination at any time by a notice given either by the Government servant to the appointing authority or by the appointing authority to the Government Servant, the period of such notice being one month unless otherwise agreed to by the Government and by the Government servant.

The condition laid down in R. 5 of the Central Civil Service (Temporary Service) Rules, 1949 is exactly similar to the conditions of the agreement which was entered into by the petitioner when he accepted this appointment as an upper division clerk in the office of the opposite party. The validity of the contract under which such a rule became enforceable against that person was considered by the Supreme Court in the following words:

"His grievance, when analysed, is not one of personal differentiation but is against an offer of temporary employment on special terms as opposed to permanent employment. But of course the State can enter into contracts of temporary empolyment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who chose to accept those terms and enter into the contract are bound by them, even as the State is bound.

When the employment is permanent, there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above as free to make contracts of service with temporary employees, engaged in works of a temporary nature, as any other employers."

With these remarks the contract of service was held to be vaild. The Supreme Court has thus laid down a principle of law that the Government is free to make special contracts of service with temporary employees provided that such conditions of service are not inconsistent with the Constitution. The principal condition which came up for consideration in that case was the one entitling the Government to terminate the service after one month's notice without any reasons. That case was, therefore, very similar to the case before me. The decision given by the Supreme Court is clearly a declaration of law applicable to such cases and is consequently binding on me under Art. 141 of the Constitution.

It is, therefore, not open to me to examine the question whether this contract was or was not void as tending to bypass the constitutional protection given to the civil servants by Art. 311 of the Constitution.

Learned counsel had also further contended that a condition permitting the appointing authority to terminate the service after one month's notice in the case of a number of temporary employees could be enforced arbitrarily and without any limi-

tations so as to bring about discrimination between various employees and on this ground also such a condition in the contract of service must be held void. Firstly I do not consider that the power of an employer to terminate the services of an employee after one month's notice is a power that needs to be regulated by any definite principles.

Such a power does inherently vest in an employer, and the employee accepts to be governed by it when he voluntarily accepts the employment. Secondly, once the Supreme Court has declared that such a contract of service is vaild, it is not open to me to examine the validity of that contract even on any ground which may not have been considered by the Supreme Court. The law declared by the Supreme Court is binding whether the declaration is made after discussing all possible aspects or without doing so. The contract of service of the petitioner must, therefore, be held to be a valid contract by which he is bound.

Learned counsel for the petitioner tried to distinguish the decision of the Supreme Court in 'Satish Chandra Anand's case (A)' (supra) on the ground that in that case the employee was to be governed by R. 5 of the Central Civil Services (Temporary Service) Rules, 1949, whereas in the present case the opposite party relies on the special condition in the contract of service signed by the petitioner. No such distinction exists. Rule 5 of the Central Civil Services (Temporary Service) Rules, 1949, in that case was not held to be applicable as a rule governing that Government servant on the ground that, in the contract of service, the Government servant had himself voluntarily agreed to be governed by such a condition. It was thus treated as one of the conditions of service in the contract which is also the position in the case before me. In the case of — 'Shyamlal v. State of Uttar Pradesh', AIR 1954 SC 369 (D) the Supreme Court had occasion to refer to its previous decision in the case of 'Satish Chandra Anand', (A), (Supra), and said that:

"Our recent decsion in 'Satish Chandra Anand v. Union of India (A)' fully supports the conclusion that Art. 311 does not apply to all cases of termination of service.

That was a case of a contract for temporary service being terminated by notice under one of the clauses of the Contract itself....."

These remarks bring out the fact that the case of 'Satish Chandra Anand (A)' was decided by the Supreme Court on the basis that the termination of service by notice was permissible under one of the clauses of the contract itself. That case is, therefore fully applicable to the case before me and the contract of service entered into by the petitioner is therefore enforceable as between him and the opposite party.

(7) The next contention that in enforcing the contract the opposite party brought about discrimination and consequently the order of termination of the service of the petitioner is void, cannot be accepted on two grounds. Firstly, I am not at all satisfied that the petition makes out any case at all that there has really been any discrimination between the petitioner and others who were governed by a similar contract of service.

The petitioner has alleged that other persons who were also appointed as temporary Upper Division Clerks like him in the years 1948, 1949 and 1950 have been retained in service even though they failed in the departmental examination which was held as a necessary qualification for eligibility to receive a permanent appointment. In the counter affidavit it has been clearly stated that the case of each individual was considered on merits and additional chances were given in deserving cases after a consideration of the character roll and the marks obtained in the examination in the various subjects.

Obviously, for the purpose of further retaining a temporary servant, the entries in the character roll and the marks obtained in different subjects in the examination were very relevant considerations and any action taken after having regard to these circumstances must be held to be a proper exercise of the discretion. It does not appear from the facts given in the various affidavits that the character roll of the petitioner was as good as, or better than, the character rolls of others whose services were retained.

Nor does it appear that the petitioner obtained marks equal to or higher than the marks obtained by those persons in different subjects in the examination. The petitioner and those other persons cannot be said to be similarly situated, and as between persons not similarly situated no question of discrimination can arise.

Secondly, it is to be noticed that the services of the petitioner were terminated in accordance with one of the conditions embodied in his contract of service which I have already said above was a valid contract. As long as action is taken in accordance with the terms of the contract and the contract is valid, it is not open to the petitioner to contend that the action taken is void on the ground of discrimination in enforcement of different contracts. Whenever there is a possibility of discrimination in any statute, rule or contract which is not permissible under Art. 14 of the Constitution, that statute, rule or contract itself would become void and in a case like the present one where it is not open to me to hold that the contract was void such a ground cannot therefore be taken into consideration. This ground also therefore fails.

(8) The petitioner's contention that he had become a quasi permanent government servant is clearly not correct and learned counsel for the petitioner, when asked to show the rule under which a temporary Government servant becomes quasi permanent after three years, had to concede that the rule which was in contemplation had been wrongly interpreted by the petitioner, as the petitioner did not satisfy all the conditions required to give him the status of a quasi permanent Government servant.

(9) One more point that has been argued by learned counsel for the petitioner in support of this petition is that in this case the order of termination of service was not in accordance with the conditions embodied in the contract of service. In the agreement signed by the petitioner the exact language used was:

"I understand that my employment under Government is temporary and that my services may be terminated at any time after notice for a period of not less than thirty days but without any reasons being assigned."

Learned counsel has urged that in this case the order of termination of service of the petitioner does assign a reason on account of which the order, that should have been passed, should have been an order of dismissal or removal. The termination of service can only be without assigning any reason whatsoever. I do not consider that this interpretation of the agreement can be accepted. The words "without any reason being assigned" were meant to lay down that, when terminating service after notice for a period of not less than thirty days, the authority giving the notice was not required to assign any reasons.

But it was not meant to be a limitation prohibiting his giving a reason. It is obvious that,

whenever service has to be terminated under such a condition, the person giving notice of termination has to take a decision that he would terminate the service and some reason must exist for that course of action. The reasons in some cases have to be recorded in the notice itself where the contract or the law requires this to be done. Where there is no such requirement, the reasons need not be recorded. But the mere recording of reasons would not make the termination otherwise than in accordance with such a condition.

It is to be noticed that in this case the reason given is not one relating to any misconduct on the part of the petitioner. It could not be a ground for dismissal or removal. The Government desired that no one should be appointed to a permanent post unless he had passed the departmental examination, and it appears to be natural that a policy should have been laid down that no one was to be allowed to continue indefinitely as a temporary employee if he failed to pass the departmental examination within a reasonable period of time.

The petitioner failed to pass the examination during the four years when he held the temporary post and this appears to have been the reason which actuated action for termination of his service in accordance with the terms of the contract. Such action does not cast any reflection on the conduct of the person whose service is terminated. The termination of service was in exercise of the power conferred by the condition of service which in terms did not require any imputation or charge against the petitioner and such termination of service therefor involves no implication of misbehaviour or incapacity.

In this connection, reference may be made to the case of 'Shyamlal v. State of U. P. (D)' where the question of validity of compulsory retirement of a Government servant was considered by the Supreme Court. It was held that:

"There can be no doubt that removal — I am using the term synonymously with dismissal — generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer.

There is no such element of charge or imputation in the case of compulsory retirement. The two requirements for compulsory retirement are that the officer has completed twenty five years' service and that it is in the public interest to dispense with his further services. It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action. But what is important to note is that the directions in the last sentence in note 1 to Art. 465A make it abundantly clear that an imputation of charge is not in terms made a condition for the exercise of the power. In other words, a compuslory retirement has no stigma or implication of misbehaviour or incapacity.

In the present case, there was no doubt some imputation against the appellant which he was called upon to explain. But it was made perfectly clear by the letter of 4-1-1950 that the Government was not holding any formal enquiry under R. 55 of the Civil Services (Classification, Control and Appeal) Rules and that before taking action for his compulsory retirement the Government desired to give him an opportunity to show cause why that action should not be taken.

In other words, the enquiry was to help the Government to make up its mind as to whether it was in the public interest to dispense with his services. It follows, therefore, that one of the principal tests for determining whether a termination of service amounts to dismissal or removal is absent in the case of compulsory retirement."

On this view their Lordships of the Supreme Court decided that a termination of service by compulsory retirement did not amount to dismissal or removal, and that the enquiry, which was held, was for the purpose of helping the Government to make up its mind at to whether it was in the public interest to dispense with the services of the Government servant. The compulsory retirement which had been found to be in the public interest was held to be valid.

The existence of a reason for termination of the service does not, therefore, convert the termination of service into an order of dismissal or removal, and the termination remains a termination under the terms of the contract. In 'AIR 1951 All 793 (B)' the services of Jayanti Prasad were terminated after one month's notice in accordance with his conditions of service. His services were terminated due to his bad reputation in the Rationing and Supply Organisation. The Bench which decided the case held that termination of service after giving reasons, which had been given in the notice of termination of service, was in accordance with the conditions of service. In the case of 'AIR 1954 All 5 (C)' while overruling the contention that the termination of service by notice was a device adopted to avoid the necessity of proving misconduct to entitle dismissal it was held that

"The other objection is that even if there was some suspicion against the applicant that his conduct had not been above board, it was open to the Regional Food Controller, Lucknow, to overlook it and the mere fact that the applicant's conduct was suspected did not mean that the Regional Food Controller, Lucknow, was bound to have the charges established and then dismiss him and could not terminate his services which were no longer required." It is clear that the existence of reasons for termination of the service is no ground for holding that the services could not be, or were not, terminated in accordance with the conditions incorporated in the contract of service and the mere fact that these reasons happened to be incorporated can make no difference.

(10) In the view that I have taken, it is not at all necessary to consider the other points which have been taken by the petitioner and which have been mentioned by me earlier. I may, however, take notice of the allegations made by the petitioner about the manner in which the departmental examination is held. In his affidavit, the petitioner stated that the papers used to be examined by local officers who had already "their liking or disliking about the individual candidates."

This clearly contains an insinuation that the officers examining the answers-books of the candidates are influenced by their personal likes or dislikes when giving marks instead of doing so on the basis of the quality of the answers given. This insinuation is strengthened further by alleging that roll numbers were not assigned to the candidates and the answer-books bore the names and sections of the department of the candidates, the suggestion being that the officer could know which candidate's answer-book he was examining. A further suggestion was made that the answers were written on

loose sheets of paper to which was tagged the name of the examinee leaving every chance for manipulation.

This allegation contains an insinuation that the answers written out by the candidates on loose sheets can be manipulated by those who handle them. The petitioner did not in plain words come forward with an allegation that any manipulation had been done in his case, or that the marks awarded to him had been influenced by personal likes or dislike of the examiners.

It does, however, appear that he put in these circumstances in the affidavit for the purpose of insinuating that there had been dishonesty in the examination and it also appears that this was done without any satisfactory material or sufficient cause. Even though the allegation was not directed against any particular officer such scandalous insinuations against the officers should not have been made in the affidavit without any justification and this by itself would be a ground for refusing to entertain this writ petition.

A person who comes to invoke the discretionary power under Art. 226 of the Constitution must come with clean hands and must not try to throw mud on others without sufficient grounds and unless he is prepared to substantiate his allegations. If he does so he is not to be heard. This is one more ground on which this petition must fail.

(11) The petition is, therefore, dismissed with costs which I fix at Rs. 200/-.

D.R.R. Petition dismissed.

(S) AIR 1955 Allahabad 501 (V. 42 C. 139 Sept.)

MOOTHAM C. J. AND BRIJ MOHAN LALL J.

(1-3-1955)

Mahabir Prasad, Applicant v. District Magistrate, Kanpur and others, Opposite Parties.

Civil Misc. Writ No. 963 of 1953.

(a) U. P. General Clauses Act (1 of 1904), S. 21 — Judicial or quasi-judicial orders and administrative orders — Power to modify — Order of allotment by Rent Control and Eviction Officer — Power to modify or cancel — (Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7) — (Words and Phrases — Judicial or quasi-judicial order) — (Constitution of India, Art. 226).

The power of an authority to modify its own order or the order of a co-ordinate or subordinate authority varies according to the nature of the order. Ordinarily finality attaches to a judicial or a quasi-judicial order. If the authority passing the order wishes to modify or rescind the said order, it has to act within the provisions of law conferring power of review. Similarly, if it is desired to modify or cancel judicial or quasi-judicial order passed by a subordinate authority or an authority exercising concurrent jurisdiction, the power must be expressly conferred by some provisions of law.

Greater latitude is permissible in the case of an administrative or executive order. Such an order may be modified or revoked by the authority passing it under S. 21, U. P. General Clauses Act (1 of 1904). (Paras 6, 7)

The term "judicial or quasi judicial" has been given a liberal interpretation so as to include orders by tribunals or authorities other than the regular Courts of justice. (Para 9)

To constitute a quasi-judicial or a judicial order, the authority passing the order should be under an obligation to hear the parties, to make an enquiry, to weigh the evidence and to base its conclusion thereon. Its decision should be based on the result of the enquiry and not on its own discretion. (Para 11)

An order of allotment passed under S. 7, Rent Control and Eviction Act is an executive or administrative order and not a judicial or quasi-judicial order.

Hence the Rent Control and Eviction Officer can modify or cancel his previous order of allotment. But this power can be exercised so long as the allottee acting in pursuance of the order does not take possession of the accommodation. After possession has been taken over by the allottee in pursuance of the allotment order the Rent Control and Eviction Officer's power comes to an end (except in a case where order was secured by fraud, misrepresentation of facts or some other undesirable method) because the accommodation is no longer vacant nor is about to fall vacant. Civil Misc. Writ No. 7563 of 1951 All, approved. (Paras 13, 15)

Anno: AIR Com.: Const. of India, Art. 226, N. 161.

(b) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7 — District Magistrate empowering Rent Control and Eviction officer to act as "District Magistrate" — District Magistrate whether can exercise power of allotment.

The District Magistrate can exercise the power of allotment under the Rent Control and Eviction Act after having empowered the Rent Control and Eviction Officer to act as "District Magistrate" under the Act. The mere fact that another officer has also been empowered under the Act does not take away the District Magistrate's own power. Both of them can exercise concurrent jurisdiction. But a power under concurrent jurisdiction can be exercised so long as it has not been exercised in respect of the same matter by another co-ordinate authority.

Hence the District Magistrate cannot interfere with an order of the Rent Control and Eviction Officer after that officer has passed an order. AIR 1952 All 819, Rel. on. (Paras 15, 16)

(c) U. P. General Clauses Act (1 of 1904), S. 21 — District Magistrate as superior authority cannot upset order of allotment of Rent Control and Eviction Officer — (Houses and Rents — U. P. (Temporary Control of Rent and Eviction Act (3 of 1947), S. 7).

Where a power is exercised by a public servant under statutory sanction, that power can be exercised by him alone and not by any superior authority. The superior authority may give him suggestion and may even ask him to reconsider his decision leaving to him the freedom to change his mind or not. If in such circumstances the officer who originally passed the order, changes his mind and arrives at a contrary conclusion, the order will be perfectly valid because it would be the order of the original authority and not of the higher authority.

But the higher authority cannot by its own order set aside the order of the inferior authority and assume to itself an appellate or revisional power which has not been conferred upon it by the statute. Hence the District Magistrate acting not as an authority of co-ordinate jurisdiction but as a superior authority cannot upset the order of allotment of the Rent Control and Eviction Officer. (Para 21)

(d) U. P. General Clauses Act (1 of 1904), S. 21 — Order of allotment by Rent Control and

Eviction Officer — If can be cancelled in pursuance of order of superior authority — (Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7).

The Rent Control and Eviction Officer cannot lawfully cancel his own order when that cancellation is not the result of the exercise of his own discretion but is brought about in pursuance of an order of a superior authority. The revised order although passed by the Rent Control and Eviction Officer could not be upheld by invoking the aid of S. 21, U. P. General Clauses Act.

(Para 26)

(e) Constitution of India, Art. 226 — Certiorari — Order of District Magistrate and Rent Control and Eviction Officer cancelling order of allotment — (Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 7).

The Rent Control and Eviction Officer passed an order of allotment under S. 7, U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947) but subsequently, in pursuance of an order of the District Magistrate, cancelled that order. The allottee applied for a writ of certiorari.

Held that an order of allotment is not a judicial or a quasi-judicial order and therefore a writ of certiorari could not issue. But in order to give redress to the petitioner against the illegal orders passed by the District Magistrate and on his command by the Rent Control and Eviction Officer High Court had jurisdiction to issue a writ of any other description as the situation may demand. In the circumstances of the case, High Court directed that a writ of prohibition should issue to the District Magistrate and the Rent Control and Eviction Officer forbidding them to enforce their order cancelling allotment.

A writ of mandamus should also issue to them directing them to give effect to the previous order of allotment.

(Para 28)

Anno. AIR Com., Const. of India, Art. 226, N. 161.

CASES REFERRED: Paras

(A) (V37) AIR 1950 SC 222: 1950 SCR 621 (SC) 9
(B) (1931) 1931-2 KB 215: 100 LJKB 760 9
(C) (V39) AIR 1952 All 63: ILR (1952) 2 All 783 12
(D) (V39) AIR 1952 All 859: 1952 All LJ 278 12, 24
(E) ('51) Civil Misc. Writ No. 7563 of 1951, D/- 27-7-1951 (All) 13, 22, 26, 31
(F) (V41) AIR 1954 All 6: 1953 All LJ 440 14, 31
(G) (V42) AIR 1955 All 36: 1955 All LJ 132 (FB) 17, 32
(H) (V39) AIR 1952 All 819: 1952 RD (HC) 79 18, 23, 32
(I) (V41) AIR 1954 All 745: 1954 All LJ 225 19, 32

S. N. Kacker, for Applicant; Standing Counsel, for Opposite Parties.

BRIJ MOHAN LALL J.:

One of the shops on the ground floor of house No. 40/-1, Parade, Kanpur, fell vacant in the first week of June 1951. Several persons including Mahabir Prasad (petitioner) and Bansidhar (opposite party No. 3) were desirous of taking the shop on rent. They applied for allotment to the Rent Control and Eviction Officer who, according to the common case of the parties, is a person authorised by the District Magistrate to perform his functions under the Rent Control and Eviction Act (3 of 1947), and is, therefore, a "District Magistrate" within the meaning of the term as defined in S. 2 (d) of the Act.

The Rent Control and Eviction Officer allotted the shop in question to the petitioner on 14-6-51. Bansidhar, however, managed to occupy the shop. This occupation was obviously unauthorised.

(2) The Rent Control and Eviction Officer took steps under S. 7A of the Act and passed an order for Bansidhar's eviction. The latter went up in revision to the Commissioner, Allahabad-cum-Jhansi division but the latter by his order dated 4-10-1952 dismissed the said revision.

(3) Having failed before the executive authorities, Bansidhar turned to civil Courts and instituted a suit against the petitioner for an injunction restraining him from taking possession. He obtained a temporary injunction to that effect, but the suit was ultimately dismissed and the injunction was discharged. Bansidhar preferred an appeal and sought an injunction from the District Judge who also refused it. Thereafter he came to this Court and obtained an interim injunction which also was discharged on 28-4-53.

(4) After all attempts on Bansidhar's part to seek protection of his unauthorised occupation of the disputed premises from civil Courts had failed the petitioner moved the Rent Control and Eviction Officer to enforce the order which he had passed for Bansidhar's eviction. On 11-5-53 the said officer directed the Station Officer, Kotwali to dispossess Bansidhar and to deliver possession to the petitioner. The very next day, i. e., on 12-5-53 Bansidhar approached the District Magistrate and prayed that fresh enquiry might be held and further proceedings for his eviction might be stayed.

The petitioner objected, but in spite of his objections the District Magistrate passed an order on 18-9-53 directing the Rent Control and Eviction Officer to cancel the allotment made by him in petitioner's favour and to allot the shop to Bansidhar. Acting on this command the Rent Control and Eviction Officer passed an order on 26-9-53 allotting the shop to Bansidhar "as demanded by the District Magistrate".

(5) The petitioner has come up to this Court and he prays that in exercise of our power under Art. 226 of the Constitution we may issue a writ of certiorari quashing the District Magistrate's order dated 18-9-53 and the Rent Control and Eviction Officer's order dated 26-9-53 and may further issue a writ of mandamus directing the said officers to enforce the Rent Control and Eviction Officer's order dated 11-5-53.

(6) The power of an authority to modify its own order or the order of a co-ordinate or subordinate authority varies according to the nature of the order. Ordinarily finality attaches to a judicial or a quasi-judicial order. Such an order when passed is supposed to dispose of the dispute once for all. If the authority passing the order wishes to modify or rescind the said order, it has to act within the provisions of law conferring power of review. Similarly, if it is desired to modify or cancel judicial or quasi-judicial order passed by a subordinate authority or an authority exercising concurrent jurisdiction, the power must be expressly conferred by some provisions of law.

(7) Greater latitude is permissible in the case of an administrative or executive order. Such an order may be modified or revoked by the authority passing it under S. 21, U. P. General Clauses Act (1 of 1904). This section provides that

"Where, by any United Provinces Act, a power to issue notification, orders, rule or bye-

laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary, or rescind any notifications, orders, rules or bye-laws so issued".

(8) A subsidiary question will arise whether the power to modify or recall its own order can be exercised by an authority in exercise of its own discretion only or whether it can also be exercised in a case in which the said authority, if left to itself, would never interfere with it but is acting under the command of a superior authority. This point will be considered hereafter along with the other important question as to how far a superior authority can interfere with an executive or administrative order passed by an inferior authority in exercise of its statutory powers.

(9) Before entering into this question it is necessary to ascertain whether an order of allotment is an administrative or executive order or an order of a judicial or quasi-judicial nature. An order of judicial or quasi-judicial nature does not mean that it should have been passed by a Court of law. The term "judicial or quasi-judicial" has been given a liberal interpretation so as to include orders by tribunals or authorities other than the regular Courts of justice. The Supreme Court had to interpret the term "judicial or quasi-judicial" order in the case of — 'Province of Bombay v, Khushaldas S. Advani', AIR 1950 SC 222 (A).

They had laid down that the writ of certiorari could issue in the case of judicial or quasi-judicial orders and this led them to consider as to what kinds of orders were judicial or quasi-judicial orders. Kania C. J. quoted with approval at pp. 224-225 a dictum of Scrutton L. J. in — 'King v. London County Council', (1931) 2 KB 215 (B) at p. 233 which runs as follows:

"It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari."

Thereafter, Kania C. J. referred to the dictum of Slesser L. J. in the same case where it was held that in order to issue a writ of certiorari four things were necessary, viz., the tribunal whose order is sought to be quashed (1) having legal authority, (2) to determine questions effecting rights of subjects, (3) having the duty to act judicially, (4) has acted in excess of their legal authority.

(10) Summing up his own views on p. 226 Kania C. J. observed that:

"It seems to me that true position is that when the law under which the authority is making a decision itself requires a judicial approach, the decision will be quasi-judicial."

Fazl Ali J. expressed himself on p. 228 as follows:

"It may be safely laid down that an order will be a judicial or quasi-judicial order if it is made by a Court or a Judge, or by some person or authority who is legally bound or authorised to act as if he was a Court or a Judge. To act as a Court or a Judge necessarily involves giving an opportunity to the party who is to be affected by an order to make a representation making some kind of inquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of a controversy, before any decision affecting the rights of one or more parties is arrived at.

The procedure to be followed may not be as elaborate as in a Court of law and it may be very summary, but it must contain the essential elements of judicial procedure as indicated by me,"

(11) It will therefore follow that to constitute a quasi-judicial or a judicial order, the authority passing the order should be under an obligation to hear the parties, to make an enquiry, to weigh the evidence and to base its conclusion thereon. Its decision should be based on the result of the enquiry and not on its own discretion.

(12) To the same effect is a decision of a Bench of this Court reported in — 'Avadhesh Pratap Singh v. State of Uttar Pradesh', AIR 1952 All 63 (C). This latter decision was followed by another Bench of this Court in — 'Mannu Lal v. Chakradhar Hans', AIR 1952 All 859 (D).

(13) Judging an allotment order passed under S. 7 by this standard, one finds that the allotting authority is not bound to hold an enquiry, to hear the parties or to permit them to produce evidence. It may in certain cases act on its own discretion irrespective of the respective needs of the different applicants. One very often comes across a case where an officer transferred to a new station has been waiting for sometime for accommodation but another officer, a more recent arrival, is given a vacant accommodation because allotment to him will serve some public purpose or facilitate Government work.

In such a case if the personal needs only of the two claimants are considered the needs of the former are certainly greater than those of the latter. He and members of his family had been suffering inconvenience for want of proper accommodation for a much longer period than his rival and had much stronger claim than the newly arrived officer. But the allotting officer can, in the exercise of his discretion and in public interest, ignore the right of the officer who has been waiting from before.

In the circumstances it is obvious that the decision which the allotting officer has to make is not a judicial or quasi-judicial order, but an order which rests mainly in his discretion, although it may be conceded that the discretion is to be exercised neither capriciously nor arbitrarily. An exactly similar point arose for decision in an unreported case viz., — 'Sri Nath v. Commissioner of Allahabad', Civil Misc. Writ No. 7563 of 1951 (All.) (E) decided by a Division Bench of this Court on 27-7-1951. It was held in that case that an order of allotment passed under S. 7, Rent Control and Eviction Act was an executive or administrative order and not a judicial or quasi-judicial order. With this decision I am in entire agreement.

(14) Reference was also made to the case of — 'Chandrabhan v. Rent Control and Eviction Officer, Agra', AIR 1954 All 6 (F) in which it was held that proceedings under R. 4 of the Rules made under S. 17 of the Act were quasi-judicial proceedings. I have gone through that decision. I find nothing in that decision to support the conclusion that a decision under S. 7 is also a quasi-judicial decision. The remarks made in that case are confined to the case of R. 4 and are not applicable to the present case. So far as an allotment order under S. 7 is concerned I am definitely of the opinion that it is an administrative or executive order.

(15) As a result of the above finding it will follow that the Rent Control and Eviction Officer can modify or cancel his previous order of allotment. But this power can be exercised so long as the allottee acting in pursuance of the order does not take possession of the accommodation. After

possession has been taken over by the allottee in pursuance of the allotment order the Rent Control and Eviction Officer's power comes to an end (except in a case where order was secured by fraud, misrepresentation of facts or some other undesirable method) because the accommodation is no longer vacant nor is about to fall vacant.

(16) The next question that arises for decision is whether the District Magistrate can exercise the power of allotment under the Rent Control and Eviction Act after having empowered the Rent Control and Eviction Officer to act as "District Magistrate" under the Act. The mere fact that another officer has also been empowered under the Act does not take away the District Magistrate's own power. Both of them can exercise concurrent jurisdiction. If a petitioner instead of applying to the Rent Control and Eviction Officer approaches the District Magistrate the latter has certainly jurisdiction to pass a suitable order thereon.

But a power under concurrent jurisdiction can be exercised so long as it has not been exercised in respect of the same matter by another co-ordinate authority. To hold that the District Magistrate can interfere with an order of the Rent Control and Eviction Officer even after that Officer has passed an order will mean concerting an authority of concurrent jurisdiction into a superior authority. Moreover anomalous results will follow from such a proposition.

If the District Magistrate exercising a concurrent jurisdiction is held entitled to upset the order of the Rent Control and Eviction Officer the latter can, for similar reason, again upset the order of the District Magistrate. This will lead to utter confusion. This could never have been the intention of law.

(17) Reference was made in this connection to the Full Bench case of — 'Abdul Hamid v. Smt. Fatima Begum', AIR 1955 All 36 (G). I have gone through this case and am of opinion that it does not support the proposition that a District Magistrate can set aside the Rent Control and Eviction Officer's order. That was a case in which the landlord had made an application under S. 3 of the Act for permission to sue his tenant for ejectment. The Rent Control and Eviction Officer was throughout acting under the guidance and supervision of the District Magistrate.

From the very beginning he was acting at the command and bidding of the District Magistrate and even where he was of a different opinion he never enforced his own opinion but gave effect to the opinion expressed by the District Magistrate. The District Magistrate directed him at a certain stage to set aside an order of his and he did. Malik C. J., delivering the judgment of the Full Bench, remarked as follows :

"If the Rent Control and Eviction Officer had been acting independently and had passed final orders which are now revisable by the Commissioner and then by the Local Government the District Magistrate who has neither appellate nor revisional powers may not be entitled to interfere, but where, as in this case, the District Magistrate has all along been functioning through the Rent Control and Eviction Officer and bearing in mind that the orders passed were administrative or executive orders, it cannot be said that the order passed by the Magistrate on 6-4-1949, was without jurisdiction as by that order he was merely recalling a permission which had been granted at his instance."

It is obvious from this finding that the Rent Control and Eviction Officer was really a mouthpiece of the District Magistrate. The Full Bench held that "in the circumstances of this case" the District Magistrate could cancel the order passed by the Rent Control and Eviction Officer. As pointed out above, the Full Bench was of the opinion that the position would have been different if the Rent Control and Eviction Officer "had been acting independently.'

It is therefore obvious that this decision is no authority for the proposition that a District Magistrate can set aside the order of a Rent Control and Eviction Officer on the ground that he has concurrent jurisdiction.

(18) The point in question was considered in the case of — 'R. S. Seth v. Girja Shankar Srivastava', AIR 1952 All 819 (H), where it was held that a District Magistrate who had authorised the Rent Control and Eviction Officer to act for him could not rescind the order previously passed by the former.

(19) A case which contains some observations to the contrary is to be found in — 'Jang Bahadur v. District Magistrate, Benaras', AIR 1954 All 745 (I). In that case a learned Judge of this Court remarked on p. 747 as follows.

"It is obvious that if two officers exercise the same power one cannot revise the order of another, but if the jurisdiction is concurrent it may be possible for one to review the order of another." This remark was, however, mere 'obiter dictum' because the learned Judge himself observed a little later as follows:

"In this case before me also it appears unnecessary to decide this question for the purpose of this writ application."

(20) As I read this judgment I find that the learned Judge simply contemplated the possibility of a certain view being taken without having committed himself to that view. There is therefore no definite decision to that effect before me. I am, therefore, of the opinion that this authority does not lay down the proposition that where two persons exercise concurrent jurisdiction one can upset the order of another. My own view is that he cannot.

(21) The next question that arises for decision is whether the District Magistrate acting not as an authority of co-ordinate jurisdiction but as a superior authority can upset the order of the Rent Control and Eviction Officer. On this point also I am of the opinion that he cannot. Where a power is exercised by a public servant under statutory sanction, that power can be exercised by him alone and not by any superior authority. The superior authority may give him suggestion and may even ask him to reconsider his decision leaving to him the freedom to change its mind or not.

If in such circumstances the officer who originally passed the order, changes his mind and arrives at a contrary conclusion, the order will be perfectly valid because it would be the order of the original authority and not of the higher authority. But the higher authority cannot by its own order set aside the order of the inferior authority and assume to itself an appellate or revisional power which has not been conferred upon it by the statute. If it were possible to hold that the District Magistrate by reason of being a superior authority can upset the Rent Control and Eviction Officer's order it will follow, from the same process of reasoning, that the Commissioner can also by reason of being a higher authority upset the District Magistrate's order and the State Government can upset the Commissioner's order.

(22) In the aforesaid unreported Civil Misc. Writ No, 7563 of 1951 (All,) (E) the Commissioner

had set aside the allotment order of the Rent Control and Eviction Officer. This Court held that no such power was vested in the Commissioner.

(23) In the case of AIR 1952 All 819 (H) also it was held that the District Magistrate acting as a superior authority could not set aside the order of the Rent Control and Eviction Officer.

(24) Reference was made by the learned Counsel for the opposite party to the case of AIR 1952 All 859 (D). In that case it was observed in the penultimate paragraph of the judgment that

"An administrative or executive power is to be exercised always subject to the control of a superior officer and we see no objection to the second order having been passed at the direction of the District Magistrate."

(25) It may be pointed out that although there was a suggestion in that case by the petitioner that the second order had been dictated by the District Magistrate there was no finding to that effect by the Court. There is nothing in the judgment to lend support to the suggestion that the District Magistrate had coerced the will of the Rent Control and Eviction Officer and had substituted his own discretion in place of the discretion of the Rent Control and Eviction Officer. What the learned Chief Justice meant by the above quoted remark was that the District Magistrate could suggest new facts and new aspects of the case to the Rent Control and Eviction Officer and could ask him to reconsider the matter in the light of those suggestions.

Had it been his Lordship's intention to say that the District Magistrate could substitute his own discretion for the discretion of the Rent Control and Eviction Officer a more explicit language would have been used. It may again be pointed out that in the Full Bench case cited above the Hon'ble the Chief Justice has remarked that where the Rent Control and Eviction Officer has been acting independently different considerations arise and it is not possible for the District Magistrate to interfere. His remarks relied upon by the learned counsel for the opposite party are to be interpreted in the light of his observations in the Full Bench case.

Obviously his Lordship meant that the District Magistrate could ask the Rent Control & Eviction Officer to reconsider the matter. He did not mean to hold that the District Magistrate could overrule the decision of the Rent Control & Eviction Officer. This would mean conferring right of appeal or revision where no such right has been conferred by the statute. I have therefore come to the conclusion that a superior authority cannot, where a power to that effect is not conferred on it by statute, set aside an order of a subordinate authority passed in exercise of the statutory powers.

(26) The next point that arises for decision is whether the Rent Control and Eviction Officer could lawfully cancel his own order when that cancellation was not the result of the exercise of his own discretion but was brought about in pursuance of an order of a superior authority. A similar question arose for decision in the aforesaid Writ Petn. No. 7563 of 1951 (All.) (E). In that case the Rent Control and Eviction Officer had cancelled his order in obedience to the Commissioner's command. This Court held that the revised order although passed by the Rent Control and Eviction Officer could not be upheld by invoking the aid of S. 21, General Clauses Act. The reason is obvious.

Where an order is passed in the aforesaid circumstances it is not the Rent Control and Eviction Officer who is passing the order and who alone can modify or revise his previous order by virtue of S. 21. It is really the order of a superior authority and that authority cannot be permitted to do, through the agency of its subordinates, what it could not do itself. I am, therefore, of the opinion that although the order dated 26-9-53 has ostensibly been passed by the Rent Control and Eviction Officer, it is liable to be set aside.

(27) It may also be pointed out that when notice was issued to Bansidhar under S. 7A he had a right under S. 7A(2) to show that the order of allotment passed under S. 7(2) had not been duly passed. In other words, he could question the order of allotment. He could do the same when the revision was taken to the Commissioner. When the Commissioner dismissed the revision he in substance upheld the order of allotment. Therefore the District Magistrate has in this case not only set aside the Rent Control and Eviction Officer's order but has also cancelled the order which had been affirmed by a higher authority, viz., the Commissioner.

This is an additional ground for setting aside the District Magistrate's order and the order passed by the Rent Control and Eviction Officer in pursuance thereof.

(28) It remains to determine the nature of writs that can issue in this case, The petitioner has asked for a writ of certiorari to quash the orders dated 18-9-53 and 26-9-53 and a writ of mandamus to compel the District Magistrate and the Rent Control and Eviction Officer to enforce the order dated 11-5-1953. Since I have come to the conclusion that an order of allotment is not a judicial or a quasi-judicial order a writ of certiorari cannot issue. But in order to give redress to the petitioner against the illegal orders passed by the District Magistrate and on his command by the Rent Control and Eviction Officer this Court has jurisdiction to issue a writ of any other description as the situation may demand.

In the circumstances of the present case I direct that a writ of prohibition shall issue to the District Magistrate and the Rent Control and Eviction Officer forbidding them to enforce the former's order dated 18-9-53 and the latter's order dated 26-9-53. A writ of mandamus shall also issue to them directing them to give effect to the order dated 11-5-53, to evict Bansidhar from the shop in question and deliver possession thereof to the petitioner.

(29) The petitioner shall get his costs from the opposite parties.

MOOTHAM C. J.:

(30) I am of the same opinion. The two questions which arise in this case are whether the order of allotment made by the Rent Control and Eviction Officer on 14-6-1951 under S. 7, U. P. (Temporary) Control of Rent and Eviction Act, 1947, is an administrative order or a quasi-judicial order, and if it be the former whether it was validly cancelled by the subsequent order of the Rent Control and Eviction Officer, dated 26-9-1953.

(31) The first question is in my opinion concluded by the Bench decision of this Court in the unreported Writ Petn. No. 7563 of 1951 (All.) (E), decided on 27-7-1951. In that case it was held that an order of allotment made under S. 7 of the Act is an administrative order. It has been suggested that there is some conflict between the decision in that case and the decision in AIR 1954 All 6 (F), to which I was a party. In that case we said that—

"when the Rent Control and Eviction Officer decides a question of fact the result of which

determines the right of a person to the benefit of R. 4" — that is of the Rules made under the Act — "he acts in a quasi-judicial capacity. Although the act of issuing an allotment order may be an administrative act, the consideration which must precede the doing of that act (in a case such as the present) in which the rights of one party depend upon the existence of a particular set of facts is of the nature of a quasi-judicial consideration."

The Court was there considering the nature of the inquiry which the Rent Control and Eviction Officer was required to make in a case which fell within the ambit of R. 4, and it was unnecessary for the Court to express an opinion, nor did it do so, on the question whether an order under S. 7 is an administrative order or not.

(32) The allotment order dated 14-6-1951 was made by the Rent Control and Eviction Officer in the exercise of his discretion; his order of 26-9-1953 cancelling that order was not so made, for it is clear from its terms that it was made in compliance with the direction which he had received from the District Magistrate embodied in an order of that officer dated the previous 18th September, it was in substance the order of the District Magistrate. The second question, therefore, resolves itself into this, whether the District Magistrate could cancel the allotment order made by the Rent Control and Eviction Officer.

That question is also, in my opinion, covered by authority, for in AIR 1952 All 819 (H), another Bench of this Court held that a District Magistrate had no power to rescind an administrative order passed by the Rent Control and Eviction Officer under S. 3 of the Act, on the ground that the statutory power to rescind an order conferred by S. 21, U. P. General Clauses Act can be exercised only in the same manner as the power to make the order, and that as the order was made by the Rent Control and Eviction Officer it could be rescinded only by that officer.

Learned counsel has invited our attention to AIR 1954 All 745 (I) and to AIR 1955 All 36 (G), but in my opinion neither of these cases is of assistance to the respondent. In the former of these cases a learned single Judge of this Court expressed the tentative view that if two officers exercise a concurrent jurisdiction, it may be possible for one to review the order of the other. That expression of opinion was however 'obiter' as the point was expressly stated by the learned Judge to be one which it was not necessary for him to decide.

In AIR 1955 All 36 (G) it was held by a Full Bench that, in the particular circumstances of that case, the order passed by a Rent Control and Eviction Officer was cancelled by a subsequent order of the District Magistrate. But it is clear from the judgment that the District Magistrate had throughout been acting through the Rent Control and Eviction Officer who, both when he made the order of allotment and when he cancelled it, was acting in accordance with the instructions of the District Magistrate,

The case is therefore not only distinguishable on the facts, but the learned Chief Justice in delivering the judgment of the Court was careful to point out that the result might have been different had the Rent Control and Eviction Officer been acting independently.

(33) In my opinion this petition must be allowed and I agree with the order proposed by my brother.

D.S.P. Petition allowed.

(S) AIR 1955 Allahabad 506 (V. 42 C. 140 Sept)

MUKERJI AND UPADHYA JJ. (21-4-1955)

The State, Applicant v. Ramniranjan and another, Opposite Parties.

Criminal Ref. No. 245 of 1952, against order of Addl. S. J., Banaras at Jaunpur, D/- 28-5-1952.

Criminal P. C. (1898), Ss. 346 (2) and 350 — Transfer of case under S. 346 (2) — Magistrate receiving case after transfer has to try case afresh — AIR 1916 Nag 115, Dissented from.

In criminal cases the Magistrate, who is to decide the case, should hear the evidence produced at the trial unless there is some provision in the Code expressly authorising him to act on evidence already recorded by his predecessor. This general rule applicable to trials is also applicable to commitment proceedings. (Para 5)

The provisions of S. 350, sub-s. (1) which enable a succeeding Magistrate to act on the evidence recorded by his predecessor, cannot be applicable where action has been taken under S. 346. The Magistrate in such a case cannot exercise an option that would be available under S. 350(1) and has no option but to try the case 'de novo'. (Para 5)

Where on the report of a second class Magistrate that the case not being triable by him should be transferred to some other Magistrate, the District Magistrate transferred the case to a First Class Magistrate who did not take any evidence but weighing the evidence already recorded by the second class Magistrate, passed an order committing the accused to the Court of Session.

Held that the order of commitment was bad. AIR 1952 All 657, Approved; AIR 1916 Nag 115, Dissented from. (Para 6)

Anno: AIR Com.: Criminal P. C., S. 346 N. 5; S. 350 N. 16.

CASES REFERRED: Paras

(A) ('92) 14 All 346: 1892 All WN 19 4
(B) (V5) AIR 1918 Pat 676: 19 Cri LJ 625 4
(C) (V10) AIR 1923 Mad 327: 24 Cri LJ 413 4
(D) (V20) AIR 1933 Sind 191: 34 Cri LJ 749 4
(E) (V25) AIR 1938 Cal 415: 39 Cri LJ 606 4
(F) (V30) AIR 1943 Lah 27: 43 Cri LJ 925 4
(G) (V3) AIR 1916 Nag 115: 18 Cri LJ 35 5
(H) ('08) 12 Cal WN 136: 6 Cri LJ 429 5
(I) (V39) AIR 1952 All 657: 1952 Cri LJ 1112 6

A. G., for the State; Shyam Bahadur Varma, Sehat Bahadur and S. N. Kacker, for Opposite Parties.

UPADHYA J.:

This is a reference by the Addl. Sessions Judge of Banaras at Jaunpur recommending that an order passed by Shri N. K. Roy, Magistrate, First Class committing the accused to Sessions be set aside and that this Court should order that the commitment proceedings be started afresh.

(2) The case originally started on the complaint of one Sub Karan filed against the accused and some others under S. 498/109, I. P. C. The case came up for hearing before Shri Jagdeo Prasad, Magistrate, Second Class Jaunpur, who recorded some evidence in the case. The learned Magistrate came to the conclusion that the girl Sm. Phula was only 14 years old and that in his opinion an offence under S. 366, Penal Code, was made out.

He, therefore, stayed the proceedings and submitted the case to the District Magistrate with a report that the case being triable by the Court of Session and not by him should be transferred to some other Magistrate for proceeding under Chapter 18, Criminal P. C. The learned District Magistrate by his order dated 8-5-1951, transferred the

case to Shri N. K. Roy, Judicial Officer, Jaunpur, who is a Magistrate of the Ist Class. Shri N. K. Roy passed an order on 1-6-1951 as follows:

"Let the whole case be started 'de novo' as the learned Special Magistrate was not competent to hold an enquiry as he himself arrived at the conclusion that the case was one under section 366, I.P.C. which was beyond his jurisdiction."

It appears that Shri N. K. Roy changed his mind afterwards and on 9-6-1951, passed the following order:

"In view of Section 350(2), Criminal P. C. I think question of 'de novo' trial does not arise in this case. I proceed to hear argument whether the case is fit to be committed to the Court of Session, Jaunpur under Section 366, I.P.C. or not."

Thereafter Shri N. K. Roy did not take any evidence but heard arguments and weighing the evidence already recorded by Shri Jagdeo Prasad, II Class Magistrate, passed an order committing the accused to stand their trial in the Court of Session at Jaunpur under S. 366, I. P. C. Before the Sessions Judge the accused challenged the validity of this order of commitment inasmuch as, Shri N. K. Roy was not justified in basing his order on evidence recorded by a Magistrate who had no jurisdiction to try the case or to hold that enquiry.

This contention found favour with the learned Addl. Sessions Judge and he has recommended that the order of commitment should be set aside as mentioned above.

(3) This reference came up before a learned Judge of this Court, who considered the point raised to be of some importance and as no reported decision of this Court was placed before him and there appeared to be some conflict of opinion among the other High Courts, he ordered the case to be placed before a Division Bench.

(4) It may be taken as a general principle adopted in the Code of Criminal Procedure that evidence taken by one Magistrate is no evidence in a trial before another Magistrate unless some provision of law expressly makes it so. One of the earliest cases is — 'Queen Empress v. Bashir Khan', 14 All 346 (A). A case which was heard in part by a Bench of Honorary Magistrates was transferred to a First Class Magistrate.

The accused thereupon applied that the witnesses who had been examined before the Bench should be resummoned and examined 'de novo'. This was not done and Straight J. considered this to be 'most objectionable'. The Patna High Court in — 'Ambika Singh v. Emperor', AIR 1918 Pat 676 (B) explained that S. 350(1) of the Code provides that the accused should have the option of demanding a 'de novo' trial or proceeding with it from the stage at which it was left by the Magistrate who ceased to have jurisdiction and this provision of an option is based upon the consideration that the Magistrate who ceased to have jurisdiction was competent equally with the succeeding Magistrate to try the accused.

As the Second Class Magistrate who heard the case first was not qualified to proceed with the trial and the case had to be stayed under S. 346 of the Code, the provisions of S. 350(1) did not apply. The Court further held that the Code required the evidence to be recorded by the Magistrate trying the case and the defect was not a mere 'irregularity' or curable by the consent of the accused. The Court ruled that the trial was not in accordance with law.

In — 'In re China Venku Naidu', AIR 1923 Mad 327 (C) and — 'Sher Khan v. Emperor', AIR 1933 Sind 191 (D), the Courts took the word "try" in S. 346(2) of the Code to mean that the Magistrate must try the case 'de novo'. A Division Bench of the Calcutta High Court took the same view in — 'Sashti Gopal v. Haridas Bagdi', AIR 1938 Cal 415 (E). Henderson J., held that when a case is transferred under the provisions of S. 346, the Magistrate is bound to hold a 'de novo' trial. In — 'Gura v. Emperor', AIR 1943 Lah 27 (F), Tek Chand J. reviewed earlier decisions and observed that the plain meaning of S. 346 (2) is that there is to be a trial 'de novo' before the District Magistrate or the Magistrate to whom the case has been assigned by him.

(5) In — 'Emperor v. Ram Prasad', AIR 1916 Nag 115 (G), a Judicial Commissioner of Nagpur, however, took a different view. In that case the accused were challaned for murder and abetment thereof respectively but after examining them upon the evidence for the prosecution the Subordinate Magistrate thought the principal offence, if any committed, to be the lesser form of culpable homicide and he, therefore, acted under S. 346, Criminal P. C., with a view to disposal of the case by the District Magistrate in the exercise of his powers under S. 30 of that Code.

The Magistrate, however, charged the accused with murder and abetment of murder respectively, explained the charges to them and committed them to the Court of Session for trial. The accused were not represented nor did they raise any objection. The Sessions Judge took the view that the order of the District Magistrate was illegal inasmuch as he had not heard the evidence 'de novo' and made a reference recommending that the order be set aside.

The learned Judicial Commissioner took the view that S. 350, Criminal P. C. had no application to the case. He observed that the second subsection of S. 350 expressly laid down that nothing in the first sub-section applied to cases in which action had been taken under S. 346. But he felt that the section afforded no guidance as to the procedure to be followed on receipt of a case under S. 346.

He, therefore, relied on a Division Bench case of the Calcutta High Court—'Kamini Baurini v. Faqir Chand Sarkar', 12 Cal WN 136 (H), and rejected the reference. With great respect, we find ourselves unable to accept this view. The learned Judicial Commissioner ignored the well-settled principle that in criminal cases the Magistrate, who is to decide the case, should hear the evidence produced at the trial unless there is some provision in the Code expressly authorising him to act on evidence already recorded by his predecessor.

Section 350 provides an exception to the above general principle and lays down that when any Magistrate after having heard and recorded the whole or any part of the evidence in an enquiry or trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate, who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor.

There is an important proviso to this rule that in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be resummoned and re-heard. This is a right given to the accused. Subsection (2) of S. 350 expressly lays down that the above exception to the general principle to be followed in criminal trials is not applicable to cases in which proceedings have been stayed under S. 346.

It is, therefore, clear that the provisions of S. 350, sub-section (1) which enable a succeeding Magistrate to act on the evidence recorded by his predecessor, cannot be applicable where action has been taken under S. 346. The Magistrate in such a case cannot exercise an option that would be available under S. 350(1) and has no option but to

try the case 'de novo'. The learned Judicial Commissioner has himself observed:

"It is no doubt a general rule that only an authority who has heard all the evidence is competent to decide whether the accused is innocent or guilty."

He, however, felt that as the case before him related to a commitment for trial the above 'general rule' was not applicable. With great respect again, we are unable to accept the distinction drawn by the learned Judicial Commissioner between a trial and an enquiry. In an enquiry the accused has a right to produce evidence and the Magistrate may discharge him if he finds that there are no sufficient grounds for committing him for trial.

Thus the accused has a valuable right and there appears to be little justification for the view that the "general rule" applicable to trials may not be applicable to commitment proceedings. The judgment in the Calcutta case relied upon by the learned Judicial Commissioner is extremely short and the learned Judges have not been pleased to give any reason whatever for the decision taken by them.

(6) It appears that this point came up before this Court in — 'Panna Lal v. State', AIR 1952 All 657 (I), where Desai J. took the view that according to S. 346(2) itself the Magistrate who receives a case after the transfer, has to try the case afresh and that had the Legislature intended that the Magistrate could try the case from the stage at which it came to his Court it would have used the appropriate words to confer that power.

It appears that this case was not placed before the learned Single Judge who referred the present case to be heard by a Bench in the belief that there was no decision of this Court on the point. We respectfully agree with the view taken by Desai J., in the above case and accept the reference. The order of commitment is set aside and the Magistrate is directed to make the enquiry afresh by recalling and rehearing all the witnesses.

D.S.P. Reference accepted.

(S) AIR 1955 Allahabad 508 (V. 42, C. 141 Sept.)

LUCKNOW BENCH—KIDWAI AND H. S. CHATURVEDI JJ. (16-3-1955)

Sheo Prasad Kanhaya Lal, Plaintiff-Appellant v. Municipal Board Bahraich, Defendant-Respondent.

Second Appeals Nos. 270 and 317 of 1950, against decree of 1st Civil J., Bahraich, D/- 30-8-1950.

Government of India Act (1935), S. 142-A — Scope — Professions-Tax Limitation (Amendment and validation) Ordinance (17 of 1949), S. 3 — Professions-Tax Limitation (Amendment and Validation) Act (61 of 1951), S. 3 — Validity.

The amendment of Professions-Tax Limitation Act, 1941 by Ordinance 17 of 1949, subsequently replaced by Act 61 of 1951 was not ultra vires the powers of the Central Legislature given to it by S. 142-A, Government of India Act, 1935. The proviso to S. 142-A, Government of India Act makes it clear that the maximum limit of tax fixed by the Central Legislature may be altered from time to time. The use of the words "for the time being" makes it clear that the maximum could be reduced only temporarily by the Federal Legislature if it so desired and that that Legislature could make laws fixing the maximum for the time being. Thus the Central Legislature was competent to amend Act 20 of 1941 so as to take the circumstances and property tax out of the mischief of that Act and it expressly gave the amendment retrospective effect. There can thus be no challenge to the validity of the amending enactment and it must now be held that the limit of Rs. 50/- formerly imposed on such tax is no longer applicable.

(Paras 16, 17, 18)

CASE REFERRED: Para

(A) (V35) AIR 1948 All 382: ILR (1949) All 26 (FB) 12

Iqbal Ahmad and Hakimuddin, for Appellant; Saraswati Prasad for Respondent.

KIDWAI J.:

Messrs. Sheo Prasad Kanhaiya Lal & Rameshwar Lal Bisheshwar Lal are two registered firms having their offices within the municipal limits of Bahraich and having a rice mill in the district of Bahraich outside municipal limits. Lalas Kanhaya Lal and Bisheshwar Lal are the managing partners of their respective firms.

(2) The Municipal Board of Bahraich imposed a circumstances and property tax amounting to Rs. 534 and Rs. 569/- on the two firms respectively for the year 1948 to 1949.

(3) On 23-3-1949 the firm of Sheo Prasad Kanhaiya Lal instituted suit No. 135 of 1949 in the court of the Munsif Bahraich against the Municipal Board of Bahraich and on 24-3-1949 Messrs. Rameshwar Lal Bisheshwar Lal instituted suit No. 137 of 1949 in the same court against the same defendant.

(4) The plaintiffs of the two suits contested the validity of the tax on the ground that it was in excess of Rs. 50/- which is the maximum limit of such a tax under Act 20 of 1941 (The Professions Tax Limitation Act). They also alleged that the Municipal Board had issued notices of demand and was about to realise the tax by drastic methods. It was accordingly prayed that perpetual injunction be issued to the defendant not to realise more than Rs. 50/- as tax.

(5) In each case the defendant pleaded that the plaintiffs have a very big Kothi and shop having goods worth several lakhs of rupees within municipal limits and that they carry on business on a large scale. It was further alleged that the tax was a very small amount in proportion to the value of the property of the plaintiffs and that the Professions Tax Limitation Act did not apply to the case. It was also pleaded that the suit was barred by S. 164, U. P. Municipalities Act.

(6) The learned Munsiff framed the following seven issues;

"(1) Whether the tax in suit, as assessed by the Municipal Board is illegal and without jurisdiction beyond Rs. 50/- in view of Professions Tax Limitation Act 20 of 1941 as alleged by the plaintiffs.

(2) Whether the plaintiffs are estopped from bringing the suit as alleged in para. 12 of the written statement.

(3) Whether the suit for injunction is maintainable without previous notice to Municipal board as alleged.

(4) Whether the suit is barred under the provisions of S. 164, U. P. Municipalities Act.
(5) To what relief, if any, is the plaintiff entitled?
(6) Whether the suit is barred by Ordinance No. 17 of 1949 as alleged.
(7) Whether the Ordinance is ultra vires".

The learned Munsif found:

(1) That a tax on circumstances and property could not exceed Rs. 50/- Per annum:
(2) That the amendment of Professions Tax Limitation Act by Ordinance No. 17 of 1949 and later by Act 61 of 1949 was ultra vires:
(3) That the suit was not barred by S. 164 (1) because it did not assail the amount of the tax but the basis on which the tax was sought to be levied:
(4) That the suit was not barred by S. 326(1), U. P. Municipalities Act.

(6a) As a result of these findings the learned Munsif directed the issue of an injunction restraining the defendant from realising more than Rs. 50/- per annum as tax from each of the plaintiffs.

(7) The defendant filed appeals in both cases and the appeals were allowed. The learned first Civil Judge of Bahraich held:

(1) That Ordinance No. 17 of 1949 and Act 61 of 1949, validly amended Act 20 of 1941 and that therefore it was possible for the Municipal Board to assess the circumstances and property tax at a figure exceeding Rs. 50/- per annum: and
(2) That the laws were given retrospective effect and consequently the assessment of more than Rs. 50/- though made before the Ordinance was issued, was a valid imposition.

(8) The two plaintiffs have come up to this Court and have filed Second Civil Appeals Nos. 270 and 317 of 1950.

(9) Their learned Counsel has contended that the tax is hit by the provisions of the Professions Tax Limitation Act (20 of 1941) and is, therefore, invalid for a sum exceeding Rs. 50/-. This is the sole point involved in these appeals.

(10) Attempts having been made by some Provincial Legislatures to impose a tax on incomes derived from professions, trades, callings or employment and the validity of such taxes having been questioned by reason of the fact that under S. 100 read with item 54 of List I of Sch. 7, Government of India Act it was the Central Legislature alone that could impose a tax on incomes other than agricultural income, the English Parliament stepped in and in 1940 inserted S. 142-A, Government of India Act. This section, while it legalised taxation of incomes derived from specified sources, imposed a limit on such taxation. The maximum in the case of taxation after 31-3-1939 was to be Rs. 50/- per annum while in the case of existing taxes it was to be the maximum which was payable in the financial year ending on that date. The Federal Legislature of India was, by a proviso to the section, given authority to reduce the latter maximum to such a figure as it thought fit.

(11) In pursuance of the power so conferred the Central Legislature enacted the Professions Tax Limitation Act (20 of 1941) S. 2 of which provided that all taxes payable by any one person

"by way of a tax on professions, trades, callings or employments shall from and after the commencement of this Act cease to be levied to the extent to which such tax exceeds rupees fifty per annum".

S. 3 provided that the taxes mentioned in the schedule to the Act were to be exempt from the operation of S. 2. Among the taxes so exempt was the tax on trades and callings leviable under S. 128, U. P. Municipalities Act. The circumstances and property tax leviable by the District and Municipal Boards was not entered in the schedule.

(12) In 1948 a Full Bench of the erstwhile Allahabad High Court held in —'District Board, Ferrukhabad v. Prag Dutt', AIR 1948 All 382(FB) (A), that the nomenclature was immaterial and that the tax known as the circumstances and property tax imposed by a District Board was in fact a tax on income derived from trade and was subject to the limitation of rupees fifty per annum imposed by the Professions Tax Limitation Act.

(13) As a result of the above mentioned decision Central Ordinance No. 17 of 1949 was issued on 21-7-1949 and was later replaced by the Professions Tax Limitation (Amendment and Validation) Act 61 of 1949 which received the assent of the Governor General on 26-12-1949. These laws amended the schedule to Act 20 of 1941. Act 61 of 1949 inserted items 3A and 3B. Item 3A is in the following words:

"The tax on inhabitants assessed according to their circumstances and property, imposed under cl. (ix) of sub-s. 1 of S. 128, U. P. Municipalities Act, 1916 (U. P. Act 2 of 1916)".

(14) Section 3 of Act 61 of 1949 enacted:

"(i) no tax on circumstances and property imposed before the commencement of this Act under cl. (ix) of sub-s. (1) of S. 128, U. P. Municipalities Act, 1916 (U. P. Act 2 of 1916) .....shall be deemed to be or ever to have been invalid merely on the ground that the tax imposed exceeded the limit of Rs. 50 per annum prescribed by the said Act, and the validity of the imposition of any such tax shall not be called in question in any Court."

(15) The learned Munsif has held both the Ordinances and the Act to be ultra vires because he considered that the proviso to S. 142A, Government of India Act enabled the Central Legislature to reduce the maximum limit of the tax but

"once the limit of tax has been brought down to Rs. 50/- by the Professions Tax Limitation Act, 1941, the Government of India Act bars it to be raised any further; and no amount of amendments or a new Act can validate."

(16) There is nothing in S. 142A, or any other section, of the Government of India Act which imposes any such restriction on the power of the Central Legislature. In fact a reading of the proviso to S. 142A makes it clear that the maximum limit fixed by it may be altered from time to time. The important words (which the learned Munsif seems to have ignored) are:

"Unless 'for the time being' provision to the contrary is made by a law of the Federal Legislature."

(17) The use of the words "for the time being" makes it clear that the maximum could be reduced

cn'y temporarily by the Federal Legislature if it so desired and that that Legislature could make laws fixing the maximum for the time being.

(18) Thus a legislature which was competent to do so amended Act 20 of 1941 so as to take the tax with which we are concerned out of the mischief of that Act and it expressly gave the amendment retrospective effect. There can thus be no challenge of the validity of the amending enactment and it must now be held that the limit of Rs. 50/- formerly imposed on such tax is no longer applicable.

(19) It was, therefore, open to the Municipal Board to assess the taxes which it has done and the suits of the plaintiffs were rightly dismissed by the lower appellate Court. We dismiss these appeals with costs. The costs of the lower Courts shall be in accordance with the decree of the lower appellate Court. The injunction order dated 4-4-1951 is vacated.

K.S.B. Appeal dismissed.

(S) AIR 1955 Allahabad 510 (V. 42, C. 142 Sept.)
(FULL BENCH)

MOOTHAM C. J., RAGHUBAR DAYAL AND RANDHIR SINGH JJ. (14-4-1955)

Abdul Hamid, Plaintiff-Appellant v. Abdul Rahim and others, Defendants-Respondents.

First Appeal No. 241 of 1952, against order of Addl. Dist. J., Meerut, D/- 20-5-1952.

†Court-fees Act (1870), S. 4 and Sch. II, Art. 1 (e) (3) (U. P.) — Application for translation and printing — Court-fee if payable — 1954 All LJ 769: AIR 1954 All 812, Overruled.

An application made by the appellant under R. 13 of Chap. 13 of the Rules of Court for the translation and printing of such parts of the record of the trial court as are considered necessary at the hearing of the appeal, is "filed in or received by" the court in a case coming before it in the exercise of its jurisdiction "as regards appeals from the courts subject to its superintendence", and therefore such application must bear a court-fee stamp of Rs. 3-12-0. 1954 All LJ 769: AIR 1954 All 812, Overruled. (Para 4)

Anno: AIR Com., C. F. Act, S. 4 N. 3 and 14.

CASE REFERRED: Paras

(A) (V41) AIR 1954 All 812: 1954 All LJ 769 1, 2, 6

Maheshwari Dayal and Guru Dayal Srivastava, for Appellant; S. Sadiq Ali and S. C., for Opposite Parties.

MOOTHAM C. J.:

On 13-1-1955, an application was made by the appellant under R. 13 of Chap. 13 of the Rules of Court for the translation and printing of such parts of the record of the trial court as were considered necessary at the hearing of the appeal. The application was made on the prescribed form, and in accordance with the provisions of R. 14 was presented to the Deputy Registrar. The application was unstamped, and the appellant contended that no court-fee was payable thereon. The practice in Allahabad has been to require such applications to bear a court-fee stamp of Rs. 3-12-0, but a different practice prevails in Lucknow where such applications are not stamped, and that practice has been approved in the recent case of — 'Baij Nath Das v. Ram Charan Das', AIR 1954 All 812 (A). As the question is one of great practical importance it has been referred to a Full Bench for further consideration.

(2) In 'Baij Nath Das's case (A)' the view taken was that applications for translation and printing are not applications for the exercise of the judicial functions of the officer of the Court to whom they are presented, and that they did not therefore require to be stamped. With great respect we do not think that is a wholly correct approach to the problem for a court-fee is payable on many applications or petitions in which the prayer is for the exercise of purely administrative functions, as for example in the case of an application to a District Magistrate for permission to have a display of fireworks or for a police escort (see item 1(b) of Sch. II, Court-fees Act).

(3) In our opinion the answer to the question whether a court-fee is payable on applications for translation and printing will depend upon whether such applications come within the ambit of S. 4, Court-fees Act, 1870, which so far as is material reads as follows:

> "4. No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received ..... by any of the said High Courts in any case coming before such Court ..... in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence .... unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

Item 1(e) of Schedule II of the Act is as follows:

1. Application or petition.	(e) When presented to a High Court: (1) Under the Indian Companies Act, 1913, (Act 7 of 1913), for winding up a Company. (2) Under S. 115, Civil P. C., 1908 (Act 5 of 1908), for revision of an order. (3) In any other case.	Sixty-two rupees, eight annas. Five rupees. Three rupees, twelve annas.

(4) We entertain no doubt, and it was indeed conceded before us, that an application for translation and printing, although it must be presented to the Deputy Registrar under the Rules, is an application presented to the Court. The form on which the application must be made bears the heading "In the High Court of Judicature at Allahabad", and it is presented to the Deputy Registrar as an officer of the Court. Nor can we hold otherwise than that such an application is "filed in or received by" the court in a "case" coming before it (in the present circumstances) in the exercise of its jurisdiction "as regards appeals from the courts subject to its superintendence". We are

therefore of opinion that such applications must bear a court-fee stamp of Rs. 3/12/-.

(5) It is argued that an application for translation and printing is in no way different from certain other applications for which provision is made in the Rules of Court and which are there treated as not coming within the scope of S. 4, Court-fees Act. These are applications for information (Chap. 8, R. 30), for inspection of a record (Chap. 39), and for copies (Chap. 40). It appears to us that these applications may stand on a different footing. It is however unnecessary and undesirable that we should express a concluded opinion with regard to the fee payable on these applications for that is not a matter which is before us. The fact that these applications have been treated in the Rules as not coming within the scope of S. 4, Court-fees Act is, strictly speaking, not relevant to the question whether an application for translation and printing does come within the ambit of that section.

(6) The Bench which decided 'Baij Nath Das's case (A)' did not have the advantage of hearing argument on behalf of the State, and it does not appear from the short order made by the Court that its attention was invited to the provisions of S. 4, Court-fees Act. With great respect we are of opinion that so much of the order of the Court in that case as decides that an application for translation and printing does not require to be stamped does not appear to be in accordance with law and must be overruled.

V.R.B. Order accordingly.

(S) AIR 1955 Allahabad 511 (V. 42, C. 143 Sept)

RAGHUBAR DAYAL AND BEG JJ. (13-4-1955)

Gopal Das Sakseria and another, Applicants v. The State, Opposite Party.

Criminal Ref. No. 183 of 1952, from Order of Dist. Magistrate, Agra, D/- 24-3-1952.

(a) Factories Act (1948), S. 106 — Complaint and not cognizance of offence to be within three months — Observations in AIR 1954 All 27 held not correct.

What S. 106 of the Factories Act, 1948, requires is that a complaint must be made within three months of the date on which the alleged commission of the offence came to the knowledge of the Inspector and not that the Court must take cognizance of the offence within such period. — Observations in AIR 1954 All 27 held not correct. (Para 9)

(b) Factories Act (1948), S. 106 — Unsigned complaint is not complaint — (Criminal P. C. (1898), S. 476).

An unsigned copy of the complaint by the Chief Inspector of Factories being no complaint cannot form a good basis for taking cognizance of the offence by the Magistrate against the accused. (Para 10)

Anno: AIR Com. Cr. P. C. S. 476 N. 14.

(c) Factories Act (1948), S. 106 — Complaint to District Magistrate when not proper complaint — (Criminal P. C. (1898) S. 4(1)(h).)

Where the Chief Inspector of Factories does not send a complaint to the District Magistrate for his taking action as a Magistrate but for his taking action on the executive side as an Inspector just as a senior officer in the executive hierarchy, there is no proper complaint to a competent Magistrate. (Para 12)

Anno: AIR Com. Cr. P. C. S. 4(1)(h) N. 8.

CASES REFERRED: Paras

(A) (V39) AIR 1952 All 937: 1952 All LJ 534: 1952 Cri LJ 1711 6

(B) (V41) AIR 1954 All 27: 1953 All LJ 481: 1953 Cri LJ 1915 7, 9

(C) (V41) AIR 1954 All 255: 1954 Cri LJ 524 8

Jagdish Sahai and M. M. Chaturvedi, for Applicants, Addl. Asst. Govt. Advocate, for The State.

RAGHUBAR DAYAL, J.:

The Chief Inspector of Factories, U. P., addressed a complaint to the Court of City Magistrate, Agra, in August 1950, against Gopal Das Saksaria and Brij Mohan Jha for an offence under S. 92, Factories Act, 1948. He sent the typed and signed complaint with a covering letter to the District Magistrate, Agra, requesting him to inform the Court concerned for further action and informing him that a copy of the complaint had also been sent to the City Magistrate, Agra, direct.

The District Magistrate, Agra, forwarded this complaint to the Sub-Divisional Magistrate, Firozabad, for trial on 1-9-1950. It is not known when this complaint reached the Sub-Divisional Magistrate, Firozabad, but he appears to have ordered the registering of the case and the issue of summons to the accused on 6-9-1950.

(2) Meanwhile an unsigned copy of the complaint was sent to the City Magistrate, Agra, direct by the Chief Inspector of Factories. The City Magistrate forwarded it to the Factory Magistrate for disposal on 28-8-1950. It is not known again when this reached the Sub-Divisional Magistrate Firozabad. It was on 6-9-1950, that a case was registered on this complaint and the accused were ordered to be summoned for 28-9-1950. The summons was actually issued on 9-9-1950. This date has been wrongly read by Sri S. Goswamiji, who was the Sub-Divisional Magistrate, Firozabad, as 1-9-1950.

(3) Objection was taken on behalf of the accused that the trial was bad in law as it was in contravention of S. 106, Factories Act, which is:

"No Court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector:

Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed."

(4) The learned Magistrate rejected the contention and held that the complaint received through the City Magistrate has been received within three months by a competent Magistrate and that therefore it could not be said that a proper complaint had not been made to the City Magistrate within the period of limitation. The accused then went up in revision to the District Magistrate, Agra who did not agree with the view of the Factory Magistrate and made this reference to this Court.

(5) A learned Single Judge of this Court referred the case to the Division Bench on account of the importance of the question raised and an apparent difference of opinion between two learned Judges of this Court on the interpretation of S. 106, Factories Act.

(6) We have been referred to three cases. The first is — 'Baldev Das v. The State', AIR 1952 All 937 (A). In this case the offence was detected on 13-8-1949. It is not known when the complaint actually reached the City Magistrate, who passed his first order on 5-12-1949. It was contended in the case that the complaint was, in fact, made to the City Magistrate on 5-12-1949, that is on the day on

which it was put before him and he took cognizance thereof. Brij Mohan Lall J. did not deal with the question whether S. 106, Factories Act, required the cognizance of the offence to be taken within three months or merely required that complaint be made within three months of the detection of the offence.

He held that the complaint must be held to be made on 5-12-1949, and that, therefore, it was not made within three months of the detection and that, therefore, the Magistrate could not take cognizance of it. The view expressed cannot be said to have laid emphasis on the question of cognizance being taken within three months.

(7) The next case is — 'Madan Lal v. The State', AIR 1954 All 27 (B). In this case no complaint was made within three months and naturally no cognizance could have been taken within that period. Randhir Singh J. mentioned at page 28 of the judgment:

"It is provided in S. 106, Factories Act that cognizance of an offence committed in connection with the Factories Act or Rules could be taken only within three months of the date of the offence."

This may mean that he held that S. 106 of the Factories Act required cognizance of the offence to be taken within three months of the Inspector's knowledge about the commission of the offence.

(8) In the third case — 'Shiva Behari v. State', AIR 1954 All 255 (C), Randhir Singh J. has clearly laid down a different view. He has said:

"This section does not enjoin that cognizance should also be taken within three months of the offence. All that it requires is that a complaint should be made within three months."

(9) We are of opinion that what S. 106, Factories Act requires is that a complaint must be made within three months of the date on which the alleged commission of the offence came to the knowledge of the Inspector and not that the Court must take cognizance of the offence within such period and that the observation about the provision of S. 106, Factories Act in AIR 1954 All 27 (B), is not correct.

(10) The next point to determine in the present case is when the complaint was made to the competent Court. The unsigned copy of the complaint sent to the City Magistrate is no complaint in the eye of law. It was received by the City Magistrate within three months of the detection of the offence. It is not known when it was received by the Sub-Divisional Magistrate, Firozabad, who at the relevant time was authorised to try Factories Act cases of the entire district. The complaint, it may be mentioned, was addressed to the City Magistrate because the City Magistrate used to do these cases till the District Magistrate passed a fresh order about the distribution of work on 1-8-1950.

This complaint being no complaint cannot form a good basis for taking cognizance of the offence by the Sub-Divisional Magistrate, Firozabad, against the accused.

(11) The signed complaint addressed to the City Magistrate was sent to the District Magistrate with a covering letter. This undoubtedly did not reach the Sub-Divisional Magistrate, Firozabad, till 30-8-1950, the last date of the three months since the detection of the offence. Clearly therefore the Sub-Divisional Magistrate, Firozabad, could not have taken cognizance of the offence on the basis of this complaint which was received by him beyond three months of the detection of the offence.

(12) The question arises whether the receipt of this complaint by the District Magistrate would amount to the making of the complaint to the District Magistrate by the Chief Inspector of Factories. The District Magistrate did receive this complaint according to the order of Sri S. Goswamiji on or before 29-8-1950, on which date it was placed before the Additional District Magistrate. The complaint was addressed to the City Magistrate and the contents of the forwarding letter make it clear that the Chief Inspector of Factories did not make the complaint to the District Magistrate.

He simply forwarded the complaint to him for purposes of being forwarded to the Court concerned. The covering letter contained several matters in connection with the case which could not have been properly mentioned in a letter to the Magistrate to whom a complaint is being made for necessary action under the Criminal Procedure Code. The District Magistrate is an Inspector of Factories in view of S. 8, sub-s.(4), Factories Act, and is competent himself to make a complaint under S. 105, Factories Act.

It appears to us therefore that the Chief Inspector of Factories did not send this complaint to the District Magistrate for his taking action as a Magistrate but for his taking action on the executive side as an Inspector or just as a senior officer in the executive hierarchy. It follows, therefore, that no proper complaint to a competent Magistrate was made within three months of the detection of the offence and that, therefore, the Sub-Divisional Magistrate of Firozabad could not have taken cognizance of this offence.

The trial of the case before him, therefore, is without jurisdiction. We, therefore accept the reference and quash the proceedings in the case against Gopal Das Sakseria and Brij Mohan Jha.

V.S.B. Proceedings quashed.

(S) **AIR 1955 Allahabad 512 (V. 42, C. 144 Sept)**

AGARWALA AND SAHAI JJ. (29-3-1955)

A. K. Moitra and others, Appellants v. Ministry of Defence, Union of India and others, Respondents.

Special Appeal No. 54 of 1955, against judgment of M. L. Chaturvedi J., D/- 17-3-1955.

(a) Constitution of India, Art. 226 — Certiorari — There must be body of persons with power to make determination affecting rights of parties.

High Court will not issue a writ of 'certiorari' under Art. 226 of the Constitution when the proceedings that are sought to be quashed are merely administrative or are not intended to determine any of the rights of the parties. (Para 6)

There must be 'authority to determine' and the persons exercising that authority must be those who have a duty to act judicially. (Para 7)

It is, therefore, not enough to show that a body of persons has to hear evidence from one side and the other and also submissions of one side and the other and to arrive at a conclusion. What is further necessary to show is that that body of persons has been given the power to make an order or a determination which affects the rights of one of the parties before them. (Para 8)

Hence, no writ of certiorari can lie against the proceedings of a 'Court of inquiry' which had been given power merely to investigate into a charge against an employee and submit its report to the officer concerned for taking necessary action. (Para 13)

Anno: AIR Com., Const. of India, Art. 226, N. 161.

(b) Constitution of India, Art. 226 — Futile writs.

High Court will not issue a writ order or direction in a case in which the final authority is not bound by the orders of the High Court and may well flout the directions of the High Court by ignoring them and passing orders as he thought best: (Para 14)

Anno: AIR Com., Const. of India, Art. 226, N. 20 and 41.

(c) Constitution of India, Art. 226 — Certiorari — Proceedings relating to disciplinary matters — Relief at intermediate stage.

In disciplinary proceedings it is normally not desirable that the Courts should interfere before the proceedings have terminated. If interference were made by Courts at intermediary stages it would result in unnecessary delay. (Para 15)

Anno: AIR Com., Const. of India, Art. 226, N. 29 and 173.

CASES REFERRED: Paras

(A) (1928) 1928-1 KB 291: 96 LJ KB 347 5, 9

(B) (1939) 1939-2 KB 651: 108 LJ KB 657 5, 11, 13

(C) (1924) 1924-1 KB 171: 93 LJ KB 390 7

(D) (1953) 1953-2 All ER 766: 216 LT 420 7, 12

(E) (V37) AIR 1950 SCR 222: 1950 SCR 621 (SC) 13

S. S. Dhawan, for Appellants.

AGARWALA J.:

This is a special appeal against a decision of a learned single Judge of this Court dismissing a petition under Art. 226 of the Constitution. The facts, briefly stated, are as follows:—

(2) The appellants are employed as Storemen in the Defence Department, Union of India, and were working at the Central Ordnance Depot, Chheoki, Allahabad. There was a report about the theft of certain articles and a police enquiry was at first held and later on the matter was referred to what is called a "court of enquiry" which held the preliminary enquiry and came to the conclusion that the appellants were responsible for the thefts and they were suspended with effect from 15-9-1952 and they are still under suspension.

The petition under Art. 226, as originally presented on 27-8-1953, merely stated the facts, as they existed on that date and the prayer made was that the opposite party, which was the Ministry of Defence, Union of India, be commanded to withdraw the order of suspension passed on 15-9-1952 against the appellants and restore them to their posts. Later on, the petition was amended. Nine other persons, including those who were members of the "court of enquiry" were added as opposite parties and a fresh affidavit was filed and an additional relief was claimed.

The fresh facts mentioned were that the "court of enquiry" had completed its investigation and had submitted its report to the Officer-in-charge, A. O. C., Records, Jubbulpur — the officer who is stated to be the person having the authority to dismiss or, otherwise, punish the appellants. Various irregularities in the conduct of the enquiry by the "court of enquiry" were also alleged.

These irregularities are mainly three, namely (1) that the appellants were asked to give evidence although this was not legal as the charge against them was of a criminal nature, (2) that the witnesses examined in the preliminary enquiry were not examined 'de novo' when the appellants were charge-sheeted, and the statements of these witnesses were merely read over to the appellants and they were asked to cross-examine those witnesses upon that evidence and that the copies of the depositions of the witnesses who were examined in examination-in-chief in the absence of the appellants were not supplied to them when they were asked to cross-examine them and (3) that the members of the "court of enquiry" were not present throughout the proceedings.

It is further stated that on the basis of the report of the "court of enquiry", the Officer-in-charge, A. O. C., Records, Jubbulpur has charge-sheeted the appellants and has issued notice to the appellants asking them to show cause why they should not be dismissed from service or, otherwise, punished.

(3) No steps have yet been taken against the appellants by the Officer-in-Charge, A. O. C., Records, Jubbulpur, and no relief is claimed against that officer obviously because he is beyond the jurisdiction of this Court. The fresh relief claimed now is that a writ in the nature of prohibition or 'certiorari' calling for the record and findings of the enquiry proceedings be issued and after examining the validity of the proceedings, this Court may be pleased to quash them.

(4) The allegations contained in the affidavits filed by the appellants as to the irregularities committed during the course of the enquiry were not admitted on behalf of the respondents. It is not necessary for us to go into details in regard to the alleged irregularities as the petition was dismissed by the learned single Judge upon other grounds. The learned single Judge held that this was not a suitable case in which the Court should exercise its powers under Art. 226.

The grounds on which he dismissed the petition were, firstly, that this was a case where an equally efficacious and adequate remedy, by way of a regular suit, would be available after a final order had been passed against the petitioners and secondly, that no relief should be given at an intermediate stage of the proceedings where no final orders had been issued, specially when the proceedings related to disciplinary matters.

(5) Learned counsel for the appellants has urged before us that the grounds on which the learned Judge dismissed the petition are not sufficient in law. He has referred us to two English cases and has urged that even at an intermediate stage where final orders had not been passed, the English Courts had issued writs of 'certiorari' to quash the proceedings which had affected the rights of the petitioners. The cases referred to are — 'Rex v. Postmaster General', (1928) 1 KB 291 (A) and — 'Rex v.Boycott', (1939) 2 KB 651 (B).

(6) The question to be determined, in cases like the present, is whether there has been a judicial or quasi-judicial determination of the rights of the petitioner. This Court will not issue a writ of 'certiorari' under Art. 226 of the Constitution when the proceedings that are sought to be quashed are merely administrative or are not intended to determine any of the rights of the parties.

(7) In — 'Rex v. Electricity Commissioners', (1924) 1 KB 171 (C), Atkin L. J. defined the scope of writs of 'certiorari' in words which have now become classic—

"Wherever any body of persons having legal authority to determine questions affecting the rights of subject, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the (Queen's) Bench Division exercised in these writs."

There must be 'authority to determine' and the persons exercising that authority must be those who have a duty to act judicially. As was observed in — 'R. V. Statutory Visitors to St, Lawrence's

Hospital, Caterham', 1953-2 All ER 766 (D) at p. 768 by Lord Goddard C. J.:

"It is essential to remember — that there must be something that can be called a determination which will affect the rights of the applicant and a tribunal whose duty it is to act judicially. It is not easy to give an exact definition of what is meant by "act judicially", but I should say that for this purpose it means a body bound to hear evidence from one side and the other. There need not be anything called strictly a lis, but the body would have to hear submissions and evidence by each side and come to a judicial decision approximately in the way that a Court must do.

Unless there is an order or a determination by the body to whom it is suggested the order should be directed the order of 'certiorari' will not lie."

(8) It is, therefore, not enough to show that a body of persons has to hear evidence from one side and the other and also submissions of one side and the other and to arrive at a conclusion. What is further necessary to show is that that body of persons has been given the power to make an order or a determination which affects the rights of one of the parties before them. In the same case, Lord Goddard pointed out that the reports submitted by certain bodies, if they are no more than materials put before a higher authority to enable that higher authority to come to a decision are not judicial or quasi-judicial proceedings at all and that a writ of 'certiorari' will not issue to quash those reports.

(9) In (1928) 1 KB 291 (A), a certificate issued by a medical officer was quashed because it was considered that the giving of a certificate was in the nature of a judicial act. The facts of that case were these. Section 1, sub-s. (1), Workmen's Compensation Act, 1925 and an Order extending the provisions of that section to include telegraphists' cramp had the effect that a post office workman obtaining the certificate of a certifying surgeon that he was suffering from that complaint and was thereby disabled, became entitled to get compensation.

By section 44, sub-s. (3) of the Act, a medical practitioner appointed by the Secretary of State was given the powers and duties of a certifying surgeon. The order provided that so far as regards post office employees, the post office medical officer under whose charge the workman is placed shall, if authorised to act, be substituted for the certifying surgeon in cases of telegraphists' cramp. It was the practice of the post office to refer all cases of telegraphists' cramp to the chief medical officer of the post office, and this reference was relied on as constituting him the substitute for the certifying surgeon under the above sub-section and Order.

The applicant in this case, a telegraphist, was on the capitation list of the local post office medical officer, but in fact never consulted him. On her claiming compensation for telegraphists' cramp, the case was referred to the chief medical officer in accordance with the usual practice. He certified that she was not suffering from telegraphists' cramp. It was obvious that the chief medical officer was not the post office medical officer under whose care the applicant had been placed within the meaning of the aforesaid Order and that he could not be substituted for the certifying surgeon.

The certificate was quashed on the ground that it vitally affected the right of the applicant to obtain compensation. The certificate of the certifying surgeon was a condition precedent to the obtaining of the compensation. The certificate had to be granted upon a judicial determination of the facts. In those circumstances, it was held that the certificate could be quashed. It will be observed that there is a vital difference between that case and the present. In that case, the giving of the certificate was a complete act of the certifying surgeon and prevented the applicant from obtaining the relief.

That cannot be said of the report of the enquiry court in the present case, The enquiry court has been given no power to "determine" anything. It merely records certain findings and sends them on to the officer concerned. The determination is by the officer.

(10) This will be clear by a reference to R. 15 of the Rules, Civilians in Defence Service (Classification, Control and Appeal Rules), 1952, which is almost the same as Rule 55 of the Civil Service (Classification and Appeal) Rules.

(11) In the case of (1939) 2 KB 651 (B), S. 31 of the Mental Deficiency Act, 1913, provided that in case of doubt as to whether a child is or is not capable of receiving benefit from instruction in a special school or class, or whether his retention in such school or class could be detrimental to the interests of the other children, the matter shall be determined by the Board of Education. A boy Stanley Keasley was certified by one Dr. Boycott, certifying medical officer, to be incapable by reason of mental defect from receiving further benefit from instruction in a special school or class under the Education Act and to be an imbecile within the meaning of the Mental Deficiency Act, 1913.

The certificate was also signed by the school medical officer, who had neither seen nor examined the boy. A report dated October 5, confirming the certificate was also sent by Dr. Boycott to the education officer and by letter dated 10-10-1938, the clerk of the local education authority forwarded that document to the clerk of the County Council Mental Deficiency Act Committee with a view to steps being taken to transfer the boy to an occupational centre.

(12) It was held by the K. B. Division that the certificates of the certifying medical officer and of the school medical officer and the report confirming the certificate sent by Dr. Boycott which were part and parcel of the same transaction purported to be a decision of a quasi-judicial authority and were liable to be corrected by an order of certiorari. This case was adversely commented upon by Lord Goddard in 'R. v. Statutory Visitors to St. Lawrence's Hospital (D)', Ubi supra, and it was also pointed out by him that in that case it seemed to have been accepted on behalf of the respondents that in those circumstances the writ could issue as a matter of law.

(13) It was urged that this case was cited with approval by the Supreme Court in — 'Province of Bombay v. Kushaldas', AIR 1950 SC 222 (E). That was a case in which the Court had to consider the nature of a judicial or quasi-judicial act. In considering that question reference was made to 'Boycott's case (B)'. But the mere fact that a reference to that case was made without any expression of its approval does not mean that the decision in the case was approved by the Supreme Court. The point that arises for decision before us in the present case did not arise in the case before the Supreme Court.

We are, therefore, of the opinion that the report of the Court of Enquiry cannot be said to be a determination of the rights of the applicants, and as such are not a fit subject for the issue of writ of certiorari.

(14) Further, as we have already pointed out, the final order in the case has to be made by

A. O. C., Records Officer, Jubbulpore, (now in Hyderabad) against whom this Court has no jurisdiction to issue any writ, direction or order, he being not resident within the jurisdiction of this Court. This Court will not issue a writ order or direction in a case in which the final authority is not bound by the orders of this Court and may well flout the directions of this Court by ignoring them and passing orders as he thought best.

(15) Thirdly, as held by the learned single Judge, in disciplinary proceedings it is normally not desirable that the Courts should interfere before the proceedings have terminated. If interference were made by Courts at intermediary stages it would result in unnecessary delay.

(16) In the result we dismiss this appeal.

D.S,P. Appeal dismissed.

(S) AIR 1955 Allahabad 515 (V. 42, C. 145 Sept)

V. BHARGAVA AND M. L. CHATURVEDI JJ.
(14-4-1955)

Gangadhar Baijnath and others, Petitioners v. Income-tax Investigation Commission through its Chairman and others, Opposite Parties.

Civil Misc. Writ Petn. No. 387 of 1952.

(a) Constitution of India, Arts. 226 and 14 — Territorial jurisdiction of High Courts — Income-tax Officer Kanpur, initiating proceedings against assesses in U. P. under S. 34, Income-tax Act in pursuance of directions of Central Govt., given under S. 8(2), Taxation on Income (Investigation Commission) Act — Application for writs against Central Govt. and Income-tax Officer, Kanpur — Jurisdiction of Allahabad High Court to issue writs — (Taxation on Income (Investigation Commission) Act (30 of 1947), Ss. 5, 8(2)) — (Income-tax Act (1922) (as amended in 1954), S. 34(1A)).

On the basis of the report, submitted by the Investigation Commission, the Government of India, Ministry of Finance issued an order under S. 8(2) of the Taxation on Income (Investigation Commission) Act, directing re-assessment of the petitioners' firm in U. P. and its partners on the escaped income.

Thereafter Income-tax Officer, Kanpur, issued notices to the petitioners under S. 34 of the Income-tax Act. It was not disputed that those notices were issued for purposes of initiating proceedings under S. 34 in pursuance of the directions of the Central Govt. given under S. 8(2) of the Act 30 of 1947.

After the service of those notices, the petitioners moved a writ petition in the Allahabad High Court and impleaded Income-tax Investigation Commission, New Delhi; the Govt. of India, New Delhi; the Central Board of Revenue, New Delhi, and the Income-tax Officer, Kanpur. The prayer was for various writs against those authorities. Against the Income-tax Officer, Kanpur, a writ in the nature of prohibition was sought prohibiting him from continuing further proceedings initiated in pursuance of the Central Govt. order on the ground that the subsequent proceedings, which were going to be taken by him, would offend Art. 14 of the Constitution.

Held (i) that the Allahabad High Court was not competent to issue writs against Income-tax Investigation Commission, Govt. of India and Central Board of Revenue, as those parties were situated at New Delhi which was outside the territorial jurisdiction of the Allahabad High Court. AIR 1953 SC 210 — AIR 1954 SC 207 — AIR 1955 All 435 (FB) and AIR 1955 All 468, Rel. on. (Para 4)

(ii) That so far as Income-tax Officer, Kanpur, was concerned, if it became necessary for the High Court to issue a writ to the Income-tax Officer, Kanpur, on the ground that the proceedings, which had been taken earlier by other persons or bodies so as to invoke his jurisdiction, were void, it might not be possible for it to issue a writ to the Income-tax Officer also, because no such writ could be issued unless previous void orders were quashed.

The position, however, was different. Even if it be held that the Income-tax Officer was exercising jurisdiction, which had been conferred upon him by means of valid prior proceedings, the further proceedings, that were going to be taken by the Income-tax Officer, if he complied with the law under which he was acting, would result in bringing about inequality and thus create a breach of Art. 14 of the Constitution. (S) AIR 1955 SC 13, Applied. (Para 6)

Consequently, this was a fit case where an appropriate writ should be issued to the Income-tax Officer, Kanpur, prohibiting him from proceeding further with the cases initiated on the basis of the notices issued by him against the petitioners. (Para 7)

Anno: AIR Com.: Const. of India, Art. 226 N. 41; Art. 14 N. 17.

(b) Constitution of India, Art. 226 — Procedure — Alternative cases on question of nature of proceedings initiated — (Civil P. C. (1908), O. 6, R. 2).

The question as to the nature of the proceedings initiated is a question of fact and on such a question no party can be allowed in writ proceedings to put forward alternative cases. (Para 5)

Anno: AIR Com.: Const. of India, Art. 226 N. 42.

(c) Constitution of India, Art. 226 — Costs in writ proceedings — Costs against party beyond territorial jurisdiction.

Where the prime mover (Central Govt., in this case) of proceedings, sought to be quashed by writ proceedings, was beyond the territorial jurisdiction of the High Court, it is true the High Court cannot issue a writ directed to that party, but it does not mean that costs cannot be awarded against that party, when that party is given an opportunity to appear and represent its case before the High Court.

There may be a case where a person, residing outside the jurisdiction of the High Court, may institute a suit in a Court within the jurisdiction of the High Court. In such a case, if a writ of certiorari or of prohibition is issued against that Court, the liability for the costs incurred by the petitioner would fall not on the Court but on the person, who initiated those proceedings, even though he may be residing outside the jurisdiction of the Court. (Para 8)

Anno: AIR Com.: Const. of India, Art. 226 N. 50.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 210: 1953 SCR 1144 (SC) 4

(B) (V41) AIR 1954 SC 207: 1954 SCR 738 (SC) 4

(C) (V42) AIR 1955 All 435: (Civil Misc. Appln. No. 21 of 1953—All) (FB) 4

(D) (V42) AIR 1955 All 468: (Writ Petn. No. 1005 of 1953, D/- 12-4-1955—All) 4

(E) (V42) (S) AIR 1955 SC 13: 1955 SCR 787 (SC) 6

R. S. Pathak, for Petitioners; S. C. Das and J. Sarup, for Opposite Parties.

V. BHARGAVA J.:

This petition under Art. 226 of the Constitution has been filed by the firm Gangadhar Baijnath and its three partners, Rameshwar Prasad Bagla, Harishankar Bagla and Satyanarain Bagla. The petition relates to proceedings being taken against the firm under the provisions of the Taxation on Income (Investigation Commission) Act.

(2) It has been stated on behalf of the petitioners that one Sri V. P. Gupta was appointed as the Authorised Official by the Income-tax Investigation Commission to discharge the functions of such officer under the said Act No. XXX of 1947, and on 29-6-1950 the petitioners received a notice from Sri V. P. Gupta, Authorised Official, to furnish certain information appearing in the petitioners' books of accounts, which were specified in that notice.

Thereafter the Authorised Official carried on his investigation for more than a year and a half, during which time he sent a number of requisitions to the petitioners calling for account books, statements and other information. While this investigation was still going on, the petitioners were informed by a letter of the Authorised Official, dated 22-10-1951 that the matter was likely to be heard by the Income-tax Investigation Commission sometime early in December, 1951.

Later the definite date of hearing was communicated to the petitioners as 18-12-1951. On 11-12-1951 the petitioners received a copy of the report of the Authorised Official, which had been submitted by him to the Income-tax Investigation Commission. The petitioners appeared through a counsel before the Commission on 18-12-1951 at New Delhi, when their request for adjournment had been refused.

The case was heard for several days and the proceedings were protracted. Since considerable time was being taken in the case, the petitioners thought that it would be advisable to conclude the proceedings by requesting the Commission to arrive at a settlement and fix the quantum of evaded income at Rs. 16 lacs. This offer was not accepted by the Commission and, on the other hand, a demand was made that the petitioners should disclose the details of the income covered by their proposal for settlement.

This disclosure was to be made by 17-3-1952. Later, the time granted was curtailed to 10-3-1952. The next hearing of the case commenced, however, on 17-3-1952 and, during this hearing, one of the partners, Harishanker Bagla, who has filed the affidavit in support of this petition, was examined in connection with the detailed disclosure referred to above. The next hearing took place on 7-4-1952 at Kanpur.

Further hearings continued in May 1952 and ultimately the Investigation Commission submitted its report to the Government, this report being dated 23-5-1952. On the basis of this report, the Government of India, Ministry of Finance (Revenue Division) issued an order dated 7-6-1952 under S. 8(2) of the Taxation on Income (Investigation Commission) Act, No. XXX of 1947, directing reassessment of the petitioners' firm and its partners on the escaped income the figures of which have been detailed in that order.

It was also directed that penalty proceedings under S. 28 of the Income-tax Act, and S. 16 of the Excess Profits Tax Act be taken against the petitioners. Thereafter Sri Satnam Singh Hitkari Income-tax Officer, District II(i), Kanpur, issued notices dated 21-7-1952 to the petitioners under S. 34 of the Income-tax Act. These notices were received by the petitioners on 4-8-1952. Similar notices were also issued under S. 15 of the Excess Profits Tax Act.

These notices under S. 34 of the Income-tax Act related to the assessment years ending on 31-3-1944, 31-3-1945, 31-3-1946, 31-3-1947 and 31-3-1948. The notices under the Excess Profits Tax Act related to the five chargeable accounting periods, the first one of which began on 30-9-1941 and the last one of which ended on 31-3-1946. After the service of those notices, the petitioners moved this petition in this Court on 25-8-1952 and an ad interim order was passed restraining the Income-tax Officer from continuing the proceedings initiated in pursuance of the Government Order dated 7-6-1952.

The opposite parties impleaded in this petition are the Income-tax Investigation Commission, New Delhi; the Government of India, Ministry of Finance (Revenue Division), New Delhi; the Central Board of Revenue, New Delhi, and the Income-tax Officer, District II(i), the Mall, Kanpur. In the petition, the prayer is for the issue of three writs. The first is a writ in the nature of mandamus to opposite party No. 2, the Government of India, directing it to withdraw its order dated 7-6-1952.

The second is a writ in the nature of prohibition to the Income-tax Officer, opposite party No. 4, prohibiting him from continuing further proceedings initiated in pursuance of that Government order dated 7-6-1952. The third is a writ in the nature of certiorari to the Income-tax Investigation Commission, opposite party No. 1, and to the Income-tax Officer, opposite party No. 4, calling for the record of the case and quashing proceedings of the Income-tax Investigation Commission and of the Income-tax Officer, which had been initiated in pursuance of the Government order dated 7-6-1952.

(3) A counter-affidavit was filed on behalf of the opposite parties by Sri V. P. Gupta, who was the Authorised Official, as mentioned above. A rejoinder affidavit has been filed on behalf of the petitioners. It does not appear to be necessary to go into the facts, given in the counter and the rejoinder affidavits, for the purpose of deciding this writ petition, as the facts, on which we intend to rely, are not controverted in the counter-affidavit.

(4) When the petition came up for hearing, a preliminary objection was raised by Sri Jagdish Swarup, learned counsel for the opposite parties, that this Court was not competent to issue writs against opposite parties Nos. 1, 2 and 3.

This objection was raised on the basis of the principles laid down by the Supreme Court in — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (A), — 'K. S. Abdul Rashid v. Income-tax Investigation Commission', AIR 1954 SC 207 (B) and the opinion delivered by a five Judge Bench of this Court at Lucknow in — 'Azmat Ullah v. Custodian, Evacuee Property, U. P. Lucknow', AIR 1955 All 435 (FB) (C).

It appears to us that this objection raised by the learned counsel for the opposite parties must succeed. We may also in this connection refer to a decision of a Division Bench of this Court in — 'Ram Kirpal v. Union of India', AIR 1955 All 468 (D), in which judgment was delivered on 12-4-1955. The principles laid down in these cases clearly support the preliminary objection of learned counsel for the opposite parties.

It is not within the jurisdiction of this Court to issue a writ of certiorari against the Income-tax Investigation Commission, which is situated at New Delhi, and to quash its findings in the case of the petitioners. Similarly, it is not within the jurisdiction of this Court to issue any writ to the Government of India, Ministry of Finance (Revenue Division), New Delhi, in respect of its order dated 7-6-1952.

Mr. Pathak, learned counsel for the petitioners, in view of this position, argued this case before us only with respect to the prayers for the issue of writs against opposite party No. 4. The Income-tax Officer, Kanpur, before whom the proceedings are at present pending and who issued notices under S. 34 of the Income-tax Act to the petitioners in pursuance of the order of the Government of India dated 7-6-1952. All these notices were issued by opposite party No. 4 on 21-7-1952.

(5) In this case, it has not been clearly stated in the petition or in the affidavit, filed in support of the petition, that the proceedings, which were initiated by opposite party No. 4 against the petitioners by issue of the notices dated 21-7-1952, were in pursuance of the directions given by the Government of India under sub-s. (2) of S. 8 of the Taxation on Income (Investigation Commission) Act.

Mr. Pathak, learned counsel for the petitioners, when arguing the case, however, urged that these notices had been issued in pursuance of the directions of the Government of India dated 7-6-1952 so that the proceedings, pending before opposite party No. 4, were proceedings, which would be governed by the various sub-sections of S. 8 of the Taxation on Income (Investigation Commission) Act.

We put a question to Mr. Jagdish Swarup, learned counsel for the opposite parties, whether the case of the opposite parties was that those notices, which had been issued by opposite party No. 4, were in pursuance of the Central Government direction dated 7-6-1952, or their case was that those notices were not issued in pursuance of that direction but were issued for purposes of initiating independent proceedings under S. 34, which opposite party No. 4 was competent to do in exercise of his jurisdiction.

Mr. Jagdish Swarup accepted the contention of Mr. Pathak that those notices were all issued in order to initiate proceedings under S. 34 in pursuance of the directions of the Central Government dated 7-6-1952, which directions were given under S. 8(2) of the Taxation on Income (Investigation Commission) Act. Since learned counsel for both the parties were agreed on this point, it is not necessary for us to go into the question whether these proceedings before opposite party No. 4 should be held to be proceedings initiated by him independently of the provisions of the Taxation on Income (Investigation Commission) Act and in exercise of his own powers under S. 34 of the Income-tax Act.

At one stage Mr. Jagdish Swarup did contend that he may be allowed to argue the case on the alternative basis that those notices had really initiated independent proceedings taken by the Income-tax Officer under S. 34 of the Income-tax Act, and had no connection with the proceedings under the Taxation on Income (Investigation Commission) Act, but we could not grant this permission, because the question as to the nature of the proceedings initiated is a question of fact and on such a question no party can be allowed to put forward alternative cases.

If, as admitted on behalf of the opposite parties, these notices were issued in compliance with the directions given by the Central Government by its order dated 7-6-1952, it is quite clear that these notices could not have been issued by the Income-tax Officer in exercise of his own mind to arrive at a finding whether circumstances existed, which would justify exercise of his powers under S. 34 of the Income-tax Act on his own initiative.

If an act is done under a direction of another person, the possibility that it was done on the basis of exercise of independent discretion is clearly excluded. Since the opposite parties have taken up the case that the Income-tax Officer was acting under the directions of the Government of India, it is not possible to contend that these proceedings can also be treated as independent proceedings under S. 34 of the Income-tax Act initiated by the Income-tax Officer after exercise of his own independent discretion, belief or knowledge.

For purposes of dealing with this petition, therefore, we have treated these notices as initiation of proceedings under S. 8 of the Taxation on Income (Investigation Commission) Act by the Income-tax Officer in pursuance of the directions of the Central Government given under sub-s. (2) of S. 8 of that Act.

(6) When considering the validity of these proceedings pending before the Income-tax Officer, Kanpur, we have to take notice of the fact that these proceedings had been initiated after findings by the Investigation Commission had been recorded and its report submitted to the Government in accordance with the provisions of sub-s. (1) of S. 8 of the Taxation on Income (Investigation Commission) Act.

Those findings and the report of the Commission cannot be quashed by us by issue of a writ of certiorari, as the Investigation Commission is beyond our jurisdiction, so that, for purposes of dealing with this petition, we have to treat those findings and the report as valid. Further, the order passed by the Central Government under S. 8(2), dated 7-6-1952 must also be treated by us as a valid order, because we cannot, by issue of a writ, quash that order, nor can we treat that order as wholly void and ignore it altogether.

On the basis of these two circumstances, it was contended by learned counsel for the opposite parties that this Court can have no jurisdiction to issue writs to opposite party No. 4, the Income-tax Officer, Kanpur, as he is merely exercising jurisdiction in compliance with a valid order passed by the Central Government. It appears to us that this contention can succeed only to a partial extent.

If it became necessary for us to issue a writ to the Income-tax Officer, Kanpur, on the ground that the proceedings, which had been taken earlier by other persons or bodies so as to invoke his jurisdiction, were void, it may not be possible for us to issue a writ to the Income-tax Officer also, because no such writ can be issued unless previous void orders are quashed.

The position, however, is different. Even if it be held that the Income-tax Officer is exercising jurisdiction, which has been conferred upon him by means of valid prior proceedings, the prayer is to restrain the Officer from exercising jurisdiction on the ground that the subsequent proceedings, which are going to be taken by him, would offend against Art. 14 of the Constitution and would bring about unequal protection of the laws or inequality before the law.

Mr. Pathak has drawn our attention to the provisions of sub-ss. (4), (5), (6) and (7) of S. 8 of the Taxation on Income (Investigation Commission) Act. Under these sub-sections, when the Income-tax Officer deals with these proceedings, he is bound to accept the findings already recorded by the Commission as final and is not competent to give his own findings on the disputed points concluded by those findings of the Commission. Further, the right of appeal against the order of the Income-tax Officer, based on those findings, does not exist and the only right, that remains to the assessee, is to ask for a reference to the High Court on a question of law arising out of the order of the Income-tax Officer during the proceedings before the Income-tax Officer.

Further, the findings that would be used against the assessee are findings arrived at by the Commission on application of a procedure, which considerably limited the rights of the assessee to put forward his case before the Commission. The procedure, that would thus be applied by the Income-tax Officer in these proceedings, is markedly different from the procedure that the Income-tax Officer is bound to apply, if proceedings had been taken against the petitioners by him under the provisions of S. 34 of the Income-tax Act, without reference to the provisions of the Taxation on Income (Investigation Commission) Act.

In the proceedings before the Income-tax Officer, therefore, the rights available to the petitioners are seriously curtailed and restricted rights as compared to the rights, which would have been available to the petitioners, if they had been dealt with under S. 34 of the Income-tax Act without applying the provisions of the Taxation on Income (Investigation Commission) Act.

We have also to take notice of the circumstance that, while proceedings against the petitioners are being taken under S. 8 of the Taxation on Income (Investigation Commission) Act, it is still open to the Income-tax Officer to take proceedings against the petitioners under S. 34 of the Income-tax Act, as amended by the Income-tax Amendment Act, No. XXXIII of 1954.

The petitioners are, therefore, in a position where they can ask the question, which was posed by their Lordships of the Supreme Court in — 'Shree Meenakshi Mills Ltd., Madurai v. A. V. Visvanatha Sastri', (S) AIR 1955 SC 13 (E), in the following words:

"Why are we now being dealt with by the discriminatory and drastic procedure of Act XXX of 1947 when those similarly situated as ourselves can be dealt with by the Income-tax Officer under the amended provisions of S. 34 of the Act.

Even if we once bore a distinctive label, that distinction no longer subsists and the label now borne by us is the same as is borne by persons who can be dealt with under S. 34 of the Act as amended, in other words, there is nothing uncommon either in properties or in characteristics between us and those evaders of income-tax who are to be discovered by the Income-tax Officer under the provisions of amended S. 34."

This question in this very form arises in the present case, because under the amended S. 34 of the Income-tax Act the power of initiating proceedings can be exercised up to the 31st day of March 1956. On the facts, which have been brought out by the petitioners and not disputed by the opposite parties, the petitioners are clearly persons who would fall within the ambit of the amended S. 34 of the Income-tax Act and it is still open to the authorities to take proceedings against them under that provision of law.

Other persons, situated like the petitioners, can also be dealt with under the amended S. 34 of the Income-tax Act. Those persons and the petitioners, being situated in exactly similar circumstances, are capable of being dealt with under two different provisions of law, viz., S. 34 of the Income-tax Act and S. 8 of the Taxation on Income (Investigation Commission) Act by the same Income-tax Officer.

Consequently the principle laid down by their Lordships of the Supreme Court in the case of — 'Shree Meenakshi Mills Ltd. (E)', cited above, is fully applicable to the case before us. The difference that in that case the proceedings were still before the Investigation Commission and in the present case the proceedings are before the Income-tax Officer, is not at all material.

The proceedings before the Investigation Commission were held to be void on the ground that further proceedings, which would be taken, would violate the fundamental right of equality under Art. 14 of the Constitution. In the case before us also the further proceedings that are going to be taken by the Income-tax Officer, if he complies with the law under which he is acting, would result in bringing about inequality and thus create a breach of Art. 14 of the Constitution.

(7) Consequently this is a fit case where an appropriate writ should be issued to the Income-tax Officer, Kanpur, prohibiting him from proceeding further with the cases initiated on the basis of the notices dated 21-7-1952 against the petitioners and we order accordingly.

(8) On behalf of the petitioners it was requested that costs should be ordered in their favour, as they have succeeded in this petition. Learned counsel for the opposite parties urged that costs should be awarded against opposite party No. 4 only as a writ is being issued to him, and should not be awarded against the other opposite parties Nos. 1, 2 and 3.

In this case, we find that opposite party No. 4, the Income-tax Officer, Kanpur, is purporting to exercise jurisdiction, which has to be prohibited, on the basis of the proceedings initiated at the instance of opposite party No. 2, the Government of India, by making a reference to the Investigation Commission under S. 5. The prime mover of these proceedings was opposite party No. 2.

It is true that opposite party No. 2 being beyond our jurisdiction, we cannot issue a writ directed to that party, but it does not mean that costs cannot be awarded against that party, when that party is given an opportunity to appear and represent its case before us. There may be a case where a person, residing outside the jurisdiction of this Court, may institute a suit in a Court within the jurisdiction of this Court.

In such a case, if a writ of certiorari or of prohibition is issued against that Court, the liability for the costs incurred by the petitioner would fall not on the Court but on the person, who initiated those proceedings, even though he may be residing outside the jurisdiction of the Court. On that principle the costs should be payable by the opposite party No. 2 and we direct that the petitioners shall be entitled to their costs from opposite party No. 2, which we assess at Rs. 500/-.

V.B.B. Order accordingly.

(S) AIR 1955 Allahabad 518 (V. 42, C. 146 Sept.)

MOOTHAM C. J. AND AGARWALA J. (11-4-1955)

Shaukat Ali, Applicant v. State of Uttar Pradesh and another, Opposite Parties.

Civil Writ Petn. No. 547 of 1954.

(a) **Tenancy Laws — Rampur Thekedari and Pattedari Abolition Act, 1953 (U. P. Act 10 of 1954) — Validity — Question whether Act contravenes Para. 8 of States Merger (Governor's Provinces) Order, 1949 — Jurisdiction of Court to decide — (Constitution of India, Art. 363) — (States Merger (Governor's Provinces) Order, 1949, Para. 8).**

The Court has, no jurisdiction to decide whether the U. P. Act 10 of 1954 is invalid on the ground that it constitutes a breach of the terms of the agreement between the Government of India and the Nawab of Rampur by virtue of Art. 363 of the Constitution.

Besides, Cl. (iii) of the Collateral Agreement dated 15-5-1949, while providing for the sanctity of contracts and agreements clearly provided that

they would be honoured "except in so far as they may be repugnant to the provisions of any law made applicable to the State". This meant that these contracts and agreements could be abrogated by a law made by the State, though not by an executive act. The law by which they have been abrogated is the U. P. Act 10 of 1954 which cannot therefore be questioned as invalid. (Paras 10, 11)

(b) Tenancy Laws — Rampur Thekedari and Pattedari Abolition Act, 1953 (U. P. Act 10 of 1954), S. 3 — Validity of the Act — Question whether it contravenes Arts. 14 and 31 — Art. 31A — Bar of — (Constitution of India, Arts. 14, 31 and 31-A).

Even assuming that the compensation provided for in the U. P. Act 10 of 1954 on account of the determination of leases and thekas is contrary to the provisions of Arts. 14 and 31 of the Constitution, the Act comes within the ambit of Art. 31A (1). S. 3 of the U. P. Act 10 of 1954 empowers the State Government to determine any lease.

The leases under the Notification D/- 12-3-1949 created an intermediary between the State and the tenants and the lessees do not become tenants themselves. The leases being of proprietary rights in land, they are covered by expression "rights in an estate" as mentioned in Cl. 2(b) of Art. 31A. (Paras 12, 13)

Anno: AIR Com.: Const. of India, Art. 31 N. 35(e).

S. C. Khare, for Applicant; S. N. Dwivedi, for Opposite Parties.

AGARWALA J.:

This is a petition under Art. 226 of the Constitution praying that an order, direction or writ in the nature of 'mandamus' be issued to the Government of Uttar Pradesh and to the Collector of Rampur restraining them from giving effect to a Notification No. 3136/1-A.559/1951 issued by respondent 1 on 28-6--1954, and directing them not to take possession of the properties held by the petitioner or to interfere with the rights of the petitioner over such properties.

(2) The main point that arises for consideration in this case is whether The Rampur Thekedari and Pattidari Abolition Act (U. P. Act 10 of 1954), which abolishes Thekedari and Pattedari in Rampur is 'ultra vires' the State Legislature or not. The facts briefly stated are as follows:

The petitioner is a pattedar of a certain village of the district of Rampur. Rampur was a princely State before 1947 and was ruled by His Highness the Nawab of Rampur. In 1947, India obtained independence and became a Dominion by virtue of the Indian Independence Act of 1947. The Suzerainty of the British Crown over the Indian States lapsed at the same time because of S. 7 of the said Act, and the State of Rampur along with the other States in India in the eye of Law became independent.

It was, however, expected that such States would not remain independent but would accede to one or the other of the Dominions into which India had been divided. The State of Rampur acceded to the Dominion of India by executing an instrument of accession in respect of three subjects, Defence, External Affairs and Communications, which were transferred to the Government of the Dominion of India. Later, on 15-5-1949. the Nawab of Rampur agreed to merge his State with the Dominion of India. This was done by means of an agreement entered into between the Governor General of India and His Highness the Nawab of Rampur. This agreement is printed in the revised edition of the White Paper on Indian States at page 209.

Under para. 1 of the aforesaid agreement, the Nawab of Rampur ceded to the Dominion of India full and exclusive authority, jurisdiction and power for and in relation to the governance of the State as from 1-7-1949. Along with this agreement, what is known as the Collateral Agreement, was also executed on 15-5-1949. Clause (iii) of the Collateral Agreement provided that—

"All contracts & agreements entered into by Your Highness before the date on which the Administration is made over to the Government of India will be honoured except in so far as any of these contracts or agreements may either be repugnant to the provisions of any law made applicable to the State or inconsistent with any general policy of the successor Government."

On 1-7-1949 an order known as the Rampur (Administration) Order, 1949, was promulgated by the Governor General under which a Chief Commissioner was appointed to administer the area of the former Rampur State.

At that time all agricultural land in the territory of Rampur State was, broadly speaking, administered in three different ways. One portion of the State lands was known as 'Ilaqa Jadid'. In this territory there were intermediaries called zamindars of the type known in Uttar Pradesh. They had proprietary rights in land and were liable to pay land revenue to the State Government. Another portion of the State lands consisted of 'Jagirs' which had been conferred by His Highness the Nawab of Rampur on certain persons who were the proprietors of their land and who had to pay no land revenue but were liable to pay a local rate or Abwab. The third area of the State lands consisted of what is known as 'Kham villages'.

The land belonged to the Nawab or the State and was let out to Pattedars and Thekedars who used to realise rents from the tenants cultivating the land.

(3) Prior to the Merger Agreement the Nawab of Rampur had by a Notification dated 12-3-1949, promulgated a scheme whereby leases of villages were granted to Thekedars and Pattedars in consideration of a fixed amount payable to the Nawab, the lessees being entitled to retain possession of the land for a number of years. The leases granted to Pattedars and Thekedars in this connection were those of proprietary rights, that is to say the lessees were intermediaries between the State and the tenants.

(4) The arrangements so made were recognised by the Chief Commissioner after the merger of the State in the Dominion of India and in some cases the Chief Commissioner executed agreements in favour of the lessees and in others no such agreements were executed but the names of the lessees were entered in the revenue papers as such. These leases were for a period of ten years in the first instance with a clause for renewal for another period of ten years.

(5) On 27-7-1949 the States' Merger (Governors' Provinces) Order, 1949 was promulgated by the Governor General providing for the merger of the former princely States with the adjoining Provinces and for their governance as part of those provinces. Rampur State was, however, not included at first in this Order but by a later Order, called the "States' Merger (United Provinces) Order, 1949, Rampur State was included in the previous Order and was to be administered as part of the United Provinces. The States' Merger (United Provinces) Order came into force on 1-12-1949. Article 8 of the States' Merger (Governors' Provinces) Order provided that—

"8. Without prejudice to the Special provisions contained in Art. 7, any contract made or deemed to be made before the appointed day, or on behalf of the Dominion for purposes connected

with the governance of a merged State shall, as from that day, have effect as if it had been made by or on behalf of the absorbing province, unless it is wholly or in part for central purposes."

Thereafter the former territories of the Rampur State were merged in the province of United Provinces and have since been governed as a district of that Province now called the 'State of Uttar Pradesh' under the Constitution which came into force on 26-1-1950. Article 1 of the Constitution read with the first schedule made the territories of the former Rampur State part and parcel of the State of Uttar Pradesh amenable to the jurisdiction of the State Legislature.

(6) In 1954 the Uttar Pradesh Legislature passed the Rampur Thekedari and Pattedari Abolition Act, 1953 (U. P. Act 10 of 1954) which empowered the State Government to terminate the leases and thekas granted by His Highness the Nawab of Rampur on payment of compensation as provided for in the Act. Under S. 3 of the said Act, a notification dated 28-6-1954 for determining the leases was issued. It is this notification which is sought to be rendered ineffective by the present petitions.

(7) The contention of the petitioner is that this Act is 'ultra vires' firstly, because it violates Cl. (iii) of the Collateral Agreement dated 15-5-1949, and Art. 8 of the States' Merger (Governors' Provinces) Order, 1949, already quoted, and, secondly, that the provisions relating to compensation are illusory and discriminatory and the Act does not award just compensation for the rights which have been extinguished and is, therefore, repugnant to Arts. 31 and 14 of the Constitution. It is the petitioner's case that Art. 31A of the Constitution does not apply to the Act in question because the rights determined by the Act do not amount to an 'estate' within the meaning of that Article.

(8) In this petition the lease was granted or recognised before 29-11-1949, the date of the States' Merger (United Provinces) Order, 1949.

(9) As regards the contention that the impugned Act contravenes para. 8 of the States' Merger (Governors' Provinces) Order, 1949, and para. (iii) of the Collateral Agreement dated 15-5-1949, it is alleged on behalf of the petitioner that Art. 8 was the implementation of a treaty entered into between the Government of India and the Nawab of Rampur, the treaty being the Merger Agreement read with the Collateral Agreement dated 15-5-1949. It is urged that the power to alter the terms of the treaty is vested in the Central Legislature. Reference has been made to the Legislative List I, item 14 in the 7th Schedule to the Constitution.

(10) The answer to this contention is two-fold: first, that Art. 363 of the Constitution bars the jurisdiction of the Court to question any breach of treaties, agreements or the like made between the Government of India and the former princely States. The Court has, therefore, no jurisdiction to decide whether the enactment is invalid on the ground that it constitutes a breach of the terms of the Agreement between the Government of India and the Nawab of Rampur.

(11) Secondly, it may be noted that Cl. (iii) of the Collateral Agreement dated 15-5-1949, which, while providing for the sanctity of contracts and agreements entered into by His Highness, the Nawab of Rampur, before the date on which the administration was taken over by the Government of India, clearly provided that these contracts and agreements would be honoured "except in so far as they may be repugnant to the provisions of any law made applicable to the State". This meant that these contracts and agreements could be abrogated by a law made by the State, though not by an executive Act. The law by which they have been abrogated is the impugned Act which cannot therefore be questioned as invalid.

(12) The second ground urged on behalf of the petitioner namely that the compensation provided for in the Act on account of the determination of leases and thekas is not just or fair or that it is illusory or that it is discriminatory is also not open to him, as, even assuming that it is contrary to the provisions of Arts. 14 and 31 of the Constitution, the Act comes within the ambit of Art. 31A(1) of the Constitution which provides that—

"Notwithstanding anything in the foregoing provisions of this part no law providing for the acquisition by the State of any 'estate' or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part.

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent."

It may be noted here that the impugned Act received the assent of the President.

(13) Article 31A(2) reads as under:

"In this article—

(a) The expression 'estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area, and shall also include any 'jagir', 'inam' or 'muafi' or other similar grant;

(b) The expression 'rights', in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue."

Article 31A would bar any objection to the validity of the Act on the ground that it contravenes Arts. 14 and 31 if the impugned Act deals with the acquisition of an 'estate' or of any rights therein or for the extinguishment or modification of any such rights. Section 3 of the impugned Act empowers the State Government to determine any lease. A lease is defined in the Act as a Theka, Patta or grant made by the State Government under and in accordance with the Notification published in the Rampur State Gazette dated 19-10-1935, and Ch. 13 of the Qanun Qabza Arazi Riyasat Rampur Act, 1937 or the said Chapter read with Rampur State Gazette Notifications dated 28-5-1938, and 12-3-1949.

The lease in the present petition was created under the Notification dated 12-3-1949. This and similar leases are leases of proprietary rights in land. These leases created an intermediary between the State and the tenants and the lessees do not become tenants themselves. The leases being of proprietary rights in land, they are coverted by the expression "rights in an estate" as mentioned in Cl. 2(b) of Art. 31A. The Act is, therefore, in our opinion saved by Art. 31A from being questioned on the ground that it contravenes Arts. 14 and 31 of the Constitution.

(14) We are, therefore, of opinion that this petition must fail. It is accordingly dismissed with costs.

H.G.P. Petition dismissed.

(S) AIR 1955 Allahabad 521 (V 42 C. 147 Oct)

DESAI AND BEG JJ. (9-5-1955)

Dukhi and another, Applicants v. State and another, Opposite Parties.

Criminal Writ Petn. No. 950 of 1955.

Criminal P. C. (1898), Ss. 344 Explanation, 167 (2) — Detention in custody — Power of Magistrate under S. 344 to remand accused to custody on expiry of 15 days without taking cognizance of offence: AIR 1955 All 462, OVERRULED; AIR 1924 Cal 614, Doubted.

Where a person is arrested by the police without a warrant, it is not required that he must be released from custody on the expiry of 15 days mentioned in S. 167(2) if the police are still investigating the matter. A Magistrate, having jurisdiction to take cognizance of the offence, can avail himself of the provisions of S. 344 without taking cognizance of the offence or while the matter is still under investigation by the police: AIR 1955 All 462, Overruled; AIR 1924 Cal 614, Doubted; AIR 1949 Cal 143 and AIR 1931 All 617, Ref. (Para 2)

Anno: AIR Com.: Criminal P. C., S. 167 N. 7; S. 344 N. 16, 17.

CASES REFERRED: Paras

(A) (V20) AIR 1933 All 399: 34 Cri LJ 761 4
(B) (V23) AIR 1936 PC 253 (2): 63 Ind App 372: 37 Cri LJ 897 (PC) 4
(C) (V11) AIR 1924 Cal 614: 26 Cri LJ 68 6
(D) (V36) AIR 1949 Cal 143: 50 Cri LJ 231 6
(E) (V18) AIR 1931 All 617: 53 All 729: 32 Cri LJ 1045 6
(F) (V42) AIR 1955 All 462: (Misc. Case No. 1352 of 1951, D/- 28-8-1951—All) 6

T. Rathore, for Applicants.

DESAI J.:

The applicants applied for a writ of habeas corpus under S. 491, Criminal P. C. and Art. 226 of the Constitution. They were arrested on a charge of murder and are being detained in prison under the orders of a Magistrate since 29-3-1955 in one case and 2-4-1955 in the other case. Their contention is that under S. 167, Criminal P. C. they can be detained in custody under the orders of a Magistrate only for 15 days and that their continued detention after the expiry of 15 days is unlawful and they should be released at once.

Though it is not stated in the application, the applicants seem to have been arrested without a warrant by the police and the police are still investigating the matter.

(2) The questions that arise are, (1) Whether a person arrested by the police without a warrant must be released from custody on the expiry of the period of 15 days mentioned in S. 167 (2) of the Code unless the Magistrate having jurisdiction takes cognizance of the offence and decides to postpone the inquiry or trial under S. 344 of the Code, and (2) Whether a Magistrate can avail himself of the provisions of S. 344 without taking cognizance of the offence or while the matter is still under investigation by the police.

We were satisfied that the first question should be answered in the negative and the second question, in the affirmative; so we held that the detention of the applicants was not unlawful and dismissed their application. We now proceed to give reasons for our views.

(3) The Legislature has expressly divided the period for which a person can be detained in custody prior to the commencement of an inquiry or trial into two stages. The first stage is of the period of 24 hours; in this period the police have absolute discretion to detain the person anywhere they like during the investigation. If the investigation cannot be completed within 24 hours, the police must forward the accused to the nearest Magistrate; see S. 167(1).

The second stage consists of 15 days; the Magistrate to whom the police have forwarded the accused can authorise his detention in such custody as he thinks fit for a term not exceeding 15 days in the whole; see S. 167(2). This remand is practically automatic as soon as the police report that the investigation cannot be completed within 24 hours and that the accused must be remanded to custody for 15 days, the Magistrate would feel bound to grant the remand. The Legislature expects investigations to be completed within the period of 15 days, but frequently investigation must go on for more than 15 days; other persons involved in the commission of the offence may be absconding, identification proceedings in respect of the arrested persons or property may have to be done, a report may have to be obtained from an expert such as the Chemical Examiner or the Imperial Sereologist or a handwriting expert, witnesses may not be available for interrogation on account of illness or being away from their homes, or the investigating officer may be absent, on leave or may have more urgent investigations to do in the period.

On account of these and other reasons investigations, particularly investigations in dacoity, riot and murder cases, are often delayed beyond 15 days. So there must be a third stage of investigation, e.g., the stage after 15 days. The Legislature must have realised that frequently investigation would last more than 15 days, particularly investigation of serious crimes like dacoity and murder.

It could not have contemplated that the arrested person must be released from custody after the expiry of 15 days regardless of the nature of the accusation or information against him and regardless of the quantity of evidence so far available against him. Therefore, it must have made provision for continuing the arrested person's detention after 15 days in suitable cases and there is no provision barring that contained in S. 344.

It follows that S. 344 is meant to be applied when the investigation cannot be completed within 15 days and there is a reasonable ground to believe that the accusation or information is true. It is stated in the explanation to S. 344 that if sufficient evidence has been obtained to raise a suspicion that the accused might have committed the offence and it appears likely that further evidence may be obtained by a remand, it is a reasonable cause for a remand.

This explanation necessarily refers to the stage when the offence is still under investigation by the police. The investigation is to be done by the police only; only they can unearth or collect evidence. The Court simply tries or holds an inquiry by examining witnesses produced before it by the police or the complainant; it does not investigate and does not collect evidence.

Therefore, when the explanation refers to the probability of obtaining further evidence it means that the remand under S. 344 can be granted while the case is still being investigated by the police. If the investigation has been completed, normally there would not arise any question of the probability of obtaining more evidence by further investigation. If there are good grounds for not completing the investigation within 15 days and there is sufficient evidence or reasonable suspicion against the accused, the Court may postpone the commencement of enquiry or trial pending completion of the investigation and remand the accused to custody in the meanwhile; this is exactly what S. 344 permits.

This remand under S. 344 is to be distinguished from the remand under S. 167(2). Section 344

is more general than S. 167(2), which is confined in its operation to the stage of 15 days of investigation; it can be used at any stage and can be used by any Magistrate or Judge. A remand under S. 344 can be ordered only by the Court having jurisdiction for the offence and not by any Magistrate like a remand under S. 167(2).

It has to be for a reasonable cause and is not almost automatic or as a matter of course like a remand under S. 167(2). Under S. 167(2) the Magistrate has hardly any discretion; if the police report to him that the investigation cannot be completed within 24 hours and that there are reasons to believe that the accusation or information is well founded, he will have no option but to remand the accused.

He is not required to give any reasons for granting remand to jail custody; but a Court granting remand under S. 344 has to give reasons. A Magistrate granting remand under S. 167(2) has discretion to remand the accused either to police custody or to jail custody but it is doubtful if a Court granting remand under S. 344 has such discretion and can remand the accused to police custody.

(4) Sections 169, 170 and 173 provide for the acts to be done by the police upon investigation. If "upon an investigation" it appears to the police that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to Court, the police must release him on his executing a bond; see S. 169.

If on the other hand it appears to the police that there is sufficient evidence or reasonable ground, they must forward the accused under custody to the Magistrate empowered to take cognizance of the offence upon a police report and to try the accused; see S. 170.

Since the period of investigation expressly allowed by the Legislature (in S. 167(2)) is of 15 days, the report mentioned in S. 173 must be made within 15 days (if possible) and the acts mentioned in Ss. 169 and 170 must necessarily have been done before the report is made. But even if the investigation cannot be completed, and the report cannot be made, within 15 days, the acts mentioned in the two sections must still be done within 15 days.

If in this period sufficient evidence has been obtained or there is a reasonable suspicion against the arrested person, he must be forwarded to the Magistrate, otherwise he must be released, while the investigation is going on. Naturally the police will send a communication to the Magistrate while forwarding the accused explaining the circumstances in which they cannot complete the investigation within 15 days and stating what evidence has so far been collected to prove that the accused has committed the offence or to cause a reasonable suspicion of his having committed it.

The Magistrate then will decide whether to postpone the commencement of enquiry or trial and remand the accused. This communication is not a report within the meaning of S. 190(b); it need not state the facts constituting the offence and the Magistrate is not required to take cognizance on receipt of it; evidently if the communication does not state the facts the Magistrate cannot possibly take cognizance. There is nothing in S. 344 to suggest that the Magistrate must take cognizance before taking action under it.

It is laid down in S. 173 that the investigation must be completed without unnecessary delay and that as soon as it is completed, the police should forward to the Magistrate empowered to take cognizance of the offence on a police report a report in the prescribed form stating whether the accused (if arrested) has been forwarded in custody or has been released on his bond (he can be released on his bond if the offence is bailable).

This report may be a charge-sheet requesting the Magistrate to take cognizance of the offence and put the arrested person on trial or a final report informing him that there is no evidence against the arrested person or no reason to believe that he has committed the offence. Under S. 190(b) a Magistrate may take cognizance of an offence upon a report in writing of facts which constitute such offence by any police officer.

As the report mentioned in S. 173 is the only report which is contemplated by the Code to be made by a police officer to a Magistrate who is entitled to take cognizance of the offence, it must be held that the report upon which a Magistrate may take cognizance of an offence is the report mentioned in S. 173. When the Code provides for a certain report to be made by a police officer and does not provide for any other report to be made by him the report contemplated by S. 190 must be the report for which the Code has provided.

It was observed by Bajpai J. in — 'Chunni Lal v. Emperor', AIR 1933 All 399 (A), that an application made during the trial of a case by the prosecuting inspector that a certain witness should also be put on trial is a report within the meaning of S. 190 (b) but with great respect to the learned Judge I do not think it can be said to be such a report. It cannot be disputed that the report made by the police under S. 173 is such a report. An elaborate procedure is laid down in the Code to be followed by the police before they make such a report; it follows that no other kind of report is permissible under the Code.

It would have been useless for the code to provide for the elaborate procedure to be followed before making a report if any application such as the one made in the case of Chunni Lal could be held to be a report.

I think the doctrine laid down by the Judicial Committee in — 'Nazir Ahmad v. King Emperor', AIR 1936 PC 253 (2) (B), that where a power is conferred upon an authority to do an act in a particular manner, it must do it in that manner and in no other manner, applies; if the police are required by the Code to make a report in a particular manner they may not make a report at all, but if they make one, they must make it in the prescribed manner and in no other manner.

(5) Once it is found that the report contemplated by S. 190 (b) is the report referred to in S. 173, it follows that a Magistrate can take cognizance of an offence only after the investigation has been completed and cannot take cognizance of it while the investigation is still progressing. The whole scheme of the Code is against a Magistrate's taking cognizance of an offence even during the pendency of an investigation. There is only one provision dealing with further investigation after it has been once completed; it is that contained in S. 173(2).

Before the Magistrate passes orders on the report made under S. 173, the Superintendent or the Deputy Superintendent of Police, through whom the report is submitted by the station officer in charge of the police station, may order him to make further investigation. The Station Officer might have thought that he has done all the investigation that he could but the superior officer may think that the investigation is not complete and that some further investigation is still required and may direct it to be done pending orders of the Magistrate on the report. In no other case can further investigation be done after the submission of the report under S. 173.

After the Magistrate has passed orders on the report, whether of taking cognizance of the offence under S. 190(b) or of approving the final report

and discharging the bond executed by the arrested person under S. 169, there is no scope for any further investigation by the police. Further investigation after the Magistrate has taken cognizance of the offence may even amount to contempt of his court and be illegal. If no investigation can be done after the Magistrate has taken cognizance of the offence, the explanation to S. 344 must refer to circumstances existing before the taking of cognizance by the Magistrate, i.e., S. 344 can apply even before the Magistrate takes cognizance of the offence.

It was argued that the words "to postpone the commencement of.....any inquiry or trial" of the section suggest that the Magistrate has already taken cognizance of the offence. An inquiry or trial can commence only after the Magistrate has taken cognizance of the offence; therefore, the question whether the commencement of an inquiry or trial should be postponed or not would normally arise after cognizance of the offence has been taken. But there is nothing in the section to suggest that taking cognizance of the offence itself may not be postponed.

There is nothing to be done by a Magistrate after taking cognizance on a police report and before the commencement of an inquiry or trial; so postponing commencement of an inquiry or trial may include postponing the taking cognizance of an offence. In any case in the absence of express words like "after taking cognizance of an offence" I am not prepared to hold that the power conferred by S. 344 cannot be exercised unless cognizance has been taken.

(6) In — 'Bhola Nath Das v. Emperor', AIR 1924 Cal 614 (C), Greaves and Panton JJ. laid down:

"At the expiration of the maximum period of 15 days' detention of an accused person.....an accused must either be released by the police under S. 169 ....or the Magistrate, empowered in that behalf, must either take cognizance if he has before him a police report (which ordinarily would be a report in the form laid down in S. 173) .....or he must release him."

With great respect to the learned Judges I may point out that the alternative to proceeding under S. 169 is proceeding under S. 170 and not the Magistrate's taking cognizance of the offence or releasing him. Only two things are possible upon an investigation; either it appears that there is not sufficient evidence or it appears that there is. In the former case the police must act as laid down in S. 169 and in the latter case — as laid down in S. 170. So acting under S. 170 is the only alternative to acting under S. 169.

The correctness of the decision was doubted by Roxburgh and Blank, JJ. in — 'Superintendent and Remembrancer of Legal Affairs Bengal v. Bidhindra Kumar Roy', AIR 1949 Cal 143 (D). In that case it was observed by the learned Judges that the explanation to S. 344 "clearly contemplates a stage prior to submission of the charge sheet and that time is wanted for further investigation. In — 'Emperor v. Sooba', AIR 1931 All 617 (E), Kendall J. observed that if an investigation is not complete within 15 days, the accused must be forwarded to the Magistrate having jurisdiction for being remanded under S. 344 if there are sufficient reasons and that it is not the law that a police investigation can in no case involve detention of the accused persons in custody for more than 15 days.

In — 'Kali Charan v. State', AIR 1955 All 462 (F), decided by our brother Raghubar Dayal on 28-8-1951, a contrary view was taken and it was held that S. 344 cannot apply unless cognizance has been taken. In that case Kali Charan was detained in custody during investigation for more than 15 days. He was remanded to custody after having been in detention for 15 days by a Magistrate who had no jurisdiction to take cognizance of the offence. Under S. 167 a Magistrate not empowered to take cognizance of the offence can remand the accused to custody for no more than 15 days; therefore, the detention of Kali Charan beyond 15 days under the orders of a Magistrate, who was not empowered to take cognizance of the offence, was unlawful, regardless of the question whether S. 344 applies only after cognizance of the offence has been taken or also while the investigation is going on.

Our learned brother, however, considered the provisions of S. 344. He laid considerable stress upon the use of the word "court" and inferred that the section contemplates that a Magistrate has taken cognizance of the offence and a court has come into existence. I do not think that this is the significance of the word "court". The word "Magistrate" also is used in the same section. The word "court" is used instead of the word "Magistrate", because the provisions of the section are meant to be available not only to Magistrates but also to Judges. Had the word "Magistrate" been used, the provision could not have been available to Judges.

I find it difficult to accept our learned brother's observation that there is nothing in the Code to suggest that the police cannot continue investigation after submitting a report to the Magistrate for taking cognizance of the offence. It is only under S. 173 that a report is to be made and the section expressly uses the words "As soon as it is completed"; investigation cannot be completed and also remain pending at the same time. It is true that the explanation does not use the words "during the course of an investigation", but a similar argument is available against the interpretation sought to be placed upon the section — the section does not use the words "after taking cognizance of the offence".

Our learned brother did realize that further investigation, though it can go on after the Magistrate has taken cognizance of the offence, cannot go on after he has disposed of the case and consequently was forced to lay down that the Magistrate should not pass final orders in the case so long as the investigation has not been completed. What a court should do after it has taken cognizance of an offence is laid down in certain sections of the Code and, apart from the provisions there can be no restriction of any kind on the power of the Court to dispose of the case.

The Legislature would not have left such an important restriction unexpressed or to be inferred. There is no warrant for implying that the court's completing the case is dependent upon the investigation being completed. If the investigation can go on even after the court has taken cognizance, there is nothing in the law to prevent its going on even after the Court has disposed of the case. If it would be absurd for the investigation to go on even after the case is disposed of, the absurdity results from holding that investigation can go on simultaneously with an inquiry or trial and not from the operation of any of the provisions laying down the procedure to be followed after cognizance has been taken.

I do not agree with our learned brother that the interpretation that I am putting on S. 344 would render the limit of 15 days placed by S. 167 (2) useless. I have already pointed out the difference between the provisions of the two sections. If a Magistrate by simply passing an order of remand under S. 344 in a case pending investigation is deemed to have taken cognizance of the offence, as our learned brother thinks he is, it would be useless also to presume that the order can be passed only after cognizance has been taken. It would ordinarily be useless to presume that a power can be exercised only if a certain condition

precedent exists, if the existence of the condition precedent can be inferred from the very exercise of the power.

In 'Kali Charan's case (F)' since the order under S. 344 was passed by a Magistrate not empowered to take cognizance, he could not be presumed to have taken cognizance; in the present case it is not shown to us that the orders of remand were passed by a Magistrate not empowered to take cognizance of the offence against the applicant.

Our learned brother further observed:

"The forwarding of the accused to the Magistrate under S. 170, Criminal P. C. was for the purpose of the Magistrate taking cognizance against the accused.....it was in such a contingency that the Magistrate was to grant further remand under S. 344, Criminal P. C. in order that further evidence might be secured against the accused."

I have already explained how the communication that the police would send to the Magistrate while forwarding the accused under S. 170 cannot be the report contemplated by S. 190(b). Really the Code does not expressly require any report or any other communication to be sent by the police along with the accused; had it been the intention of the Legislature that the Magistrate should take cognizance when the accused is forwarded to him, it would have enacted a provision to that effect, or at least provided for a report to be made by the police while forwarding the accused.

Moreover, action under Ss. 169 and 170 is to be taken only if a person has been arrested by the police without a warrant; if none has been arrested or the arrested person has been released on bail, the action cannot possibly be taken, and the Magistrate can take cognizance of the offence only on receipt of the report made under S. 173. I do not see any reason for saying that the Magistrate must take cognizance even before receipt of the report just because some arrested person is in custody. The accused is to be forwarded even if there is no evidence, but only a reasonable suspicion; but the Magistrate cannot take cognizance on mere reasonable suspicion; he must have a statement of facts constituting the offence as laid down in S. 190(b).

If he has taken cognizance on the accused being forwarded to him, it would be superfluous for the police to make a report under S. 173 later; the Magistrate cannot take cognizance again. I have, therefore, no doubt that no cognizance can be taken by the Magistrate on the communication received from the police along with the accused under S. 170. A Magistrate passing an order under S. 344 may have to act judicially but acting judicially is not dependent on taking cognizance.

A Magistrate passing an order under S. 167(2) is also acting judicially; if he can act so without taking cognizance, there is no reason why he cannot act under S. 344 without taking cognizance. For these reasons I think that the law has not been correctly laid down by our learned brother in 'Kali Charan v. State (F)'.

(7) The detention of the applicants is not unlawful.

(8) BEG J. : I agree.

V.B.B. Application dismissed.

(S) AIR 1955 Allahabad 524 (V. 42 C 148 Oct)

LUCKNOW BENCH — H. S. CHATURVEDI AND MULLA JJ. (14-4-1955)

The State, Complainant-Appellant v. Udit Narain, Accused-Respondent.

Criminal Appeal No. 637 of 1954, against Order of Civil and S. J., Partapgarh D/- 22-2-1954.

Press and Registration of Books Act (1867), S. 3 — 'Paper', interpretation of — (Interpretation of Statutes — Penal Statutes) — (Civil P. C. (1908), Pre.) — (Words and Phrases — 'Paper') — AIR 1931 Pat 351(2), Dissented from.

A penal provision must be clear and unambiguous before effect can be given to it. AIR 1954 All 183, Relied on. (Para 8)

The word 'paper' was intended to cover all those papers which could not be defined as 'books' or 'newspapers' but which had historical, cultural or literary value. (Para 7)

Hence the word 'paper' did not include the notice announcing the holding of a public meeting to oppose the transfer of the Deputy Commissioner. AIR 1931 Pat 351(2), Dissented from. (Para 8)

Anno: AIR Com., C. P. C., Pre., N. 7.
AIR Manl. Press and Regis. Act, S. 3 N. 1.

CASES REFERRED : Paras

(A) (V18) AIR 1931 Cal 641: 33 Cri LJ 91 4
(B) (V24) AIR 1937 Bom 28: 38 Cri LJ 145 5
(C) (V18) AIR 1931 Pat 351(2): 10 Pat 492: 32 Cri LJ 1063 7
(D) (V30) AIR 1943 Lah 1: ILR (1943) Lah 95: 43 Cri LJ 897 8
(E) (V41) AIR 1954 All 183: 1953 All WR (HC) 601: 1954 Cri LJ 388 8

Shankar Sahai, for Appellant; Shyam Lal Misra, for Respondent.

MULLA J. :

Udit Narain, the opposite party in this case, was convicted by the Sub-Divisional Magistrate, Sadar, District Pratapgarh, under S. 12, Press and Registration of Books Act, 1867, and was sentenced to a fine of Rs. 300/-, in default to undergo simple imprisonment for six months.

(2) The facts of the case briefly stated are as follows : One Sri Sarkar was the Deputy Commissioner of Pratapgarh. He was transferred from the district. Some residents of Pratapgarh did not like this transfer. A notice was printed on 2-4-1953, in which it was announced that a meeting of the residents of Pratapgarh would be held to oppose this order of transfer. The names of the Press as well as the Printer were not printed on the notice. The place where the notice was printed was also not printed in the notice. The matter was investigated by a C. I. D. Inspector, who took the permission of the District Magistrate for doing so.

In the course of his investigations, he found that this notice was printed at the Avadh Press and it was printed by the opposite party, who was the Assistant Manager of that Press. The opposite party was placed before a Magistrate for recording his statement and he admitted that it was a mistake that the particulars mentioned above were not printed in the notice. He also prayed that he should be pardoned as it was a sheer mistake and he had no intention of defying any law. The Magistrate, however, as mentioned above, convicted him.

(3) Udit Narain appealed against this order of conviction and the Civil and Sessions Judge of Pratapgarh allowed his appeal on the ground that the notice printed by the opposite party cannot be held to be a 'paper' within the meaning of S. 3, Press and Registration of Books Act 1867. He relied on several authorities, which he quoted in his decision. It is against this order of acquittal that the State has come up in appeal.

(4) The counsel for the State contends that the learned Sessions Judge erred in holding that the word 'paper' in S. 3 does not include a notice. According to him, the word 'paper' means any piece

of paper, which has been printed. He also relies on a decision — 'Amiya Kumar v. Emperor', AIR 1931 Cal 641 (A). In this decision a hand-bill was held to come within the definition of the word 'paper' but the point was conceded by the counsel & the matter was not really argued. It is therefore of no help in interpreting the word 'paper'.

(5) Unfortunately the word 'paper' has not been defined in the Press and Registration of Books Act (Act 25 of 1867). Normally where a word is not defined the proper course is to interpret it in its ordinary and natural meaning. But the difficulty in this case is that that if the natural meaning is given to the word 'paper' it would lead to absurd and ridiculous results. As observed by Beaumont, C. J. in — 'Dattatraya Malhar v. Emperor', AIR 1937 Bom 28 (B):

"The Advocate General argues that the only meaning which can be given to the expression 'paper printed' is that it includes every piece of paper on which any letter, figure or sign is printed, and that every such piece of paper falls within the mischief aimed at by the Act..... If the contention of the Advocate General be correct as to the meaning of 'paper' it would seem to follow that offences against S. 3 of the Act are committed by practically everybody from the Viceroy and Governors downwards. Every invitation to dinner or to a party of any sort which is printed, every printed notice from a club secretary to members, every printed visiting card would be "printed paper" within the meaning attributed to the expression by the Advocate General and would require to have printed upon it the name of the printer and place of printing".

It is, therefore, clear that the word 'paper' cannot be construed in the ordinary and natural meaning of the word.

(6) In interpreting the words of a statute, it is always necessary to consider the intention of the legislature. The intention of the legislature is to be judged from the preamble to the Act. The preamble runs as follows :

"Whereas it is expedient to provide for the regulation of printing presses and of periodicals containing news, 'for the preservation of copies of every book printed or lithographed in British India', it is hereby enacted as follows: ....."

The short note before the preamble at the beginning of the Act reads as follows :

"An act for the regulation of Printing presses and Newspapers, 'for the preservation of copies of books printed in British India'; and for the registration of such books."

It is, therefore, clear from this short note and the preamble that the primary concern of the legislature in passing this Act was to enact a measure which would help in the preservation of the copies of books. This is further illustrated from the statement of Objects and Reasons given in the Gazette of 1867, at page 191. Extracts from these Objects and Reasons are as follows :

"It has for many years been the endeavour of the authorities to make a collection of the books and other publications emanating from the various printing presses at work throughout the country. It was an instruction of the late court of Directors of the East India Company that copies of every important and interesting work published should be despatched to England to be deposited in the liabrary of the India House. .....in the province of Lower Bengal at least, there has been of late years very great activity in the literary world and every year shows no inconsiderable increase in the number of works original or reprinted, published and in the number of printing presses established.

The literature of a country is no doubt an index of the opinions and condition of the people and such an index it is essential to good government that the rulers of country should possess. In the interest, too, of history and of the scholars of Europe, it is undoubtedly wise to provide that a complete collection of the publications of the press of this country should be made as well in this country as in England.

It cannot, but be of benefit to authors and publishers that catalogues of their works, and to a very limited extent copies of the works themselves, should be accessible to the public in certain well-known places."

In view of the extracts quoted above, there can be no doubt that the primary intention in passing Act 25 of 1867 was to preserve copies of every book or paper which had a literary, historical or cultural value. In this context the word 'paper' appears to have been used to cover every such printed matter which did not come under the definition of book given in this Act, but which had a literary, historical or cultural value.

(7) Another meaning of the word 'paper' has been given by Courtney-Terrell, C. J. in — 'Rameshwar Prasad v. Emperor', AIR 1931 Pat 351(2) (C). The learned Judge observed :

"It is clear that this part of the Act to which this preamble relates is concerned only with the regulation of papers containing news which are intended to be circulated and, in my opinion, the word 'papers' in sections 3 and 4 of the Act are clearly papers of this description and are practically, if not exactly, synonymous with the word 'newspaper' as defined in section 1 of the Act itself."

With deep respect for the Judges who gave this decision, we think that the word 'paper' in S. 3 of the Act is not synonymous with the word 'newspaper', because the Act has used the word 'newspaper' distinctly in several sections of the enactment and has even defined it. In our opinion the word 'paper' was really intended to cover all those papers which could not be defined as 'books' or 'newspapers' but which had historical, cultural or literary value.

(8) This question again came up before a Bench of the Lahore High Court in — 'Manohar Lal v. Emperor', AIR 1943 Lah 1 (D), and the learned Advocate General in that case argued that, on a reasonable construction, the word 'paper' meant other printed matter analoguous to a newspaper, pamphlet or a book. The learned Judges held that even if this definition is accepted, it cannot apply to a 'paper' of the type of a poster or a notice.

They, however, did not accept this definition and expressed their agreement with the views given in the Patna and Bombay decisions cited above. In the end they observed:

"We are of opinion that there is a lacuna in the Act in so far as it omits to define the phrase 'paper printed'. If the intention is to bring within the ambit of the Act a poster which is not within the scope of the definition of the 'newspaper', there should be a separate definition from which pressmen, the public and the Courts will be in a position to know what posters or notices fall within the mischief of the Act and what are exempt and thereby set at rest the doubts which have been expressed by various High Courts on this point.'

This decision was given in 1942 and still the State has not chosen to define the word 'paper' used in this Act. We have already observed that the natural meaning of the word 'paper' cannot be accepted. It leads to absurd and ridiculous results. We have also given our opinion that in the context of the enactment, the word 'printed paper' means a paper which is of cultural, historical or literary value. We have also mentioned the interpretation and the meaning given to the word 'paper' by Courtney-Terrel C. J., according to which the word 'paper'

as used in S. 3 of this Act is almost synonymous with the word "newspapers". It is therefore, clear that the word 'paper' used in the Act is so vague that it is not possible to interpret it.

We may have our own interpretation of the word, but we cannot be sure that that interpretation is correct. It may be that the word 'printed paper' means a paper printed for public circulation either by sale or free distribution and does not include papers intended for private use of an individual or a corporate body, but if we give this meaning to the word 'paper' it would be introducing our own interpretation of the word, which may or may not be correct.

We cannot convict a person on such an interpretation. It has been held that a penal provision must be clear and unambiguous before effect can be given to it. As held by Desai J. in — 'Bishamber Dayal v. State', AIR 1954 All 183 (E), "an order of a penal nature must be clear and specific in its language and must not leave anything to presumption. If a member of the public is prohibited from doing an act, he must be prohibited clearly and in an unambiguous language."

We, therefore, find that the word 'paper' is neither clear nor unambiguous. As such, it is not possible to convict the opposite party by holding that the word 'paper' includes the notice which was printed by him.

(9) In our opinion the learned Sessions Judge made no error of law when he acquitted the opposite party. On the law as it stands, the conviction of the opposite party was not maintainable. We, therefore, dismiss this appeal. The opposite party need not surrender, and his bail bonds stand cancelled.

H.G.P. Appeal dismissed.

(S) AIR 1955 Allahabad 526 (V. 42 C. 149 Oct.)

AGARWALA AND OAK JJ. (4-4-1955)

Jokhu Mal and others, Applicants v. Sudama Mal and others, Opposite Parties.

Civil Revn. No. 340 of 1948, against decree of Dist. J., Azamgarh, D/- 27-3-1948.

(a) Civil P. C. (1908), S. 144(2) — Restitution under inherent powers — Bar of S. 144(2) does not apply — (Civil P. C. (1908), S. 151).

The bar of suit under S. 144(2), C. P. C. applies to cases to which S. 144 applies and not to cases of restitution under the inherent powers of the Court. If an application for restitution under the inherent powers of the Court is not made, there is nothing in law to prevent a party from obtaining the same relief by means of a suit. Where a decree passed in the mortgage suit was not varied or reversed but an order for sale of the property made in execution of the decree was set aside, S. 144 does not in terms apply.

No doubt if any restitution was needed the Court could order it under its inherent powers, but that would not attack the consequence which flows from an omission to make an application under S. 144. AIR 1931 Cal 517, Rel. on. (Para 5)

Anno: AIR Com.: C. P. C., S. 144 N. 29.

(b) Limitation Act (1908), S. 28 — 'Suit' in S. 28 does not include application under S. 144, Civil P. C. — Mere fact that an order passed under S. 144 is a decree cannot mean that the application itself is a suit. AIR 1948 All 400, Dissented from — (Civil P. C. (1908), S. 144). (Para 7)

Anno: AIR Com., Lim. Act. S. 28 N. 3.

(c) Limitation Act (1908), S. 28 — 'Suit' does not include application for restitution under S. 151, Civil P. C. — (Civil P. C. (1908), S. 151). (Para 7)

Anno: AIR Com., Lim. Act, S. 28 N. 3.

CASES REFERRED: Paras

(A) (V18) AIR 1931 Cal 517: 58 Cal 465 5

(B) (V35) AIR 1948 All 400: 1948 All LJ 536 7, 11

(C) (V40) AIR 1953 SC 23: 1953 All LJ 101 (SC) 12

Kanhaiya Lal Misra, for Applicant; Brij Lal Gupta, for Opposite Parties.

AGARWALA J.:

This is an application in revision arising out of proceedings under S. 12, Agriculturists' Relief Act. The facts are simple. On 17-6-1913, one Udit Mal executed a simple mortgage of the property in dispute in favour of one Billar Mal for a sum of Rs. 550/-. On the 20th August, 1914, Udit Mal executed a usufructuary mortgage in respect of the same property in favour of four persons, Lalla Mal to the extent of one-third share, Oudh Behari Mal, Jokhu Mal and Palakdhari to the extent of two-thirds share. In 1926, Billar Mal, the first mortgagee, sued upon his mortgage and obtained a decree for sale of the mortgaged property.

The heirs of Udit Mal, the mortgagor, were impleaded as defendants in the suit. The decree was sent to the Collector for execution. The Collector held a sale under the U. P. Regulation of Sales Act 26 of 1934 and instead of auctioning the property transferred it in favour of four persons, Jokhu Mal, Sri Narain Mal, Sheo Shanker Mal and Rama Shanker Mal. The deed of transfer is dated 16-10-1936.

It may be noted that Jokhu Mal was one of the usufructuary mortgagees, Sri Narain Mal and Sheo Shankar Mal were the heirs of Oudh Behari Mal, another usufructuary mortgagee, but Rama Shanker Mal was not one of the usufructuary mortgagees, and the heirs of Lalla Mal, one of the usufructuary mortgagees, were not the transferees under this transfer. On 30-10-1937 the Collector put the transferees in possession of the transferred property. Since the transferees, with the exception of Rama Shanker Mal, were the usufructuary mortgagees, they obviously did not raise objections to this procedure. It does not appear whether Lalla Mal was actually ejected or remained in possession as mortgagee.

(2) On 14-2-1938, however, the Board of Revenue set aside the transfer made by the Collector with the result that the title to the equity of redemption that had been transferred by the Collector became re-vested in the heirs of the mortgagor. In 1945 an application was made under S. 12, Agriculturists' Relief Act by the heirs of the mortgagor for redemption of the usufructuary mortgage. The defendants to the application were the heirs of all the usufructuary mortgagees as well as Rama Shanker Mal himself, one of the transferees.

(3) The main defence to the suit with which we are concerned in the present application was that the title to the mortgaged property became extinguished by lapse of time, as, after the sale was set aside by the Revenue Court, the plaintiffs did not obtain restitution of possession over the property by means of an application under S. 144, C. P. C. within a period of three years.

(4) The trial court held that the suit was not maintainable against Rama Shankar Mal and therefore dismissed it as against him. No appeal was filed by the plaintiffs as against Rama Shankar Mal and the decree became final so far as Rama Shankar Mal was concerned. The trial Court, however, decreed the suit against the heirs of the mortgagees. They went up in appeal to the lower appellate

court. Their appeal was dismissed. They have now come up in revision to this Court.

(5) The only point argued before us by the learned Advocate General is that the plaintiffs should have applied for restitution of possession over the property in dispute under S. 144, C. P. C. within three years as provided for by Art. 181, Indian Limitation Act and not having done so, their title to the property became extinguished by virtue of S. 28, Limitation Act and they are not entitled to maintain the suit for redemption. This contention raises two distinct points:—

"(1) Whether the plaintiffs were bound to apply for restitution of possession over the property under S. 144, C. P. C., within a period of three years and could not file a suit for possession within 12 years, and (2) whether the plaintiffs not having applied under S. 144, C. P. C. within the period of three years, their title has become extinguished under S. 28, Limitation Act."

Section 144, Civil P. C. provides:

"144 (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section."

This section applies to a case where "a decree is varied or reversed". In the present case the decree passed in the mortgage suit was not varied or reversed but an order for sale of the property made in execution of the decree was set aside. Section 144 therefore does not in terms apply. No doubt if any restitution was needed the court could order it under its inherent powers, but that would not attract the consequence which flows from an omission to make an application under S. 144.

The consequence of the omission to make an application under S. 144, C. P. C. is that no suit can be maintained for relief which could be obtained under that section. This bar applies only to cases to which S. 144 applies. There is no provision in law which makes the bar applicable to cases of restitution under the inherent powers of the Court. If an application for restitution under the inherent powers of the Court is not made, there is nothing in law to prevent a party from obtaining the same relief by means of a suit: vide 'Balram Das v. Umesh Mandal', AIR 1931 Cal 517 (A).

In the present case, therefore, no application under S. 144 could have been made by the plaintiffs. If no application could be made under S. 144, there can be no question of the plaintiffs' title having become extinguished under S. 28, Limitation Act. Certain arguments of the Learned Advocate General have however to be noted.

(6) Section 28, Limitation Act provides that at the determination of the period limited in the Limitation Act to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. The limitation prescribed for a suit for possession of any immovable property is admittedly twelve years, and the present suit was filed well within twelve years of the date of transfer. A suit for possession over the property, therefore, was not barred by time and section 28 did not, one would have thought apply to the present case.

(7) But it was urged that the phrase "a suit" for possession also includes an application for possession under S. 144, Civil P. C. and that the period fixed for such application is three years under Art. 181, Limitation Act and that that period having expired the right to the property itself became extinguished. Reference was made to a decision of this Court in — 'Amba Prasad v. Mumtaz Ali Khan', AIR 1948 All 400 (B) where it was held that an application under S. 144, C. P. C. was a 'suit' within the meaning of S. 28, Limitation Act, and that where such application was not made within a period of three years, the title to the property became extinguished. The reasons why an application under S. 144 was held to be a suit within the meaning of S. 28 were that S. 144 prohibited the institution of a separate suit for a relief which could be claimed under S. 144, C. P. C. and S. 2(2), Civil P. C. provided that an order determining any question under S. 144 was to be deemed to be a decree.

With the greatest respect to the learned Judges I hardly think that the two reasons given can convert an application under S. 144 into a suit. The mere fact that an order passed under S. 144 is a decree cannot mean that the application itself is a suit. A decree is not necessarily confined to a suit, but may also be passed on an application. It is obvious that the learned Judges' attention was not drawn to the specific provisions of S. 2(10), Limitation Act which expressly lays down that for the purposes of that Act the word "suit" does not include an appeal or an application.

But, it is not necessary to pursue this matter further, as according to my finding recorded above, S. 144, C. P. C. could have no application to the facts of this case. Even if an application for restitution could have been made by the plaintiffs, it could have been made under S. 151, C. P. C. and any order thereon could not have been a decree as it would not fall within the definition of 'decree' in S. 2(2), C. P. C. and therefore it could not be treated as a suit within the meaning of S. 28, Limitation Act even upon the reasoning adopted in 'Amba Prasad's case (B)'.

(8) It was also urged on behalf of the respondents that no revision lay to this Court from the decision of the Court below. It is not necessary to consider this point in view of what I have stated above.

(9) I would, therefore, dismiss this application in revision with costs.

OAK J.:

(10) I agree that this revision application should be dismissed.

(11) In my opinion in the special circumstances of this case, there was little point in Udit Mal filing an application under S. 144, C. P. C. in 1938. With the greatest respect to the learned Judges who decided the case AIR 1948 All 400 (B), I do not think that a person, who does not file an application for restitution under S. 144, C. P. C. within time, would lose his rights in immovable property in all cases. It was pointed out in that case that, S. 144, C. P. C. was introduced to provide a speedy remedy to a person, who has succeeded in getting an erroneous order of a lower court corrected by a superior Court. A person may not care to take advantage of S. 144, C. P. C., and may rest content with his rights in immovable property apart from restitution proceedings.

(12) Again, I am of opinion that the present revision application is not covered by the limited scope of S. 115, C. P. C., as explained by their Lordships of the Supreme Court in — 'Keshardeo v. Radha Kishan', AIR 1953 SC 23 (C). The ques-

ion of limitation and connected questions came up for decision before the learned District Judge. It cannot be said that the learned District Judge acted illegally or with material irregularity in deciding those questions in a particular way.

BY THE COURT:

(13) This application in revision is dismissed with costs.

D.S.P. Application dismissed.

(S) AIR 1955 Allahabad 528 (V. 42 C 150 Oct.)

RAGHUBAR DAYAL J. (25-3-1955)

O. N. Chauhan, Petitioner v. Collector of Central Excise, Allahabad, Respondent.

Civil Misc. Writ Nos. 989 and 990 of 1954.

Constitution of India, Art. 311(2) — Reduction in rank.

The expression "reduction in rank" in Art. 311 (2), implies the posting of a public servant to a post of a lower rank by way of punishing him for some misbehaviour. There appears to be nothing wrong in a public servant, who is selected for a selection post not on account of his being the senior-most person entitled to that post but on account of some senior of his being considered unfit for that post, reverting to his original post in case it be found by an authority superior to the selecting authority that the supersession of the senior was unjustified and that the selection post should go to the senior. AIR 1952 Orissa 285 and AIR 1953 Orissa 329, Distinguished.

(Paras 15, 23)

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 369: 1954 All LJ 324 (SC) 11

(B) (V39) AIR 1952 Orissa 285: ILR (1952) Cut 326 16

(C) (V40) AIR 1953 Orissa 329: ILR (1953) Cut 517 16

Ambika Prasad and L. Chandra, for Petitioner; Standing Counsel, for Respondent.

ORDER: These are two petitions under Art. 226 of the Constitution, one by Shri O. N. Chauhan and the other by Shri G. K. Sinha, praying for a writ in the nature of certiorari quashing the order of the Collector, Central Excise, Allahabad, dated 10-11-1953, and a writ in the nature of mandamus ordering the Collector of Central Excise, Allahabad, the opposite party, to restore the petitioners to the cadre of Selection Grade Inspector to which they were appointed permanently by the order of 27-2-1953.

(2) The petitioners were permanent Inspectors in the Central Excise Department Allahabad in August 1952; Letter No. 4(98)—Ad. (CX) 51, dated 20-8-1952, from Government of India, Ministry of Finance (Revenue Division), New Delhi, to the Collectors of Central Excise said in para. 2:

"The Selection grade for Inspector of Central Excise will constitute 15 per cent. of the cadre strength of Inspectors, appointments thereto being made of permanent incumbents only on the basis of seniority-cum-fitness."

(3) It was mentioned in letter No. C. No. II-359-ET/52/810, dated 12-1-1953, forwarding the Government of India, Ministry of Finance (Revenue Division), New Delhi, letter No. C. No. 4(98) Ad. (CX)/51, dated 3-12-1952, to Collectors of Central Excise:

"The selection grade posts for Inspectors will constitute 15 per cent. of the sanctioned permanent posts of ordinary grade Inspectors, and in calculating the number of Selection grade posts fractions of a whole number will be ignored. All the selection grade posts will be permanent and the cadre strength of the ordinary grade will be reduced by the number of posts placed in the selection grade."

(4) The Collector of Central Excise, Allahabad, hereinafter referred to as the Collector, had to select 60 inspectors for the Selection Grade from among the permanent inspectors in his charge. He made that selection and passed an order on 27-2-1953. The order is:

"The following confirmed Inspectors are appointed with effect from 1-8-1952 to the Selection Grade in the scale of Rs. 200-10-300 in the posts sanctioned in Government of India, Ministry of Finance (Revenue Division) No. 4 (98) Ad. (CX) 51, dated 20-8-1952."

Among the names we find those of the two petitioners at serial Nos. 43 and 60 respectively.

(5) It appears that a number of permanent inspectors who were senior to a number of these selected inspectors submitted representations to the Central Board of Revenue or the Government of India. The Government of India disagreed with the interpretation put by the Collector on their directions contained in their two letters, dated 20-8-1952, and 3-12-1952. The Government of India informed the Collector by their letter No. 7(79)—Ad (CX) 53, dated 7-8-1953, that they had held that appointments of inspectors of Central Excise to the Selection Grade made on 'selection basis' instead of seniority-cum-fitness were irregular and should be cancelled after giving a show-cause notice to the individuals concerned why their appointments to the selection grade should not be cancelled and made it clear that such a notice would not be with reference to the obligations imposed by Art. 311(2) of the Constitution but was being given on grounds of fairplay and principles of natural justice.

The Collector was consequently asked to review the cases of all the inspectors, to cancel such appointments to the Selection Grade as be necessary in accordance with the procedure indicated in that letter and to fill in the resulting vacancies strictly in accordance with the principle of seniority-cum-fitness.

(6) The Collector reviewed the cases of all the inspectors. It appears that he ultimately sent up his final proposals for selection to the Central Board of Revenue. By its letter, dated 14-10-1953, the Board laid down considerations which should deprive a permanent inspector of the Selection Grade and communicated that judging from that standard the Board did not think that any of the permanent inspectors whose cases were reviewed were unfit for promotion to the Selection Grade.

The Board then gave directions how the 60 posts of Inspectors (Selection Grade) were to be filled up and indicated that that arrangement would necessitate reversion of 42 out of 60 inspectors who were appointed to the Selection Grade by the Collector's order, dated 27-2-1953, and directed that they be reverted. It also approved of the draft notice to be issued to the previously selected inspectors to show cause why they be not reverted.

(7) The Collector then gave notice to 40 inspectors whom he had previously selected for the Selection Grade. Those persons showed cause. The Collector considered what they had to say and coming to the conclusion that their objections were not acceptable passed an order on the 10-11-1953, saying that on re-examination of the appointments made to the Inspector (Selection Grade's) posts on the basis of "seniority-cum-fitness" it was found that some inspectors senior in the inspector's grade to

those mentioned in that order would require to be appointed to the Selection Grade in preference to them. He cancelled his order, dated the 27th of February appointing the 40 persons including the two petitioners mentioned in this order and ordered that they would revert as inspector (ordinary grade) with effect from the date of the order.

(8) The two petitioners and a number of other such inspectors who were reverted made representations to the Central Board of Revenue. Their representations were rejected. The rejection order was communicated to them by the Under-Secretary of the Board by his letter, dated 22-2-1954.

This letter said that the Board had carefully considered the representations, that their appointment to the Selection Grade post was irregular and had operated to the prejudice of their seniors and that the cancellation of such irregular appointment did not amount to the penalty of reduction in rank within the meaning of Rule 49, Civil Services (Classification, Control and Appeal) Rules.

(9) The petitioners being dissatisfied with the final order of the Board filed the present petitions. The learned counsel for the petitioners has mainly submitted two points for consideration. The first point is that the petitioners were substantively appointed to the permanent posts of Selection Grade Inspectors whose creation was communicated by the Board's letter, dated 20-8-1953, and that therefore their appointment to these posts could not be set aside by the Collector who really had no power to review his previous order of 27-2-1953.

The second point is that the final order ordering their reversion to the post of Inspector (ordinary grade) from the post of inspector (Selection Grade) amounts to reducing them in rank and that such an order could be passed in accordance with the provisions of Art. 311(2) of the Constitution and, as no opportunity after the consideration of their explanations to the show-cause notice was given to them to show cause against the proposed reduction in rank, the order of the Collector cancelling his previous order appointing them to the Selection Grade and reverting them to the post of Inspectors (ordinary grade) deserves to be set aside.

(10) I am of opinion that these petitions should fail.

(11) I shall deal with the second point first. The order impugned does not reduce the petitioners in rank as contemplated in Art. 311(2) of the Constitution, which is:

"No such person as aforesaid (i.e., no person who is a member of a civil service of the Union or an all-India Service or a civil service of a State or holds a civil post under the Union or a State) shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

...."

The Supreme Court in the case reported in — 'Shyam Lal v. State of Uttar Pradesh', AIR 1954 SC 369 (A) had to consider the scope of the provisions of Art. 311(2) of the Constitution in a case of compulsory retirement of a public servant and Das J., made the following observations distinguishing the case of compulsory retirement from the case of removal or dismissal.

"There can be no doubt that removal—I am using the term synonymously with dismissal—generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer.

Such grounds, therefore, involve the levelling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement... ..... In other words, a compulsory retirement has no stigma or implication of misbehaviour or incapacity.....

In other words, the enquiry was to help the Government to make up its mind as to whether it was in the public interest to dispense with his services. It follows, therefore, that one of the principal tests for determining whether a termination of service amounts to dismissal or removal is absent in the case of compulsory retirement."

Their Lordships of the Supreme Court further referred to R. 49, Civil Services (Classification, Control and Appeal) Rules, which clearly indicated that dismissal or removal was a punishment.

(12) Reduction in rank is also a punishment under R. 49, Civil Services (Classification, Control and Appeal) Rules and is described in its cl. (iii) as "reduction to a lower post or time-scale, or to a lower stage in a time-scale." Paragraph 1 of R. 55, Civil Services (Classification, Control and Appeal) Rules is:

"Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a Service (other than an order based on facts which had led to his conviction in a criminal court or by a court-martial) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself.

The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so directs, an oral inquiry shall be held.

At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness.

The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof."

Rule 3, cl. (iii) of the Rules framed for Central Service Class III in exercise of the powers conferred on the Central Government by Rr. 44 and 54, Civil Services (Classification, Control and Appeal) Rules, printed in Appendix XIV at p. 115 of the Central Excise Circle and Divisional Office Procedure Manual corresponds to para. 49, cl. (iii), Civil Services (Classification, Control and Appeal) Rules. Rule 6(ii) of these Rules is:

"(ii) The authority imposing any penalty under these rules shall maintain a record showing—

(a) the allegations upon which he proceeded against the officer punished,

(b) the officer's representation, if any, and the evidence taken, if any,

(c) the finding and the grounds thereof.

(13) Rule 7 provides for an appeal against the imposition of any of the penalties specified in R. 3.

(14) The petitioners themselves do not seem to have considered their reversion in dispute as penalty as they did not file appeals but simply made representations to the Central Board of Revenue as would appear from Annexure E to the petition.

(15) It appears to me, therefore, that the expression "reduction in rank" in Art. 311(2) of the Constitution implies the posting of a public servant to a post of a lower rank by way of punishing him for some misbehaviour. The cancellation of the order, dated 27-2-1953, and reversion of the petitioners on account of a favourable view taken of the representations made by the superseded inspectors and not on account of any fault being found with the work of the petitioners cannot amount to reducing the petitioners in rank within the meaning of Art. 311(2) of the Constitution.

In cases of reduction in rank in such circumstances the public servant concerned can possibly have nothing to explain. It is only when objection is taken to some conduct of his that he can explain such conduct and say that the suggested punishment of reduction in rank was not suitable or justified.

(16) The cases reported in — 'Kashinath Patnaik v. P. K. Kapila', AIR 1952 Orissa 285 (B) and — 'Dandapani Gouda v. State of Orissa', AIR 1953 Orissa 329 (C) are not of help in this connection. In the former case it was not urged on behalf of the State that reversion from a higher substantive post to a lower substantive post would not amount to reduction in rank.

It was not considered whether reduction in rank for the purposes of Art. 311(2) of the Constitution does require it to be on account of some alleged misconduct of the public servant or not. Further it appears that the public servant was reverted to the lower post as his work in the higher post was considered unsatisfactory and that, therefore, his reversion could amount to reduction in rank within the meaning of Art. 311(2) of the Constitution.

In the latter case it was just observed that reduction in rank implied bringing down to a lower rank or position or dignity, either in the same cadre, or giving a lower place either in the same class of officers or to a lower class of officers. It was not considered whether this should be as a punishment or not in order to come within the ambit of Art. 311(2) of the Constitution.

(17) The petitioners belong to Central Services, III Class. Rules for first appointment, discipline and appeals concerning their services provide that censure and withholding of increments or promotion could be imposed by the Collector and that the appellate authority then is the Central Board of Revenue.

In case of non-appealable orders of the Collector, a representation would lie to the Board in view of C. B. R. Letter C. No. 261-Admn. (GL) 44, dated 1-9-1944, printed in Appendix XVII at page 126 of the Central Excise Circle and Divisional Office Procedure Manual. This letter specifically refers in para. 2 to the non-selection for a post declared as a selection post to which appointment should be made strictly on merit.

It follows, therefore, that the order of the Collector, dated 27-2-1953, affecting such senior inspectors who were not selected for the selection post could be revised by the Board on a representation by the superseded persons who had a grievance. Rule 18 of the Rules for Central Service Class III is:

"18. Notwithstanding anything contained in the foregoing provisions, the Central Government may, of its own motion or otherwise, call for the record of any case in which an order has been made by an authority subordinate to it in the exercise of any power conferred on such authority by these rules,

(a) confirms, modify or reverse the orders;

or

(b) direct that a further inquiry be held in the case;

or

(c) reduce or enhance the penalty imposed by the order;

or

(d) make such other order in the case as it may deem fit."

The Board could, therefore, pass orders on such representations in favour of the persons making the representations. It seems to have referred the matter to the Government of India which by its letter, dated 7-8-1953, conveyed to the Collector that his selection was irregular, that his order, dated 27-2-1953, should be cancelled and that he should review the cases of all the inspectors.

The Collector, therefore, had the power to review the cases of all the inspectors and make a fresh selection after his previous order had been cancelled. He did so and selected some senior persons, with the result that a number of previously selected inspectors had to be reverted.

(18) The selection of the senior men to the selection grade could be given practical effect only by reverting the previously selected junior inspectors to their original posts in the ordinary grade. It is true that no such rule in the Civil Services (Classification, Control and Appeal) Rules or in the Fundamental Rules has been shown on behalf of the State which lays down in clear terms that in such contingency when the appeal of a superseded public servant is allowed the junior who had been selected previously must be reverted.

But such must be the result. The promotion of a junior to the selection post in preference to the senior must be deemed to be subject to the result of the appeal or representation by the superseded senior who has been given a right to appeal or represent against his supersession. When he succeeds, he secures the selection with the necessary result that the junior makes room for him and reverts.

(19) The same can be impliedly inferred from certain Fundamental Rules*. Fundamental R. 12(a) provides that two or more Government servants cannot be appointed substantively to the same permanent post at the same time. It must follow therefore, that both the previously selected junior inspector and a senior inspector who has succeeded in showing that his non-selection was bad and that therefore he should be appointed to the permanent post, could not be appointed to the same post at one and the same time.

The result must be that the senior man who is entitled to that post on merit must occupy it and the junior man should make room for him, and that can take place only when the junior man is reverted to his original post.

(20) Fundamental R. 12-A is:

"Unless in any case it be otherwise provided in these rules, a Government servant on substantive appointment to any permanent post acquires a lien on that post and ceases to hold any lien previously acquired on any other post."

This rule is clearly subject to other rules and appears to be subject to fundamental R. 14. Fundamental R. 14, is:

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*Posts and Telegraphs Compilation of the Fundamental Rules, Vol. I, Third Edition.

"(a) The Governor-General in Council shall suspend the lien of a Government servant on a permanent post which he holds substantively if he is appointed in a substantive capacity.

(1) to a tenure post, or

(2) to a permanent post outside the cadre on which he is borne, or

(3) .....

(b) .....

(c) .....

(d) If a Government servant's lien on a post is suspended under Cl. (a) or (b) of this rule, the post may be filled substantively, and the Government servant appointed to hold it substantively shall acquire a lien on it; provided that the arrangements shall be reversed as soon as the suspended lien revives.

Note: (1) This clause applies if the post concerned is a post in a selection grade of a cadre.

Note: (2) When a post is filled substantively under this clause, the appointment will be termed a provisional appointment; the Government servant appointed will hold a provisional lien on the post; and that lien will be liable to suspension under cl. (a) or (b) of this rule."

(21) 'Cadre' means the strength of a service or part of a service sanctioned as a separate unit. In view of the terms of para. 2 of the aforesaid letter, dated 12-1-1953, the selection grade posts of inspectors will be outside the cadre of ordinary grade inspectors on which the petitioners were borne prior to their appointment to selection grade posts.

In view of cl. (a)(2) of R. 14 when a person is selected for the selection post his lien on the original permanent post does not cease but is suspended. The lien revives when the person promoted to the selection grade is reverted to that post. The same implication is to be found in Fundamental R. 15(a) and (b). This rule is:

"(a) The Governor-General in Council may transfer a Government servant from one post to another; provided that, except—

(1) on account of inefficiency or misbehaviour, or

(2) on his written request,

a Government servant shall not be transferred substantively to, or, except in a case covered by R. 49, appointed to officiate in, a post carrying less pay than the pay of the permanent post on which he holds a lien, or would hold a lien had his lien not been suspended under R. 14.

(b) Nothing contained in cl. (a) of this rule or in cl. (13) of R. 9 shall operate to prevent the retransfer of a government servant to the post on which he would hold a lien, had it not been suspended in accordance with the provisions of cl. (a) of R. 14."

This rule means that the Central Government is free to transfer a Government servant from one post to another subject to the restriction that one should not be transferred to a lower post except on account of inefficiency or misbehaviour or on his written request. This supports my earlier observation that reduction in rank connotes reduction on account of inefficiency or misbehaviour.

Any way sub-r. (b) does make it clear that in cases of persons to whom the provisions of Fundamental R. 14(a) apply the Government is free to retransfer them to a lower post.

(22) I may also say that I am not shown any clear provision which would show that such reversion cannot take place. The petitioners, being not seniormost persons, for the selection posts, could not claim them as of right merely because they were fit for these posts; and no injustice is done to them when their seniors who are found fit are selected for the posts.

(23) In view of all these considerations I am of opinion that both on account of the nature of things and on account of the implications of these various rules, there appears to be nothing wrong in a public servant, who is selected for a selection post not on account of his being the seniormost person entitled to that post but on account of some senior of his being considered unfit for that post, reverting to his original post in case it be found by an authority superior to the selecting authority that the supersession of the senior was unjustified and that the selection post should go to the senior.

(24) I am, therefore, of opinion that these petitions should fail and I accordingly dismiss them with costs, which I assess at Rs. 100/- for each application.

(25) This order will govern Civil Miscellaneous (Writ) No. 990 of 1954.

D.H.Z. Petitions dismissed.

(S) **AIR 1955 Allahabad 531 (V. 42 C. 151 Oct.)**

LUCKNOW BENCH—MULLA J. (15-3-1955)

V. D. Jhingan, Applicant v. State, Complainant-Respondent.

Criminal Misc. Appln. No. 538 of 1954.

(a) **Criminal P. C. (1898), S. 561A — Scope — Quashing of proceedings.**

Section 561A no doubt gives power to a High Court to quash the proceedings if it finds that such an order is necessary to prevent an abuse of the process of any Court. In other words an order under this section should only be passed where there is a glaring defect on the face of the proceedings which makes the prosecution untenable and where there is no reasonable chance of the accused being convicted. This can be only either on account of a legal flaw or because the alleged facts do not constitute an offence. (Para 4)

Anno: AIR Com.: Criminal P. C., S. 561A N. 6; 1949 Mitra: S. 561A, P. 1693 N. "Quash proceedings" (2 Pts. extra in N. 6 to S. 561-A in AIR Com. —See also N. 25 to S. 439 in AIR Com. and 1949 Mitra: S. 439 P. 1344 N. 1215 "Power....case").

(b) **Criminal P. C. (1898), S. 403 — Departmental enquiry — Restarting of prosecution.**

It cannot be said that as the prosecution was withdrawn at an earlier stage and a departmental enquiry was substituted in its place, it shows that the sanctioning authority had given up the intention of prosecuting the accused a public servant. The State had a perfect right to hold a departmental enquiry and it cannot be said that because the prosecution was launched it should not have held a departmental enquiry.

The State cannot be compelled to keep a public servant in service if the State has reasons to believe that a breach of the rules of service has been committed by the public servant which, if proved, necessitates his dismissal. The withdrawal of the prosecution at the earlier stage did not amount to an acquittal and S. 403, is not applicable to the circumstances of the case. (Para 5)

Anno: AIR Com.: Criminal P. C., S. 403 N. 1; 1949 Mitra: S. 403 P. 1175 N. 1086, "Principle" (3 Pts. extra in AIR Com.—Part of note in Mitra covered in N. 2 to S. 403 in AIR Com.)

AIR Com.: Criminal P. C., S. 403 N. 2; 1949 Mitra: S. 403 (Topic in AIR Com. extra — See however, note 1086 "Principle" to S. 403 on P. 1175 in Mitra).

(c) **Criminal Prosecution — Delay — Effect.**

A State has certainly a right to prosecute a public servant, if he misbehaves or commits an offence, but this prosecution should not be kept hanging over his head for years and years. However, there is no provision of law which lays down

that criminal proceedings cannot be started because of inordinate delay. An accused cannot escape punishment for an offence, if it is proved against him, merely because the prosecution was launched against him after considerable delay. (Para 5)

(d) Prevention of Corruption Act (1947), S. 6 — Applicability to ex-public servants — AIR 1952 Nag 12, Dissented from.

An offender cannot invoke the protection of S. 6 unless two conditions are fulfilled: (1) He was a public servant when the offence charged against him was committed. (2) On the date when he is prosecuted there is some authority who could remove him from his office. Section 6 affords protection only to those public servants who were in office both on the date of the commission of the offence charged and the date when a Court is asked to take cognizance.

He would not be protected by S. 6 and a sanction would not be necessary where the alleged offence was committed on a date when he was a public servant but the prosecution was launched after he ceased to be a public servant. Section 6 is enacted only for the protection of public servants and not ex-public servants. AIR 1952 Nag 12, Dissented from. (Para 6)

CASES REFERRED: Paras

(A) (V19) AIR 1932 Sind 177: 34 Cri LJ 171 7
(B) (V24) AIR 1937 Nag 293: 39 Cri LJ 146 7
(C) (V39) AIR 1952 Nag 12: 1952 Cri LJ 98 8
(D) (V40) AIR 1953 All 470: 1953 Cri LJ 1052 9
(E) (V41) AIR 1954 Bom 109: 1954 Cri LJ 284 9

G. G. Chatterji, for Appellant; P. N. Choudhry, Addl. Govt. Advocate, for the State.

ORDER: This is an application under S. 561A, Criminal P. C. praying that the criminal proceedings pending before Sri B. N. Zutshi, Special Judge, Anticorruption be quashed. The applicant in this case is Sri V. D. Jhingan who was employed as Assistant Director, Enforcement, by the President of India in the Ministry of Industry and Commerce on 25-3-1949.

(2) The prosecution case is that on 11-9-1951 the applicant accepted a sum of Rs. 10,000/- as the first instalment out of an agreed total of Rs. 30,000/- as an illegal gratification for recommending to the District Magistrate, Kanpur, that the cloth licence issued to one Sri Sidh Gopal may not be cancelled. This charge was investigated by the Special Police Establishment, Delhi who recovered this amount from the applicant.

The prosecuting agency then applied for sanction to prosecute the applicant but the Ministry of Industry and Commerce instead of granting the sanction at that stage decided to hold an enquiry under R. 55, Civil Services (Classification, Control and Appeal) Rules. This decision was communicated to the prosecuting agency on 26-8-1952 and on its basis a final report was submitted in the court of Sri. Girja Shankar Misra, the Anti-corruption Magistrate at Lucknow, before whom the case was pending.

Sri Misra accepted the report and discharged the applicant. His bail bonds were also cancelled and the sum of Rs. 10,000/- recovered from him was also ordered to be returned.

(3) The departmental enquiry against the applicant continued till September 1953 and as the charges were found to be proved, the applicant was dismissed from service on 25-11-1953. The Delhi Police again arrested the applicant on 30-1-1954 and in February 1954 the charge that was withdrawn earlier was again pressed against the applicant.

This prosecution is now pending before Sri B. N. Zutshi, the Anti-Corruption Judge and it is against this prosecution that the applicant has filed this application.

(4) Section 561A, Cr. P. C. no doubt gives power to a High Court to quash the proceedings if it finds that such an order is necessary to prevent an abuse of the process of any court. In other words an order under this section should only be passed where there is a glaring defect on the face of the proceedings which makes the prosecution untenable and where there is no reasonable chance of the accused being convicted. This can be only either on account of a legal flaw or because the alleged facts do not constitute an offence. Before me it is not contended that the facts of the case as alleged by the prosecution do not constitute an offence. It is, however, contended that the proceedings started are wholly illegal and it would waste the time of a court to take cognizance of this case.

(5) Two main grounds have been taken before me. Firstly, it is contended that as the prosecution was withdrawn at an earlier stage and a departmental enquiry was substituted in its place, it shows that the sanctioning authority had given up the intention of prosecuting the applicant. It is urged that it is not open to the prosecuting agency to start this prosecution again after the departmental authority in the exercise of the discretion had refused to give a sanction. Reading the evidence in the case I am of the opinion that it cannot be inferred that the sanctioning authority withheld its sanction and gave up the idea of prosecuting the applicant.

It is difficult to believe that although there was evidence to prove that an illegal gratification of Rs. 10,000/- out of an agreed total of Rs. 30,000/- was received by the accused, still the departmental authority considered that a criminal prosecution was not desirable and only departmental action would meet the ends of justice. No doubt the proceedings were withdrawn at a particular stage, but this was done with a view to hold a departmental enquiry. It would have been extremely distressing to the applicant himself if a departmental enquiry and a prosecution for an offence were conducted simultaneously.

Apart from this the same documents would have been necessary both in the Court as well as in the departmental enquiry and it would have been extremely inconvenient to arrange for these documents being shifted from one place to another all the time. The State had a perfect right to hold a departmental enquiry and it cannot be said that because the prosecution was launched it should not have held a departmental enquiry. The State cannot be compelled to keep a public servant in service if the State has reasons to believe that such a breach of the rules of service has been committed by the public servant which, if proved, necessitates his dismissal. It is conceded by the counsel for the applicant that the withdrawal of the prosecution at the earlier stage did not amount to an acquittal and S. 403, Cr. P. C., is not applicable to the circumstances of the case. I, therefore, find that no exception can be taken to the departmental enquiry held in this case by the State.

This enquiry unfortunately took a very long time. It would be better if these enquiries are expedited because they result in delaying the prosecution to a great extent. In the case although the offence is alleged to have been committed on 11-9-1951, yet the actual prosecution which is now pending before the Anti-Corruption Judge was started in February 1954. A State has certainly a right to prosecute a public servant, if he misbehaves or commits an offence, but this prosecution should not be kept hanging over his head for years and years.

Even an offender should not be deprived of his right to restart his life after paying the penalty for the offence which he has committed, but if the prosecution is delayed for several years after it was detected, it means that he cannot take up any new work for at any moment the State may choose to prosecute him. However, there is no provision of law which lays down that criminal proceedings cannot be started because of inordinate delay. An accused cannot escape punishment for an offence, if it is proved against him, merely because the prosecution was launched against him after considerable delay.

(6) The second contention of the counsel for the applicant was that the Anti-Corruption Judge cannot take cognizance of this criminal prosecution because the pre-requisite sanction necessary under S. 6, Prevention of Corruption Act has not been secured and filed by the prosecuting authority. Great stress was laid on the spirit of S. 6, Prevention of Corruption Act and it was argued that it contemplates that when an offence is committed by a public servant, he cannot be prosecuted without a sanction merely because the prosecution is started at a time when his services are terminated.

In other words it was contended that the application of S. 6, Prevention of Corruption Act is determined by the status of the offender not at the time when the prosecution is launched but at the time when the offence was committed. Section 6, Prevention of Corruption Act runs as follows:

"(1) No court shall take cognizance of an offence punishable under S. 161 or S. 165, Indian Penal Code or under Sub-s. (2) of S. 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,

(a) in the case of a person who is employed in connection with the affairs of the (Union) and is not removable from his office save by or with the sanction of the Central Government....;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from the office save by or with the sanction of the State Government....;

(c) in the case of any other person of the authority competent to remove him from his office."

On a careful reading of this section it becomes clear that an offender cannot invoke the protection of this section unless two conditions are fulfilled:

(1) He was a public servant when the offence charged against him was committed

(2) On the date when he is prosecuted there is some authority who could remove him from his office.

If any one of these two conditions does not exist, his case goes out of the ambit of S. 6. In other words S. 6 affords protection only to those public servants who were in office both on the date of the commission of the offence charged and the date when a court is asked to take cognizance. In neither of the following two cases would he be protected by section 6 and a sanction would not be necessary,

(a) When the offence charged is alleged to have been committed before he became a public servant although the prosecution is launched while he is holding a public office.

(b) Where the alleged offence was committed on a date when he was a public servant but the prosecution was launched after he ceased to be a public servant.

In the case described in (a) the first condition is not fulfilled. In the case described in (b) the second condition is lacking. The case of the present applicant falls under (b). On the date when the court took cognizance against him there was no authority who could remove him from office because he had already ceased to be a public servant. In other words S. 6 is enacted only for the protection of public servants and not ex-public servants.

(6a) The object of the Legislature seems to be clear. In enacting S. 6, it accepted the principle that where a public servant is prosecuted for an offence which challenges his honesty and integrity, the issue in such a case is not only between the prosecutor and the offender but the State is also vitally concerned in it as it affects the morale of the public services and also the administrative interests of the State. For these reasons the discretion to prosecute was taken away from the prosecuting agency and was vested in departmental authorities for they could assess and weigh the accusation in a far more dispassionate and responsible manner. The State obviously was only concerned with those offences which were committed by public servants while functioning in that capacity and for which they were sought to be prosecuted while holding such an office.

No administrative interests of the State were touched if the prosecution was started against a person who had ceased to be a public servant. The Legislature, therefore, intended to protect only those public servants whose prosecution was likely to affect the administrative interests of the State. It, therefore, by enactment conferred a special safeguard against the irresponsible prosecution of the members of a particular class but the moment a person stepped out of that class, he was no longer entitled to claim that privilege. Even on equitable grounds no exception can be taken to this intention of the Legislature. I can think of no justifiable reason why the law should offer a greater protection to an offender who has ceased to be a public servant than any other ordinary citizen. I, therefore, find that the words of S. 6 not only correspond with the intention of the Legislature completely but there is also no inequity in the enactment. These words should, therefore, be given their natural meaning and any outside or far-fetched consideration should not affect their interpretation.

(7) The weight of legal authority is also against the contention of the applicant. There are some earlier decisions which support this contention. These decisions were given in interpreting S. 197, Cr. P. C., which is an analogous section. In — 'Sugan Chand v. Narain Das', AIR 1932 Sind 177 (A), which is a Bench decision, Aston A. J. C. observed:

"I also agree with the learned Magistrate that it is the status of the accused at the time of the commission of the alleged offence and not his status at the time of the complaint or of the order issuing process which is material for the purposes of S. 197, Cr. P. C."

Similarly — 'In re S. Y. Patil', AIR 1937 Nag 293 (B), Pollock J. observed:

"The protection conferred by S. 197, Cr. P. C. would be largely illusory if it were open to people to wait until the public servant had ceased to hold that position and then lodge their complaint, for generally there is no question of limitation in criminal proceedings. A public servant who is on the verge of retirement would have no protection whatever. Section 197, Cr. P. C., therefore protects a person who is a public servant at the time of the alleged incident even if he ceased to be a public servant before the prosecution starts."

(8) The later decisions, however, disagreed with this view. The Nagpur decision cited above was overruled by a subsequent Bench decision of the same Court. In — 'State Government, Madhya Pradesh v. Hafizul Rahman', AIR 1952 Nag 12 (C), the learned Judges observed:

"If the protection given by a section is rendered illusory, that may be an argument for the Legis-

lature to amend the provision. But that can afford no reason for the court to depart from the plain words used in the section. We are, therefore, of the view that S. 197 cannot afford any protection to a public servant after he has ceased to hold office."

(9) In a recent Bench decision of our own Court, — 'Ram Dhyan Singh v. State', AIR 1953 All 470 (D), Agarwala J., observed:

"It is in our opinion further clear that the sanction to prosecute a person is required when he happens to be a public servant on the date on which he is prosecuted because the crucial date on which the sanction for the prosecution is required is the date on which a court is asked to take cognizance of an offence mentioned in the section. The verb "is" in the above (S. 6(1)(a), Prevention of Corruption Act) refers to the date on which the court is called upon to take cognizance."

There is yet another Bench decision of the Bombay High Court, — 'State of Bombay v. Vishwakant Shrikant', AIR 1954 Bom 109 (E), in which the Judges held:

"In our view therefore the words "public servant" in S. 6(1) mean a person who is in service at the time when the court is called upon to take cognizance of the offence. Section 6(1) has consequently no application to the case of the Public Servant who is no longer in service."

I find myself in agreement with the view expressed in the Allahabad and Bombay decisions.

(10) A relief under S. 561A, Cr. P. C. can only be given if it is to secure the ends of justice or to prevent an abuse of the process of any Court. So far as the ends of justice are concerned they are clearly against the prayer of the applicant. There is also no abuse of any process of court involved in this case. I reserve my opinion about that particular type of case where an offence is committed and detected when a public servant is in office and where after the exercise of proper discretion (and not because the tree was equally rotten on the top) the sanctioning authority refused to grant the sanction but the prosecuting agency played a waiting game and as soon as the services of the public servant were terminated it launched a prosecution for the same offence. To the best of my knowledge there is no decision that covers such a case. Such a prosecution might amount to an abuse of the process of law, for it would be a clear circumvention of the rule of law laid down in S. 6. However, as held by me above, the circumstances of this case do not warrant the conclusion that the sanction was refused and if it was refused it was properly refused and it rightfully condoned the offence.

(11) I, therefore, reject this application.

(12) This case had been adjourned 'sine die'. The Anti-Corruption Judge should now take cognizance of the case and proceed with it.

(13) The counsel for the applicant prays that I should certify it as a fit case for appeal before the Supreme Court I see no reason to grant this prayer.

D.H.Z. Application rejected.

(S) **AIR 1955 Allahabad 534 (V. 42, C. 152 Oct.)**

MUKERJI J. (25-2-1955)

Laxmi Narayan Acharya, Applicant v. Lt. Col. C. B. Mahajan, Opposite Party.

Civil Misc. Writ Petn. No. 272 of 1954.

Constitution of India, Art. 226 — Writ against University authorities — Agra University Act (8 of 1926), Ss. 4(2) and 34 — Statute No. 2 passed under Act — Resolution of Executive Council cancelling B. A. degree conferred on a successful candidate — Validity.

The petitioner made an application in the prescribed form to the Agra University for permission to appear at the B. A. examination to be held in 1951 and attached the requisite certificate under statute No. 2(a)(iv) showing that he had served as a teacher for one year. The permission was granted and the applicant took the examination and was declared as a successful candidate in the U. P. Gazette. As a result of subsequent enquiry, the University came to the conclusion that the petitioner was not "a bona fide" teacher and that he had, therefore, "cheated" the University by making a kind of false declaration in his application form. By a resolution of the Executive Council — which is the highest executive body of the University — it was resolved that the petitioner's "result of B. A. examination of 1951 be cancelled and this fact be notified in the U. P. Gazette". Effect was given to this resolution. The petitioner thereupon applied under Art. 226 of the Constitution for a writ or a direction to the opposite party 'to recall the order cancelling the petitioner's B. A. degree and to restore the decree to the petitioner forthwith'. The application form had a note appended to it in these words: "Teachers mean persons who are bona fide wholetime teachers and does not include persons who are serving elsewhere and devoting part of their time to teaching in a school or college".

Held (i) that in order to judge the competence of the petitioner to take the examination the court has to look to the provisions of the statute itself and not to anything that is added by way of a note in an application form. On the statute any person who was a teacher, whether part-time or wholetime, whether honorary or stipendiary, was competent to appear at the examination provided he continued the occupation of a teacher for a period of one year. On the facts of the case there was no doubt, that the petitioner did perform the functions of a teacher, whether he did it in an honorary capacity and for part-time only or not, for a period of one year. Therefore, there was no inherent want of competence in him to offer himself as a candidate for the B. A. examination. (Para 13)

(ii) that the action taken by the University was beyond its competence and without jurisdiction, as there was no provision in the Act, statutes or Regulations which conferred any power on either the Executive Council or any of the ministerial officers of the University to take the action that had been taken. The power of withdrawing a degree under certain circumstances was no doubt vested in the Senate but it had to be exercised, within the ambit of the Act, strictly, and could not be exercised by any other body than the Senate.

Admittedly, there was no resolution of the Senate in this matter. The petitioner had not been found to have been convicted of any offence involving moral delinquency. It is a matter of utmost importance that statutory Bodies, like an University, should act strictly in accordance with the law made for them and not to transgress it either in the spirit or in the letter. (Paras 10, 13)

(iii) the prayer in the petition was neither properly worded nor properly sought. The appropriate prayer which should have been sought was a writ of Certiorari. The Executive Council having exceeded its jurisdiction and its powers in making its Resolution, the Resolution must be quashed. (Para 14)

Anno: AIR Com., Const. of Ind., Arts. 32 and 226 N. 164(n).

S. B. Johri, for Applicant; Dr. N. P. Asthana, for Opposite Party.

ORDER : This is a petition under Art. 226 of the Constitution by one Laxmi Narain Acharya praying for a writ or direction whereby this Court should direct the opposite parties "to recall their order cancelling the petitioner's B. A. and previous LL. B. degrees and to restore these degrees to the petitioner forthwith". In order to appreciate the prayer it is necessary to state a few facts.

(2) The petitioner applied to the Agra University which is a body corporate, constituted under an Act of the Local Legislature, namely, the Agra University Act of 1926 for among other things, conducting Examinations and awarding Degrees including the degree of Bachelor of Arts.

(3) An application was made by the petitioner to take the Examination of Bachelor of Arts. The application was made by the petitioner in the prescribed form on 28-8-1950. The application was received in the office of the Registrar of the University on 6-9-1950. After a consideration of the application, permission was accorded by the University to the petitioner to take the University's Batchelor of Arts, Examination which was to commence in March of that year, namely, the year 1951. The petitioner took the examination and was declared successful. The result of the examination was published in the U. P. Gazette and therein the petitioner was shown as a successful candidate.

(4) On 18-9-1951, one S. P. Jain drew the attention of the Registrar of the University to certain malpractices which had been resorted to by certain candidates who wrongly alleged themselves to be teachers in educational institutions. This letter of Mr. Jain made the University investigate into the matter. Investigation into the case of the petitioner led to the discovery that the petitioner was not a wholetime teacher at any educational institution. The petitioner was found to be a clerk in some educational office in Madhya Bharat. As a result of the enquiry the University came to the conclusion that the petitioner was not "a bona fide" teacher and that he had, therefore, "cheated" the University by making a kind of false declaration in his application form. By a resolution of the Executive Council — which is the highest executive body of the University — it was resolved that the petitioner's "result of B. A. examination of 1951 be cancelled and this fact be notified in the U. P. Gazette".

Effect was given to this resolution of the Executive Council and the petitioner's B. A. result was duly notified to have been cancelled by the University.

(5) The petitioner has come up to this Court and he has challenged the power of the University to cancel his result after it had been declared and published in the Gazette.

(6) Under S. 4, Agra University Act of 1926, hereinafter referred to as the Act, the scope of the activity of the University has been indicated. Section 4(2) is in these words :

"(2) To confer degrees and other academic distinctions on persons who

(a) have pursued an approved course of study in an affiliated college and have passed the examinations of the University under conditions laid down in the Statutes or Regulations, or

(b) are teachers in educational institutions under conditions laid down in the Statutes and Regulations, and have passed the examinations of the University, under like conditions;..... (it is not necessary to quote the other provisions of this sub-section)".

The relevant Statute framed under the Act is Statute no. 2 which is in these words :

"A teacher who desires to enter for an examination must submit his application, in a prescribed form (stating the subject or subjects in which he desires to present himself for the examination), so as to reach the Registrar not later than September 15, preceding the examination and must send with his application the following :

(a) A certificate from the Principal of the College or the Higher Secondary School, or from the Head Master of the High School, in which the candidate is teaching or (in the case of teachers of High School below the High School standard) from the Chief Educational Officer of the District or the Deputy or Sub-Deputy Inspector of Schools of the area concerned to the effect that immediately preceding the date of examination at which he wishes to appear he will, unless his period of service is interrupted, have served continuously as a teacher for one academical year in one or more institutions maintained or recognised by

(iv) The Education Department Rajasthan or Madhya Bharat or Vindhya Pradesh, or Bhopal; or....."

(7) There is in the Statutes or in any Regulation no other relevant rule in regard to teachers who wish to offer themselves as candidates for examination by the University. Dr. Asthana who appeared on behalf of the University and who has had vast knowledge of the Agra University Act, its Statutes and its Regulations having been its Vice-Chancellor, was unable to draw my attention to any other relevant provision in either the Act, the Statute or the Regulations which had any application to this matter.

(8) On the facts it is clear that the petitioner made his application in the prescribed form. He also put in the requisite certificate under Statute No. (2)(a)(iv). The application was, as I have already said, granted and the requisite permission to take the examination accorded by the University to the petitioner.

(9) The main question which called for determination was whether the University had the power after it had declared the petitioner successful at the B. A. examination of 1951 and had his result published in the Government Gazette, to cancel that degree or to cancel the results which followed from the declaration which the University gave in regard to the petitioner's examination result. Dr. Asthana was unable to draw my attention to any provisions of the Act, Statutes or Regulations which conferred any power on either the Executive Council or any of the Ministerial Officers of the University to take the action that has been taken against the petitioner. The position, therefore, is that the action that has been taken by the University is action beyond its competence or action without jurisdiction. Dr. Asthana drew my attention to S. 34 of the Act which gave the University the power to remove a person from the membership of the University and he argued that this section should be interpreted to mean that the University's Executive Council had the power to do what it has done in the case of the petitioner.

(10) Section 34(1) is in these words :

"The Senate may, on the recommendation of not less than two third of such members of the Executive Council as are for the time being in India, remove the name of any person from the register of graduates.

(2) the Senate may remove any person from the membership of any authority or power of the University upon the ground that such person has been convicted by a court of law of an offence which, in the opinion of the Senate, is a serious offence involving moral delinquency or upon the ground that he has been guilty of scandalous conduct; and upon the same grounds withdraw from any person any degree, diploma, or certificate conferred or granted by the University."

(11) This power which is vested in the Senate is to be exercised, in my opinion, within the ambit of the Act, strictly; this power cannot be exercised by any other body than the Senate. Admittedly, there is no resolution of the Senate in this matter. The petitioner has not been found to have been convicted of any offence involving moral delinquency. It was argued by Dr. Asthana that the petitioner was guilty of making an inaccurate statement in his application to the University for permission to appear at the B. A. examination in regard to his eligibility. It was pointed out by Dr. Asthana that the application form had a note appended to it. The note is in these words:

"Teachers mean persons who are bona fide wholetime teachers and does not include persons who are serving elsewhere and devoting part of their time to teaching in a school or college."

It was pointed out by Dr. Asthana that whatever else may be true or false this thing is clear that the petitioner was not a wholetime teacher: He may have been a part-time teacher and that being his position, he made a false statement in his application when he said he was a teacher. Item no. 14 on the application form is in these words :

14: Name of the institution in which the candidate is serving — this item was filled by the petitioner as follows :

Government Upper Primary School, Ratlam (Madhya Bharat).

Item no. 15 required an applicant to give the period of his service with dates and the territories. This the petitioner also filled in. From the data supplied under this item it is apparent that the petitioner served as a teacher for a total period of one year, one month and seventeen days.

(12) The resolution of the Executive Council which was resolution no. 288 and finds recorded in the minutes of 12-3-1953, removing the petitioner's name from the result of successful candidates does not give any reasons. The resolution is in these words :

"Resolved that the Candidate's result of B. A. Examination of 1951, be cancelled and this fact be notified in the U. P. Government Gazette."

There is, therefore, no finding by even the Executive Council that the petitioner was in any manner found by the Executive Council to have been guilty of an offence involving moral turpitude or scandalous conduct. It is no doubt true that before the resolution was recorded the Council took into consideration the letter of Mr. Jain which made the complaint against the petitioner and some others and they also had before them the report of the Director of Education Madhya Bharat dated 13-2-1953. It is however not clear from the Resolution of the Executive Council that the Executive Council accepted either of those two reports or believed any part of either of the two reports. It may be worth while pointing out that the report of the Director of Public Instruction Madhya Bharat indicated clearly that the petitioner was a teacher though in an honorary capacity. The Statutes, namely, Statute no. 2 does not clearly state that a person can fall under the category of teacher, as mentioned in the Statutes, only if he is a paid teacher or a wholetime teacher. Some argument was adduced as to the spirit of this Statute but in a matter like this it is difficult to rely on what is considered the spirit of a Statute when the words do not clearly bring out that spirit. The fact that the Statute did not refer only to whole-time teachers is clear from the fact that the University, under its powers, amended this Statute in the year 1953 and added a note to it in these words :

"For purposes of the Statute, a person will be regarded a teacher if he is a whole-time teacher at an educational institution and does not hold any other full-time appointment to make his living."

The amended Statute obviously cannot apply to the present case because the petitioner put in his application as far back as the 28th August, 1950 while the amendment to the Statute came sometime in the year 1953.

(13) Dr. Asthana, further, laid stress on the note which appeared on the application form and which was practically in the same terms as the note that has now been added to the Statute to contend that the petitioner was not competent to take the examination. I cannot agree with Dr. Asthana's contention. In order to judge the competence of the petitioner to take the examination we have to look to the provisions of the statute itself and not to anything that is added by way of a note in an application form. On the Statute any person who was a teacher, whether part-time or wholetime, whether honorary or stipendiary, was competent to appear at the examination provided he continued the occupation of a teacher for a period of one year. On the facts of this case there is no doubt, in my mind, that the petitioner did perform the functions of a teacher whether he did it in an honorary capacity and for part-time only or not for a period of one year. Therefore there was no inherent want of competence in him to offer himself as a candidate for the B. A. examination of the University in the year 1951. In my judgment, it is not open to the University, after the petitioner had been declared successful and after a degree of Bachelor of Arts had been conferred on him to cancel that degree. I am in agreement with Dr. Asthana's contention that the University should have the power to refuse or withdraw its degrees, diplomas etc., in cases where it is satisfied that the holder of the degree or the diploma or the certificate, as the case may be, has obtained it by a sort of misrepresentation. But this is a matter for the framers of the law to determine. The Legislature gave the power of withdrawing a Degree to the University under certain circumstances only and that power has been given to it under S. 34. The University can exercise that power only in the manner provided for in the Act and in no other manner. It is a matter of utmost importance that statutory Bodies, like an University, should act strictly in accordance with the law made for it and not to transgress it either in the spirit or in the letter.

(14) The prayer in the petition was neither properly worded nor properly sought. On the circumstances of the case, however, the appropriate prayer which should have been sought was a writ of Certiorari. The Executive Council has, as I have stated above, exceeded its jurisdiction and its powers in making its Resolution No. 288 of the 12-3-1953: this Resolution must therefore be quashed and I quash it hereby.

(15) Under the circumstances of the case I consider it desirable however to order that parties should bear their own costs of this petition.

K.S.B. Resolution quashed.

(S) AIR 1955 Allahabad 536 (V. 42 C 153 Oct.)

(Lucknow Bench)

KIDWAI J. (4-3-1955)

Triloki Singh, Applicant v. Returning Officer, Lucknow and others, Opposite parties.

C. M. An. (O. J.) No. 24 of 1955.

Constitution of India, Arts. 226, 227 & 329(b) — Election, meaning of — Petition under Arts 226 and 227 challenging election on ground of illegality in counting votes — Maintainability — Proper remedy is by election petition — (Representation of the People Act (1951), Ss. 81, 100(2) (c)).

Every part of the process by which a candidate is declared to be a representative of the people from the beginning to the final selection is covered by the word "election" in Art. 329, cl. (b) of the Constitution. The Court is, therefore, deprived by the Constitution itself of the power to intermeddle with an election and the proper remedy is by means of an "Election Petition." (Para 7)

Of course once an election petition has been filed and some order or decision has been given by Election Tribunal, the High Court can, in exercise of its powers under Art. 226 of the Constitution, direct the issue of certain orders or, in exercise of its powers of supervision under Art. 227 of the Constitution, proceed to consider the matter. (Para 8)

Consequently, a petition under Arts. 226 and 227 filed during the stage of counting votes and praying for certain directions to be issued and for a declaration that the counting of votes was invalid on the ground that the provisions of the Representation of the People Act as well as the rules made thereunder by the election Commission have been infringed, is not maintainable because under S. 81 read with S. 100 (2) (c) Representation of the People Act such allegations may be made the basis of an election petition. AIR 1955 SC 233, and AIR 1952 SC 64 Rel on. (Para 10)

CASES REFERRED: Paras

(A) (V39) AIR 1952 SC 64: 1952 SCR 218 (SC) 5
(B) (V15) AIR 1928 Mad 253: 108 Ind Cas 212 5
(C) (V33) AIR 1946 Lah 85: 224 Ind Cas 322 5
(D) (V42) (S) AIR 1955 SC 233: 1955 SCJ 267 (SC) 8

H. K. Ghose, K. S. Verma and B. N. Srivastava, for Applicant; B. K. Dhaon, Senior Addl. Standing Counsel, for Opposite Party (No. 1)

ORDER: Sri Triloki Singh was a candidate for election to Lok Sabha from the Lucknow District Central Constituency. The two other candidates were Srimati Sheorajvati Nehru and Sri Atal Behari Bajpai. All the processes of the election took place up to 27-2-1955. Thereafter the counting of votes commenced from 1-3-1955. This petition was filed on 2-3-1955 under Articles 226 and 227 of the Constitution of India praying for certain directions to to be issued and for a declaration to be made that the counting of votes on 1-3-1955 was invalid and inoperative in law.

The direction that was asked for was to the effect that the Returning Officer should be prohibited from following the result of, what is called, his "illegal procedure" in counting votes and should not prepare and certify the return in form No. XVI and should not cause it to be published in the Gazette. An interim order for the sealing of necessary papers was also prayed for but that order was not issued and must now be left out of consideration.

(2) The question that first of all is to be considered, on a preliminary objection being raised on behalf of the Returning Officer, is whether this Court has jurisdiction to issue a writ in this matter which relates to an election, even supposing all the allegations made in the application to be correct, though this is not accepted by the Returning Officer.

The question of law which has, therefore, arisen is whether I can exercise the powers of the High Court under Art. 226 of the Constitution and issue a writ either of certiorari or of mandamus in respect of the action of the Returning Officer.

(3) The matter is governed by authorities. The first decision is a decision of a Bench of this Court of which I was a member. In that decision it has been laid down that Art. 329, Cl. (b) of the Constitution prevents an interference by the High Court by the issue of a writ in all matters relating to an election.

It was further held that the word "election" as used in that Article is wide enough to cover every part of the process of selection of a representative. It was, therefore, held that this Court could not issue a writ in the matter of the proper or improper rejection of a nomination paper.

(4) It is true that in that case the question was as to the rejection of a nomination paper which occurred at a very early stage in the election. Nevertheless, it was necessary for the purpose of deciding that case to determine the meaning of the word 'election" as used in Art. 329, Cl. (b) of the Constitution. The decision, therefore, was a decision on the point which had really arisen in this case.

(5) The next case, to which reference may be made, is the decision of the Supreme Court reported in — 'Punnuswami v. Returning Officer, Namakkal Constituency', AIR 1952 SC 64 (A). In that case also their Lordships (per Fazl Ali J.) have laid down the law in the following words:

"As we have seen, the most important question for determination is the meaning to be given to the word "election" in Article 329, Clause (b). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll.

In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected. In — 'Srinivasalu v. Kuppuswami', AIR 1928 Mad 253 (B), the learned Judges of the Madras High Court after examining the question expressed the opinion that the term "election" may be taken to embrace the whole procedure whereby "elected member" is returned, whether or not it be found necessary to take a poll.

With this view my brother Mahajan J. expressed his agreement in — 'Sat Narain v. Hanuman Parshad', AIR 1946 Lah 85 (C), and I also find myself in agreement with it. It seems to me that the word "election" has been used in part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature.

The use of the expression "conduct of elections" in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in part XV including Article 329(b). That the word "election" bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter one of the questions mooted is when the election begins."

The learned Judges then quoted Halsbury's Laws of England and various other authorities.

(6) Mr. Ghose sought to rely upon certain remarks made in this judgment in order to differentiate the present case from the case which was considered by their Lordships of the Supreme Court. He contended that their Lordships took this view in a matter relating to the nomination of a candidate and that they have made it clear that they took this view only because in such a case another remedy was open to the applicant at the appropriate stage and in an appropriate manner.

He contends that in the present case there is no other remedy open to him at the appropriate stage and time and in the appropriate manner.

(7) The remarks upon which Mr. Ghose relies were merely remarks made in the course of the reasoning. I am bound not by the remarks made by their Lordships of the Supreme Court but by the law laid down by them in the words which I have quoted above. According to that decision, therefore, every part of the process by which a candidate is declared to be a representative of the people from the beginning to the final selection is covered by the word "election" as shown in Article 329, Clause (b) of the Constitution.

The Court is, therefore, deprived by the Constitution itself of the power to intermeddle with an election and the proper remedy is by means of an "Election Petition".

(8) Of course once an election petition has been filed and some order or decision has been given by Election Tribunal, the High Court can, in exercise of its powers under Art. 226 of the Constitution, direct the issue of certain orders or writs or, in exercise of its powers of supervision under Art. 227 of the Constitution, proceed to consider the matter.

In the latest decision reported in — 'Hari Vishnu v. Ahmad Ishaque', (S) AIR 1955 SC 233 (D), their Lordships of the Supreme Court have reaffirmed the view taken in the earlier decision with regard to the wide meaning to be given to the word "election" in Art. 329, Cl. (b) of the Constitution of India.

(9) Even, however, if the differentiation which Mr. Ghose seeks to draw is considered on the merits, it must be held that it is open to a candidate to file an election petition based upon the illegalities and irregularities alleged by the applicant to have been committed in the present case.

Section 81 of the Representation of the People Act (XLIII of 1951), provides for the presentation of an election petition calling in question any election on the grounds specified in sub-sections (1) and (2) of S. 100 and S. 101 of the Act. Section 100, Cl. 2(c) is as follows:

"that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election, or by any mistake in the use of any prescribed form."

(10) In the present case all the allegations that have been made are that the provisions of the Representation of the People Act XLIII of 1951 as well as of the Rules made thereunder by the Election Commission have been infringed and that is in fact the sole illegality and irregularity upon whch this petition is based. Clearly under S. 81 read with S. 100, Cl. 2(c) such allegations may be the basis of an election petition.

The section, therefore, gives a remedy by means of an election petition even in a case such as the present. The differentiation which Mr. Ghose seeks to make does not exist in this particular case. In these circumstances there is no valid reason why the decisions to which I have already referred should not be followed. I accordingly hold that this petition is not maintainable. The application is rejected with costs which I tax at Rs. 100/-.

K.S.B. Petition rejected.

AIR 1955 Allahabad 538 (V 42 C 154 Oct.)

M. L. CHATURVEDI J. (18-2-1955)

Ishrat Hussain, Petitioner v. Deputy Custodian and others, Respondents.

Civil Misc. Writ No. 282 of 1953.

(a) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 18(2) and 26B — Acquisition of Bhumidari right — (Tenancy Laws — U. P. Agricultural Tenants' (Acquisition of Privileges) Act (10 of 1949), Ss. 3 and 6).

Before a person can be deemed to be a Bhumidhar of the holding, he must be a person belonging to the class mentioned in S. 3 or sub-s. (2) of S. 3A of U. P. Act No. 10 of 1949, and further he should have been granted the declaration referred to in S. 6 of that Act. (Para 4)

To come under the definition of "an occupier" under cl. (e) of S. 3 it is not necessary that the land should be sir on the date preceding the date of declaration because one qualification of the land is that it should be, immediately on the date preceding the declaration in the holding of any of the kinds of tenants enumerated in the clause, and the other alternative qualification is that it is not sir or khudkasht. (Para 4)

The position, therefore, is that an occupier of land, which is sir or khudkasht, does not come within the definition of the word 'occupier', as used in cl. (e). (Para 5)

The mere fact that a trespasser got into possession of the khudkasht land which is not let out to anybody does not alter the character of the land, and the definition of the word 'occupier' itself goes to show that a man may be in occupation of the land, which land may continue to have the character of sir or khudkasht. (Para 5)

Therefore, where the land has proved to be the khudkasht land of an evacuee at the time of migration to Pakistan it must be deemed to have been khudkasht of the evacuee on 31-6-1952 by virtue of S. 26B read with Para 1 of Sch. 5 of U. P. Act (1 of 1951) and that being the case the person in possession of it does not become an occupier and does not acquire Bhumidari rights under S. 18(2) of that Act. (Para 6)

(b) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 20 — Adhivasi rights — Acquisition of.

What S. 20(b)(1) requires is the record of the name, in either of the registers, Khasra or Khatauni in the year 1356F and where the names have not been entered, the persons concerned could not acquire the rights of Adhivasis, even though they may have been in possession of the land. (Para 7)

(c) Constitution of India, Art. 226 — Mandamus — Writ against custodian of evacuee property — (Administration of Evacuee Property Act (1950), Ss. 8(4) and 9).

Where the petitioners are mere trespassers and have not acquired any rights under U. P. Zamindari Abolition and Land Reforms Act, any rights they might acquire by payment of rent to the custodian could be put an end to by the custodian. In such a case a notice given by the custodian for the surrender of possession is a valid and legal one and he could use or cause to be used such force as may be necessary for taking possession of the property from the person, who may be asked to surrender possession. Therefore, the prayer for the issue of a writ of mandamus commanding the custodian to refrain from

taking any steps to dispossess the petitioners from the land in dispute cannot be granted. (Para 9)

Anno: AIR Com., Const. of Ind., Art. 226 N. 109.

(d) Constitution of India, Art. 226 — Burden of proof.

In a writ petition it is the petitioner who has to make out a legal title before any writ can be issued to protect that title. (Para 10)

Anno: AIR Com., Const. of Ind., Art. 226 N. 47.

S. S. Dhawan, for Petitioner; Standing Counsel, for Respondents.

BY THE COURT:

ORDER: This is a petition under Art. 226 of the Constitution.

(2) The land in dispute (Plot No. 100 situate in village Mokaratpar district Meerut) was previously owned by one Mohammadi Begum who left for Pakistan in April 1950. A notice was issued by the Assistant Custodian, Evacuee Property, Meerut, under S. 8(4), Administration of Evacuee Property Act, sometime in October 1950, asking the petitioners to show cause why the lease of the aforesaid plot should not be cancelled, as the land had become evacuee property after the departure of Mohammadi Begum to Pakistan. It appears that the petitioners had entered into possession of this land even during the time that Mohammadi Begum was in India, but the exact date when they entered into possession is a matter of dispute between the parties.

The petitioners say that they obtained a lease in 1947 (1355 F.) from Mohammadi Begum, but this fact is denied in the counter-affidavit, filed on behalf of the respondents. In para. 2 of the counter-affidavit it is stated that one of the petitioners admitted before the Assistant Custodian, Meerut, that he did not obtain any lease or even oral permission from Mohammadi Begum. A copy in Roman script of the statement has been filed and is attached to the counter-affidavit, as Annexure A. At the same time it appears that the petitioners did enter into possession of the land one year before 1357 F., which would roughly mean that they got into possession in 1949 or in 1950.

After the receipt of the notice under S. 8(4), the petitioners filed objections on 15-11-1950 alleging that they had been in possession over the plot on payment of Rs. 20/- per month as rent since 1355F. (1947). The Assistant Custodian recorded the statements of the witnesses produced before him, and in the end he came to the conclusion that the execution of lease by Mohammadi Begum in favour of the petitioners had not been proved, he declared that the possession of the petitioners was unauthorised and passed an order on 7-3-1951 for the ejectment of the petitioners from the plot in dispute, which is numbered as plot No. 100.

The petitioners then went up in revision to the Deputy Custodian, Meerut, against the aforesaid order, but he dismissed the revision. A revision was then preferred before the Custodian General of India, and he held that it appeared that the petitioners came into possession of the land in dispute about the time when Mohammadi Begum migrated to Pakistan, and on these findings he dismissed the revision on 6-5-1952.

The present petition was filed on 26-3-1953 praying that a writ of mandamus be issued to the Deputy Custodian restraining him from dispossessing the petitioners from plot No. 100.

(3) The learned counsel for the petitioners has contended that his clients acquired Bhumidhari rights over this land by paying ten times the rent to the Government in 1951, when they obtained a certificate under S. 6 of the U. P. Agricultural Tenants (Acquisition of Privileges) Act, Act No. 10 of 1949, and the contention is that that being the position, the Assistant Custodian has no right to dispossess the petitioners from this land. It is not denied in the counter-affidavit that the petitioners had obtained a declaration under S. 6 of the said Act, and the question is whether the petitioners have acquired Bhumidhari rights because of their obtaining a certificate.

Section 18(2) of the U. P. Zamindari Abolition and Land Reforms Act is the relevant provision of law on the point and it may be quoted in full. It says,

"Every person belonging to the class mentioned in S. 3 or sub-s. (2) of S. 3A of the United Provinces Agricultural Tenants (Acquisition of Privileges) Act, 1949, who has been granted the declaration referred to in S. 6 of the said Act in respect of any holding or share thereof shall, unless the declaration is subsequently set aside, be deemed to be the Bhumidhar of the holding or the share in respect of which the declaration has been made and continues in force."

(4) It appears from a reading of this sub-section that a person has to fulfil two conditions before he can be deemed to be a Bhumidhar of the holding. The first condition is that he must be a person belonging to the class mentioned in S. 3 or sub-s. (2) of S. 3A of U. P. Act No. 10 of 1949, and the second condition is that he should have been granted the declaration referred to in S. 6 of that Act. The contention of the learned counsel for the petitioners is that, according to the proper interpretation of the section, the mere obtaining of a declaration under S. 6 is sufficient for the conferment of Bhumidhari rights. I do not find it possible to accept this contention.

The word 'person' used in the beginning of the sub-section is followed by the words 'belonging to the class' and subsequently it is said 'who has been granted the declaration'. If the intention of the Legislature was that the mere obtaining of the declaration under S. 6 conferred Bhumidhari rights, the first clause need not have been put in the sub-section at all. The first clause also qualifies the word 'person', and what it means is that the person should be of one of the classes mentioned in S. 3 or sub-s. (2) of S. 3A. It is, therefore, necessary to see whether the petitioners fulfil this first requirement of belonging to the class mentioned above.

So far as the second qualification is concerned, it is admitted that they have acquired a declaration under S. 6. Section 3 of U. P. Act No. 10 of 1949, as it originally stood, mentioned only four classes, which are enumerated in cls. (a) to (d) of the section. The petitioners admittedly do not come under any of these classes nor is it said that they come under S. 3A. Act 10 of 1949 was amended by U. P. Act No. 7 of 1950, and by S. 2 of this amending Act another class was added to the classes originally enumerated in S. 3 and the addition was put in the following words:

"(e) an occupier."

Two explanations were added by sub-s. (2) of S. 2 of the amending Act and we are concerned with explanation 2, cl. (1), which defines the word 'occupier' as follows:

"Occupier means an occupier of any land which on the date immediately preceding the date of declaration under S. 6 is not included in the holding of a permanent tenure holder, permanent

grantee, grantee at a favourable rate of rent, or which is not sir or khudkasht or which is not in the personal cultivation of a thekadar or a mortgagee."

According to the definition contained in this clause, it appears that only that person in occupation is called an 'occupier' who was immediately preceding the date of vesting or the date of declaration under S. 6 was in possession of land, which was not included in the holdings of the kind of tenants, enumerated in the clause, or which was not sir or khudkasht, or which was not in the personal cultivation of a thekadar or a mortgagee. If the land was sir or khudkasht, the person in occupation would not be an occupier, as defined in the clause. So far there is no difficulty in the interpretation of this clause, but the learned counsel for the petitioners urged that the land should be sir or khudkasht on the date preceding the date of declaration.

I do not think that it is necessary that the land should be sir on the date preceding the date of declaration because one qualification of the land is that it should be, immediately on the date preceding the declaration in the holding of any of the kinds of tenants enumerated in the clause, and the other alternative qualification is that it is not sir or khudkasht. The use of the word 'which' after 'land' and then the use of the same word before the words 'is not sir or khudkasht' goes to show that the first clause beginning with the word 'which' came to an end before the second clause beginning with the same word started.

If the requirement was that the land should be sir or khudkasht on the date preceding the date of declaration, the word 'which' before the words 'is not sir or khudkasht' would not have been used, and the clause might simply have read 'or was not sir or khudkasht'. I, therefore, prefer to accept the interpretation put upon this clause by the learned counsel for the respondents, which is to the effect that it is not necessary to show that the land was sir or khudkasht on the date preceding the date of declaration.

There does not appear to be much difference for practical purposes between the two interpretations and, if the land had ceased to be sir or khudkasht on the date preceding the date of declaration, it could not be said that it was sir or khudkasht which the occupier was in possession of.

(5) The position, therefore, is that an occupier of land, which is sir or khudkasht, does not come within the definition of the word 'occupier', as used in this clause. I have, therefore, to see whether the land in dispute in this case was the sir or khudkasht of Mohammadi Begum. In the affidavit, it has not been stated whether the land was sir or khudkasht. On the other hand, in para 2(d) of the counter-affidavit, it has been stated clearly that in the khasra of 1356F. Mohammadi Begum was entered as a tenant of khudkasht of the aforesaid plot.

Again, in Annexure D, filed along with the counter-affidavit, which is a copy of the statement of the Patwari made before the Assistant Custodian, it is disclosed that the petitioner Istafa Hussain was entered as having been in possession for one year in 1357F, and that before this the land was in the possession of Mohammadi Begum, who was the zamindar of the land, and that the land was khudkasht of Mohammadi Begum. No affidavit in rejoinder has been filed to controvert the above assertion. The position, therefore, is that Mohammadi Begum was the zamindar of this land, and the land was her khudkasht at least till the year 1356F, when the petitioners may have entered into possession of it.

The mere possession of the petitioners for a short period of time would not alter the character of the land. If the land was khudkasht of the zamindar, it might have lost that character if the zamindar let it out to a tenant. In the present case, it has not been proved that Mohammadi Begum let it out to a tenant. The mere fact that a trespasser got into possession of the khudkasht land does not alter the character of the land, and the definition of the word 'occupier' itself goes to show that a man may be in occupation of the land, which land may continue to have the character of sir or khudkasht.

It might have lost the character of khudkasht, if it had been let out to the petitioners; but in para 2(a) of the counter-affidavit, it has been asserted that the petitioners obtained no lease nor oral permission from the owner of the aforesaid land and that Ishrat Husain admitted in his statement before the Assistant Custodian that he did not obtain any lease or oral permission. The possession, therefore, of the petitioners over this land was as trespassers and no authority need be cited for saying that a khudkasht land does not cease to be khudkasht merely because some trespasser has entered into possession of it for a short time.

(6) In this connection I might also refer to certain provisions of the Uttar Pradesh Land Reforms (Amendment) Act, U. P. Act No. 20 of 1954. By this amending Act, Ss. 26A and 26B have been added to the U. P. Zamindari Abolition and Land Reforms Act of 1950, and S. 26B is to the effect that the provisions of the U. P. Zamindari Abolition and Land Reforms Act in their application to evacuee property shall have effect subject to the modifications set out in Sch. 5. Paragraph 1 of Sch. 5 is in the following words:

"Where any land was recorded as khudkasht of an evacuee at the time the evacuee migrated to Pakistan, such land shall, notwithstanding that the evacuee may not have continued subsequently to cultivate it, be deemed for purposes of Chapter II to have been the Khudkasht of the evacuee on the date immediately preceding the date of vesting."

This provision of law makes it clear that till 31-6-1952 this land must be deemed to have been khudkasht land of the evacuee, as it has been proved that it was khudkasht of the evacuee at the time she migrated to Pakistan. The land being khudkasht land, the petitioners did not become the "occupier" of the land and they, therefore, had not acquired Bhumidhari rights under S. 18(2) of the U. P. Zamindari Abolition and Land Reforms Act.

(7) The learned counsel for the petitioners has not urged that his clients acquired the rights of an Adhivasi, and a look at the provisions of S. 20 shows that no such claim could have been advanced, because the petitioners could have acquired rights of an Adhivasi only if they were recorded as occupants of the land in Khasra or Khatauni of 1356F. Admittedly their names had not been recorded in the Khasra or Khatauni of that year, though it is said that they were in possession of the land. What S. 20(b)(1) requires is the record of the name, in either of these registers, in the year 1356F, and the names not having been entered, the petitioners could not acquire the rights of Adhivasis, even though they may have been in possession of the land.

(8) The learned counsel for the respondents urged that, in view of the amendment to the Administration of Evacuee Property Act by Act 11 of

1953, a new section 18 is substituted to the principal Act, and the learned counsel has relied on sub-s. (2) of S. 18, substituted by the amending Act. The purport of this section is that, when a person has acquired any rights under a Provincial or a State Act in respect of any property by reason of being in possession of that property, whether in pursuance of a grant, lease, or allotment made by the Custodian or otherwise, the acquisition of such rights shall not in any way affect or be deemed to have affected the rights and powers conferred on the Custodian under the Act in respect of that property.

The argument was that even if the petitioners had acquired the rights of Bhumidhars under the U. P. Zamindari Abolition and Land Reforms Act, those rights would be subject to the rights conferred on the Custodian by the Administration of Evacuee Property Act. It is not necessary to decide in this case the actual meaning of this subsection or the point whether this section is void under some provision of the Constitution, because I have found above that the petitioners have not acquired any sort of rights under the U. P. Zamindari Abolition & Land Reforms Act. This section has been clearly given a retrospective operation by the opening words of S. 8 of the amending Act. But, as I have said above, I do not propose to go into the validity of this provision of law, because the question does not arise in the instant case.

(9) In my view of what I have stated above, the position of the petitioners appears to be that of trespassers, who had subsequently paid the rent for sometime to the Custodian of Evacuee Property. As trespassers, the petitioners had acquired no right to the property and, if any rights had accrued to them by virtue of the payment of any rent to the Custodian, those rights could be put an end to by the Custodian or the Assistant Custodian, whenever they chose to do so.

The position is made clear by the provisions of S. 8, sub-s. (4) of the Administration of Evacuee Property Act, 1950, which are to the effect that where any evacuee property has vested in the Custodian, and any person is in possession of the property, he shall be deemed to be holding it on behalf of the Custodian and shall, on demand, surrender possession of it to the Custodian or to any other person duly authorised by him in this behalf.

The petitioners, therefore, are bound to deliver possession to the Custodian whether they were in possession of the property as trespassers or holding it under the Custodian by his permission, and in either case the Custodian can call upon the petitioners to surrender possession of the land to him, or to any other person authorised by him in this behalf.

Under S. 9 of the same Act the Custodian is permitted to use or cause to be used such force as may be necessary for taking possession of the property from the person, who may be asked to surrender possession under S. 8(4). The notice, that had been issued to the petitioners on 28-10-1950, is a notice issued under S. 8(4) and, in my opinion, the notice is a legal and valid notice. The prayer contained in the petition is for the issue of a writ of mandamus commanding the respondents to refrain from taking any steps to dispossess the petitioners from the land in dispute, and, in view of my findings on the points mentioned above. I think no such prayer can be granted to the petitioners.

(10) The learned counsel for the respondents further urged that the Custodian has acquired Bhumidhari rights under S. 18(1) of the U. P. Zamindari Abolition and Land Reforms Act in this land. S. 18(1) says that, subject to certain other provisions, all lands in possession of or held or deemed to be held by an intermediary as sir or khudkasht on the date immediately preceding the date of vesting, shall be deemed to be settled by the State Government with the intermediary, and the intermediary shall be entitled to retain possession of the land as a Bhumidhar.

If the land continued to be sir or khudkasht the date of vesting the custodian would acquire the rights of a Bhumidhar in the land. But again, it is not necessary to decide this point in this petition, because in the writ petition it is the petitioner who has to make out a legal title before any writ can be issued to protect that title. This the petitioner totally failed to do in this case.

(11) This petition, therefore, fails and is dismissed with costs.

M.K.S. Petition dismissed.

(S) AIR 1955 ALLAHABAD 541 (V. 42 C. 155 Oct.)

MEHROTRA J. (2-3-1955)

Badhyamal Narayan Das, Petitioner v. Chairman, District Board, Banaras and another, Opposite Parties.

Civil Misc. Writ No. 817 of 1954.

(a) Constitution of India, Art. 226 — Procedure — Rules of Allahabad High Court — Petition not giving brief statement of facts — Maintainability.

According to the rules framed by Allahabad High Court, the application under Art. 226, Constitution of India must contain brief statement of facts supported by an affidavit and the grounds on which relief is claimed. Where the petition does not give a brief statement of the case but all the necessary facts have been stated in the affidavit filed in support of the petition, it cannot be said that the application is not maintainable on account of the non-compliance with the provisions of the rules. (Para 3)

Anno: AIR Com., Const. of India, Art. 226, N. 42.

(b) Constitution of India, Art. 226 — Other remedy open — (U. P. District Boards Act (10 of 1922), S. 174(2)(k)).

Where a District Board acting under bye-laws framed under S. 174(2)(k) of U. P. District Boards Act has imposed heavy licence fee for running a brick-kiln, the brick-kiln owner, it is true, can go in appeal against the assessment order but this remedy is not equally efficacious as a petition for writ under Art. 226, Constitution of India, so as to deprive the brick-kiln owner of his remedy by means of a writ petition under Art. 226, Constitution of India. AIR 1952 All 753 (FB), Rel. on. (Para 4)

Anno: AIR Com., Const. of India, Art. 226 N. 19.

(c) U. P. District Boards Act (10 of 1922), S. 174(2)(k) — Bye-laws under — Imposition of heavy licence-fee for running brick-kiln — Validity.

Section 174(2)(k) of the U. P. District Boards Act provides that the District Board has power to frame bye-laws regulating slaughter-houses and offensive, dangerous and obnoxious trades, callings or practices and prescribing fees to defray the expenditure incurred by a Board for this purpose. This power is only confined to charging fee enough to defray expenditure incurred by the

Board for that purpose. No fee can be charged to increase the general revenue of the Board.

Certain powers are given to the Board to impose taxes but it is not permissible for the Board under the garb of a licence fee to impose taxes. Hence the District Board has no power to impose heavy licence fee under S. 174(2)(k) of District Boards Act for running a brick-kiln: AIR 1953 All 415 and AIR 1954 SC 282, Rel. on. (Para 4)

CASES REFERRED: Paras

(A) (V39) AIR 1952 All 753: ILR (1953) 2 All 112 (FB) 4
(B) (V40) AIR 1953 All 415: 1953 All LJ 60 4
(C) (V41) AIR 1954 SC 282: 1954 SCR 1005 (SC) 4
(D) 60 CLR 263 4
(E) (V41) AIR 1954 SC 400: 1954 SCR 1046 (SC) 4

L. Hajula, for Applicant; Standing Counsel, for Opposite Parties.

ORDER: This petition has been filed under Art. 226 of the Constitution praying that a writ of mandamus be issued directing the opposite party, the Chairman, District Board, Banaras, not to enforce the bye-laws framed by the said opposite party No. 1 under S. 174(2)(k) of the U. P. District Boards Act, 10 of 1922. It is further prayed that an order be issued to the opposite party No. 1 not to demand any licence fee, as contemplated by the said bye-law for the running of the brick-kiln and a writ of certiorari be issued quashing the notification.

(2) The applicant is a brick manufacturer in the district of Banaras and is carrying on his business within the limits of the District Board. In the year 1945 the bye-laws were framed under S. 174(2)(k) of the U. P. District Boards Act providing that each brick-kiln owner shall have to take a licence from the Board for running a brick-kiln and pay a licence fee of Rs. 10/-. Attempts were made subsequently by the District Board to enhance the licence fee from Rs. 10/- to Rs. 50/-. The amount of licence fee has now been increased to Rs. 200/- and the necessary sanction has been accorded by the Commissioner to the bye-laws.

The applicant protested against the payment of such a heavy licence fee but no attention has been paid to the protest by the District Board. The licence fee is out of all proportion to the expenditure which the Board has to incur for granting a licence and it is stated in the affidavit that the heavy fee has been imposed with a view to increase the general revenue of the Board. On these facts it is prayed that a writ of mandamus be issued directing the Board not to realise the heavy licence fee from the applicant. Notices were issued to the other side.

No counter-affidavit has been filed challenging the facts set out in the affidavit filed in support of the petition and no attempt has been made on behalf of the Board to prove that the fee is enough to meet the expenses which the Board has to incur for the purpose of granting licence and realising the amount of licence fee.

(3) The Standing Counsel has raised a number of preliminary points to the maintainability of the petition. Firstly it is contended that the petition is not in accordance with the rules framed by this Court. Reliance has been placed on Chapter XXII of the rules framed under the Act which provides that the application under Art. 226 of the Constitution must contain brief statement of facts supported by an affidavit and the grounds on which the relief is claimed. It is urged that in the present case the application only says that "for the reasons given in the accompanying affidavit the following prayer may be granted."

It does not give a brief statement of the case. The affidavit no doubt does not set out the facts in brief but the grounds for the reliefs claimed are very elaborate and it cannot be said that the parties have been prejudiced on account of the failure of the petitioner to make a brief statement of the facts. The affidavit has been filed in support of the petition and all the necessary facts have been stated in that affidavit. It cannot, therefore, be said that the application is not maintainable on account of the non-compliance with the provisions of the rules.

(4) The next contention of the Standing Counsel is that the petitioner had an alternative remedy to go up in appeal against the assessment order. It is true that the petitioner could have gone up in appeal against the assessment order, but it cannot be said that the alternative remedy is equally efficacious so as to deprive the petitioner of his remedy by means of a writ petition under Art. 226 of the Constitution.

It has been held in a Full Bench of this Court in — 'Budhu v. Municipal Board, Allahabad', AIR 1952 All 753 (A) that if the interest of a large number of people is affected and a question of public importance is raised the existence of an alternative remedy by itself is no ground for refusing the petition under Art. 226 of the Constitution. Section 174(2)(k) of the District Boards Act provides that the District Board has power to frame bye-laws regulating slaughter-houses and offensive dangerous and obnoxious trades, callings or practices and prescribing fees to defray the expenditure incurred by a Board for this purpose.

The power given to the Board to frame bye-laws providing for the payment of licence fee is only confined to charging fee enough to defray expenditure incurred by the Board for that purpose. No fee can be charged to increase the general revenue of the Board. Certain powers are given to the Board to impose taxes but it is not permissible for the Board under the garb of a licence fee to impose taxes.

Reference in this connection may be made to the case of — 'Biswanath Singh v. District Board of Ballia', AIR 1953 All 415 (B) where this Court has held that under the provisions of S. 174 (2)(k) of the District Boards Act the licence fee contemplated is such which will only cover the actual and special expenses incurred by the Board in regulating the trade and under the garb of a licence fee it is not open to the Board to impose tax. In the case of — 'Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar', AIR 1954 SC 282 (C) at p. 295 their Lordships of Supreme Court have observed:

"A net definition of what "tax" means has been given by Latham C. J. of the High Court of Australia in — 'Matthews v. Chicory Marketing Board', 60 CLR 263 (D). "A tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered" ..... The essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax payer's consent and the payment is enforced by law and it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of tax."

In another case of — 'Jagannath Ramanujdas v. State of Orissa', AIR 1954 SC 400 (E) at pages 402-403 their Lordships of the Supreme Court

have again held that there is no generic difference between a tax and a fee and both are different forms in which the taxing power of a State manifests itself but there is a distinction between a tax and a fee for legislative purposes and a tax is in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law.

The tax is a common burden and the only return which the tax payer gets is the participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest but for some special service rendered or some special work done for the benefit of those from whom payments are demanded. Thus in fees there is always an element of 'quid pro quo' which is absent in a tax. There are two essential features of a fee.

Firstly it must be levied in consideration of certain services which the individuals accept either willingly or unwillingly and it should be in proportion to the expenses which the authorities have to incur for the purposes of rendering the service for which the fee has been levied. It cannot, therefore, be said in the present case that the fee imposed by the District Board was a licence fee and not a tax. The District Board had, therefore, in my judgment, no power to impose this heavy licence fee under S. 174(2)(k) of the District Boards Act.

(5) I, therefore, allow this petition with costs and direct the opposite parties not to realise the licence fee of Rs. 200/- for the grant of licence to each brick-kiln.

D.S.P. Petition allowed.

(S) AIR 1955 ALLAHABAD 543 (V. 42 C 156 Oct.)

AGARWALA J. (14-12-1954)

Ram Surat Singh, Appellant v. Ram Murat Singh and others, Respondent.

Second Appeal No. 2260-B of 1951, against decision of 1st Addl. Civil J. Jaunpore, D/- 20-8-1951.

(a) Civil P. C. (1908), S. 11 — Two suits decided by common judgment — Appeal from decision in one only if barred.

Where the two suits in which the parties were the same and the same questions of law and fact arose were decided by a common judgment and an appeal was filed from the decree in one only of the suits;

Held that the appeal would not be barred by the principle of res judicata by reason of the decree in the other suit which was not appealed against. As the two suits were decided by a common judgment, the matter in dispute between the parties in both the suits could not be said to have been finally decided until the appellate Court had disposed of the appeal in which the same question was agitated. It is immaterial that there was only one appeal from the judgment in one of the suits. AIR 1953 SC 419-AIR 1927 Lah 289 (FB) and AIR 1923 All 490 (2) (FB), Foll; AIR 1953 SC 419 held had the effect of overruling 7 All LJ 861 (FB). (Paras 4, 5)

Anno: C. P. C. S. 11 N. 29.

(b) Constitution of India Art. 141 — Supreme Court — Obiter. (Precedents)

The observations of the Supreme Court even if obiter are binding on the Courts in India. AIR 1953 All 613 Foll. (Para 10)

(c) Civil P. C. (1908), S. 11 — Suits by or against Hindu widow.

Where a Hindu widow brought a suit for cancellation of a deed of surrender, executed by her in favour of R who was the nearest reversioner on ground of fraud and misrepresentation and that R was not the sister's son of her husband, but the suit was dismissed on her admission that R was her husband's sister's son.

Held that the decree would not operate as res judicata in a subsequent suit against the reversioners as it could not be said in the circumstances that the question whethsr R was the sister's son of her husband was litigated in her capacity as a widow representing the estate on behalf of the reversioners. AIR 1918 PC 87 Rel. on. (Para 11)

Anno: AIR Com. C. P. C. S. 11 N. 63.

CASES REFERRED: Paras

(A) (V14) AIR 1927 Lah 289: 8 Lah 384 (FB) 5, 7, 10.
(B) ('10) 7 All LJ 861: 7 Ind Cas 156 (FB) 7,9,10
(C) ('07) 29 All 730: 4 All LJ 587 7
(D) (V10) AIR 1923 All 490 (2): 45 All 506 (FB) 7, 10.
(E) (V11) AIR 1924 All 834: 78 Ind Cas 1026 9
(F) (V28) AIR 1941 All 277: ILR (1941) All 360 9
(G) (V40) AIR 1953 SC 419: 1950 SCR 754 (SC) 10
(H) (V40) AIR 1953 All 613: 1953 All LJ 273: 1953 Cri LJ 1384 10
(I) (V2) AIR 1915 All 360: 13 All LJ 594 12
(J) (V5) AIR 1918 PC 87: 40 All 593 (PC) 12

A. P. Pandey and Surendra Narain Singh, for Appellant; Kedar Nath Sinha and K. N. Seth, for Respondents.

JUDGMENT: This is a plaintiff's appeal arising out a suit for a declaration that the plaintiff is entitled to one-eighth share in the property in suit and for delivery of possession over one-eighth share of one item of the disputed property. The property in suit belonged to one Bhagirathi Singh. On his death his widow Smt. Chandra Pati succeeded him. But she too died in April, 1947, leaving the plaintiff Ram Surat Singh and Achhaibar and six others as the next collaterals of Bhagirathi Singh.

There was also the contesting defendant Ragho Sewak Rai who has been arrayed as defendant No. 9 in the present suit and who claims to be the sister's son of Bhagirathi Singh and as such the nearest reversioner of Bhagirathi Singh. During her life-time Smt. Chandra Pati executed a usufructuary mortgage in favour of Prithipal Singh and another person in respect of some of the property left by Bhagirathi Singh. This deed is dated 14-6-1917.

On 31-5-1934 she executed a deed of relinquishment surrendering the whole estate in favour of Ragho Sewak Rai, defendant No. 9, whom she described in the deed of relinquishment as sister's son of Bhagirathi Singh. Then she changed her mind and in 1937 filed a suit (No. 506 of 1937) for the cancellation of the deed of surrender. In this suit she alleged that the deed of surrender had been obtained from her by means of fraud and misrepresentation and that Ragho Sewak Rai was not at all the sister's son of Bhagirathi Singh.

This suit was dismissed on 2-9-1938. Chandra Pati ultimately died in 1947. After her death two suits were filed. One was by Ram Surat Singh appellant one of the collaterals of Bhagirathi Singh, & the other was by Achhaibar Singh respondent No. 6, another collateral of Bhagirathi Singh of the same degree as Ram Surat Singh. The appellant's suit was for a declaration and possession, as already stated, while Achaibar's suit was for redemption of the mortgage of 1917 which had been executed by Chandra Pati.

It may be mentioned that after Chandra Pati had executed a deed of surrender in favour of Ragho Sewak Rai, the latter sold the mortgaged property to one Sanno Devi who redeemed the mortgage, and,

therefore, in Achhaibar's Suit Sanno Devi, Ragho Sewak Rai and all the other nearest collaterals of Bhagirathi, namely the appellant and the other six collaterals, were impleaded. Achhaibar and the other six collaterals were also impleaded by the appellant in his suit along with Sanno Devi and Ragho Sewak.

So in both the suits the parties were the same.

(2) In Achhaibar's suit the appellant filed a written statement in which he supported Achhaibar Singh & also prayed that a decree for possession over his one-eighth share be also passed a relief which he had claimed in his own suit. Achhaibar Singh's suit was dismissed on the ground that Ragho Sewak Rai was the sister's son of Bhagirathisingh and was the nearest reversioner and entitled to succeed.

The appellant's suit was also dismissed both on the merits upon the finding that Ragho Sewak Rai was the sister's son, as also upon the ground that the decision in the suit filed by Chandra Pati for the cancellation of the deed of surrender operated as 'res judicata' because Chandra Pati must be deemed to have litigated in that suit in a representative capacity on behalf of all the future reversioners to the estate. Achhaibar Singh submitted to the decree and did not appeal. The appellant appealed against the decree in his own suit but did not appeal against the decree in the suit of Achhaibar Singh.

Both the suits, it may be mentioned, had been dismissed by the munsif by a common judgment.

(3) The lower appellate Court dismissed the appellant's appeal upon the ground that he not having filed an appeal from the decree in Achhaibar's suit the appeal was barred by the principle of 'res judicata' by reason of the decision in Achhaibar Singh's suit. The lower appellate court did not decide the question whether the decision in Chandra Pati's suit of 1937 also operated as 'res judicata' as the Munsif had held. The lower appellate court did not decide the further question of fact whether Ragho Sewak Rai was the sister's son of Bhagirathi Singh.

(4) In this appeal by the appellant, learned counsel for the appellant has urged that the lower court was in error in holding that his appeal was barred by the principle of 'res judicata' on account of his not having appealed against the decree passed in Achhaibar's suit. Learned counsel for the respondents has contested this proposition and has in addition urged that the decision in Chandra Pati's suit of 1937 also operated as 'res judicata'.

To my mind the contention of the learned counsel for the appellant must be accepted and it must be held that the decree in Achhaibar Singh's case did not operate as 'res judicata'. I have also come to the conclusion that the decision in Chandra Pati's suit did not operate as 'res judicata'.

(5) No doubt, in Achhaibar's suit the same questions of the fact and law were canvassed as in the appellant's suit, and undoubtedly if one had to deal with the result of Achhaibar's suit alone, the decision could have been binding not only upon Achhaibar Singh but also upon all the pro forma respondents including the appellant. But the question is whether the appellant could file only one appeal in his own suit to get rid of that adverse decision against him in Achhaibar's suit. It has been mentioned already that the judgment in the two suits was common and the same questions of fact and law arose in both the suits. If the appellant's appeal in his own suit were allowed, he would get all the reliefs that he claimed for himself, whether in the suit of Achhaibar Singh or in his own suit.

The doctrine of 'res judicata' is based upon the principle that a particular matter in dispute between parties has been litigated upon and finally decided and that, having thus become finally decided, it should not be allowed to be reopened in a subsequent litigation. As the two suits were decided by a common judgment, the matter in dispute between the parties in both the suits could not be said to have been finally decided until the appellate court had disposed of the appeal in which the same question was agitated.

It is immaterial that there was only one appeal from the judgment in one of the suits.

This question was discussed at length in a Full Bench decision of the Lahore High Court in — 'Mt. Lachhmi v. Mt. Bhulli', AIR 1927 Lah 289 (FB) (A). In that case there were two cross-suits about the same subject-matter. They were filed simultaneously between the same parties. The suits were consolidated and one judgment was given in both the suits but two decrees were drawn up. There was an appeal from one decree only and there was no appeal from the other decree.

It was held that the fact that no appeal was preferred against the other decree could not prevent the appeal from one of the decrees being heard. It was observed:

"The 'raison d'etre' of the doctrine of 'res judicata' was that two proceedings should be so independent of each other that the trial of one could not be confused with the trial of the other. Where two suits having a common issue are, by consent of parties or by order of the court, tried together, the evidence being written in one record and both suits disposed of by a single judgment, it cannot be said that there have been two distinct and independent trials.

The test is whether the Judge has applied his mind to the decision of the issue involved in the two suits twice or whether there has been in reality but one trial, one finding and one decision.....

Res judicata is either estoppel by verdict or estoppel by judgment, and there is no such thing as estoppel by decree. The determining factor is not the decree but the decision of the matter in controversy."

(6) To the argument that if the decree in one suit is allowed to remain unappealed there would be two contrary judgments, it was answered that:

"There was no anomaly in that case. It is well-settled that, if two or more conflicting decrees happen to be passed regarding the same property in two different proceedings, it will be the last one which will prevail."

(7) This decision is contrary to a Full Bench decision of this Court in — 'Zaharia v. Dibia', 7 All LJ 861 (FB) (B). In 'Damodar Das v. Sheoram Das', 29 All 730 (C), there were two appeals from a decree in one suit. Both the appeals were decided by one and the same judgment and two decrees were passed. The plaintiff appealed from the decree in one appeal only, and it was held that the appeal was not barred by reason of his not having appealed also from the decree in the other appeal. This decision was considered to be not in consonance with the Full Bench decision in 7 All LJ 861 (FB) (B), and so the matter was referred to another Full Bench in the case of — Ghansham Singh v. Bhola Singh', AIR 1923 All 490(2) (FB) (D). In that case the decision in Damodar Das's case (C) was affirmed by all the Judges. In the judgment delivered on behalf of the majority of the Judges, it was observed:

"We are of opinion that some of the reasonings and 'dicta' contained in the judgments in Zaharia's case (B) went further than was necessary, or than we ourselves are prepared to go, and that they have been misapplied in some of the subsequent cases. Where it appears to an appellate court that there

are two decrees arising out of two suits heard together or raising the same question between the same parties and arising out of two appeals to a subordinate appellate court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of 'res judicata', or at all by reason of his failure to appeal from the decree which does not prejudice him.

It would be indeed wrong for an appellant to appeal against a decree which did not prejudice him and to which he did not object or to appeal against two duplicate decrees where an appeal against one of them would be sufficient and he is certainly under no obligation to do so. The ultimate rights of the parties must be adjusted and regulated according to the final decision of the last court of appeal."

The words in the last quotation, "which is not raised and cannot be set right if the appeal which he has brought succeeds" are important. This judgment virtually upholds the principle of law enunciated in the 'Lahore Full Bench case', (A).

(8) In the present case although in essence the decree in Achhaibar Singh's case was against the appellant, yet there was nothing in that decree which was not raised or could not be set right if the appeal which he brought in the court below succeeded.

(9) In subsequent decisions of this Court, in some cases the strict view taken in — 'Zaharia's case (B)', was followed without giving full effect to the observations of the latter Full Bench which I have quoted above, while in others full effect was given to the above observations in — 'Bijai Bahadur v. Premeshwari Ram', AIR 1924 All 834 (E), where a common judgment was given in two appeals arising out of two suits and in the High Court only one appeal was filed against that judgment but the parties to the other appeal were also impleaded and where it was objected that the failure to file a separate appeal against the decree in the other appeal should result in the dismissal of the appeal in the High Court, it was held that the appeal was not barred by res judicata. In Mohmmad Mohtashim v. Joti Prasad, AIR 1941 All. 277 (F) a suit was filed by J against M and another suit by M against J.

Both suits were decided by one single judgment and as a result a decree was passed against M in favour of J. M filed an appeal from the decree in J's suit. It was held that by reason of the failure of the appellants to file an appeal in other suit the appeal was incompetent.

(10) Recently the matter came up for decision before the Supreme Court in Narhari v. Shankar, AIR 1953 S. C. 419 (G) and the Supreme Court has approved of the Lahore Full Bench decision AIR 1927 Lahore 289 (FB) A. Their Lordships have observed.

"It is now well settled that where there has been one trial, one finding and one decision, there need not be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand J. in his learned judgment in AIR 1927 Lah. 289 (FB) (A) mentioned above, the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree it can only be created by the judgment.

The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit".

It is true that in the Supreme Court there was only one suit and two appeals arose out of that very suit. But from the observations quoted above it would appear that their Lordships held that even if there were two suits but where there was one trial and one judgment and all the parties concerned were impleaded in an appeal from one of the suits the appeal would not be barred by res judicata by reason of the judgment in the other suit which was not appealed against.

This Supreme Court decision, in my opinion, has the effect of overruling the Full Bench decision of this Court in Zaharia's case (B) and in upholding what was observed in the later Full Bench decision of this Court in AIR 1923 All 490 (2) (FB) (D). There is no point in saying that the observations of the Supreme Court were obiter, because even so, the decision of the Supreme Court is binding on the courts in India, vide the observation on this point in Sm. Bimla Devi v. Sri Chaturvedi, AIR 1953 All 613 (H).

I am, therefore, bound to follow the Supreme Court decision. In this view of the matter it must be held that the learned Judge of the Court below was in error in holding that the appeal before him was barred by the principle of res judicata.

(11) The contention of learned counsel for the respondents that the decision in Chandra Pati's case operated as res judicata in the present suit has no force. Chandra Pati had executed a deed of relinquishment in favour of Ragho Sewak Rai describing him as the sister's son of her husband Bhagirathi Singh. She challenged this deed of relinquishment on the ground that it was obtained from her by means of fraud and misrepresentation. So far as her suit challenging the deed of relinquishment was concerned, it was a matter entirely personal to her.

By the relief she was claiming she was to be benefited personally in that she would be enabled to enjoy the estate till her death. But when she challenged the relationship of Ragho Sewak Rai to her husband Bhagirathi Singh, she might be said to be not only helping herself in getting the relief which she claimed but also protecting the interests of the future reversioners and thus representing the estate of her husband. If this matter had been challenged and had been decided on the merits, the decision might have operated as res judicata in the present suit.

But Chandra Pati did not press this objection after having filed the suit, for in her statement in court she admitted that Ragho Sewak Rai was the sister's son of Bhagirathi Singh. On her admission, therefore, the matter was not decided by the court on its merits upon evidence on the record.

In the circumstances it cannot be said that the question whether Ragho Sewak Rai was the sister's son of Bhagirathi Singh was litigated in Chandrapati's case by Chandra Pati in her capacity as a widow representing the estate on behalf of the future reversioners to the estate.

(12) This point was discussed at length in a Full Bench decision of this Court which was approved of by the Privy Council. In Risal Singh v. Balwant Singh, AIR 1915 All 360 (I) a suit was brought by D, a widow, to set aside the adoption of B made by her on the ground that she had no authority to adopt. B defended the suit on the ground that she had authority to make the adoption and that having in fact made it, she was estopped from denying the authority.

The suit was decided by the courts in India on the ground of estoppel. But in the Privy Council the question of fact whether there was an authority to adopt was also gone into and decided adversely to the widow. Richards C. J. was of

opinion that this decision did not operate as res judicata against the reversioners to the estate, but the majority of the Judges (Banerji and Chamier JJ.) held otherwise. Banerji J. observed:

"Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heirs. Where, however, the decree relates to a matter personal to her, it is not so binding."

His Lordship went on to observe:

"The main ground on which the learned counsel for the appellants contends that the decree in the former suit is not binding on the appellants is that in that suit the trial Court did not go into evidence on the question of authority to adopt. That court, it is true, decided the case on the ground of estoppel and refused to record oral evidence on the issue as to authority. This Court also decided the case on the same ground. Had the matter rested there and had the Rani's suit been finally decided on the ground of estoppel only, the decision would have been on a ground personal to the Rani and would not have been binding on the reversioners."

This decision was affirmed in the Privy Council in Risal Singh v. Balwant Singh, AIR 1918 PC 87 (J). Their Lordships observed that

"the principle of law applicable to such a case was correctly applied by Mr. Banerji in his judgment in that case".

The decision in Chandrapati's suit being on a question which was personal to her, cannot operate as res judicata in the present case.

(13) I, therefore, allow this appeal, set aside the judgment and decree of the Court below and remit the case to that Court for trial of the other issues involved in the case. The costs here and hitherto shall abide the result.

G.M.J. Appeal allowed.

(S) AIR 1955 ALLAHABAD 546 (V 42 C 157 Oct.)

V. BHARGAVA J. (25-2-1955)

Pt. Bansgopal Tewari and others, Applicants v. State of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ Petn. No. 478 of 1954.

Constitution of India, Art. 14 — Estate abolition legislation — Territorial discrimination — (Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Ss. 2 and 10 — Notification No. 1830/IA-1063-53 — Validity).

The U. P. Zamindari Abolition and Land Reforms Act was extended to the area which was comprised in the erstwhile Banaras State on 13-6-1953 under Notification No. 1830 /IA-1060-53, with certain modifications. The modification of S. 10 when applying it to those areas which were comprised in the erstwhile Banaras State was beyond the scope of the powers of the Government of Uttar Pradesh under S. 2, U. P. Zamindari Abolition and Land Reforms Act and was also void as offending against Art. 14 of the Constitution. Consequently, Notification No. 1830/IA-1060-53, dated 30-6-1953, is quashed to the extent that it applies S. 10 to the territories of the former Banaras State as defined in the Banaras State (Administration) Order, 1949, with the modifications made in that Notification. (Paras 1, 7)

The course adopted by the State Government in doing away with the protection granted to persons assessed to local rates to the extent of the amount assessable on land revenue of Rs. 250/- or less must be held to be a modification which was not required by the different circumstances. This modification was in no way related to the difference in the manner of assessment of land revenue and local rates in the two areas. Further, the modification made by the Government of Uttar Pradesh when applying S. 10 was in no way required by the difference in the manner of acquiring or holding sir in the two areas. (Paras 3, 5)

Section 10 applies to sir alone and not to khudkasht and any modification made in it should be justified by difference in circumstances relating to sir rights paying no regard to khudkasht rights at all. (Para 6)

The result of applying S. 10 with the modification made by the Government of Uttar Pradesh is that intermediaries holding sir land in the erstwhile Banaras State paying the same amount of land revenue or assessed to the same amount of local rate would not acquire bhumidhari rights in their land, whereas their counterparts in the areas comprised in the district of Banaras would acquire such rights. This is clear discrimination between sets of persons similarly situated. (Para 7)

Sir holders of the erstwhile Banaras State areas paying Rs. 250/- or less as land revenue or assessed to local rate assessable on land revenue of Rs. 250/- or less in the erstwhile Banaras State did not acquire any bhumidhari rights at all in their sir land in which there were tenants of sir and lost those rights without any compensation by modification of S. 10. On the other hand, similar intermediaries in the State of Uttar Pradesh acquired bhumidhari rights. Their tenants of sir become adhivasis and subsequently if these adhivasis acquired bhumidhari rights or were granted rights of sirdar under the provisions of the U. P. Zamindari Abolition and Land Reforms Act or the U. P. Land Reforms (Amendment) Act, Act No. 20 of 1954, compensation was payable to the intermediaries for loss of their bhumidhari rights. (Para 7)

Anno: AIR Com., Const. of India, Art. 14 N. 15, 30, 39.

Ambika Prasad, for Applicants; N. D. Pant, Jr. Standing Counsel, for Opposite Parties.

ORDER : This petition under Art. 226 of the Constitution was originally filed by 19 persons who were all ex-intermediaries of the erstwhile Banaras State which merged with the State of Uttar Pradesh in November 1949. Subsequently the petition was amended and the names of 18 of the petitioners were removed leaving only one petitioner Markande Upadhya so that the petition has been heard on merits as a petition presented by him alone.

It appears that before the merger of the erstwhile Banaras State in the State of Uttar Pradesh, the rights of zamindars and cultivators in the State of Banaras used to be governed by the Banaras State Tenancy Act (Act 3 of 1949) which came into force on 1-10-1949. When the Banaras State was merged in the State of Uttar Pradesh, this Banaras State Tenancy Act (3 of 1949) continued to remain in force under clause 6 of the Banaras State (Administration) Order, 1949, not having been repealed by the Banaras Application of Laws Orders, 1949, and replaced by any Act which was already in force in the rest of the State of Uttar Pradesh. The petitioner at the time of merger held 87 bighas and 5 biswas of sir, his zamindari rights being those of a 'muafidar'. He also had 2 bighas and 13 biswas of khudkasht.

It is contended by the petitioner that the local rate assessed on him was below the amount which would be assessed on a land revenue of Rs. 250/-.

The U. P. Zamindari Abolition and Land Reforms Act was extended to the area which was comprised in the erstwhile Banaras State on 30-6-1953, under Notification No. 1830/I-A-1060-53, with certain modifications. Amongst the provisions of the U. P. Zamindari Abolition and Land Reforms Act which were modified was S. 10. In S. 10 as it applied to the State of Uttar Pradesh, every tenant of land recorded as sir of an intermediary who on the date immediately preceding the date of vesting was assessed in Uttar Pradesh to a land revenue of more than Rs. 250/- annually or where no land revenue was assessed, was assessed to a larger amount of local rate than would be payable on a land revenue of Rs. 250/- annually or in the case of an under-proprietor, sub-proprietor or permanent tenure-holder, the rent payable by whom was more than Rs. 250/- annually was to be deemed to be a hereditary tenant thereof at the rate of rent payable by him on the said date and such land was not for the purposes of S. 18 to be deemed to be sir. Under this provision, if the holder of the sir on the date immediately preceding the date of vesting was assessed to land revenue of Rs. 250/- or less, or, if no land revenue was assessed, he was assessed to an amount of local rate equal to or larger than the amount which would be payable on a land revenue of Rs. 250 annually, or in the case of an under-proprietor, sub-proprietor or permanent tenureholder the rent payable by him was Rs. 250 or less, the tenant of the sir of such sirholder did not acquire the rights of hereditary tenant. The sirholder himself became the bhumidhar of that land under S. 18 and the tenant of such sir land became an adhivasi under S. 20.

When applying the U. P. Zamindari Abolition and Land Reforms Act to the areas which were comprised in the erstwhile Banaras State, the State Government amended S. 10 so as to do away with this limitation on the acquisition of rights of a hereditary tenant by the tenant of the sir land. The result was that in those areas, irrespective of the land revenue payable by or local rate assessed on the intermediary or the rent payable by the under-proprietor, sub-proprietor or permanent tenure-holder, the tenant of his sir land became a hereditary tenant, the result being that the sirholder lost his rights as such and did not acquire bhumidhari rights under S. 18.

This modification in S. 10 affected the rights of the petitioner who was a sirholder in the areas previously comprised in the Banaras State. If S. 10 had been applied without any modification, the petitioner would have acquired the rights of a bhumidhar in his sir, which, as mentioned above, comprised 87 bighas 5 biswas; but as a result of the modification he was unable to acquire those rights.

It has been contended by the petitioner that this modification of S. 10 when applying it to those areas which were comprised in the erstwhile Banaras State was beyond the scope of the powers of the Government of Uttar Pradesh under S. 2, U. P. Zamindari Abolition and Land Reforms Act and further that this modification was void as offending against Art. 14 of the Constitution.

(2) Learned Junior Standing Counsel attempted to justify the modification of S. 10 on the basis of three circumstances which, according to him, required that this modification be made. These three circumstances are that the intermediaries in the areas comprised in the erstwhile State of Banaras were assessed to land revenue on a principle which was different from that applicable to assessment of land revenue on intermediaries in the rest of Uttar Pradesh.

The second was that the rights of a sirholder could be acquired in those areas in a manner different from the manner in which such rights could be acquired in Uttar Pradesh. The third was that in those areas the khudkast rights were different in nature from the khudkasht rights in Uttar Pradesh, inasmuch as in those areas there could be tenants of khudkasht without the rights of the khudkasht-holder getting extinguished whereas in Uttar Pradesh the rights of a khudkrasht-holder ceased as soon as a tenant was admitted in khudkasht land.

(3) There is no doubt that the differences pointed out in these three circumstances did exist but not in all cases. There were 'muafidars' in Uttar Pradesh as well as in the erstwhile Banaras State. The other intermediaries in Uttar Pradesh were of various classes but in most cases land revenue was assessed at settlements by fixing the amount at about 40 per cent. of the assets of the property owned by the intermediary subject to variations in special cases so that the range was from 35 per cent. to 40 per cent.

The Settlement Reports of Banaras and Punnets Manual, which summarises the laws that were applicable in the Banaras State, show that in that State the majority of intermediaries who were known as Manzuridars were assessed to land revenue at the rate of 80 per cent. of the assets. It thus appears that in Uttar Pradesh the majority of intermediaries were liable to pay between 35 to 45 per cent. of their assets as land revenue, whereas in the Banaras State they were liable to pay 80 per cent. of their assets as land revenue.

This distinction did exist, but learned counsel has failed to indicate how the particular modification in S. 10 became necessary as a result of this difference. In Uttar Pradesh sirholders paying Rs. 250 or less as land revenue were to retain their sir rights which were to be converted into the rights of bhumidhars. An intermediary in the State of Banaras would be almost in the same position as an intermediary in Uttar Pradesh paying Rs. 250 or less as land revenue if the land revenue payable by the former was Rs. 500 or less.

Consequently when applying S. 10, if the Government of Uttar Pradesh had changed the figure of Rs. 250 in S. 10 to Rs. 500 the modification would have been a modification required by the different circumstances prevailing in the two areas. Instead of increasing the figure, what the Government of Uttar Pradesh did was to do away altogether with the protection granted to the rights of sirholder who were paying Rs. 250 or less as land revenue.

The remarks apply 'mutatis mutandis' to the cases of 'muafidars' also who instead of being assessed to land revenue were assessed to local rates. Learned Junior Standing Counsel contended that there was nothing to show that the people in the areas which were comprised previously in the erstwhile State of Banaras were assessed to local rate at all. The fact whether an intermediary was or was not assessed to local rate has to be judged with reference to the date on which the U. P. Zamindari Abolition and Land Reforms Act was applied to those areas, which means 30-6-1953. Before that date, the U. P. District Boards Act had become applicable to those areas as also the U. P. Local Rates Act.

Section 109A had been introduced in the District Boards Act making provision for assessment

of local rates in the areas which were comprised in the merged State of Banaras, and this provision of law had also amended the U. P. Local Rates Act, 1914, so as to make it applicable in those areas. Local rates were, therefore, assessed in any case in June 1953 and consequently, in applying S. 10 to 'muafidars' in those areas the clause relating to assessment of local rate could have been acted upon and, in case the rate of local rates assessed was markedly different from the rate at which the local rates were assessed in other areas of Uttar Pradesh, modification could have been made to make proportionate adjustments in the figure.

Once again the course adopted by the State Government in doing away with the protection granted to persons assessed to local rates to the extent of the amount assessable on land revenue of Rs. 250 or less must be held to be a modification which was not required by the different circumstances. It is, therefore, clear that this modification was in no way related to the difference in the manner of assessment of land revenue and local rates in the two areas.

(4) So far as the second circumstance is concerned there is again no doubt that sir rights in the two areas could be acquired in different manner by some of the persons, but some other acquired sir rights in identically the same manner. For the intermediaries who acquired sir rights in exactly the same manner, no modification could be acquired by any circumstances as there were no different circumstances to which such modification could be related.

For this purpose it may be mentioned that acquisition of sir rights in Uttar Pradesh under Cl. (c) of S. 4, Agra Tenancy Act, 1926, which sir rights were continued under S. 6, U. P. Tenancy Act, 1939, was in exactly the same manner as acquisition of sir rights under Cl. (b) of S. 6, Banaras State Tenancy Act, 1949. Further, acquisition of sir rights under Cl. (a) of S. 4, Agra Tenancy Act, 1926, was very similar in manner to that laid down in Cl. (a) of S. 6, Banaras State Tenancy Act, 1949.

It is true that the manner of acquiring sir rights under Cl. (c) of S. 6, Banaras State Tenancy Act, 1949, was not identical with any manner of acquiring sir rights laid down in S. 4, Agra Tenancy Act, and this difference in the manner of acquiring sir rights could legitimately have been made the basis of a modification in S. 10 when applying it to the areas comprised in the erstwhile State of Banaras. But that modification should have been such as was necessitated by this difference.

I fail to see how the doing away with the protection of the rights of the sir-holders was in any way related to this difference. Some of the persons acquiring sir rights under Cl. (c) of S. 6, Banaras State Tenancy Act, 1949, may have acquired rights in the same manner in which some persons might have acquired sir rights under S. 4, Agra Tenancy Act, 1926, whereas in the case of some others there might have been a difference.

If a modification was to be made in applying S. 10, it is only for the latter class that the modification could be said to be required by the circumstances and could be justified. The modification actually made has no relation at all to these differences in the circumstances. Learned counsel also drew my attention to the proviso to Cl. (a) of S. 6, U. P. Tenancy Act, 1939, which placed a limitation on the extent of sir acquired under certain clauses of S. 4, Agra Tenancy Act, 1926.

That proviso only applied to persons paying more than Rs. 25 as local rate. Those would, therefore, generally be persons whose rights as sir-holders were not protected at all by S. 10, U. P. Zamindari Abolition and Land Reforms Act. The intermediaries covered by those provisos would be persons in whose cases all tenants of sir would acquire rights of hereditary tenants under S. 10 of the U. P. Zamindari Abolition and Land Reforms Act and therefore it is unnecessary to consider this proviso when dealing with the modification in S. 10 which only relates to intermediaries not covered by this proviso.

(5) Another point urged by learned counsel was that under the laws in force in the State of Uttar Pradesh if any intermediary held sir in excess of 50 acres in which there were tenants of sir, the sir to the extent of 50 acres would have to be demarcated in which the intermediary would retain his sir rights, whereas in the rest of the land the tenants of sir would acquire hereditary rights, and it was urged that there was no such provision in the Banaras State so that modification might have been necessary to make allowance for this difference.

Once again this argument fails because the particular modification made is not related to this circumstance. It is possible that if S. 10 had been so modified as to lay down that in the State of Banaras also there would be demarcation of sir if a sir-holder held sir to the extent of more than 50 acres and hereditary rights would accrue in the area exceeding 50 acres, that modification might have been justified by the different circumstances.

The modification now made is entirely different. Under this modification a sir-holder in the areas of the erstwhile Banaras State loses his sir rights and hereditary rights accrue to the tenant of sir even if the total area of sir held by the sir-holder was below 50 acres. It is clear, therefore, that the modification made by the Government of Uttar Pradesh when applying S. 10 was in no way required by the difference in the manner of acquiring or holding sir in the two areas.

(6) So far as khudkasht is concerned, it appears to be quite unnecessary to enter into this question at all. S. 10 applies to sir alone and not to khudkasht and any modification made in it should be justified by difference in circumstances relating to sir rights paying no regard to khudkasht rights at all. Thus none of the three circumstances relied upon by learned Junior Standing Counsel show that any modification was required by the circumstances and obviously therefore the modification of S. 10 was beyond the scope of the powers granted to the Government of Uttar Pradesh by S. 2, U. P. Zamindari Abolition and Land Reforms Act.

(7) The second ground that these modifications bring about discrimination between persons similarly situated and offend against Art. 14 of the Constitution is also clearly applicable for holding that these modifications are void. Areas comprised in the erstwhile Banaras State had adjoining to them areas comprised in the district of Banaras which was part of the State of Uttar Pradesh. There can be cases where people may have fields in adjoining areas and the intermediaries in those lands might have acquired sir rights in identically the same manner.

The result of applying S. 10 with the modification made by the Government of Uttar Pradesh is that intermediaries holding sir land in the erstwhile Banaras State paying the same amount of land revenue or assessed to the same amount of local rate would not acquire bhumidhari rights in their land, whereas their counterparts in the areas com-

prised in the district of Banaras would acquire such rights. This is clear discrimination between sets of persons similarly situated.

The classification of the persons as residents of the district of Banaras or residents of the erstwhile State of Banaras is in no way related to the purpose for which the discrimination has been made. The residence in these two different areas could not by itself be a ground for bringing about discrimination about protection of their sir rights and grant of bhumidhari rights in their sir lands.

Learned counsel also urged that as a result of the amendment of S. 20, U. P. Zamindari Abolition and Land Reforms Act and the enforcement of U. P. Land Reforms (Amendment) Act, 1954 (U. P. Act 20 of 1954), even the intermediaries in the areas which were previously in the State of Uttar Pradesh have been brought to the same position to which were relegated the sir-holders of the erstwhile Banaras State.

But an examination of the provision of law shows that this is not so. Sir-holders of the erstwhile Banaras State areas paying Rs. 250 or less as land revenue or assessed to local rate assessable on land revenue of Rs. 250 or less in the erstwhile Banaras State did not acquire any bhumidhari rights at all in their sir land in which there were tenants of sir and lost those rights without any compensation by modification of S. 10. On the other hand, similar intermediaries in the State of Uttar Pradesh acquired bhumidhari rights.

Their tenants of sir became adhivasis and subsequently if these adhivasis acquired bhumidhari rights or were granted rights of sirdar under the provisions of the U. P. Zamindari Abolition and Land Reforms Act or the U. P. Land Reforms (Amendment) Act, Act No. 20 of 1954, compensation was payable to the intermediaries for loss of their bhumidhari rights. These are the advantages that persons holding sir rights in the erstwhile Banaras State lost as a result of the modification.

This loss caused to them is in no way justified either on the ground that circumstances required the modification or on the ground that it was based on any reasonable classification related to the discrimination being brought about by the modification. In these circumstances it must be held that the Notification of the State of Uttar Pradesh to the extent that it applied S. 10 after modification to the areas comprised in the erstwhile State of Banaras is void and must be quashed.

Consequently Notification No. 1830/I-A-1060-53, dated 30-6-1953, is quashed to the extent that it applies S. 10 to the territories of the former Banaras State as defined in the Banaras State (Administration) Order, 1949, with the modifications made in that Notification. There is a further prayer for issue of a writ of mandamus directing the State of Uttar Pradesh not to realise rent from the tenants of the land which was recorded as sir of the petitioner.

No such writ appears to be necessary in view of the fact that the Notification on the basis of which such action was being taken by the State of Uttar Pradesh has been quashed. The petitioner shall be entitled to his costs from the opposite party No. 1 which I fix at Rs. 200.

K.S.B. Order accordingly.

AIR 1955 ALLAHABAD 549 (V. 42 C. 158 Oct.)

V. BHARGAVA J. (30-3-1955)

Swadeshi Cotton Mills Co. Ltd., Applicant v. State Industrial Tribunal, U. P. and others, Opposite Parties.

Civil Misc. Writ No. 591 of 1953.

(a) U. P. Industrial Disputes Act (28 of 1947), S. 4 — Notification under — Requirements — Specification of dispute.

When a dispute is actually referred, all that is required by S. 4 is that the matters referred should be specified. The specification may be made either by giving the details in that order itself, or, by making some earlier notification, which had already received adequate publicity, a part of the order referring the dispute. If the latter course is chosen, it has still to be held that the order, referring the dispute for adjudication, does specify the matters for adjudication. (Para 5)

(b) U. P. Industrial Disputes Act (28 of 1947), S. 3 — State Government considering it inexpedient to refer certain dispute for adjudication — State Government can refer same dispute subsequently.

The opinion as to the necessity or expediency for referring an industrial dispute for adjudication for one of the purposes mentioned in S. 3 has to be formed by the State Government at the time when the State Government decides to make a reference of the dispute for adjudication. It is impossible to contend that the necessity or expediency of making a reference of a particular industrial dispute must or will remain the same at all times because, at different times, different circumstances may exist. (Para 6)

It is really for the State Government to judge for itself, when forming its opinion whether there had been change of circumstances. It is even doubtful whether the State Government can be called upon to give in Court its reasons for changing its opinion and holding that it was necessary or expedient to refer the dispute for adjudication when it had held earlier, that it was not so. The correctness of such an opinion is not open to judicial scrutiny by Courts. AIR 1953 SC 53 and AIR 1954 All 538 (FB), Rel. on. (Para 6)

CASES REFERRED: Paras

(A) ('53) Writ Petns. Nos. 330 and 331 of 1953: (AIR 1955 NUC (All) 1732) 4, 6

(B) (V40) AIR 1953 SC 53: 1953 SCR 334 (SC) 6

(C) (V41) AIR 1954 All 538: 1954 All LJ 452 (FB) 6

R. S. Pathak and S. N. Kakkar, for Applicant; S. K. Verma and Advocate-General, for Opposite Parties.

ORDER: The Swadeshi Cotton Mills Company, Limited, Kanpur, filed this petition under Art. 226 of the Constitution, praying for the issue of a writ in the nature of 'prohibition' against opposite party 1, the State Industrial Tribunal, U. P., prohibiting it from proceeding further with the industrial dispute case No. 78 of 1953 pending before that Tribunal, a writ in the nature of 'certiorari' quashing the proceedings in that industrial dispute case and a writ in the nature of 'mandamus' against the State of Uttar Pradeh opposite party 5, directing it to withdraw its notification No. 2078 (LC)XVIII-LA-T-176/3(KR)/53 dated 25-6-1953, by which an industrial dispute between the petitioner company and opposite party 6, the Suti Mill Mazdoor Union, Kanpur, was referred for adjudication by the State of Uttar Pradesh to the State Industrial Tribunal, U. P.

(2) The case as put forward by the petitioner company, is that, on 7-11-1951, an illegal strike was commenced in the mills operated by the petitioner company. Thereupon the company warned the participants in the strike that it was

illegal and also informed them of the consequences that would follow this illegal strike. The strikers paid no heed to this warning nor to the advice given to them by the labour Inspector and the Labour Conciliation Officer and continued their strike up to 23-11-1951.

During this strike, acts of violence and unruly behaviour were committed. Work was resumed on the advice of the Labour Commissioner and then charge sheets were submitted against 55 workmen, who had taken part in the strike, for various acts of misconduct in connection with the strike. After written explanations had been submitted and an enquiry had been made, 30 workmen, who were adjudged guilty of various types of serious misconduct, were dismissed under the standing orders. The remaining 25 workmen were allowed to rejoin their duties after punishment under the standing orders.

Opposite party 6, the Suti Mill Mazdoor Union, Kanpur, then made a representation on behalf of those 30 dismissed workmen to the Conciliation Officer, Kanpur, stating that an industrial dispute had arisen as a result of the dismissal of those 30 workmen and asking for the constitution of a Conciliation Board. The Conciliation Board was constituted and it commenced its proceedings on 10-1-1952. No settlement having been arrived at, the Conciliation Board submitted its report to the State Government.

The Government of Uttar Pradesh sent for the representatives of the petitioner company and discussed the entire position with them. Thereafter in May 1952, the Government communicated its decision in writing, through the Labour Commissioner's office, to opposite party 6, intimating that the Government considered it inexpedient to refer the dispute for adjudication as no case had been made out. This decision was also communicated to the representatives of the petitioner company.

Subsequently, on 7-2-1953, opposite party 6 again applied to the Conciliation Officer for the constitution of a Conciliation Board for settlement of the same dispute. The proceedings for conciliation were commenced afresh and were continued despite the protest of the petitioner company that the repetition of the conciliation proceedings was not permissible when the matter had been finally disposed of about a year earlier.

Subsequently, the State Government issued a notification dated 25-6-1953, mentioned above and referred the industrial dispute for adjudication to the State Industrial Tribunal and, on 30-6-1953, the petitioner company received a notice from the State Industrial Tribunal, U. P. that 10-7-1953 had been fixed in the case. Subsequently the case was adjourned to 15-7-1953. On 13-7-1953, this petition was presented in this Court and, on 14-7-1953, an interim order was passed, prohibiting the State Industrial Tribunal U. P., from proceeding with case No. 78 of 1953 pending before it until further orders of this Court.

(3) The petition has been contested by all the opposite parties but no counter-affidavit has been filed on behalf of opposite parties 1 to 5. A counter-affidavit was filed only on behalf of opposite party 6, the Suti Mill Mazdoor Union, Kanpur, and, in reply to that counter-affidavit, a rejoinder affidavit was filed on behalf of the petitioner company.

Further, two amendment applications were presented by the petitioner company for adding new grounds, particularly, in view of subsequent general orders issued by the State Government in its notifications No. U-464(LL)/XXXVI-B-257(LL)-1954, dated 14-7-1954, and No. U. 686-(LL)/XXXVI(B)-257(LL)-1954 dated 8-9-1954. These amendment applications were allowed and the grounds added in them have, therefore, also to be considered.

(4) The main grounds, that were taken in this petition originally, are now all covered by a decision of a Division Bench of this Court in — 'British India Corporation, Limited, Kanpur v. The State Industrial Tribunal U. P.', Writ Petns. Nos. 330 and 331 of 1953: (AIR 1955 NUC (All) 1732) (A). The contention of the petitioner company that the reference to the State Industrial Tribunal U. P. was void because the general order dated 15-3-1951, constituting that Tribunal had no statutory force does not arise in view of that decision.

In fact, the decision in that case being applicable, it has to be held that, in this case also, there is now before the State Industrial Tribunal, U. P., a fresh reference with effect from 8-9-1954, of the Industrial dispute which is to be adjudicated upon in accordance with the notification dated 14-7-1954, mentioned above. The points, that are being held against the petitioner company on the ground that they have already been decided by the Division Bench of this Court in the cases referred to above, need not again be discussed by me. There are only two new points that have been urged by learned counsel before me in support of this petition and I proceed to deal with them alone.

(5) The first point, that has been urged by learned counsel, is that, according to the decision of the Division Bench in the writ petitions mentioned above, the dispute now pending before the State Industrial Tribunal, U. P., is a new dispute referred to that Tribunal by the notification of 8-9-1954, and that notification does not comply with the requirements of S. 4, U. P. Industrial Disputes Act, 1947, so that that notification is void. Under S. 4, U. P. Industrial Disputes Act, an order made under S. 3, referring an industrial dispute for adjudication must specify, as far as may be practicable, the matters, upon which adjudication is necessary or desired, provided that

(1) the State Government may, of its own motion or at the instance of the adjudicating authority, add to or amend or vary the matters so specified;

(2) the State Government may, with a view to specifying the said matter, direct the adjudicating authority to make a preliminary enquiry into the nature of the dispute and postpone specification for such time as may reasonably be required.

It is submitted on behalf of the petitioner company that the order of 8-9-1954 did not specify matters upon which adjudication was necessary or desired and, consequently, it did not comply with the requirements of S. 4 and was, therefore, void and ineffective. It appears to me that this contention of learned counsel for the petitioner company ignores the fact that the matter, upon which adjudication was necessary or desired, had been specified in the earlier notification dated 25-6-1953, by which the reference was made to the State Industrial Tribunal, U. P., for being adjudicated upon in accordance with the general notification dated 15-3-1951, and that that earlier notification must be read as a part of this later notification dated 8-9-1954.

The notification of 8-9-1954, did not separately mention the industrial disputes which were covered by that notification. It only stated that the disputes, which had been referred earlier to the State Industrial Tribunal under the notification of 15-3-1951, were to be deemed to be disputes referred under the general notification dated 14-7-1954.

It was held by the Division Bench in the cases cited above that this amounted to a fresh reference of those very disputes which had been referred earlier by the notifications issued under S. 3 for adjudication in accordance with the general notification dated 15-3-1951. The notification of 8-9-1954, has, therefore, to be read with all earlier notifications by which the disputes pending before the State Industrial Tribunal on 8-9-1954, had been referred to that Tribunal initially.

Those earlier notifications are, therefore, to be deemed to be parts of the notification of 8-9-1954. For the purpose of making an industrial dispute the subject matter of a fresh reference on 8-9-1954, the notification, of that date as well as the earlier notification, by which the dispute was originally referred to the State Industrial Tribunal, are to be treated as one single notification though they were published on different dates as different notifications.

They have to be read as one single notification. When a dispute is actually referred, all that is required by S. 4 is that the matters referred should be specified. The specification may be made either by giving the details in that order itself, or, by making some earlier notification, which had already received adequate publicity, a part of the order referring the dispute. If the latter course is chosen, it has still to be held that the order, referring the dispute for adjudication does specify the matters for adjudication.

There is, of course, no doubt that the earlier notification of 25-6-1953, did fully specify the industrial dispute that was referred for adjudication. A copy of that notification has been filed by the petitioner company before me. The notification began as follows:

"Whereas an industrial dispute in respect of the matter hereinafter specified exists between the concern....."

Later on, the notification lays down that

"The Governor is pleased to refer the said dispute to the Industrial Tribunal which shall adjudicate on the following issue....."

The matter of the dispute is described in the following words:

Whether the management of M/S Swadeshi Cotton Mills Co., Ltd., Kanpur have unjustly and or wrongfully dismissed the workmen given in the annexure? If so, to what relief are these workmen entitled?"

A reading of the whole of this notification shows that, in the opinion of the Governor, an industrial dispute existed and that particular dispute related to the subject-matter of the dispute mentioned at the end of the notification. Reference was, therefore, made to the existence of that dispute by using the words "an industrial dispute in respect of the matter hereinafter specified exists." That very dispute was referred for adjudication by using the words "The Governor is pleased to refer the said dispute to the Industrial Tribunal".

The issue that was to be adjudicated upon, was identical with the matter of dispute. There was, therefore, clear specification in that notification of the matter for adjudication which was identical with the industrial dispute, the existence of which was found by the State Government and which the State Government considered necessary to refer for some of the purposes mentioned in S. 3, U. P. Industrial Disputes Act.

When the notification of 8-9-1954, was, therefore, issued, that very specification became a part of that notification, making a fresh reference of that industrial dispute for adjudication in accordance with the general order dated 14-7-1954, and there is, therefore no question of non-compliance with the provisions of S. 4. Learned counsel referred me to a decision of learned Single Judge of this Court on the point that an industrial dispute need not be identical with the matter upon which adjudication was necessary or desired and, under S. 4, it is the matter upon which adjudication is necessary or desired, which has to be specified whenever a reference in respect of an industrial dispute is made.

Even after the reference, the specification of the subject-matter for adjudication can be added to, amended or varied which clearly indicates that there is some distinction between an industrial dispute and the subject-matter for adjudication.

This may be so in particular cases but, in the case before me, the notification of 25-6-1953, makes it perfectly clear that the only industrial dispute, that arose, was identical with the matter which was referred for adjudication and the specification in the notification, therefore, covered both the industrial dispute itself as well as the matter for adjudication. This having become a part of the notification of 8-9-1954, that order must also be read as having specified the industrial dispute as well as the matter for adjudication. There is, therefore, no invalidity in the reference which is now pending before the State Industrial Tribunal and the State Industrial Tribunal is competent to deal with it.

(6) The second point, that learned counsel has urged, is that, according to the petitioner company, the State Government, in May, 1952, once formed an opinion that it considered it inexpedient to refer the dispute for adjudication as no case had been made out. Subsequently, the State Government had no power or jurisdiction to change its view and make a reference by the notification of 25-6-1953. In this connection, attention must be paid to the language of S. 3, U. P. Industrial Disputes Act which lays down the circumstances under which an industrial dispute can be referred for adjudication.

The condition for a valid reference is that, in the opinion of the State Government, it must be necessary or expedient to do so for securing the public safety or convenience, or the maintenance of public order or supplies and services essential to the life of the community, or for maintaining employment. The opinion as to this necessity or expediency for one of the purposes mentioned above has to be formed by the State Government at the time when the State Government decides to make a reference of the dispute for adjudication.

It is impossible to contend that the necessity or expediency of making a reference of a particular industrial dispute must or will remain the same at all times because, at different times different circumstances may exist. At one time, it may not be necessary or expedient to refer a particular dispute for adjudication but, at a subsequent time, it may become necessary or expedient to do so, though the dispute may be the same.

In the affidavit filed in support of the petition, it was nowhere stated that circumstances had not changed between May, 1952, and June, 1953, the two relevant periods of time when the State Government held different views with regard to the expediency or necessity of referring the dispute for adjudication. There being no such averment in the affidavit filed in support of the petition, the State Government naturally did not file any counter-affidavit on the subject.

In the counter-affidavit filed on behalf of opposite party 6, there was an assertion that circum-

stances had changed and, in this connection, reference was made to the termination of some criminal case that was pending in May, 1952, and which concluded before February, 1953. In the rejoinder affidavit it was stated on behalf of the petitioner company that the termination of the proceedings in that criminal case was not relevant and did not change the circumstances.

The opinion of the petitioner company that those criminal proceedings were not relevant and their decision did not change the circumstances cannot be accepted. It was really for the State Government to judge for itself, when forming its opinion whether there had been change of circumstances. It is even doubtful whether the State Government could have been called upon to give in Court its reasons for changing its opinion and holding in June, 1953, that it was necessary or expedient to refer the dispute for adjudication when it had held in May, 1952, that it was not so.

The correctness of such an opinion is not open to judicial scrutiny by Courts, as held by the Supreme Court in — 'State of Madras v. C. P. Sarathy', AIR 1953 SC 53 (B). It was also held by a Full Bench of this Court in — 'Basti Sugar Mills Co. Ltd., v. State of Uttar Pradesh', AIR 1954 All 538 (C), that, in order to pass an order under S. 3, U. P. Industrial Disputes Act, the State Government is entitled to form its opinion on any or all material information available to it.

In the present case, the dispute had been raised afresh in February, 1953, by opposite party 6 and the criminal case, that had been pending, had been terminated and the Government had before it a fresh report of the Conciliation Board. On these materials, the State Government came to the opinion that it was necessary and expedient, for purposes mentioned in the notification of 25-6-1953, to refer that industrial dispute for adjudication. It cannot be said that this opinion was entirely capricious or arbitrary.

Whether the opinion was rightly formed or wrongly formed is not a question which can be gone into by this Court.

This was, therefore, a case where it was not a capricious or arbitrary revision of its previous opinion formed by the State Government in May, 1952. The Government had subsequent material before it and, on its basis it came to the opinion that it was necessary to make a reference of the industrial dispute for adjudication. The order of reference was, therefore, within the competence of the Government.

As was held by the Division Bench of this Court in Writ Petns. Nos. 330 and 331 of 1953 (All) (A), cited above, when the order of 8-9-1954, was passed, the State Government again formed the opinion afresh that it was necessary to refer this dispute once more for adjudication on that date and to lay down that it should be adjudicated upon in accordance with the order of 14-7-1954. The reference before the State Industrial Tribunal has, therefore, been competently made and the State Industrial Tribunal is competent to proceed with it.

(7) The petition fails and is dismissed with costs. Opposite Parties 1 to 5 shall get Rs. 250/- each as costs and Opposite Party 6 shall get Rs. 100/-/-.

V.B.B. Petition dismissed.

(S) AIR 1955 ALLAHABAD 552 (V. 42 C. 159 Oct.)

AGARWALA AND SAHAI JJ. (24-3-1955)

Ramesh Chandra, Objector-Appellant v. Seth Ghanshiam Dass, Defendant-Respondent.

Ex. First Appeals Nos. 78 and 79 of 1950 and 434 of 1951, against decree of Civil Judge, Aligarh, D/- 21-1-1950.

(a) Limitation Act (1908), Art. 182(2) — Appeal, whether should be against decree or order sought to be executed — (Civil P. C. (1908), S. 2(2)) — AIR 1948 Bom 337, Dissented.

The appeal mentioned in Col. 2 must have a direct and immediate connection with the decree or order which is sought to be executed. The appeal need not necessarily be from the very decree or order which is sought to be executed. It may be from an earlier decree or order which has merged in the decree which is sought to be executed. (Para 11)

A decree as defined in S. 2(2), Civil P. C., may be either preliminary or final or partly preliminary or partly final. The final decree, merely carries into fulfilment the preliminary decree passed in the suit. If an appeal from the preliminary decree succeeds, the final decree automatically falls to the ground. Therefore, the phrase "where there has been an appeal" must include an appeal from a preliminary decree, though the execution application relates to the final decree and if the application is within three years from the date of the decision in the appeal it is not barred by limitation although it is beyond the period of 3 years from the date of the final decree. 4 All 274 — AIR 1927 Pat 215 — AIR 1937 Mad 421 — AIR 1939 Mad 735 — 1943 All LW 40 — AIR 1932 PC 165, Rel. on. AIR 1927 Cal 904 — AIR 1950 SC 6, Distinguished. AIR 1948 Bom 337, Dissented. (Paras 12, 15)

Anno: AIR Com., Lim. Act, Art. 182 N. 34; C. P C., S. 2(2) N. 9.

(b) Civil P. C. (1908), S. 38 — Executing court if can go behind decree.

Where the final decree as passed in a suit for partition is against the defendant personally it has to be executed against him as such. The executing Court cannot go behind the terms of the decree. (Para 2)

Anno: AIR Com., C. P. C., S. 38 N 8.

CASES REFERRED: Paras

(A) ('82) 4 All 274: 1882 All WN 25 4
(B) (V14) AIR 1927 Pat 215: 6 Pat 780 6
(C) (V24) AIR 1937 Mad 421: 171 Ind Cas 980 6
(D) (V26) AIR 1939 Mad 735: ILR (1939) Mad 528 6
(E) ('43) 1943 All LW 40 6
(F) (V19) AIR 1932 PC 165: 59 Ind App 283 (PC) 7
(G) (V35) AIR 1948 Bom 337: ILR (1948) Bom 521 9
(H) (V14) AIR 1927 Cal 904: 54 Cal 1052 9
(I) (V37) AIR 1950 SC 6: 1950 SCR 25 (SC) 10

N. P. Asthana and K. B. Asthana, for Appellant; Govind Dass, for Respondent.

AGARWALA J.:

This is a judgment-debtor's appeal arising out of execution proceedings. A preliminary decree for partition of certain joint family property was passed on 18-5-1933 against the appellant and his father. They filed an appeal to the High Court which was dismissed on 30-3-1939. They went up to the Privy Council in appeal. The appeal was, however, dismissed with costs on 6-4-1948. During

the pendency of the appeal to the Privy Council the trial court passed the final decree on 28-4-1945. This decree was against the appellant alone as his father Basdeo Sahai had died during the pendency of the appeal in the Privy Council.

The decree directed a partition of the immoveable property in suit, and also awarded to the plaintiff a certain amount to be paid by the appellant. An execution application to execute the final decree was made on 9-9-1949 as against the appellant and the prayer was to realise the amount decreed by attachment and sale of the personal property of the appellant. The execution application was obviously within three years of the decision of the appeal from the preliminary decree by the Privy Council, but beyond three years of the date of the final decree.

Ramesh Chandra objected to the execution of the decree on several grounds out of which we are concerned only with two in the present appeal, namely that the execution application was barred by time as it was made more than three years after the date of the final decree and that the decree could not be executed against the personal property of Ramesh Chandra, judgment-debtor. These objections were dismissed by the court below and the judgment-debtor has now come up in appeal to this Court.

(2) So far as the objection regarding the execution of the decree against the personal property of Ramesh Chandra is concerned, the execution Court is bound by the terms of the decree and cannot go behind them. The decree as passed was against the appellant personally. It has, therefore, to be executed against him as such.

(3) As regards the objection that the execution application was barred by time, the point to be decided is whether the starting point of time for computing the period of limitation for execution of a final decree in a suit can be the date of the order of the appellate court in an appeal not from the final decree itself but from the preliminary decree. There appears to be a conflict of authority in India on the point. The matter is governed by the provisions of Art. 182, cl. (2), Limitation Act. Article 182 runs as follows :

1	2	3
"For the execution of a decree or order of any Civil Court not provided for by Art. 183 or by S. 48 of the Code of Civil Procedure, 1908 (V of 1908)—	Three years; or, where a certified copy of the decree or order has been registered, six years,	(1) The date of the decree or order, or (2) (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal."

The normal starting point for the period of limitation for the execution of a decree or order is the date of the decree or order, but the starting point in a case in which there has been an appeal, is the "date of the final decree or order of the appellate Court."

(4) In clause (2), the words used are simply "where there has been an appeal", and it is not indicated as to whether the appeal is to be from the decree or order sought to be executed or from some other decree or order. No doubt the appeal obviously has to be in the very suit or proceeding in which the decree or order sought to be executed was passed and an appeal wholly unconnected with the order or decree sought to be executed cannot obviously have been intended.

The language of Art. 182(2) is word for word the same as it was under the Limitation Act 15 of 1877 and under that Act in — 'Narsingh Sewak Singh v. Madho Das', 4 All 274 (A) a Division Bench of this Court expressed the opinion that the words "where there has been an appeal" in cl. (2) of Art. 179 of the Act XV of 1877, did not contemplate only an appeal from the decree or order from which execution was sought, but included, where there had been a review of judgment on which such decree was based, an appeal from the decree passed on such review. It was observed that an appeal contemplated in that clause was an appeal in the suit and not necessarily an appeal from the decree which was sought to be executed.

(5) The Limitation Act 1877, was replaced by Act 9 of 1908. Several amendments were made in Art. 182, e.g. clauses (4) and (6) were newly added, clause (4) of the old Act which is now cl. (5) of the new Act appears in a modified form, and clause (5) of the Act of 1877 has been omitted, but no change whatsoever has been made in clauses (1), (2) and (3). They are word for word the same.

(6) The Legislature is deemed to know the interpretation put upon its Acts by the Courts. The meaning put upon the phrase "where there has been an appeal" in cl. (2) by a Division Bench of this Court must be deemed to have been known to the Legislature and the fact that it did not amend the clause shows that the Legislature accepted the interpretation put upon it by this Court. In — 'Somar Singh v. Deonandan Prasad Singh', AIR 1927 Pat 215 (B) the facts were similar to the facts of the present case.

There also an execution application was made within three years of the date of dismissal of an appeal from a preliminary decree, though beyond three years of the date of the final decree. It was held that the application for execution of the final decree was within time. The learned Judges observed that

"where there has been an appeal" in cl. (2) of Art. 182 do not mean that the appeal must be against the decree sought to be executed, but imply that if there has been an appeal which in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed."

This view was followed by a single Judge of the Madras High Court in — 'Koyakutti v. A. Veerankutti', AIR 1937 Mad 421 (C) which was affirmed in Letters Patent Appeal by a Division Bench of that Court, vide — 'Veeran Kutti v. Koya Kutti', AIR 1939 Mad 735 (D). These cases were followed by a learned single Judge of this Court in — Mst. Bugian v. Chhotey Lal', 1943 All LW 40 (E).

(7) In — 'Nagendra Nath v. Suresh Chandra', AIR 1932 PC 165 (F). The Privy Council, in dealing with the phrase "where there has been an appeal" observed;

"There is no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide.

It is at least an intelligible rule that so long as there is any question sub-judice between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may

lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court."

(8) In the case before the Privy Council, there was an appeal from a portion of the decree which was sought to be executed and, in the result of which the judgment-debtors were not interested, as it was a dispute between two decree-holders. Yet both these grounds were held by the Privy Council not to affect the starting point of limitation for an application for the execution of the decree. No doubt the Privy Council case is not exactly on all fours with the present case because in that case the appeal was against the very decree which was sought to be executed. But the reasoning upon which the judgment was based, applies with full force to the facts of the present case.

(9) A different view, however, has been taken by the Bombay and the Calcutta High Courts. In — 'Mahadeo Bhimashankar v. Fatumiya Huseinbhai', AIR 1948 Bom 337 (G) where the learned Judges relying upon some earlier decisions of that Court held on facts similar to those in the present case that the starting point of limitation for an execution application was the date of the final decree and not of the final order passed in the appeal against the preliminary decree.

The reasoning of the learned Judges is simply this that the appeal referred to in cl. (2) must have reference to the decree or order mentioned in Col. 1. In — 'Fakir Chand v. Daiba Charan', AIR 1927 Cal 904 (H), the facts were that there was an application to set aside an ex parte decree which was sought to be executed. This application was dismissed and the appeal from the dismissal of the application was also dismissed. It was held that the period of limitation started not from the dismissal of the appeal, but from the date of the ex parte decree. It was observed that

"An application to set aside a decree does not 'keep the decree open', and is not to be regarded as an appeal from the decree itself."

It was further observed that the words "where there has been an appeal" mean "where there has been an appeal from the decree which is sought to be executed." These words have to be taken in the context in which they were used, namely in connection with an appeal from the dismissal of an application to set aside the decree which was sought to be executed. An appeal from the dismissal of an application to set aside a decree is clearly a collateral proceeding and the question in such a proceeding is not whether the decision which resulted in the decree which was sought to be executed was sound or unsound. It can, therefore, be properly said that the decision of the Calcutta High Court is distinguishable.

(10) It has recently been held by the Supreme Court in — 'Bhawanipore Banking Corporation Ltd. v. Gouri Shankar', AIR 1950 SC 5 (I) that the expression "where there has been an appeal" must be read with the words in col. 1, Art. 182, viz., for the execution of a decree or order of any civil Court, and that, however broadly we may construe it, it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct or immediate connection with the decree under execution."

The case before the Supreme Court was one in which it was attempted to compute the period of limitation for an application for execution of a decree from the date of the dismissal of an application for the restoration of an appeal against an order refusing to restore a suit dismissed in default. That was also therefore, a case of a collateral proceeding and is distinguishable from the present case.

(11) It appears to us that the true view as to the effect of clause (2), Art. 182 may be stated as follows:

(1) that the words "where there has been an appeal" must be read with the words in col. 1 of Art. 182, viz. "for the execution of a decree or order of any civil Court . ." that is to say, that the appeal mentioned in col. 2 must have a direct and immediate connection with the decree or order which is sought to be executed and

(2) that the appeal need not necessarily be from the very decree or order which is sought to be executed. It may be from an earlier decree or order which has merged in the decree which is sought to be executed.

(12) A decree is defined in S. 2(2), Civil P. C. as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." This may be either preliminary or final or partly preliminary or partly final. A decree is preliminary when further proceedings have to be taken when the suit can completely be disposed of.

It is final when such adjudication completely disposes of the suit. The final decree, therefore, merely carries into fulfilment the preliminary decree passed in the suit. If an appeal from the preliminary decree succeeds, the final decree automatically falls to the ground for the reason that it is based upon the preliminary decree and is merely a superstructure upon it which must fall when the base is taken away. We think that the phrase "where there has been an appeal" must include an appeal from a preliminary decree, though the execution application relates to the final decree.

(13) It would indeed be futile to hold that the starting point of limitation for an application for the execution of a final decree should not be taken from the date of the decision of an appeal from the preliminary decree, because the decree-holder could very well apply for the preparation of a fresh final decree in which case undoubtedly the starting point of limitation would be the date of the fresh final decree and the execution application would not be time barred.

(14) For all these reasons, therefore, the view taken by the Bombay High Court does not with respect, appeal to us.

(15) We, therefore, hold that the execution application in the present case was not barred by limitation. In the result, this appeal is dismissed with costs.

M.K.S. Appeal dismissed.

(S) AIR 1955 ALLAHABAD 554 (V 42 C 160 Oct.)

MOOTHAM C. J. AND AGARWALA J.

(11-4-1955)

Ziaullah Khan and another, Applicants v. State of Uttar Pradesh and another, Opposite Parties.

Civil Misc. Writ No. 1002 of 1954.

Constitution of India, Art. 245 — Delegated legislation — Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), S. 2 — Notifications under, Nos. 3168 and 3169 — Validity.

Where the legislature has passed an Act and empowered a responsible authority to extend that particular Act to a specified locality with such modi-

fications and alterations as the necessities of the situation may require and to repeal those existing laws only which would impliedly stand repealed when the Act is so extended, the delegation of the power to repeal existing laws in these circumstances cannot be said to be ultra vires.

Held, that the modifications made by the Notifications Nos. 3168 and 3169 while extending the U. P. Act 1 of 1951 to Rampur district did not amount to an alteration affecting the substance, that is, the essential nature of the impugned enactment. Nor the provision regarding the repeal of certain laws already in force in the former territories of Rampur is unconstitutional; for, the notification in repealing the Acts does nothing more than express what was implicit in the situation.

A repeal of this nature is not in reality a repeal by any act of the delegate but by the Act of the legislature itself. Hence, the Notifications are not ultra vires the State Government. AIR 1954 SC 465, Foll. AIR 1951 SC 332, Dist. and Expl. (Paras 13, 17)

CASES REFERRED : Paras

(A) (V41) AIR 1954 SC 465: 1954 Cri LJ 1322 (SC) 13

(B) (V38) AIR 1951 SC 332: 1951 SCR 747 (SC) 14, 15, 17

Hari Swarup, for Applicants; Standing Counsel, for Opposite Parties.

AGARWALA J. :

This is a petition under Art. 226 of the Constitution by two jagirdars of certain villages in the territories formerly forming part of the State of Rampur and now part of the State of Uttar Pradesh. The jagirdars had to pay no land revenue to the State and paid only a cess called the Chaukidara Tax. They were proprietors of the land comprised within their respective jagirs.

(2) The State of Uttar Pradesh passed an Act, called the U. P. Zamindari Abolition and Land Reforms Act, 1950 (Act I of 1951) which came into force on 26-1-1951. The Act did not apply in the first instance to the territories formerly forming part of the State of Rampur, now the District of Rampur, but S. 2 of the Act empowered the State Government to extend the Act to the district of Rampur "subject to such exceptions or modifications, not affecting the substance" as the State Government may, by notification, specify in this behalf. The proviso to S. 2 lays down:

"Provided that, when this Act or its provisions are so extended to such areas or estates, with or without exceptions or modifications, so much of any Act or Regulation in force therein as is consistent with this Act or the provisions so extended or with any modifications made therein, shall be deemed to have been repealed."

In exercise of the powers thus conferred upon the State Government by S. 2 of the Act, the State Government issued two notifications: (1) No. 3168, dated 30-6-1954, whereby the U. P. Zamindari Abolition and Land Reforms Act was extended, subject to the modifications and amendments mentioned in a Schedule appended to the notification, to the Rampur district and (2) No. 3169 dated 1-7-1954, whereby the vesting order under S. 4, Zamindari Abolition and Land Reforms Act 1 of 1951 was made in exercise of the powers conferred by sub-s. (1) of S. 4 of the Act.

The result was that all the estates situate in the former Rampur State excluding the estates owned by the State Government and certain other estates became vested in the State of Uttar Pradesh free from all encumbrances.

(3) The main point for consideration in this petition is whether the Notifications mentioned above are ultra vires the State Government and are invalid or not.

(4) The validity of Notification No. 3168 is challenged on two grounds:

(1) that the modifications made by it (as specified in the schedule) in the original U. P. Zamindari Abolition and Land Reforms Act, as extended to the former Rampur State, affect the "substance" of the enactment, and

(2) that the provisions in the aforesaid schedule whereby certain laws already in force in Rampur have been repealed are ultra vires on the ground that the power of repeal could not be delegated by the Legislature nor could be exercised by the delegate.

(5) As regards the second notification it is alleged that if the first is invalid, this also must be held to be invalid.

(6) As regards the first objection, it was at first urged that most of the amendments as set out in the schedule in the notification were of substance, but later on learned counsel confined his arguments to three amendments only, namely those made in S. 3(8), S. 44 and S. 32 of the original Act. Before we deal with these amendments it is desirable to examine the scope of the expression "not affecting the substance" occurring in S. 2(1) of the Act. Section 2(1) runs as follows:

"The State Government may by notification in the Gazette apply the whole or any provision of this Act to any of the following areas or estates subject to such exceptions or modifications, 'not affecting the substance', as the circumstances of the case may require."

'Substance' means "essential nature, essence; that which constitutes an essence of a thing; the essential part", (see the New English Oxford Dictionary). Therefore the restriction imposed upon the exceptions and modifications which the State Government is authorised to make is that the modifications and restrictions should not amount to an alteration of the essential nature of the enactment or the provision in question.

(7) We now consider the amendments objected to on behalf of the applicants. We begin with S. 3(8) which defines the word 'estate'.

(8) The definition of the word 'estate' in that section is as follows :

"'estate' means the area included under one entry in any of the registers prepared and maintained under clause (a), (b), (c), or (d) of section 32 of the United Provinces Land Revenue Act, 1901 or in the registers maintained under clause (e) of the said section in so far as it relates to a permanent tenure holder and includes a share in or of an estate."

The meaning of the word "estate" as amended by Notification No. 3168 is as follows :

"'estate' means the area included under one entry in any of the registers prepared and maintained under clause (a) or (b) of section 27 of the Qanun Malguzari Arazi Riyasat Rampur, 1932. other than one in respect of a rent free grant, and includes a share in or of an estate."

It will be noticed that the only modifications are (1) that in place of the registers mentioned in clauses (a), (b), (c) or (d) of S. 32, U. P. Land Revenue Act, 1901, the registers mentioned in clauses (a) and (b) of S. 27 of the Qanun Malguzari Arazi Riyasat Rampur, 1932, have been substituted, (2) that rent free grants have been excluded, and (3) that permanent tenure holders who are mentioned in the registers mentioned in clause (e) of S. 32 of the U. P. Land Revenue Act, 1901 are not mentioned in the modified S. 3(8).

(9) These three modifications are really consequential modifications and not of any substance. Clauses (a) to (d) of S. 32 of the U. P. Land Revenue Act correspond to clauses (a) and (b) of S. 27 of the Rampur Land Revenue Act. Revenue free grantees will not fall under clauses (a) and (b) of S. 27 of the Rampur State Act but they have been mentioned in the modified section by way of precaution and involve no change in the original section. The permanent tenure holders mentioned in cl. (e) of S. 32 of the U. P. Land Revenue Act do not seem to exist in Rampur and therefore mention of them has been omitted in the modified section.

(10) We next take up the amendments in S. 44 of the original Act. Section 44 deals with the method of calculating the net assets of an intermediary whose estate has vested in the State. Under the original section one of the items of expenditure to be deducted out of the gross income of an estate is the cost of management and irrecoverable arrears of rent which together are taken to be equal to fifteen per centum of the gross assets.

By the Notification in question this has been changed in to "twenty five per cent of the difference between the gross assets and the deduction to be made under cl. (a)." The deduction to be made in cl. (a) of the original section refers to the land revenue or rent payable to the superior land-holder on account of land revenue or rent and cesses or local rates. This amendment does involve some change but not a change to the detriment of the intermediary. Whatever change it involves is for his benefit.

Fifteen per cent of the gross assets is very nearly the same as twenty-five per cent. of the gross assets minus the land revenue or rent payable to the superior landlords, and cesses and local rates. The land revenue in U. P. amounts to between 40 to 50 per cent. of the gross assets. Now if the land revenue is 40 per cent. of the gross assets, then 25 per cent of 60 per cent is equal to 15 per cent of the gross assets. If land revenue is 50 per cent then 25 per cent of the balance will be 12½ per cent. Cesses or local rates are usually 10 per cent of the land revenue.

If this amount is further deducted from the gross assets, the cost of management and irrecoverable arrears of rent will be still less, with the result that the amount payable to the intermediary will increase. A change which is for the benefit of the applicants themselves cannot be made a ground of attack against the validity of the Notification.

(11) Let us now take up S. 132. This section describes land in which sirdari rights shall not accrue to erstwhile tenants. The petitioners are not tenants but are jagirdars or proprietors, and being intermediaries have acquired 'bhumidhari' rights and not 'sirdari' rights. The provisions regarding 'sirdari' rights do not affect them. It is, therefore, not necessary to consider whether the modification made in S. 132 are substantial or not.

(12) At one stage of the arguments a grievance was made to the effect that the Notification makes a change in certain dates mentioned in the original Act. By S. 22 of the original Act, a variation in rent on or after 1-7-1948, was not to be recognised; in S. 23 of the original Act, a transfer by way of sale or gift made after 1-7-1948, was not to be recognised, in S. 37 a partition made on or after 8-8-1946, and in S. 77 a waqf, trust or endowment created on or after 8-8-1946 are not to be recognised. Both these dates have been altered to 1-12-1949.

This modification was necessary because it was on 1-12-1949 that the States' Merger (United Provinces) Order which amended the States' Merger (Governor's Provinces) Order was passed. By the amendment Rampur was included in the list of States to which the latter order became applicable. Obviously, it was the intention that nothing done before the State of Rampur was merged in a Governor's Province should be invalidated and the continuance of the dates 1-7-1948 and 8-8-1946 would have been most inequitable so far as the territories included in the former State of Rampur were concerned.

A change in the dates is not, therefore, a change of substance within the meaning of S. 2 of the original Act but is a change which was necessitated by the circumstances affecting the territories to which the Act has been extended.

(13) This brings us to the point whether the provision regarding the repeal of certain laws already in force in the fromer territories of Rampur is unconstitutional or not. The Notification repeals the following Acts :

1. Qanun Malguzari Arazi Riyasat Rampur 1932,
2. Qanun Kabza Arazi Riyasat Rampur 1937, and
3. Qanun Tahaffuz Jagir Wa Muafiyat 1938.

The repeal of these Acts became necessary because of the extension of the U. P. Abolition of Zamindari and Land Reforms Act to the territories to the former Rampur State. These Acts could not be retained after the aforesaid Act had been extended to those territories, as they were wholly inconsistent with the latter Act. Even if the Notification had not expressly repealed these Acts, they would have been deemed to have been repealed by the very fact of the extension of the U. P. Abolition of Zamindari and Land Reforms Act to the said territories.

This kind of repeal has been expressly provided for in the proviso to S. 2 of the Act already quoted. The notification in repealing the Acts mentioned above does nothing more than express what was implicit in the situation. A repeal of this nature is not in reality a repeal by any act of the delegate but by the act of the legislature itself. As was observed by the Supreme Court in Harishanker Bagla v. State of Madhya Pradesh AIR 1954 S.C. 465(A) with reference to S. 6 of the Essential Supplies (Temporary Powers) Act, 1946:

"The repeal is not by any act of the delegate, but the repeal is by the legislative act of the Parliament itself. By enacting Section 6, Parliament itself has declared that an Order made under S. 3 shall have effect notwithstanding any inconsistency in the Order with any enactment other than this Act. This is not a declaration made by the delegate but by the legislature which has declared its will that way in S. 6.

Parliament being supreme it certainly could make a law abrogating or repealing by implication provisions of any pre-existing law and no exception could be taken on the ground of excessive delegation to the act of the Parliament itself. There is thus no delegation involved in the provisions of S. 6 at all and that section could not be held to be unconstitutional on that ground."

The above observations apply, 'mutatis mutandis', to the proviso to S. 2 of the U. P. Abolition of Zamindari and Land Reforms Act and the repeal made by means of the notification aforesaid.

(14) On general principles it may be stated that the very fact that the legislature has permitted the delegate to extend the Act to a specified particular area implies the repeal or amendment of

those existing laws which would be in conflict or inconsistent with the Act so extended. A repeal or alteration of existing laws which is necessitated by the extension of a new Act to a particular area is not by the Act of the delegate but by the legislature itself which authorized the extension, and this sort of delegation was not prohibited by the Supreme Court in — In re, Art. 143, Constitution of India and Delhi Laws Act, 1912 etc. AIR 1951 S.C. 332 (B).

In that case by S. 2 of the Part 'C' States (Laws) Act, 1950, Parliament had authorised the Government to extend to any part 'C' State, with such restrictions and modifications which it thought fit.

"any enactment which is in force in a Part A State at the date of the notification and provision may be made in any enactment so extended for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part 'C' State."

It will be observed that in S. 2 of the Part 'C' States Laws Act, 1950, the power of repeal or amendment of any corresponding law was not restricted to a consequential repeal or amendment, or in other words it was not restricted to any repeal or amendment which would impliedly occur on the ground that it was inconsistent with the newly extended law. The power conferred on the Central Government was wide enough to cover a case in which the Central Government could repeal or amend any corresponding law whether the repeal or amendment was consequential or not.

(15) Moreover in the Delhi Laws Act case it was considered that the Legislature had not made clear its legislative policy in respect of repeal of existing laws, but had invested the executive with the power to replace any of the laws in force in a particular territory by bringing in any of the laws prevalent in other territories. As Mukerjee J. observed in this connection.

"To repeal or abrogate an existing law is the exercise of an essential legislative power, and the policy behind such act must be the policy of the legislature itself. If the Legislature invests the executive with the power to determine as to which of the laws in force in a particular territory are useful or proper and if it is given to that authority to replace any of them by laws brought from other provinces with such modifications as it thinks proper, that would be to invest the executive with the determination of the entire legislative policy and not merely of carrying out a policy which the legislature has already laid down..... The Executive Government is given the authority to alter, repeal or amend any laws in existence at that area under the guise of bringing in laws there which are valid in other parts of India."

It was in these circumstances that it was held by the majority of Judges constituting the Bench of the Supreme Court which decided the Delhi Laws Act case (B) that the power of repeal or amendment was ultra vires.

(16) In the present case, however, the legislature had laid down its entire legistative policy. It has enacted a law complete in itself and has merely empowered the executive to extend that particular law and no other to a specified locality (with consequential exceptions and modifications suitable to the locality) and the power of repeal vested in the executive is limited to consequential repeals only. In a case of this kind, therefore, it cannot be said that the Legislature has invested the executive with the power to determine the entire legislative policy.

(17) In our judgment the rule laid down in the Delhi Laws Act case (B) cannot be applied to cases where the legislature has passed an Act and empowered a responsible authority to extend that particular Act to a specified locality with such modifications and alterations as the necessities of the situation may require and to repeal those existing laws only which would impliedly stand repealed when the Act is so extended.

The delegation of the power to repeal existing laws in these circumstances cannot be said to be ultra vires.

(18) We are, therefore, of opinion that the modifications in question cannot successfully be challenged by the petitioners as ultra vires. This petition accordingly fails and is dismissed with costs.

H.G.P. Petition dismissed.

(S) **AIR 1955 ALLAHABAD 557 (V 42 C 161 Oct.)**

MUKERJI AND MEHROTRA JJ. (29-4-1955)

Kishan Singh, Applicant v. Board of Revenue, U. P. at Allahabad and others, Opposite Parties-Respondents.

Civil Misc. Writ. Appln. No. 449 of 1954.

(a) Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 275(c) — Decision by Assistant Commissioner as to payment of rent — Interference in revision — (Civil P. C. (1908), S. 115(c)).

Where the Assistant Collector in appeal, on a consideration of the evidnce before it, reaches the conclusion that certain payments of rent to the Zamindar, as alleged by opposite parties, were not proved, it cannot be said that he has committed either any error of procedure or any material irregularity in the manner in which he reached that conclusion.

A contrary decision arrived at by the Commissioner in revision on the evidence is really an interference on a question of fact which, in the opinion of the Commissioner, was erroneously decided by the Assistant Collector. It is not an interference on any matter of procedure and such an interference is not contemplated by the provisions of S. 275(c). (Para 8)

Anno : AIR Com., Civil P. C., S. 115 N. 12, 13.

(b) Constitution of India, Art. 226 — Certiorari — Error on face of record — Power of superior Court to disturb decision of inferior Court on question of jurisdiction — Board of Revenue erroneously entertaining and allowing revision under S. 275, U. P. Tenancy Act — Decision whether can be quashed by writ of certiorari under Art. 226 — (Tenancy laws — U. P. Tenancy Act (17 of 1939), S. 275).

The power of the High Court to issue a writ of certiorari is not confined to the grounds where the subordinate Court has acted without jurisdiction or in excess of its jurisdiction but also on the ground that there is an error of law apparent on the face of the record.

If a certain order passed by the subordinate tribunal gives the reasons for the decision, that is to say, it is a speaking order as it is termed by English Courts, then it is open to the High Court, in the exercise of its power under Art. 226 of the Constitution, to scrutinise the reasoning of the subordinate tribunal so far as can be done without going outside the order itself, examine it and if the Court finds that the reasons are manifestly wrong on a question of law and the conclusions arrived at by the Courts below are apparently erroneous, then it is open to the High Court to exercise its jurisdiction under Art. 226 of the Constitution and quash such a decision. (S) AIR 1955 SC 233, Rel. on; (S) AIR 1955 All 131, Ref. (Para 11)

The question whether a matter is to be decided by a subordinate Court as an issue in the case and as such relating only to the exercise of its jurisdiction or it is a matter on which the jurisdiction itself depends and is collateral to the exercise of the jurisdiction is a question which can be determined on the language of the section under which the Court has been constituted or has been given the power to entertain and decide a matter.

(Para 17)

Under S. 275, U. P. Tenancy Act the Board of Revenue can only interfere with an order passed by the subordinate Court if the grounds enumerated in Cls. (a) to (c) of the said section exist. It is a conditional jurisdiction exercisable by the Board of Revenue. Any decision by the Board of Revenue as to the existence or non-existence of conditions mentioned in the section is not a decision on any issue in the case which the Board had to decide.

It is a decision with regard to the existence or non-existence of the conditions on which its jurisdiction depended and any decision by the Board, whether explicit or by implication, on this point can be looked into by the High Court in the exercise of its writ jurisdiction and if the Court is of opinion that the Board of Revenue has exceeded its power of interference with the order of the Assistant Collector, on grounds not permissible under S. 275, then such a decision can be interfered with by the High Court: Case law Ref.

(Para 17)

Anno: AIR Com., Const. of India, Art. 226 N. 168, 171.

CASES REFERRED: Paras

(A) (V35) AIR 1948 Nag 258: ILR (1948) Nag 16 (FB) 8

(B) (V42) (S) AIR 1955 SC 233: 1955 SCJ 267 (SC) 10

(C) (1951) 1951-1 KB 711: 1951-1 TLR 270 10

(D) (1952) 1952-1 KB 338 : 1952-1 All ER 122 10, 12

(E) (V42) (S) AIR 1955 All 131: 1955 All LJ 244 11

(F) (1878) 4 AC 30 : 48 LJ MC 65 12

(G) (V40) AIR 1953 All 260 : ILR (1953) 1 All 877 12, 14

(H) (V39) AIR 1952 SC 319 : 1952 SCR 696 (SC) 12, 17

(I) (V40) AIR 1953 All 531 : ILR (1954) 1 All 198 13

(J) (V41) AIR 1954 All 497 : 1954 All LJ 259 (FB) 15

(K) (V8) AIR 1921 Cal 34: 48 Cal 138 (FB) 17

Harish Chandra Sharma, for Applicant; Standing Counsel, for Opposite Party 1 and S. B. L. Gaur, for Opposite Parties 2 to 4.

MEHROTRA J.:

This is an application under Art. 226 of the Constitution praying that a writ of certiorari be issued to the opposite party quashing the order of the Board of Revenue dated 2-2-1954. It is necessary to give certain facts in order to appreciate the grounds raised in the petition. Lala Ram Kishore, who is opposite party No. 5 to the present petition, was a zamindar and landholder of the disputed plots, mentioned in the petition, and Karan Singh, father of opposite parties Nos. 2 to 4 in the present petition, was the hereditary tenant of the said plots.

(2) A suit was brought by Ram Kishore against Karan Singh under S. 163, U. P. Tenancy Act, for arrears of rent in respect of the disputed plots. In the said proceedings, it was found that Karan Singh had not paid the rent and therefore he was ordered to be ejected u/s. 165 on 1-6-1942. Possession was obtained by Ram Kishore over the plots in pursuance of the aforesaid order. After obtaining possession Ram Kishore let out the land to the applicant Chaudhary Kishan Singh. After the coming into force of the U. P. Tenancy (Amendment) Act, 1947, the opposite parties 2 to 4 to the present petition made an application u/s. 27 of the said Act on 9-10-1947 for recovery of possession on the ground that the arrears of rent for which the father of the applicant who died on 1-1-1943, had paid to the zamindar outside the Court and two receipts dated 25-8-1941 and 1-1-1943 had been granted by the zamindar.

The petition was contested by the present applicant who alleged that the receipts produced by the opposite parties had been fraudulently issued by the zamindar to them subsequently and they were fictitious. In effect, the contention of the petitioner in those proceedings was that the alleged payment to the zamindar by the applicant was fictitious. The Tahsildar by his order, dated 21-9-1948, allowed the application u/s. 27 and ordered the reinstatement of the opposite parties Nos. 2 to 4, holding that the rent receipts filed by opposite parties 2 to 4 were genuine and the alleged payment to the zamindar by the tenant has been established.

(3) It will be significant to note that the zamindar who was produced in the case admitted that the arrears of rent had been received by him. An appeal was filed by the present applicant against the aforesaid order of the Tahsildar before the Collector and the Assistant Collector, first class, on 31-12-1949, allowed the appeal and dismissed the application holding that the rent receipts filed by the opposite parties 2 to 4 were fictitious and the payment of the arrears of rent alleged by them has not been consequently established.

The receipts were obtained in collusion with the zamindar. Against the aforesaid order of the Assistant Collector a revision was filed by the opposite parties 2 to 4 before the Commissioner.

(4) It may be pointed out at this stage that the power of revision under the Tenancy Act is given to the Board of Revenue. The Board of Revenue has, however, framed certain rules of procedure under which a revision has to be filed before the Commissioner. Paragraphs 183 and onwards of the Board of Revenue Manual lay down the procedure prescribed in such cases. The Commissioner is given power to reject summarily an application for revision.

In case he finds that there is some ground for interference in revision, the Commissioner has to submit his report to the Board of Revenue and the party aggrieved by the order of the Commissioner is given powers to object to the report. Thereafter, the Board of Revenue hears the parties and either accepts or rejects the report submitted by the Commissioner. Whatever may be the position of these rules framed by the Board of Revenue, mentioned above, the ultimate order passed by the Board of Revenue is one under S. 275, U. P. Tenancy Act.

(5) In the present case the Commissioner, Aligarh cum Agra Division before whom the revision had been filed on behalf of the opposite parties 2 to 4 by his order dated 13-4-1951 referred the matter to the Board of Revenue, recommending that the finding of fact arrived at by the Assistant Collector be set aside. The Commissioner during the course of the enquiry summoned the zamindar with the counterfoils of the receipts and after comparing them with the counterfoils produced by the opposite parties held that the receipts were genuine.

The Board of Revenue by its order dated 2-2-1954 concurred by the other Member on 6-2-1954 allowed the reference and set aside the finding of fact arrived at by the learned Assistant Collector first class and allowed the application made by the

opposite parties 2 to 4. On these facts the present petition has been filed.

(6) The contention of the petitioner is that the Board of Revenue had no jurisdiction to entertain and allow a revision under S. 275 of the Tenancy Act on a question of fact and the decision of the Board is therefore without jurisdiction and liable to be quashed by means of a writ of certiorari under Art. 226 of the Constitution.

Mr. S. B. L. Gaur, who appears for the opposite parties 2 to 4, and the Standing Counsel who assisted us in the case, have urged that the question whether the Board could or could not have interfered under S. 275 of the U. P. Tenancy Act is not a question relating to the jurisdiction of the Board and any decision by the Board on this point cannot be examined by this Court by means of a writ of certiorari.

(7) It was also contended by the Standing Counsel that the decision of the Board of Revenue interfering with the order passed by the Assistant Collector was one justified under S. 275(c) of the U. P. Tenancy Act. Section 275 of the Act reads as follows:

"The Board of Revenue may call for the record of any case decided by any subordinate revenue Court in which no appeal lies either to the District Judge or to the Board and if such subordinate Court appears

(a) to have exercised the jurisdiction not vested in it by law or

(b) to have failed to exercise a jurisdiction so vested or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity."

"The Board may pass such order in the case as it thinks fit."

This provision is similar to the provision contained in S. 115, Civil P. C. and, in our judgment the ground on which the Board of Revenue has interfered with the order passed by the Assistant Collector in appeal is not governed by any of the subclauses of this section.

(8) It is conceded by counsel for the opposite parties that it is not covered by sub-ss. (a) or (b). Reliance, however, has been placed by the Standing Counsel on sub-section (c) of the said section and it is contended that the Assistant Collector acted illegally in the exercise of his jurisdiction and as such the order was revisable under this subsection.

In a recent case their Lordships of the Supreme Court in dealing with Cl. (c) of S. 115 approved of the observations of Bose J. made in his order of reference in — 'Narayan Sonaji v. Sheshrao Vithoba', AIR 1948 Nag 258 (FB) (A), and held that the words "illegally" and material irregularity" in Cl. (c) do not cover either errors of fact or of law. They do not refer to the decisions arrived at but to the manner in which it is reached.

The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. Applying this test to the present case it cannot be said that the Assistant Collector had committed either any error of procedure or any material irregularity in the manner in which he reached the conclusion that the payments of the rent to the zamindar, as alleged by the opposite parties 2 to 4, was not proved.

The Assistant Collector is a final Court of appeal on facts and on a consideration of evidence before it, it was open to the Assistant Collector to reject or to accept the contentions of fact raised by the parties. It was open to the Assistant Collector to believe or disbelieve any evidence produced by the parties and having done so a contrary decision arrived at by the Commissioner on the evidence is really an interference on a question of fact which, in the opinion of the Commissioner, was erroneously decided by the Assistant Collector.

It is not an interference on any matter of procedure and such an interference is not contemplated by the provisions of S. 275 (c) of the U. P. Tenancy Act.

(9) It was further contended by the counsel for the opposite parties that the referring order of the Commissioner was eminently just and correct on the evidence in the case. There was no justifiable reason on which the Assistant Collector could have rejected the receipts produced by the opposite parties 2 to 4.

As we have already pointed out, this was a question of fact and the point which we have to consider is not whether the decision of the Commissioner was correct on the evidence on the record or that of the Assistant Collector was correct. What we have to decide is whether the Commissioner had any jurisdiction under S. 275, U. P. Tenancy Act, to interfere with the decision of the Assistant Collector on a pure question of fact.

(10) The main contention raised by the Standing Counsel is that this Court cannot under Art. 226 of the Constitution scrutinise the decision arrived at by the Board of Revenue, even though it may be erroneous either on a question of law or on a question of fact. In other words, the argument of the Standing Counsel is that the powers of this Court to interfere by means of a writ of certiorari are confined to the cases where a subordinate Court has acted in excess of its jurisdiction.

Any erroneous decision on a question of law or on a question of the applicability of any section of the Statute, is not a ground for interference under Art. 226 of the Constitution. It is, therefore, necessary to consider what is the scope of the powers of this Court under Art. 226 of the Constitution of interference by means of a writ of certiorari with the decision of subordinate Courts.

There are a number of decisions of their Lordships of the Supreme Court which lay down clearly the law on the subject. In the case of — 'Hari Vishnu Kamath v. Ahmad Ishaque', (S) AIR 1955 SC 233 at p. 243 (B), their Lordships of the Supreme Court have summarised the propositions established on certain earlier authorities of their Court, as follows:

(1) 'Certiorari' will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) 'Certiorari' will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice.

(3) The Court issuing a writ of 'certiorari' acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right and when the Legislature does not choose to confer a right of appeal against that decision it should be defeating its purpose and policy if a superior Court were to rehear the case on the evidence, and substitute its own findings in 'Certiorari'.

In that case they further accepted the law as laid down in — 'Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw', 1951-1 KB 711 (C) and affirmed in appeal in — 'Rex v. Northumberland Compensation Appeal Tribunal; Ex Parte Shaw', 1952-1 KB 338 (D) and held that it was settled that a writ of certiorari could be issued to correct an error of law. But it was essential that

it should be something more than a mere error which was manifest on the face of the record.

(11) This decision, to our mind, clearly lays down that the power of this Court to issue a writ of certiorari is not confined to the grounds where the subordinate Court has acted without jurisdiction or in excess of its jurisdiction but also on the ground that there is an error of law apparent on the face of the record. The difficulty does arise in deciding whether a particular error of law is an error on the face of the record.

To our mind, if a certain order passed by the subordinate tribunal gives the reasons for the decision, that is to say, it is a speaking order as it is termed by English Courts, then it is open to this Court, in the exercise of its power under Art. 226 of the Constitution, to scrutinise the reasoning of the subordinate Tribunal so far as can be done without going outside the order itself, examine it and if this Court finds that the reasons are manifestly wrong on a question of law and the conclusions arrived at by the Courts below are apparently erroneous then it is open to this Court to exercise its jurisdiction under Art. 226 of the Constitution and quash such a decision.

Reference in this connection may be made to the case of — 'Dr. Ishwari Prasad v. Registrar, University of Allahabad', (S) AIR 1955 All 131 (E), where it has been held that—

"in the exercise of its jurisdiction to issue a writ of certiorari the Court does not and has no power to substitute its own views for those of the inferior Tribunal, nor has it power to quash a decision because it thinks it wrong unless the error is an error of law and is apparent on the face of the record."

If the record of the proceedings of an inferior tribunal discloses, on examination, an error of law the proceedings can be quashed by a writ of certiorari.

(12) In the case of (1952) 1 KB 338 (D), it was observed by Singleton J. at p. 344—

"The decision of the Tribunal was a speaking order in the sense in which the term has been used. The Court is entitled to examine it and if there be error on the face of it to quash it—"not to substitute another order in its place but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty, as Lord Cairns said in — 'Walsall Overseers v. London and North Western Rly. Co.', (1878) 4 AC 30 (F).

To our mind, it is perfectly clear that their Lordships of the Supreme Court approved of the principle underlying this decision and, therefore, it is open to this Court to examine an order passed by a subordinate tribunal and quash it if, on an examination of the order, it comes to the conclusion that the order is erroneous on the face of it. In the present case it is contended that the Board of Revenue by exercising its power under S. 275 had by implication held that interference in the case could be made within the terms of that section.

This Court can, therefore, examine the decision of the Board to see whether or not the Board was competent to interfere with the matter before it under the terms of S. 275 and if this Court found that the order of the Board on an examination of the order was erroneous or that the interference made by the Board was beyond the scope of the interference prescribed by S. 275 then the order of the Board could be set aside by this Court.

Reliance has been placed by the Standing Counsel on three cases of this Court to contend that the Board had the power to do what it has; it is, therefore, necessary to refer to them at this stage. The first case is — 'Sunder Lal Saxena v. Hindustan Commercial Bank, Ltd.', AIR 1953 All 260 (G). In that case the petitioner Sunderlal was employed as a sub-agent at the Kanpur main office of the Hindustan Commercial Bank Ltd. He was suspended by the Bank. The dispute relating to his suspension was placed by the U. P. Bank Employees Union before the State Government which under S. 3, Industrial Disputes Act, 1947, referred it for decision to an adjudicator.

The adjudicator held that the petitioner was a workman and gave an award that the petitioner was entitled to the withdrawal of the order of suspension and that he was entitled to his full salary. This award was enforced and the petitioner was reemployed. Certain other reliefs which were claimed by Sunderlal were not granted to him and the petitioner then represented his case to the Union Government.

When these proceedings were going on the petitioner was dismissed by the Bank. He then took his case of dismissal to the Central Government and the said dispute was referred by the Central Government to the Industrial Tribunal at Calcutta for adjudication. The Tribunal held that Sunderlal was not a workman within the meaning of the word as used in the Industrial Disputes Act, 1947, and consequently refused any relief to him. An appeal was filed by him to the Labour Appellate Tribunal of India which dismissed it.

Thereupon a petition was filed before this court challenging the correctness of this order of the Labour Appellate Tribunal on the ground that as the petitioner was a workman, both the Calcutta Industrial Tribunal and the Labour Appellate Tribunal wrongly refused to exercise their jurisdiction in favour of the petitioner.

It was held under those circumstances by this Court that the determination of the question whether the petitioner was a workman was not a determination of an issue preliminary or collateral to the proceedings but was the determination of a fact which was itself one of the subject matters of the dispute referred for adjudication and the decision on such a matter by a tribunal in the exercise of its jurisdiction could not be challenged by a writ of certiorari. It was after the examination of a number of cases of the English Courts and the observations made by their Lordships of the Supreme Court in the case of — 'Ebrahim Aboobaker v. Custodian General of Evacuee Property, New Delhi', AIR 1952 SC 319 (H) it was held that this Court could not interfere with an order passed by a Subordinate Court on the ground that it was erroneous unless it was on a matter collateral of the issue in the cause itself.

In this case the question, whether this Court could or could not interfere on the ground that the decision of the tribunal was on the face of it erroneous on a question of law, was not canvassed.

The contention mainly urged by the counsel for the petitioner was that the question whether the petitioner was or was not a workman is a question on which the jurisdiction of the Industrial Tribunal depended and, as such, it was the very foundation of the exercise of the jurisdiction by the Labour Appellate Tribunal and, as such, this Court could scrutinise the finding of the tribunal on that point and if it found that such a decision was erroneous, it could interfere by means of a writ of certiorari.

This contention was repelled by this Court. It was held that the question whether the petitioner was or was not a workman was a part of the issues to be decided by the tribunal itself and was not a collateral issue and, as such, this Court could not interfere with a decision on that matter, given by a tribunal which had jurisdiction to determine it, in the exercise of its power under Art. 226 of the Constitution.

(13) If this case can be said to have laid down that this Court cannot interfere with an erroneous decision of law of a tribunal even on the finding that

such a decision is erroneous apparent on the face of the record then we would respectfully differ from such a decision as the Supreme Court has laid down to the contrary in the decision referred to above, but to our mind this case did not lay down any proposition which was in conflict with the view that we have taken.

The other case of this Court referred to by the Standing Counsel is the case of — 'Firm Dewan Sugar Mills v. Govt. of the State of Uttar Pradesh', AIR 1953 All 531 (I). That was a case where some dispute had arisen between the employees and the management of the Diwan Sugar Mills. The State Government referred the matter to the adjudication of the Regional Conciliation Officer, Meerut, who came to the conclusion that the dismissal of the employees was wrongful. The employers went up in appeal against the said order to the Labour Appellate Tribunal which was rejected by the Tribunal on the ground that it raised no substantial question of law and against that order the above writ petition was filed.

(14) It was contended that the jurisdiction of the tribunal to entertain an appeal depended upon the existence of a substantial question of law and any decision of the tribunal whether a substantial question of law arose in the case or not was a decision on a question collateral to the matter in issue and, as such, this Court could interfere by a writ of certiorari.

The Bench repelled this contention and held that the decision whether a substantial question of law arose in the case or not was a decision on a question which was an issue in the appeal itself. It was held that if a Court while exercising its jurisdiction made a mistake, then the wronged party could not ask the High Court to set matters right as a Court having jurisdiction can decide rightly as also wrongly.

This decision is based on the principle on which Sunderlal's case (G) was decided and our remarks dealing with the case of Sunderlal equally apply to the present case.

(15) The third case is the Full Bench decision of this Court reported in — 'Deoria Sugar Mills Ltd. Deoria v. Govt. of U. P.', AIR 1954 All 497 (FB) (J). In this case in distributing the bonus to the employees the Sugar Factory of Gorakhpur had taken into consideration the employees of the Head office at Calcutta and the question raised by the workers was that the employees of the Head Office could not be taken into account in awarding bonus to the workers of the mills at Gorakhpur.

This contention was accepted by the adjudicator and the point raised in the writ petition was that the adjudicator was not right in holding that the number of employees in the head office could not be considered in awarding bonus to the employees of the mill at Gorakhpur. It was held by the Full Bench that the decision of this question was an issue in the case itself and any erroneous decision on this question could not be interfered with by means of a writ of certiorari.

(16) In all the aforementioned three cases, however, the question whether this Court could interfere by a writ of certiorari against an order, erroneous on a question of law on the face of it, was not considered but if these cases be regarded as having laid down such law, then we are of opinion that the authority of these cases has been considerably shaken in view of the recent decisions of the Supreme Court.

(17) The next contention of the Standing Counsel was that since the Board of Revenue had not, in its order, considered the question of the applicability of S. 275 (c) the Board's order could not be said to be a 'speaking Order' in respect of this question and therefore it was argued that this Court had no power to quash the order.

It is no doubt true that the Board of Revenue in its order has said nothing in regard to the scope of its powers under S. 275 but it is nonetheless not only clear but admitted, on all hands, that the Board of Revenue interfered with the appellate decision of the Collector, an interference that could only be possible by the Board under S. 275, it is therefore, open to this Court to examine the grounds on which the Board interfered and to see if those grounds could fall within the ambit of the powers conferred on the Board under S. 275.

If on an examination of the grounds it appears that the Board had exceeded its powers then obviously this Court could interfere to quash the order by a writ of certiorari. The matter was not one which could correctly be termed an erroneous decision of a matter within the jurisdiction of the Board but it was, so to speak, an erroneous assumption of jurisdiction. The erroneous assumption of jurisdiction in this case took place because of the erroneous view which the Board took of S. 275.

If a Court can exercise jurisdiction only on certain conditions and within certain limitations then if that Court takes an erroneous view in regard to those conditions or those limitations then in such a case the Court does not decide a matter which can be said to be an issue in the case falling within its undoubted jurisdiction.

Particular reliance was placed on the following passage in the case of AIR 1952 SC 319 at p. 322 (H):

"Like all Courts of appeal exercising general jurisdiction in civil cases, the respondent has been constituted an appellate Court in words of the widest amplitude and the legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts. Ordinarily, a Court of appeal has not only jurisdiction to determine the soundness of the decision of the inferior Court as a Court of error but by the very nature of things it has also jurisdiction to determine any points raised before it in the nature of preliminary issues by the parties.

Such jurisdiction is inherent in its very constitution as a Court of appeal. Whether an appeal is competent, whether a party has locus standi to prefer it, whether the appeal, in substance, is from one or another order and whether it has been preferred in proper form and within the time prescribed are all matters for the decision of the appellate Court so constituted. Such a tribunal falls within Class 2 of the classification of the Master of the Rolls."

In our judgment the question whether a matter is to be decided by a subordinate Court as an issue in the case and as such relating only to the exercise of its jurisdiction or it is a matter on which the jurisdiction itself depends and is collateral to the exercise of the jurisdiction is a question which can be determined on the language of the section under which the Court has been constituted or has been given the power to entertain and decide a matter.

The contention of the Standing Counsel is that in cases where a Court has been constituted under a special Act, it is open to the legislature, which constitutes the Court, to lay down limitations under which such a Court has to act and if the Court in acting under that Act has transgressed those limits an argument may be available to the aggrieved party to say that any decision by the Court outside the ambit of its power is a decision beyond its jurisdiction but when a Court is not constituted by any special Act but is a Court of "general jurisdiction" and a certain section lays down the grounds on which such a Court can act then those grounds cannot be regarded as limitations placed on the jurisdiction of

the Court: they are matters which the Court has to consider while exercising its jurisdiction.

In this connection it was pointed out that the Board of Revenue has been created under the Land Revenue Act and the definition of the Board given there has been adopted by the Tenancy Act. It is, therefore, not a creation of any special statute but it is a Court of general jurisdiction. We do not see that there is any warrant for such a distinction to be drawn. In order to find out the limits of the jurisdiction to be exercised by the Court one has to go to the language of the statute which gives power to such a Court to act.

As will appear from the observations made in the Supreme Court decision referred to above, S. 27 of the Evacuee Properties Act gave a power to the appellate Court in its widest amplitude and under those circumstances their Lordships held that the words in which power was given were wide enough to include a power to decide issues of a preliminary nature.

Reference was also made to the case of — 'Hirday Nath Roy v. Ram Chandra Barna', AIR 1921 Cal 34 (FB) (K). Particular reliance was placed on the following passages in that case:

"An examination of the cases in the books discloses numerous attempts to define the term "jurisdiction", which has been stated to be "the power to hear and determine issues of law and fact", "the authority by which the judicial officers take cognizance of and decide causes, "the authority to hear and decide a legal controversy", "the power to hear and determine the subject matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them";

"the power to hear, determine and pronounce judgment on the issues before the Court"; "the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgment into effect," "the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution."..... This jurisdiction of the Court may be qualified or restricted by a variety of circumstances.

Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants..... The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction."

We do not think that that case has exhaustively laid down the scope of what could be regarded as questions of jurisdiction. On a plain reading of S. 275 of the Tenancy Act it is clear that the Board could only interfere with an order passed by the subordinate Court if the grounds enumerated in Cls. (a) to (c) of the said section exist. It was a conditional jurisdiction exercisable by the Board of Revenue. The existence of the grounds mentioned in that section is necessary for the exercise of the revisional jurisdiction by the Board of Revenue, and any decision by the Board on the question whether any of such grounds existed or not is a decision which could be examined and interfered with by this Court in the exercise of its jurisdiction under Art. 226 of the Constitution.

The Board of Revenue could not by an erroneous decision on this point assume jurisdiction where it had none. When a statute confers a "conditional" jurisdiction on a tribunal it cannot by wrongly deciding with regard to the existence of the conditions clutch at jurisdiction. The jurisdiction which the Board had to pass an order in a case as, "it thinks fit" could only be passed by the Board if the conditions prescribed for the exercise of such a jurisdiction existed and those conditions are enumerated in sub-sections (a) to (c) of S. 275 and any decision by the Board of Revenue as to the existence or non-existence of such conditions is not a decision on any issue in the case which the Board had to decide.

It was a decision with regard to the existence or non-existence of the conditions on which its jurisdiction depended and we are of opinion that any decision by the Board whether explicit or by implication on this point can be looked into by this Court in the exercise of its writ jurisdiction and if this Court is of opinion that the Board of Revenue has exceeded its power of interference with the order of the Assistant Collector, on grounds not permissible under S. 275, then such a decision can be interfered with by this Court.

(18) It was also urged by the petitioner that the rules framed by the Board laying down the procedure for the filing of revisions are 'ultra vires'. In view of our opinion on the other points we do not think it necessary to decide this question.

(19) We, therefore, allow this petition and quash the order of the Board of Revenue dated 26-2-1954. The applicant will get his costs from opposite parties Nos. 2 to 5.

V.B.B. Petition allowed.

(S) AIR 1955 Allahabad 562 (V. 42 C. 162 Oct.)

AGARWALA AND SAHAI JJ. (25-4-1955)

Hira Lal, Defendant-Appellant v. B. Firangi Lal and another, Plaintiffs-Respondents.

Appln. for Review of Judgment in Second Appeal No. 1711 of 1949.

Civil P. C. (1908), O. 41, R. 33 — Powers of the appellate Court.

Powers given under O. 41, R. 33 to an appellate court are very wide. The decision in 34 All. 32 (FB) was based on the particular facts of that very case and the interpretation put by the Full Bench has not the effect of curtailing the powers given to an appellate court under the provisions of O. 41 R. 33, C. P. C. Case Law reviewed. (Paras 10, 27)

Anno: AIR Com. C. P. C., O. 41, R. 33 N. 6.

CASES REFERRED: Paras

(A) ('12) 34 All 32: 11 Ind Cas 640 (FB) 1, 8, 10, 12, 13, 26, 28, 31, 32
(B) ('37) 1937 All LJ 804 10
(C) (V3) AIR 1916 All 327: 38 All 469 12
(D) (V18) AIR 1931 PC 234: 1931 All LJ 808 14
(E) (V4) AIR 1917 PC 111: 44 Ind Cas 304 (PC) 18
(F) (V14) AIR 1927 All 37: 48 All 551 19
(G) (V16) AIR 1929 All 334: 117 Ind Cas 111 20
(H) (V15) AIR 1928 All 77: 50 All 218 21
(I) ('36) 63 Cal 1008 22
(J) (V17) AIR 1930 Mad 801: 53 Mad 882 (FB) 23
(K) (V7) AIR 1920 Cal 428: 54 Ind Cas 636 23
(L) (V7) AIR 1920 Cal 990: 62 Ind Cas 623 23
(M) (V14) AIR 1927 All 453: 49 All 224 28

P. M. Verma for Appellant, S. B. L. Gaur, for Respondents.

SAHAI, J.:

This is a reference by a learned Single Judge of this Court under Chapter V Rule 6 of the Rules

of Court. The following question has been referred to us for answer:

"Whether the interpretation put by the Full Bench has the effect of cutting down the powers conferred by O. 41, R. 33, and if so, to what extent"?

The Full Bench case to which reference has been made is the case of 'Rangam Lal v. Chandu' 34 All 32 (A).

(2) The facts of the case are given in full in the judgment of the learned Single Judge dated 4-9-1953, disposing of the second appeal and in his order dated 1-2-1955 referring the question formulated above to a Bench of two Judges. Under the circumstances it is not necessary for us to give the facts of the case in detail.

(3) Briefly stated, the facts of the case are, that the plaintiff filed a suit for removal of obstruction placed by the defendants over a rasta by constructing a wall over it, and for the issue of an injunction. His case was that he was using this rasta, which is an old one, all along. But in 1944 suddenly the defendants closed that rasta. He was allowed for some time to pass through another gate of the Dharamshala. But ultimately that gate too was closed, which necessitated the filing of the present suit.

(4) The reliefs claimed, in substance, were as follows:

"(a) That a permanent injunction be issued to the defendants directing them to demolish that portion of the wall of the Ahata which the defendants have constructed on the land of Rasta (old No. 37) on the eastern side of the road and which was shown in the map by letters A and B, and the defendants may further be directed to put the rasta in its original condition and not to interfere with the passage of the plaintiff in any manner.

(b) In case it was held that the plaintiff was not entitled to get the wall of the Ahata demolished, the defendants may be directed to open the door 'X' through which the plaintiff used to have his passage previously and to restore it in its original condition.

(c) If the Court was of opinion that along with the above mentioned reliefs, the plaintiff was entitled to possession also, a decree for possession may also be passed."

(5) The suit was contested by the defendants on a number of grounds. The trial court rejected the pleas taken in defence and decreed the plaintiff's suit in terms of relief B only claimed in the plaint. The plaintiffs did not file any appeal against the decree of the trial court but submitted to it.

(6) One of the defendants filed an appeal to the lower appellate court. The lower appellate court modified the decree of the trial court by decreeing the plaintiff's suit by granting the plaintiff a decree in terms of the relief (a) claimed in the plaint instead of relief (b).

(7) Thereupon, the aforesaid defendant filed a second appeal to this Court and one of the points urged before the learned Single Judge was that relief (a) having been refused and the plaintiff-respondent not having appealed against it, it was not open to the lower appellate court to grant relief (a) which was a broader relief than the relief granted by the trial court. This plea was rejected by the learned Single Judge, on the ground that the lower appellate court had ample powers to grant that relief under the provisions of O. 41, R. 33, C. P. C.

In the result, none of the points raised by the learned counsel for the appellant found favour with the learned Judge who, by his judgment dated 4-9-1953 dismissed the appeal.

(8) On 19-11-1953, an application for review of the judgment was filed by the defendant-appellant, on the ground that in view of the Full Bench decision of this Court in — '34 All 32', (A) the lower appellate court had no jurisdiction to pass the decree that it did. Thereupon the learned Single Judge, before deciding the application for review on merits, referred the aforesaid question to a larger Bench for opinion.

(9) O. 41, R. 33, C. P. C. runs as follows:

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed an appeal or objection.

Provided that the appellate court shall not make any order under S. 35A in pursuance of any objection on which the court from whose decree the appeal is preferred has omitted or refused to make such order".

(10) It would be manifest from a perusal of the provisions of O. 41 R. 33, C. P. C., that powers given to an appellate court are very wide. The scope of the aforesaid rule as well as the effect of the Full Bench decision reported in — '34 All 32' (A), was considered by Iqbal Ahmad, J. in the case of — 'Secretary of State v. Basti Begam,' 1937 All LJ 804 (B).

(11) The facts of the aforesaid case were that one Basti Begum brought a suit in forma pauperis against the appellant for recovery of Rs. 5000/- as damages on the allegations, that due to the gross negligence of the defendant her only son met his death. The suit was contested by the defendant on the only ground that the damages claimed were excessive and the plaintiff was entitled only to a sum of Rs. 500/-. The trial court decreed the plaintiff's claim for a sum of Rs. 2000/- but directed that court-fee payable on the plaint should be deducted out of the amount decreed.

The plaintiff submitted to the decree of the trial court but the defendant filed an appeal to the lower appellate court. The defendant's appeal was allowed in part by the lower appellate court which reduced the amount decreed to the plaintiff from Rs. 2000/- to Rs. 1020/-. As regards the court-fee payable on the plaint the lower appellate court modified the order of the trial court by directing that the plaintiff will be liable to pay court-fee on Rs. 1020/-.

The defendant was directed to pay the remaining court-fee. There was an appeal to this Court by the defendant and the point urged was that the order passed by the lower appellate court as regards the payment by the defendant of the court-fee on the amount of the claim dismissed was not in accordance with law, and that the plaintiff ought to have been ordered to pay the court-fee on the amount of claim that was dismissed by the trial court.

(12) Reliance was placed in support of this contention on the case of — 'Ganga Dahal Rai v. Mst. Gaura', AIR 1916 All 327 (C). The plea raised by the defendant was accepted and given effect to and this Court directed that the plaintiff had to pay court-fee on the portion of the claim dismissed and the defendant had to pay court-fee on the portion of the claim decreed. The learned Judge observed as follows:

"The suit was brought in December 1932 when enhanced court-fee was payable and the court-fee payable on the entire amount of the claim was Rs. 357-8-0. The result of the order passed by me will be that out of the sum of Rs. 357-8-0 the defendant will have to pay Rs. 113-12-0 and the plaintiff will have to pay Rs. 243-12-0 on account of the court-fee payable on the plaint. But in accordance with the decree of the lower appellate court the plaintiff was liable to pay court-fee only to the extent of Rs. 113-12-0.

Therefore, as a result of the order passed by me the plaintiff will have to pay an additional sum of Rs. 130/- on account of court-fee. The question then arises whether in the absence of an appeal or a cross-objection by the plaintiff I have jurisdiction to grant her relief with respect to Rs. 130/- if I consider it just to do so".

"A Full Bench of this Court in — 'Rangam Lal v. Chandoo' (A), while pointing out that the words of the rule are very wide and that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule, held that the object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal.

It was further observed in that case that where it is essential in order to grant relief to an appellant that some relief should, at the same time, be granted to the respondent also, the court may grant a relief to the respondent although he has not assailed the decree appealed against either by means of an appeal or by cross-objection".

(13) In the end relying upon the aforesaid principles of law laid down in the case of — 'Rangam Lal' (A), he increased the amount of damages by a sum of Rs. 130/-.

(14) The same view was taken by their Lordships of the Privy Council in the case of — 'Iswaraya v. Swarnam Iswarayya' AIR 1931 PC 234 (D).

(15) The facts of the case were that a wife who had obtained a decree for judicial separation against her husband was allowed permanent alimony of Rs. 120/- for her life, and an order was also made for payment of a sum in every month in respect of the children of the marriage. Subsequently three years later two applications were made to the District Judge, one by the wife and other by the children. The District Judge ordered an increase in the amount of maintenance to the children, and further allowed a sum of Rs. 160/- per month to the wife, thus giving her an increase of Rs. 40/- a month.

The respondent appealed to the High Court but the wife did not. The High Court held that since the children had ceased to be minors, no provisions could be made for them; but holding that the District Judge could and should have fixed for the wife alimony at Rs. 260/- a month, allowed her alimony at the said rate in spite of the fact that the wife had not filed any appeal or cross objection.

(16) The husband appealed against the decree of the High Court to His Majesty in Council and one of the points urged before their Lordships was that the High Court had no power under O. 41, R. 33, C. P. C. to vary the amount (of Rs. 160/-) a month which the lower court had by its order of 8-3-1927 decreed in favour of the wife.

(17) While rejecting this plea their Lordships observed:

"There was here no reason why the wife should appeal from the order which the District Judge had made; there was every reason why she should be satisfied therewith. On the other hand, once the appellate court felt constrained to cut out all payments to the wife for the maintenance and education of the children, it was open to that court to take the view that complete justice could not be done unless the amount ordered to be paid to the wife for alimony was increased.

The appellate court in fact took that view; and their Lordships are not prepared to say either that the view could not properly be taken or that effect could not be given thereto by exercising the powers conferred upon an appellate court under O. 41 R. 33."

(18) The same view was taken in the case of — 'Tarini Charan Sarkar v. Bishunchand', AIR 1917 PC 111 (E), wherein it was observed:

"Their Lordships think it would have been a matter for regret if the court of appeal has been thus hampered in making the order, which their Lordships regard as right in all the circumstances of the case. But they think abundant power is given to the court by Ss. 107 and 151 of the Code of Civil Procedure 1908 and O. 41 R. 33 of the same statute. S. 107 gives powers, if necessary, to take additional evidence; and R. 33 of O. 41 gives power to pass any decree and give any orders which ought to have been passed or made, and to pass or make such further or other decrees or orders as the case may require".

(19) The same view was taken in the case of — 'Mohsham Ali Khan v. Mullu', AIR 1927 All 37 (F), where it was held that it was open to the appellate court to very the decree appealed against where there is a common defence in favour of persons who have not appealed but who were parties to the suit.

(20) The same view was taken in the case of — 'Tamizan v. Nanhey Lal', AIR 1929 All 334 (G), by a Single Judge of this Court, who held that an appellate court was entitled to grant relief to a defendant who could have appealed but had not appealed.

(21) The same view was taken by a Bench of this Court in — 'Maksud Ali v. Abdulla', AIR 1928 All 77 (H).

(22) In the case of — 'Lankapara Tea Co. v. Gopalpur Tea Co. Ltd.', 63 Cal 1008 (I), a Division Bench of Calcutta High Court held that O. 41 R. 33 of the Code of Civil Procedure empowers the appellate court to pass a decree for perpetual injunction in favour of the plaintiff in spite of his prayer for the same being refused by the lower court and also in spite of his omitting to ask for it in his memorandum of cross-objection to the appeal.

(23) A similar view was taken by a Full Bench of the Madras High Court in the case of — 'Subramanian v. Sinnammal', AIR 1930 Mad 801 (J). The learned Judges observed as follows:

(A)"The illustration to the rule is a type of one class of cases which calls for the exercise of the powers conferred by R. 33, but it does not by any means exhaust the class of cases in which the powers of the appellate court under this rule may be invoked."

(B) "Where a plaintiff, being dissatisfied with a decree passed in his favour, prefers an appeal, the appellate court, in a proper case, has jurisdiction to exercise its powers in favour of the respondent by dismissing the plaintiff's case in toto, though the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree passed by the first court."

In the case of — 'Debendra Narayan Singh v. Narendra Narayan Singh', AIR 1920 Cal 428 (K), a Division Bench of the Calcutta High Court recognised the extensive jurisdiction of the appellate

Court under O. 41, R. 33, C. P. C. The decision of the Calcutta High Court in — 'Jogendra Kishore v. Nasimuddin Sardar', AIR 1920 Cal 990 (L), shows unmistakably the view of that Court on this matter. The facts of the case as given in the headnote are as follows:

"In a suit for the rent of a holding the first Court passed a decree in favour of the plaintiff for a proportionate amount of the rent payable in respect of the land included in the plaint, on the ground that the holding covered more lands than were included in the plaint. There was no appeal or cross-objection by the defendant, but on an appeal by the plaintiff the appellate court held that having regard to the manner in which the suit had been framed the plaintiff would be entitled to no relief and accordingly dismissed the entire suit of the plaintiff.

The High Court held:

"That having regard to the very wide powers given to an appellate court under O. 41, R. 33, Civil P. C., the decision of the appellate Court dismissing the whole of the plaintiff's suit, in the absence of a cross-appeal or cross-objection by the defendant, was not without jurisdiction."

(24) The learned Judge hearing the aforesaid case observed as follows:

"There can be no doubt that the wording of R. 33 is very general and in this respect gives very wide powers to the Court of appeal. But the learned Vakil for appellant however urged in reply that R. 33 is controlled by R. 22 and that the wide powers given by R. 33 can only be exercised in case the whole matter is brought into controversy before the appellate Court by a cross-appeal or a cross-objection filed under R. 22. I am not satisfied that this is a correct view of the scope of R. 33."

(25) Similar view has been taken by other High Courts in India and it is not necessary for us to notice all those cases, in view of the fact, that our own Court has consistently taken the view that the powers of the appellate court under the provisions of O. 41, R. 33, C. P. C., are very wide.

(26) In the Full Bench case of '34 All 32 (A)', which had necessitated this reference, the learned Judges constituting the Full Bench in considering the scope of O. 41, R. 33, C. P. C., observed as follows:

"The words are no doubt very wide, but we think that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule. In a proper case the court, of course, is quite entitled and should not hesitate to exercise them. It is not easy, nor perhaps expedient, to lay down any hard and fast rule."

(27) It is no doubt true that in the aforesaid case this Court modified the decree of the District Judge dismissing the plaintiffs suit in its entirety by allowing him a decree for Rs. 96/11/11, that the defendant had neither appealed nor filed any cross-objection in the lower appellate court against the decree of the trial court. The decision in the aforesaid case was based on the particular facts of that very case and it cannot, by any show of reasoning, be urged that it has the effect of curtailing the powers given to an appellate court under the provisions of O. 41 R. 33, C. P. C.

(28) The effect of the decision of 'Rangam Lal's case (A)', was considered by a Bench of this Court in the case of — 'Mahmud Hasan v. Lauti Ram', AIR 1927 All 453 (M).

(29) Briefly, the facts of the case were that on 28-5-1897 five properties were usufructuarily mortgaged in favour of two ladies Aminat-un-nissa and Ghafur-un-nissa. The money agreed to be advanced by the first-named lady was Rs. 27, 500/-, and by the second Rs. 1500/-. The way in which the detail of the consideration money was made up was that one sum of Rs. 13,000/- was left for payment in respect of two mortgages dated 21-7-1893, a sum of Rs. 4,200/- under a mortgage of 19-9-1892; another sum of Rs. 4,000/- under a subsequent mortgage and a final payment of Rs. 6,300/- by the promissory note of the mortgagees.

The plaintiff asked for a declaration that the property Ibrahimpur was not subject to any charge created under the mortgage-deeds and there was an alternative prayer that if there was any charge it was limited to Rs. 987/1/9 and there was a prayer, in its nature formal, that any other relief which can be granted to the plaintiff may also be granted to him.

(30) The trial court came to the conclusion, that no redemption decree could be granted, but he found in favour of the plaintiff that the particular property had been freed from any charge upon it. The plaintiff did not appeal, and when the matter came before the District Judge he disagreed with the lower court that the sum of Rs. 6,800/- had never been paid by the mortgagees. He went on to consider whether the mortgage as regards this particular property had been redeemed and he came to the conclusion that the mortgagees had been paid back the loan of Rs. 6800/- and was satisfied that nothing was due to the mortgagees.

He further held that the suit for declaration was barred by limitation. The case, therefore, was in this position that the plaintiff, having asked for a declaration which the lower appellate court found was barred by limitation, and it having been found in his favour that there was no encumbrances on the property, the question arose as to what in the circumstances was the proper thing to do. The plaintiff had partially succeeded in the lower court but he had neither filed any cross-objection nor had he appealed on the matter decided adversely to him, namely redemption.

The lower appellate court being of opinion that he could proceed under O. 34 R. 9 and that he could direct the defendants to retransfer to the plaintiff that part of the mortgaged property which was the subject of the action, and he did accordingly.

(31) The defendant came up in appeal to this Court and one of the points raised before this Court was that the lower appellate court had no jurisdiction to do so. In repelling this contention the learned Judges observed as follows:

"It is said that that cannot be done because, having regard to the language of O. 41 R. 33 and the caution as to the application of that section which is contained in the case of — 'Rangam Lal v. Chandu', (A)', we must not in this case allow the relief which the District Judge has granted the plaintiff because if we did so we would be acting in contravention of the provisions of O. 41, R. 22. There are, however, passages in that judgment which show that the circumstances of each particular case must be borne in mind, and at p. 35, the following observations are to be found:

"The object of R. 33 is manifestly to enable the court to do complete justice between the parties to the appeal. Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an ap-

peal or preferred an objection. Of such cases the illustration to the rule is a type."

They further observed:

"In our opinion the language of O. 41 R. 33 is wide enough to support the decision of the District Judge. He very wisely chose what, in our opinion, was the proper course. He could, had he been extremely technical, have said that as the respondent had filed no cross-objection and had not independently appealed that, therefore, he could not grant the relief to which, in his opinion, the respondent was most justly entitled. Had he done that it is possible that on a strict construction of O. 41, R. 33 we might have upheld that, but we should have held that grudgingly and taken the view that it was an unfortunate decision. This decision is in consonance with justice, equity and good conscience and it is, in our opinion, one which must be upheld."

(32) In my opinion the interpretation put by the Full Bench case of ' 34 All 32 (A)', has not the effect of cutting down the powers conferred by O. 41 R. 33, C. P. C., upon an appellate court. In the view I have taken the quesion of extent does not arise.

(33) In view of what I have said above my answer to the question is in the negative.

AGARWALA J.:

(34) I agree to the answer proposed by my learned brother. If I may respectfully say so, the question referred by the learned Single Judge was too wide in its scope. It would have been better if the learned Judge had referred the question of the interpretation and of the applicability of O. 41, R. 33, C. P. C., to the facts of the case before him. The portion of the question "if so to what extent" if properly answered might include matters that may not strictly be necessary for the decision of the case itself.

BY THE COURT:

(35) Let our answer be sent to the learned Single Judge who made the reference.

H.G.P. Reference answered.

(S) AIR 1955 ALLAHABAD 566 (V 42 C 163 Oct.)

LUCKNOW BENCH — KIDWAI AND H. S. CHATURVEDI JJ. (7-4-1955)

Mool Chand Rastogi Trust, Decree-holder-Appellant v. Batay Krishna, Judgment-debtor-Respondent.

First Ex-decree Appeal No. 10 of 1953, against decree Addl. Civil J., Sm. C. C., Lucknow, D/-15-5-1953.

(a) Civil P. C. (1908), O. 34, R. 6 — Composite mortgage decree — No necessity for decree-holder to apply for personal decree.

Where a mortgage-decree is a composite decree in which the decree-holder is first asked to proceed to realise his money by sale of the Zamindari property and if such a sale does not provide sufficient funds to discharge the decretal amount, then the decreeholder is given a further right to execute that very decree as against the person and other property of the judgment-debtor; in such a case it is not necessary for the decree-holder to apply for a personal decree before proceeding to attach the other properties belonging to the judgment-debtor. (Para 5)

Anno: AIR Com.: C. P. C., O. 34 R. 6 N. 5.

(b) Civil P. C. (1908), O. 34, R. 6 — Mortgage decree, construction of — Property mortgaged not available for sale — Right of mortgagee decree-holder to proceed against other property of judgment-debtor — (T. P. Act (1882), S. 73).

Where by the decree, it is enjoined that the decree-holder shall first proceed to satisfy the mortgage-decree by sale of the mortgaged zamindari property and for reasons beyond his control, the decree-holder is unable to enforce his decree by sale of the mortgaged zamindari which has vested in the State under the U. P. Zamindari Abolition and Land Reforms Act, 1950, then his right to recover the decretal amount by sale of the other property as recognised under the decree becomes available to him as soon as it is found that he cannot proceed against the zamindari property. This right to proceed against the other property of the judgment-debtor having been guaranteed to the decree-holder under the decree, cannot be taken away merely because of the fact that for acquisition of zamindari property, the State would pay some compensation.

It is true that under S. 73 of the Transfer of Property Act, the mortgagee is entitled to claim that compensation money on equitable grounds, and has a lien on the compensation money, nevertheless the decree-holder cannot be prevented to proceed against the other property of the judgment-debtor under the terms of the decree. (Para 7)

However, even though the decree-holder can apply for attachment of the other property of the judgment-debtor, nevertheless the Court is not deprived of the power to adjust such equities as arise in the case. (Para 9)

Anno: AIR Com.: C. P. C., O. 34 R. 6 N. 10; T. P. Act, S. 73 N. 10.

Niamtullah, Jagadish Narain and Inayat Ullah, for Appellant; Bhawani Shankar and Bijai Shankar, for Respondent.

H. S. CHATURVEDI J.:

This appeal by the decree-holder arises out of proceedings under S. 47, Civil P. C. In order to appreciate the point in controversy in the appeal, it is necessary to state the relevant facts which are not disputed.

(2) On the basis of a registered mortgage deed dated 2-2-1931, executed by Lala Batey Krishna respondent, a suit was brought by the appellant. Both the mortgagor and the mortgagee referred the matter to Lala Lakshman Das for arbitration. After the receipt of the award a decree was passed on its basis on 22-1-1943. Under this decree which was founded upon the award the judgment-debtor mortgagor was to pay the decretal amount in certain instalments. It was also provided that in case the judgment-debtor failed to pay three consecutive instalments, the decree-holder would be entitled to realise the entire decretal amount by sale of the zamindari property mortgaged under the deed. The last provision was that in case the sale of the zamindari property was not found sufficient to pay off the decretal amount, the decree-holder shall be entitled to execute his decree against the person and other property of the judgment-debtor. It is not disputed that there was default in the payment of instalments which entitled the decree-holder to execute his decree in its entirety.

(3) The decree-holder applied for execution on 25-7-1952 and the amount for which the execution was sought was mentioned in the application as Rs. 48,965/7/-. By this application the decree-holder prayed attachment of certain houses and other properties of the judgment-debtor, i.e., other than the mortgaged property mentioned in the decree. It was pointed out in the application that the decree-holder was not able to proceed as against the zamindari property because that property had vested in the Government and was no longer in the ownership of the judgment-debtor.

The prayer of the decree-holder was allowed and the properties were attached. Thereupon the

judgment-debtor filed an objection under S. 47, C. P. C., questioning the attachment on two main grounds:

1. That the decree-holder could not be allowed to execute his decree against property which was not mortgaged unless he first applied for a personal decree against the judgment-debtor.
2. That the decree-holder has no right to proceed against other property of the mortgagor, until and unless he has exhausted his remedy against the zamindari property mortgaged which is now substituted by the compensation money to be given by the State.

(4) The learned Civil Judge allowed the objections on the ground that the decree-holder must first proceed against the compensation which the State would pay for the mortgaged property and till then he has no right to proceed against the other property of the judgment-debtor. Dissatisfied with this finding, the decree-holder has come up in appeal.

(5) The first objection that the decree-holder should have applied for a personal decree is wholly untenable. It is manifest from the decree itself that it was a composite decree in which the decree-holder was first asked to proceed to realise his money by sale of the zamindari property and if such a sale did not provide sufficient funds to discharge the decretal amount, then the decree-holder was given a further right to execute that very decree as against the person and other property of the judgment-debtor. In view of the decree, it was not necessary for the decree-holder to apply for a personal decree before proceeding to attach the other properties belonging to the judgment-debtor.

(6) The main question that has been argued before us is whether the decree-holder is entitled to proceed against the other property of the judgment-debtor without first exhausting his remedy as against the compensation money which may be fixed by the State for the mortgaged zamindari property. It is no longer disputed that the mortgaged zamindari property, which could be sold under the decree, no longer exists for the simple reason that that property has now vested in the Government and the judgment-debtor has no proprietary interest left in that property which could be the subject-matter of the sale.

Under the terms of the decree under execution the decree-holder was ordered to proceed first against the zamindari property of the judgment-debtor by applying for its sale. It is obvious that the decree-holder has been deprived of that remedy under the U. P. Zamindari Abolition and Land Reforms Act, 1950.

(7) Learned counsel for the respondent has, however, argued that the decree-holder could not proceed against any other property of the judgment-debtor until and unless the compensation money, which will be payable to the judgment-debtor is found insufficient to satisfy the decree. In other words, the contention is that in place of zamindari property the decree-holder will have the compensation money and as such his right to proceed against the other property of the judgment-debtor is excluded by the decree. We are unable to accept this contention.

The question that falls for determination is whether on the destruction of the mortgaged security, the decree-holder should be compelled to proceed first against the compensation money to be paid by the State for the mortgaged zamindari property which has been taken over. An answer to this question must depend upon the terms of the decree itself.

Under the decree, it was enjoined that the decree-holder shall first proceed to satisfy the decree by sale of the mortgaged zamindari property. For reasons beyond his control, the decree-holder is unable to enforce his decree by sale of the mortgaged zamindari which has vested in the State under the U. P. Zamindari Abolition and Land Reforms Act, 1950. His right to recover the decretal amount by sale of the other property as recognised under the decree becomes available to him as soon as it is found that he cannot proceed against the zamindari property.

This right to proceed against the other property of the judgment-debtor having been guaranteed to the decree-holder under the decree, cannot be taken away merely because of the fact that for acquisition of zamindari property, the State would pay some compensation. It is true that under S. 73 of the Transfer of Property Act, the mortgagee is entitled to claim that compensation money on equitable grounds, and has a lien on the compensation money, nevertheless the decree-holder cannot be prevented to proceed against the other property of the judgment-debtor under the terms of the decree. What we desire to impress is that once the mortgaged property is lost to the mortgagee and he is unable to proceed to execute the decree against that property, he cannot be forced to execute his decree against the compensation money which may be paid by the State for taking away mortgaged property.

In our judgment the appellant (decree-holder) was justified in seeking to execute his decree by attachment and sale of the other property of the judgement-debtor, and the Court below was therefore not justified in dismissing the execution application.

(8) The learned Civil Judge has further pointed out that under S. 6 of the U. P. Zamindari Abolition and Land Reforms Act, 'no execution proceedings can be taken against the zamindari property', and it was on that ground also that the execution application was dismissed. We are unable to affirm this order for the simple reason that the decree-holder did not apply for execution of his decree against the zamindari property.

In his execution application, he prayed for attachment of house property situate in Lucknow and therefore the only question that could rise for consideration was whether under the terms of the decree, the decree-holder could proceed against the other property of the judgment-debtor which is not zamindari property. We have already indicated that under the terms of the decree, the decree-holder could apply for realisation of his decree by seeking attachment of non-zamindari property of the judgment-debtor not mortgaged to him.

(9) It is no doubt, true that the appellant, decree-holder could apply for attachment of the other property of the judgment-debtor, nevertheless the Court is not deprived of the power to adjust such equities as arise in the case. It appears to us that the decree-holder while not giving up his lien over the compensation money, still desires to proceed against the sale of the other property of the judgment-debtor. In view of the fact that the zamindari property was primarily made liable to satisfy the decreed debt, it is just and proper that the decree-holder should first proceed against the compensation money. If the compensation money is not found sufficient to satisfy the decree, then it will be open to the decree-holder to put to sale the other properties of the judgment-debtor which have been attached in execution proceedings. We, therefore, think it proper to hold that the properties mentioned in the execution application should be allowed to remain attached but no sale will take place till it is known how much compensation has been realised by the decree-

holder. We further direct that in case the court below thinks that the properties attached in the execution application are more than sufficient to satisfy the amount that may remain due after the realisation of the compensation money, then it will be open to the court to attach only so much of the property as may be necessary. It will be open to the judgment-debtor to apply for release of any portion of the property attached in the case and the Court will decide in the light of what has been stated above.

(10) We allow the appeal and set aside the order of the Court below. The execution application will be restored to its old number and the attachment already made shall continue, unless the court below, on the application of the judgment-debtor decides to release a portion of the properties. No sale will take place but the attachment will continue till the compensation money has been realised.

(11) In the peculiar circumstances of the case we order the parties to bear their own costs.

V.S.B. Appeal allowed.

AIR 1955 ALLAHABAD 568 (V 42 C 164 Oct.)

LUCKNOW BENCH — MOOTHAM C. J. AND RANDHIR SINGH J. (22-4-1955)

M. M. Siddique, Plaintiff-Appellant v. Union of India (Railway Dept.) through General Manager Northern Railway, New Delhi, Respondent.

Special Appeal No. 14 of 1954, against decree of Kidwai J. in S. A. No. 326 of 1952, D/-6-12-1954.

Railway Establishment Code — R. 1708 Proviso — Removal of — Servant in terms of contract of service—Authority of Divisional Superintendent—(Master and Servant).

The power of removal referred to in the Schedule of powers contained in the pamphlet issued by the Railway Administration entitled "Regulations regarding disciplinary action against non-gazetted staff including removal from service, dismissal and rights of appeal", is a punishment for an offence and has nothing whatever to do with that form of removal from service which consists in termination of an employee's contract of service.

It does not follow that because a particular officer has authority to impose the penalty he can terminate the contract. (Para 9)

Under the proviso to R. 1708 the power to remove a railway servant from service in terms of his agreement can be exercised only by a General Manager or by an authority not lower than the head of the department to whom he has delegated his power. A divisional superintendent not being the head of a Department cannot exercise that power and hence such removal by him is invalid and has not the effect of terminating the service of the employee. (Para 11)

Niamatullah and Harish Chandra, for Appellant; B. N. Mulla, for Respondent.

MOOTHAM C. J.:

This is an appeal from a judgment and decree of a learned Judge of this Court dated 6-12-1954.

(2) The appellant was a clerk in the East Indian Railway employed in the office of the Divisional Superintendent, Lucknow. In March 1948 complaint was made against him that he had committed certain rationing offences; an enquiry was held by the railway authorities as a result of which the appellant was suspended and charges were framed against him. That was in September 1948. The appellant submitted an explanation, but the Divisional Superintendent found the charges to be proved and by an order dated 20-10-1948, he directed that the appellant be removed from service.

(3-4) On 22-10-1948, the appellant was accordingly served with a notice in the following terms:

"REMOVAL NOTICE

As your services are no longer required by the the Administration, you are hereby removed from service by my order in terms of your agreement and condition of service, and you are hereby given one month's pay in lieu of notice with effect from 25-10-1948 AN as provided for therein. Your services will accordingly terminate on 25-10-1948 A. N....."

This notice was signed by the Divisional Superintendent, Lucknow. The appellant appealed against this order to the Chief Operating Superintendent, but without success. On 5-9-1949, he filed a suit for a declaration that the order was void and that he was still in the service of the railway administration; he also sought a decree for Rs. 1,395-7- as salary due to him. On 20-8-1951, the suit was dismissed and on 31-5-1952, an appeal therefrom was dismissed by the learned Civil Judge at Malihabad. A second appeal to this Court was no more successful but the learned Judge granted special leave to appeal to a Bench.

(5) The appellant's principal contention is that the notice of 22-10-1948, purporting to terminate his contract of service, was not signed by a competent authority and was therefore of no effect in law. He further contends that even if the notice terminating his services was duly signed the provisions of S. 243, Government of India Act, 1935, were not complied with, and that therefore in either case his contract of service still subsists.

(6) The appellant entered into the service of the East Indian Railway on 14-8-1940, upon which date he executed an agreement with the Governor-General in Council (acting by and through the East Indian Railway Administration), paras 1 and 3 of which read as follows:

"1. In this Agreement and for the purposes of every clause, part and provision thereof, the expression-

(a) "Railway servant" means the said Mohd. Mukhtar Siddique,

(b) "Administration" means the Governor-General-in-Council, acting by and through the General Manager or other proper officer of the East Indian Railway.

(3) The railway Servant shall be subject to the following conditions of service, namely, (a) that such service is terminable at any time by either party on one month's notice in writing or by the Administration on one month's pay in lieu of notice, (b) that in no circumstances shall the railway servant be entitled to gratuity or pension, though he will be eligible for a gratuity for good, efficient, faithful and continuous service at the discretion of the Administration and (c) that the Administration has full power and authority at any time, for any reason that it may consider sufficient, to suspend or dismiss or remove him from the service without previous notice or otherwise punish the railway servant according to the rules of the service in which he is for the time being employed."

This agreement was signed for and on behalf of the Governor-General in Council by the then Divisional Superintendent, East Indian Railway, Lucknow.

(7) It is important to observe that it is the respondent's case that the appellant's contract of service was terminated under sub-cl. (a) of cl. 3 of the service agreement; it is no part of the respon-

dent's case that the appellant was removed from service under sub-cl (c) of that clause or pursuant to any provision of the disciplinary rules of the State Railway Establishment Code. The first question which therefore, falls for decision is whether the Divisional Superintendent had authority to terminate the plaintiff's contract on behalf of the Governor-General in Council.

(8) It is common ground that the Divisional Superintendent had authority to execute the service agreement on behalf of the Governor-General in Council, but it does not follow from that fact alone that he also had power to terminate it. Learned counsel has not referred us to any rule or other authority which specifically conferred power upon the Divisional Superintendent to terminate that agreement under sub-clause (a) of clause 3, but it is argued that that power is to be inferred from an entry in a "Schedule of powers" in a pamphlet issued by the railway administration entitled "Regulations regarding disciplinary action against non-gazetted staff including removal from service, dismissal and rights of appeal". The notice of 22-10-1948, is headed "Removal Notice"; it uses the phrase "removed from service"; and the argument for the respondent is that this is a phrase which is used by the railway administration to describe the action which it takes when it terminates a contract under sub-cl. (a) of cl. 3, and that because "removal from service" is also a penalty under R. 1708, State Railway Establishment Code the power to terminate a contract under that subclause can be exercised on behalf of the Governor General by the officer who is empowered to impose the penalty of removal from service under R. 1708.

It is common ground that under the 'Schedule of powers' a Divisional Superintendent has power to remove the petitioner from service; but it is in our opinion quite clear from this 'Schedule' that the power of removal which is there referred to is a punishment for an offence, and has nothing whatever to do with that form of removal from service which consists in the termination of an employee's contract of service under sub-cl. (a) of cl. 3.

(9) "Removal from service" is in fact a phrase used by the Railway Administration in two senses — as a penalty, and as descriptive of the termination of a railway servant's contract by notice or by one month's pay in lieu of notice. The two uses of the phrase are quite different and it does not follow that because a particular officer has authority to impose the penalty that he can terminate the contract. Power to impose the penalty depends on the rules contained in the Railway Establishment Code; power to terminate the contract depends upon the possession of authority to act in that respect on behalf of the Governor-General in Council.

(10) We think that a perusal of the relevant rules of the Railway Establishment Code shows clearly that the phrase 'removal from service' as therein used means, and means only, removal from service as a punishment. Rule 1702 enumerates the penalties which may be imposed on a railway servant; of these penalties No. (8) is removal from service. R. 1706 then specifies the circumstances in which a railway servant may be dismissed and R. 1707 the procedure which has to be followed when a railway servant is charged with an offence the maximum penalty for which is dismissal. Rule 1708 enumerates the offences for which a railway servant may be removed from service, and R. 1709 then lays down the procedure which must be followed when a railway servant is charged with an offence meriting removal from service under R. 1708. In the case of a railway servant such as the appellant who has completed seven years' continuous service, the procedure outlined in R. 1707 has to be followed, provided that the officer competent to pass the order of discharge may dispense with the departmental enquiry and make an enquiry in any manner which he deems proper, recording his considered opinion before passing an order of discharge.

(11) Rule 1708 contains a proviso; it is in these terms: "Provided that nothing in these rules shall abrogate the right of a General Manager, in exceptional circumstances, to remove a non-pensionable non-gazetted railway servant from service in terms of his agreement without application of the procedure described in the rules in this section and without assigning any reasons if he considers it desirable to do so. This power shall not be delegated to an authority lower than a Head of a Department."

The removal of a railway servant from service in terms of his agreement presumably means the termination of his contract of service under sub-cl. (a) of Cl. (3) thereof, and it would appear therefore from this proviso that that power can be exercised only by a General Manager or by an authority not lower than the head of a department to whom he has delegated his power. It is not in dispute that a Divisional Superintendent is not the Head of a Department.

(12) In the circumstances the respondent has failed to satisfy us that the appellant's contract of service was terminated by a valid notice. We are accordingly obliged to hold that the contract of service remains in force and that the appellant is entitled to a declaration that he is still in the service of the railway administration.

(13) The case must now be remanded to the court of the learned Civil Judge for determination of the question of the amount of salary to which the appellant is entitled. The appellant is entitled to his costs in all courts of appeal; the costs in the trial court will depend on the result of the issue now remanded.

M.R.G. Appeal allowed.

(S) AIR 1955 Allahabad 569 (V. 42 C. 165 Oct.)

AGARWALA AND SAHAI JJ. (27-1-1955)

Hiralal Patni, Judgment-debtor, Appellant v. Sri Kali Nath, Decree-holder, Respondent.

Ex. First Appeal No. 137 of 1954, against order of Civil Judge, Agra, D/- 3-4-1954.

(a) Civil P. C. (1908), Ss. 11, Expln. IV, 9, 21 — Want of jurisdiction — Objection — Rule as to —Applicability to execution proceedings — (Evidence Act (1872), S. 44) — (Suits Valuation Act (1887), S. 11).

The objection that the court passing the decree had no territorial jurisdiction would be barred in execution proceedings by the principle of 'res judicata' embodied in S. 11, read with Expl. 4, Civil P. C. (Para 14)

The general rule is that if the Court rendering a judgment suffers from want of jurisdiction in respect of any of the matters on which a Court's jurisdiction depends, the judgment is a nullity and may be ignored. But this general rule is subject to well defined exceptions, two of them being S. 21, C. P. C. and S. 11, Suits Valuation Act. (Para 11)

The policy underlying those provisions is that when a case had been tried by a Court on the merits and judgment rendered, it should not be reversed purely on technical grounds, unless there has been a prejudice on the merits resulting in the failure of justice. When the matter is between the

same parties, the same principle applies to execution and collateral proceedings as well. (Para 12)

Section 44, Evidence Act would not apply to such cases as that section refers to the lack of inherent jurisdiction in the Court and not to its territorial jurisdiction which can be waived. Also the fact that the defect is apparent on the face of the plaint or can be made to appear after evidence has been adduced, is wholly immaterial. (Paras 16, 18)

(Factors on which a Court's jurisdiction may depend narrated): Case law reviewed. (Para 10)

Anno: AIR Com., C. P. C., S. 9 N. 3, 5; S. 11 N. 33; S. 21 N. 6; AIR Man. Evi. Act, S. 44 N. 1.

AIR Com., Suits Valuation Act, S. 11 N. 2 Pts. 2, 4.

(b) Decrees and Orders Validating Act (1936), S. 2 — Scope — Decree passed on award.

Decrees and Orders Validating Act, embraces within its scope not only decrees which had already been passed by the Courts mentioned in the Act, but also future decrees or orders. Therefore, the decree passed by the Bombay High Court under Cl. 12 of the Letters Patent has to be deemed to be valid, even though the Court might have had no jurisdiction to pass it. The contention that since the matter was referred to an arbitrator, it could not be said that a "decree" was passed under Cl. 12 of the Letters Patent of the Bombay High Court within the meaning of S. 2 of the Act is not tenable, because the trial by an arbitrator in a pending suit, is a procedure provided by law. The decision of the arbitrator, after certain proceedings taken in the Court itself is embodied in a decree of the Court. The decree so passed is a decree of the Court and not of the arbitrator. (Paras 19, 20)

Anno: AIR Man., Decrees and Orders Validating Act, S. 2 N. 1.

AIR Com., C. P. C., Letters Patent, Cl. 12 N. 9.

(c) Arbitration Act (1940), S. 13 — A question of jurisdiction can be referred to arbitration. (Para 21)

Anno: AIR Man., Arbi. Act, S. 13 N. 1.

(d) Arbitration Act (1940), S. 32 — Award affirmed in Letters Patent appeal — Finality.

The award cannot be questioned in any other Court except in the Court in which it was filed under the provisions of the Arbitration Act. The award having been affirmed even in appeal by the Letters Patent Bench of the High Court, the decision is binding upon the parties and can no longer be questioned in execution. (Para 22)

Anno: AIR Man., Arbi. Act, S. 32 N. 1.

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 340 : 1955 SCR 117 (SC) 11
(B) ('11) 38 Cal 639: 12 Ind Cas 464 12
(C) ('12) 36 Bom 628: 16 Ind Cas 1005 12
(D) (V5) AIR 1918 PC 188 : 43 Bom 507 (PC) 12
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(F) (V33) AIR 1946 Lah 57 : ILR (1945) Lah 281 (FB) 14
(G) (V28) AIR 1941 Nag 36: ILR (1941) Nag 1 (FB) 14
(H) (V18) AIR 1931 All 454 : 53 All 560 14
(I) (V40) AIR 1953 SC 65: 1953 SCR 377 (SC) 14
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(M) (V19) AIR 1932 All 665: 54 All 297 21
(N) (V33) AIR 1946 PC 72: ILR (1946) All 103 (PC) 22

J. Swarup and Hari Swarup, for Appellant; A. K. Kirti, for Respondent.

AGARWALA J.:

This is a judgment-debtor's appeal arising out of an objection under S. 47, Civil P. C. The facts briefly stated, are as follows:

2. There are certain mills at Agra known as the John Mills, the owners of which belonged to a well-known John family. The appellant wanted to purchase the shares of one of the members of the John family and he wrote a letter to the respondent, Sri Kalinath, on 16-5-1944 from a place called Kishangarh in Rajasthan, and addressed the letter probably to Agra where Sri Kalinath resides. In this letter he made an offer to Sri Kalinath that if he could secure the sale of the shares of the late Major A. U. John in the immoveable properties and the mills at Agra, he would pay to Sri Kalinath a lump sum of rupees one lac on the completion of the transaction.

After this, Letters of Administration were issued in respect of the property of Major A. U. John to one Mr. Pereira of Bombay. This was on 18-1-1945. Sri Kalinath carried on negotiations for sale and fixed up the transaction with Mr. Pereira and ultimately a sale deed was executed by Mr. Pereira in favour of the appellant and a nominee of his at Bombay on 10-7-1946. It was also registered at Bombay.

Dispute arose between the parties as to the remuneration of rupees one lac which was agreed to be paid to Sri Kalinath, with the result that Sri Kalinath had to bring a suit for the recovery of the sum of rupees one lac on the original side of the Bombay High Court. This was Suit No. 3718 of 1947. In paragraph 10 of the plaint leave of the Court for the institution of the suit in the Bombay High Court was sought and it was alleged that the Court would have jurisdiction to entertain the suit if leave were granted under Cl. 12 of the Letters Patent.

The allegation in the plaint was that the negotiations for the sale were carried on at Bombay, the sale deed was executed at Bombay and the transaction was completed at Bombay. The claim to the relief was based not merely upon the agreed amount under the contract, but also by way of quantum meruit for the work done by the plaintiff for and on account of the defendant and for his labours and exertions in connection with the said transaction. The Bombay High Court granted leave under Cl. 12 of the Letters Patent by its order dated 10-11-1947.

3. The appellant raised an objection to the jurisdiction of the Court to entertain the suit on the ground that no part of the cause of action had arisen within the jurisdiction of that Court. Issues were framed and one of the issues was whether the Court had jurisdiction to entertain the suit. Another issue was whether the plaintiff was entitled to recover any sum as and by way of quantum meruit. Later on the parties agreed to refer all the matters in dispute between them to the arbitration of Mr. Pereira by an agreement of reference dated 23-7-1951.

4. On 25-7-1951 the Court made the order of reference and on 9-8-1951 Mr. Pereira gave his award, decreeing the suit for Rs. 75,000/- with costs and interest. An application to set aside the award was made by the appellant on 19-9-1951.

but no objection to the jurisdiction of the Court or of the arbitrator was made. On 12-11-1951 a decree was passed by the Court in terms of the award. Against this decree the appellant filed a Letters Patent appeal without raising any question of jurisdiction of the Court to pass the decree. The appeal, however, was dismissed.

After that the decree-holder made an application to get the decree transferred for execution to the Court at Agra. The application for execution was made at Agra on 4-2-1952. Several objections were raised, but none as to the jurisdiction of the Bombay High Court to pass the decree. The objections were dismissed. There was an appeal to this Court against the dismissal of the objections. Here again no objection was taken as to the jurisdiction of the Bombay High Court to pass the decree. The appeal was dismissed by the Court.

5. When the matter went back to the Court at Agra for execution and the property was advertised for sale, it was then that the appellant raised the objection as to the jurisdiction of the Bombay High Court to pass the decree. The plea taken by the appellant was that on the face of the plaint itself no part of the cause of action had arisen within the jurisdiction of the Bombay High Court and that therefore, that Court had no jurisdiction to grant leave under Cl. 12 of the Letters Patent.

The reasoning of the appellant was that the contract between the parties was merely to negotiate and fix up the transaction of the sale and that the remuneration payable to the respondent did not depend upon the completion of the sale deed, and that as such since the offer and the acceptance were both made outside the jurisdiction of the Bombay High Court, no part of the cause of action arose within the jurisdiction of that Court.

6. The Court below dismissed the objection on the ground that it was not open to the appellant to raise the plea as to the jurisdiction of the Bombay High Court at that stage and that the execution Court could not go behind the decree and must execute it as it finds it. Against this order the appellant-judgment-debtor has come up to this Court in appeal.

7. As the relevant documents were not filed by the parties in the Court below, we permitted them to file certified copies of the documents on which they relied. Documents were taken on the record with the consent of both parties and the formal proof of those documents was dispensed with with their consent.

8. Learned counsel for the appellant has strongly urged; first that the Bombay High Court had no jurisdiction to grant leave under Cl. 12 of the Letters Patent of that Court because no part of the cause of action arose within the jurisdiction of that Court; and secondly, that since the lack of jurisdiction is patent upon the face of the plaint itself, the execution Court at Agra was bound to refuse execution of a decree which was without jurisdiction.

9. It is not necessary for us to determine the question as to whether on the face of the plaint any part of the cause of action arose within the jurisdiction of the Bombay High Court, for we are satisfied, for more reasons than one, that this plea cannot be entertained by the execution Court at Agra.

10. A Court's jurisdiction may depend on several factors:

(i) the person of the defendant,

(ii) valuation of the subject-matter of the dispute,

(iii) the place where the cause of action in whole or in part arose or where the defendant resides or carries on business,

(iv) the nature of the subject-matter of the dispute,

(v) other conditions precedent prescribed by law to the exercise of jurisdiction by a Court (not falling within any of the above four conditions),

(vi) power of the Court to pass a particular order,

(vii) interest of the Court in the subject-matter of the dispute or in the parties.

11. The general rule is that if the Court rendering a judgment suffers from want of jurisdiction in respect of any one out of the above seven matters its judgment is a nullity and may be ignored. Venkatarama Ayyar, J. in delivering the judgment of the Supreme Court in 'Kiransingh v. Chaman Paswan', AIR 1954 S. C. 340 (A) observed:

"It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

But this general rule is subject to well defined exceptions. Two of these exceptions were dealt with in the aforesaid case by the Supreme Court itself.

12. Section 11, Suits Valuation Act enacts that an objection that a Court which had no jurisdiction over a suit or appeal had exercised it by reason of over-valuation or under-valuation, should not be entertained by an appellate Court, except as provided in the section. To the same effect is the provision of S. 21, C. P. C. which enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice.

After pointing out these provisions, Venkatarama Ayyar J. in the above case observed that the policy underlying Ss. 21, Civil P. C. and 11, Suits Valuation Act is the same, namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits.

But it will be noted that Ss. 21, Civil P. C. and 11 Suits Valuation Act relate to appeals and revisions in the same proceeding in which the judgment was rendered and do not refer to execution proceedings or collateral proceedings. So far as the collateral proceedings are concerned, a stranger to the previous litigation in which the judgment was rendered is not bound by the decree which was passed by a Court which suffered from a territorial or pecuniary defect of jurisdiction, vide 'Rajlakshmi Dasee v. Katyayani Dasee', 38 Cal 639 (B).

It may also be observed that the pecuniary defect of jurisdiction which falls under S. 11 Suits Valuation Act and which can be waived is a defect of under-valuation or over-valuation of the subject-matter of the dispute, but if there is no under-valuation or over-valuation and if on the valuation given in the plaint itself, the suit was

not entertainable by a particular Court, and the Court renders judgment by assuming jurisdiction, the judgment rendered by it will be treated as a nullity, vide 'Shidappa Venkatrao v. Rachappa Subrao', 36 Bom 628 (C), affirmed by the Privy Council in 'Rachappa Subrao v. Shidappa Venkatrao', AIR 1918 PC 188 (D).

But when the matter is between the same parties, the principle underlying Ss. 11, Suits Valuation Act and 21, Civil P. C. has been applied to execution and collateral proceedings as well, on the ground that these objections are technical and are not defects in the inherent jurisdiction of the Court but are mere matters of procedure and can be waived.

13. In Clarke v. Knowles, 1918-1 KB 128 at p. 134 (E) Lush J. while dealing with S. 74 County Courts Act, 1888, which provided that every action or matter may be commenced by the leave of the Judge or Registrar in the Court in the district in which the defendant dwells or carries on business, except in two cases, one of which was that the plaintiff may, by leave of the Registrar, bring the action in a district in which part of the cause of action arose, observed that

"the objection that no part of the cause of action arose in the district in which the action is brought is one of procedure rather than of jurisdiction."

14. In Musa Ji Lukman Ji v. Durga Das, AIR 1946 Lah 57 (F) Mahajan J., as he then was, observed that

"the principle that parties cannot by consent confer jurisdiction on Court or deprive Court of jurisdiction only applies to cases of inherent jurisdiction of a Court over the subject-matter of a suit, but the question of territorial jurisdiction of a Court is not a question of inherent jurisdiction. An objection as regards the territorial jurisdiction of a Court can be waived by a party and if it is not raised at earlier stages of a case it cannot be raised in a Court of appeal. The judgment or decree of a Court having no territorial jurisdiction over the subject-matter of a suit is not a nullity but is a judgment of a competent Court."

To the same effect are the observations of the Full Bench of the Nagpur High Court, vide 'Firm Jagni Ram Premsukh v. Ganpati Damaji, AIR 1941 Nag 36 (G). Two of the questions referred to the Full Bench were :

"Can the rule limiting the territorial jurisdiction of Courts to property situate within their territorial limits be validly waived by submission?" and

Is the rule embodied in S. 21, Civil P. C., limited to appeals and revisions in the same suit or does it also apply to separate suits and to execution proceedings in the same suit as well?"

and the answer of the majority of the Full Bench was that the rule limiting the territorial jurisdiction of Courts to property situate within their territorial limits can be validly waived by submission and that the rule embodied in S. 21 C. P. C. is not limited to appeals and revisions in the same suit. Stone C. J. was of opinion that :

"(1) A defect in jurisdiction may be inherent or procedural. The former cannot be waived the latter can."

"(2) If a defect in jurisdiction is procedural and is waived, whether by absence of objection or otherwise, up to judgment an objection cannot be taken in execution."

The view of this Court in Raghubir Saran v. Hori Lal AIR 1931 All 454 (H) that where a decree has been passed by a Court having no territorial jurisdiction over the matter in controversy, the defendant is entitled to maintain an independent suit for its avoidance has been recently dissented from by the Supreme Court in — 'Mohanlal Goenkar v. Benoy Kishna Mukerjee', AIR 1953 SC 65 (I) where Ghulam Hasan, J. after pointing out the distinction between inherent lack of jurisdiction of which an example was the case of — 'Lakhmichand v. Madho Rao, AIR 1930 All 681 (J) where a suit had been filed without obtaining a certificate from the Collector as required by the Pensions Act and the case of lack of territorial jurisdiction of the Court passing the decree, observed that though the former could not be waived, the latter could be waived, and that the objection would be barred by the principle of 'res judicata', embodied in S. 11, read with Expl. 4, C. P. C.

15. It may here be observed that the objection that the Bombay High Court had no territorial jurisdiction to pass the decree must be deemed to have been impliedly decided against the appellant, and as such the decision would be binding upon the appellant under S. 11, read with Expln. 4, Civil P. C.

16. Section 44, Evidence Act has no application to an objection based on the ground of lack of territorial jurisdiction. The section runs as follows.

"44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under S. 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

The words "by a Court not competent to deliver it" refer to the inherent incompetency of the Court and not to a lack of jurisdiction which can be waived, such as want of territorial jurisdiction. Although S. 44, Evidence Act is not referred to in the Supreme Court judgment above-mentioned, it must be taken that the decision of the Supreme Court implies that S. 44, Evidence Act refers to the lack of inherent jurisdiction in the Court and not to its territorial jurisdiction which can be waived.

17. It has been held that where leave under Cl. 12 of the Letters Patent is granted and a decree is passed in favour of the plaintiff, the decree cannot be questioned in the execution Court without the leave being revoked in a proper proceeding, vide 'Amiya Probha v. Jyoti Prakash', AIR 1947 Cal 364 (K).

18. It was urged that the rule that an objection as to the territorial jurisdiction of the Court will not be entertained by the execution Court, does not apply to lack of territorial jurisdiction in the Court passing the decree when the defect is apparent upon the face of the plaint. We do not think that the contention is sound. Whether the defect is apparent on the face of the plaint or can be made to appear after evidence has been adduced is wholly immaterial. It was open to the party against whom the decree has been passed to object to the jurisdiction of the Court to entertain the suit before the decree was passed.

If the objection was raised and was decided against him, the decision is binding upon him in subsequent proceedings by virtue of S. 11, C. P. C. If on the other hand the objection was not raised, the very fact that the decree has been passed by the Court implies that the Court held that it had jurisdiction to pass the decree, and, therefore, Expln. 4 of S. 11 comes into play and the decree cannot be challenged on that ground, and the decision would again be binding in subsequent proceedings.

19. The second ground on which the objection of the appellant is not maintainable is that

the decree passed by the Bombay High Court has to be deemed to be valid , even though the Court might have had no jurisdiction to pass it, because it is so provided in the Validating Act 5 of 1936. The words 'passed' or 'made' in S. 2 of that Act cannot necessarily be confined to decrees passed or orders made before the Act was passed. If that had been the intention the Legislature could have certainly said so in clear words by the addition of the word 'already' before the word 'passed'.

The presumption always is that a statute operates upon facts and events which happen or come into existence after the coming into force of the enactment, vide Bourke v. Nutt, (1894) 1 Q. B. 725 (L). In our opinion Act 5 of 1936 embraces within its scope not only decrees which had already been passed by the Courts mentioned in the Act, but also future decrees or orders that might be passed or made thereafter.

20. In this connection it was urged by learned counsel for the appellant that since the matter was referred to an arbitrator, it could not be said that a "decree" was passed under Cl. 12 of the Letters Patent of the Bombay High Court within the meaning of S. 52 (S. 2 ?) of the Act, because that section contemplates a decree passed by that Court on a trial held by itself and not on a trial held by an arbitrator. This argument has no force. The trial by an arbitrator in a pending suit, when the reference is made by the Court, is a procedure provided by law for the decision of a suit. The decision of the arbitrator, after certain proceedings taken in the Court itself is embodied in a decree of the Court. The decree so passed is a decree of the Court and not of the arbitrator.

21. It was urged that the decree is initiated because a question of jurisdiction could not be referred to arbitration. This plea again is unsound. In Mohammad Aijaz Ali Khan v. Basantrai, AIR 1932 All 665 (M) it was held that a question of jurisdiction could be referred to arbitration.

22. It was urged that the award could not be challenged by means of objections to the award in the Court in which the award was filed, because of the observations of the Privy Council in Chabba Lal v. Kallu Lal', AIR 1946 P. C. 72 (N) but such objections could have been raised in the appeal against the decree passed by the Court if the decree was without jurisdiction.

As observed by the Privy Council in the same case, the award could not be questioned in any other Court except in the Court in which it was filed under the provisions of the Arbitration Act. The award having been affirmed even in appeal by the Letters Patent Bench of the Bombay High Court, the decision is binding upon the appellant and can no longer be questioned in execution.

23. For all these reasons we hold that the order of the Court below was correct, and consequently we dismiss this appeal with costs. The stay order is discharged. The record of the case shall be sent back to the Court below at an early date.

H.G.P. Appeal dismissed.

AIR 1955 ALLAHABAD 573 (V. 42 C. 166 Oct.)

LUCKNOW BENCH—MOOTHAM C. J. AND RANDHIR SINGH J. (12-4-1955)

Misri Lal and another, Plaintiffs-Appellants v. Bhagwati Prasad, Defendant-Respondent.

Misc. Appeal No. 25 of 1948, against order of Addl. Civil Judge, Gonda, D/- 22-1-1948.

(a) Civil P. C. (1908), O. 8, R. 5 — Facts not denied specifically will be taken to be admitted.

When in a suit to file an award and to pass a decree in terms thereof the defendant made no specific denial of the execution of the award the execution of the award should be deemed to have been admitted by the defendant. (Para 5)

Anno: AIR Com.: Civil P. C., O. 8, R. 5 N. 2.

(b) Registration Act (1908), Ss. 58 and 60 — Certificate if proof of execution of document.

Per Mootham, C. J.: The Registrar's certificate is evidence of admission of execution by the executant and that itself is evidence admissible to prove the due execution of the document. The question whether it is sufficient evidence must depend upon the circumstances. (Para 20)

Per Randhir Singh, J.: Where the proof of execution depends on circumstances other than the admission of execution by the executants, such as due attestation or identity of the executants who appeared before the Sub-Registrar, the endorsement of the Sub-Registrar may not be sufficient proof of the execution of the deed, but there can be no doubt that the admission of the execution by the executants, whose identity could not be disputed, and in a case where no question of proper attestation arises, appearing in the endorsement would be evidence of execution of the document, or at any rate would be some evidence of execution. (Para 6)

The usual endorsement of the Sub-Registrar before whom the award was presented for registration was found on the back of the first page of the document wherein he stated that the execution and completion of the document were admitted by all the four executants of the deed of award, who were all personally known to him. The Sub-Registrar had affixed his own signatures, and the signatures purporting to be the signatures of all the four executants as also their thumb marks were affixed at the foot of the endorsement.

No definite denial of execution was made in the pleadings and no question challenging the execution was put to any of the two executants who entered the witness box. The executants who appeared before the Sub-Registrar were personally known to him, and the document which was registered did not require attestation.

Held that in these circumstances the endorsement of the Registrar should be deemed to be proof of execution. 33 Cal 537 (PC) — AIR 1943 PC 83, Rel. on. (Para 7)

Anno: AIR Com.: Reg. Act, S. 58 N. 6; S. 60 N. 12.

(c) Arbitration Act (1940), S. 30 — Misconduct — Theka rights in village not divided by arbitrator — (Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 213).

An arbitrator appointed to make partition cannot be said to have acted improperly if he did not divide the theka rights in a village held jointly by the parties. Theka rights of villages are governed by the U. P. Tenancy Act and are not transferable unless such a provision was made in the terms of the theka vide S. 213 (b) of the U. P. Tenancy Act.

It was, therefore, evidently not such a right as could be the subject of partition. If any of the parties held the theka and it was joint family property, it was open to the others to claim a share of the profits from the others by a suit. (Para 9)

Anno: AIR Man.: Arb. Act, S. 30 N. 12.

(d) Arbitration Act (1940), S. 30 — Misconduct — Omission to give notice of award.

The omission to send a written notice of the award to the parties may be due to the ignorance of the arbitrators of the rules of procedure provided in the Arbitration Act and cannot necessarily be refer-

able to any deliberate misconduct on their part. (Para 11)

Anno: AIR Man.: Arb. Act, S. 30 N. 12.

(e) Arbitration Act (1940), S. 30 — Misconduct — Arbitrator partitioning property by lots.

Where partition was to be effected by drawing lots, the action of the arbitrator in dividing properties by lots does not amount to misconduct. It is a matter of common knowledge that allotment of shares which are equal is done by drawing lots after equal lots have been made, and this mode of division cannot be said to amount to wagering which is opposed to public policy. (Para 11)

Anno: AIR Man.: Arbitration Act, S. 30 N. 12.

(f) Arbitration Act (1940), S. 30 — Scope — Finding of fact — Interference.

It is not open to a Court to set aside finding of fact arrived at by arbitrators, and the only grounds on which an award can be challenged are those mentioned in the Indian Arbitration Act. (Para 11)

(g) Interpretation of Statutes — Two interpretations — That consistent with intention of Legislature to be preferred — (Civil P. C. (1908), Pre.)

If, of two interpretations, one appears to be more in accord with the intention of the Legislature, or if there are other circumstances to infer the intention of the Legislature, the interpretation which is consistent with such an intention should be put upon the words of the enactment. (Para 13)

Anno: AIR Com.: Civil P. C., Pre. N. 7.

(h) Limitation Act (1908), Art. 178 — Starting point — Absence of notice under S. 14 (2), Arbitration Act — (Arbitration Act (1940), S. 14 (2).)

The starting point of limitation under Art. 178 as amended in 1940 is the date of the service of notice and not the date of the award, or the knowledge of the award. (Para 13)

If a party does not receive a notice of the award as prescribed by law (S. 14 (2), Arbitration Act) he would evidently be within his rights to wait for the receipt of such a notice and if he finds after some time that no notice has been received by him, it would be open to him to make an application for the filing of the award even if no notice has been received, but in all such cases the application would not become barred by time unless it is presented more than 90 days after the receipt of a written notice of the award. AIR 1949 Pat 393, Rel. on. (Para 13)

Anno: AIR Com.: Lim. Act, Art. 178 N. 4.

CASES REFERRED: Paras

(A) (V29) AIR 1942 Nag 84 : ILR (1942) Nag 661 6
(B) (V28) AIR 1941 Oudh 529 : 196 Ind Cas 787 6
(C) (V16) AIR 1929 Lah 711 : 116 Ind Cas 911 6
(D) ('76) 25 Suth WR 267 6
(E) ('06) 33 Ind App 60 : 33 Cal 537 (PC) 6, 20
(F) (V30) AIR 1943 PC 83 : ILR (1943) Kar PC 69 (PC) 6, 20
(G) (V23) AIR 1936 All 422 6
(H) (V36) AIR 1949 Pat 393 : 27 Pat 86 13

Niamatullah, Mohd. Husain and Inayatullah, for Appellants; S. C. Das, H. D. Srivastava and J. S. Trivedi, for Respondent.

RANDHIR SINGH J.:

This is an appeal against the order of the Additional Civil Judge of Gonda dismissing an application under S. 14 of the Indian Arbitration Act which was treated as a suit, for the filing of an award and for a decree on the basis of the award.

(2) The plaintiffs appellants and the defendant are own brothers, being the sons of Patan Din. They formed a joint Hindu family and were possessed of business and movable and immovable properties. Disputes arose amongst the brothers and ultimately it was agreed that the properties be partitioned. An agreement was executed on the 8th October, 1946, by means of which the parties appointed six arbitrators, including a sarpanch, for the partitioning of the properties and for settling the dispute.

The arbitrators then entered upon their duty and after examining the parties and their evidence gave an award on 13-1-1947. The award was registered. On 14-7-1947, an application was made by the plaintiffs appellants purporting to be one under S. 14 of the Arbitration Act, though it was wrongly described as an application under S. 51 of the Act, praying that the arbitrators be directed to file the award and a decree be passed on the basis of the award.

Notices were then issued to the respondent and the arbitrators; and Bechchu Lal the sarpanch filed the award in Court along with the registered agreement on 25-8-1947. Objections were, however, raised on behalf of the respondent challenging the validity of the award on various grounds. It was contended that certain properties had been left out and had not been partitioned, that two of the panches—Moti Sonar and Kodai Halwai, were not present on all the sittings of the panches and did not join in the award, that Ganesh Dutt Misir — one of the panches, refused to act as arbitrator, that the panches showed partiality to the applicant & did not divide the property properly and that no notice of the award was given to the respondent. It was also alleged that the application was barred by time.

(3) The learned Civil Judge framed in all 13 issues which covered the various objections raised on behalf of the respondent and finally came to the conclusion that the award had not been proved and was bad on account of judicial misconduct and partiality of the arbitrators. The application made by the plaintiffs appellants, which was treated as a suit, was finally dismissed on the 22nd January, 1948. The plaintiffs have now come up in appeal.

(4) It is not disputed that the parties had entered into an agreement on 8-10-1946, by means of which six arbitrators, including Bachchu Lal Sarpanch, were appointed for settling the disputes and for the partitioning of the property of the parties. The main grounds of contention on behalf of the defendant, however, were that the theka of village Beli and a sum of Rs. 5,000/- deposited with Lakshmi Saraf had not been partitioned by the panches.

It has also been contended in appeal that the award had not been proved and that the application was barred by time. The other points raised in the Court below have not been seriously pressed in appeal.

(4a) The first point, therefore, which arises for determination is whether the award had been proved. The original award, which is a registered document and is properly stamped, was filed by the sarpanch in Court on 25-8-1947.

(5) The plaintiffs appellants had examined two of the panches including the sarpanch, but unfortunately no question was put to either of them with regard to the execution of the award. The point that no award had been made was not specifically taken in the written statement filed by the respondent. The plaintiffs had definitely stated in paragraph 3 of their application "that the panches and the sarpanch made the necessary and proper inquiries and gave the award on 13-1-1947." The defendant respondent in his written statement denied the allegations in paragraph 3 in the following words:

"Paragraph 3 is not admitted subject to additional pleas."

In paragraph 9 of the additional pleas the defendant stated as follows:

"All the proceedings were taken in their absence. The award is not according to their opinion

nor did it come to their knowledge. For this reason also the award is invalid and ineffective."

In no other paragraph of the written statement has it been averted by the defendant that no award was made by the arbitrators. No specific issue was framed on this point, and it appears that the plaintiffs appellants were led to believe on this state of pleadings, that the making of the award was not challenged by the defendant.

Reliance has been placed on behalf of the plaintiffs appellants on O. 8, Rr. 3 and 5 of the Civil P. C. and it has been contended that if the allegations made in the plaint had not been specifically denied they should be deemed to have been admitted.

Order 8, R. 5, Civil P. C. runs as follows:

"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability."

As pointed out above, the defendant made no specific denial of the execution of the award and there appears to be some force in the contention of the learned Counsel for the plaintiffs that the execution of the award should be deemed to have been admitted by the defendant.

(6) Even apart from the contention that the award should be deemed to have been admitted by the defendant in the circumstances mentioned above, it has been argued on behalf of the appellants that the certificate of registration of the Sub-Registrar who registered the document should be taken as proof of execution of the deed.

The procedure which the Sub-Registrar or the Registrar has to follow when a document is presented for registration is detailed in Ss. 58 to 63 of the Registration Act. Section 58 of the Registration Act requires the Registrar to make certain endorsements after he has asked the executants if they had executed the document.

He then affixes the date and signature to all the endorsements made under Ss. 52 and 58 relating to the document and made in his presence, on the same day, and this is followed by a certificate of registration as provided under S. 60 of the Registration Act. In the present case the usual endorsement of the Sub-Registrar before whom the award was presented for registration is to be found on the back of the first page of the document wherein he states that the execution and completion of the document were admitted by all the four executants of the deed of award who were all personally known to him.

The Sub-Registrar had affixed his own signatures, and the signatures purporting to be the signatures of all the four executants as also their thumb marks are affixed at the foot of the endorsement.

The question as to whether such an endorsement made in accordance with Sections 58 and 60 of the Registration Act amounts to a proof of execution arose in a number of cases and has been the subject of discussion in the rulings of the Privy Council and the various High Courts.

The Nagpur High Court has, however, in — 'Bulakidas Hardas v. Sk. Chotu Paikan', AIR 1942 Nag 84 (A), held that an endorsement of the nature mentioned above is not proof of execution of the document. A similar view has also been taken by a single Judge in — 'Ara Begam v. Deputy Commissioner, Gonda', AIR 1941 Oudh 529 (B). A contrary view has been taken in some other cases vide — 'Piara v. Fattu', AIR 1929 Lah 711 (C) and — 'Nittyanund Kur v. Raj Bullubh Adyapurahit', 25 Suth WR 267 (D).

It may not be necessary to discuss the rulings of the various High Courts in view of the two Privy Council cases in which the question was considered. The point came up before their Lordships of the Privy Council in — 'Gangamoyi Debi v. Troiluckhya Nath', 33 Ind App 60 (PC) (E) and their Lordships, while considering the evidentiary value of an endorsement by the Registrar, observed as follows:

"The registration is a solemn act, to be performed in the presence of a competent official appointed to act as registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order.

Of course it may be shown that a deliberate fraud upon him has been successfully committed; but this can only be by very much stronger evidence than is forthcoming here."

In a later case, — 'Gopal Das v. Sri Thakurji', AIR 1943 PC 83 (F), the question again came up for consideration before their Lordships of the Privy Council and they observed as follows:

"It seems clear that any objection to the sufficiency of the proof upon this point would have been idle, the circumstances being such that the evidence of due registration is itself some evidence of execution as against the plaintiffs. Wills and documents which are required by law to be attested raise other questions but this receipt was not in that class."

It would, therefore, appear that an endorsement by the Registrar has been held to be some evidence of execution. No doubt it has been observed in all those cases that if there are circumstances which throw a doubt, or where the question as to whether a document was properly attested arises, the endorsement of the Registrar of the admission of the execution by the executant may not be quite sufficient to prove the due execution and attestation of the document.

In AIR 1941 Oudh 529 (B) referred to above, Yorke, J. held, under circumstances of that particular case, that the endorsement was not proof of execution. He summed up his conclusions as follows:

"To sum up the whole position, as it appears to me, the plaintiffs were in a position to lead evidence of execution without, so far as appears from the record, any difficulty. They have chosen to withhold evidence of execution although it could hardly be said that the surrounding circumstances were free from suspicion.

They have elected to rely on the admission of the Raja proved only by the registration endorsement. In my opinion after consideration of all the circumstances of the case, this evidence of admission is not by itself sufficient to establish execution of the two deeds in suit."

Those observations clearly show that Yorke, J. did not hold it affirmatively that under no circumstances an endorsement of registration was proof of execution. It was only when the surrounding circumstances were not free from suspicion, and the party relying on the document failed to prove execution, that it was held that the endorsement was not by itself sufficient to establish execution of the two deeds.

In — 'Gopal Das v. Sri Thakurji', AIR 1936 All 422 (G) a Division Bench of the Allahabad High Court held in a case in which the original document was not produced that the execution of that document by the executants could not be proved by the registration endorsement. It was this very case, — 'Gopal Das v. Sri Thakurji (G)', which ultimately went in appeal to the Privy Council and became the subject of decision in AIR 1943 PC 83 (F).

Their Lordships of the Privy Council did not agree with the view taken by the Allahabad High Court on the value of the endorsement of registration though the appeal was dismissed on other

grounds. A perusal of the rulings mentioned above shows that where the proof of execution depends on circumstances other than the admission of execution by the executants, such as due attestation or identity of the executants who appeared before the Sub-Registrar, the endorsement of the Sub-Registrar may not be sufficient proof of the execution of the deed, but there can be no doubt that the admission of the execution by the executants, whose identity could not be disputed, and in a case where no question of proper attestation arises, appearing in the endorsement would be evidence of execution of the document, or at any rate would be some evidence of execution.

(7) In the present case no definite denial of execution was made in the pleadings and no question challenging the execution was put to any of the two executants who entered the witness box. The executants who appeared before the Sub-Registrar were personally known to him, and the document which was registered did not require attestation. In these circumstances the endorsement of the Registrar should be deemed in this particular case to be proof of execution.

(8) The next point which has been raised in arguments on behalf of the appellants is that the arbitrators omitted to make a partition of the theka of village Beli and also omitted to divide a sum of Rs. 5,000/- deposited with Lakshmi Saraf. The sarpanch and one other arbitrator Baijnath were examined on behalf of the appellants. Baijnath P. W. 3 definitely stated that "it is not a fact that any party asked for the partition of any property and that it was not divided."

This statement was made in examination-in-chief and no question was put to the witness challenging the correctness of this statement. There is also no evidence on the record to show that there was any joint theka of village Beli, and reliance has been placed only on the statement of property mentioned in the agreement in which the word "theka" is to be found.

The appellants' counsel had stated at the time when the issues were framed that the theka of village Beli was not divided as the parties did not so desire. This is capable of several interpretations. The theka may not have been divided as the parties agreed that it was not joint property, or it may not have been divided as it was not feasible to divide it. It is also possible that the parties may not have thought it necessary to have it divided.

The sarpanch stated that the theka was not divided, but no question was put to him as to why the theka was not divided. All this clearly shows that the theka was not divided as the parties did not want it to be divided for any of the possible reasons mentioned above. The defendant did not enter the witness box to state that the parties had put up the theka as joint property but the arbitrators refused to divide it. It would thus appear that the joint property which was placed before the arbitrators for partition did not include the theka of village Beli.

(9) Moreover, even if it be found that the theka of village Beli was joint, it was evidently not property of such a nature as could be capable of division. Theka rights of villages are governed by the U. P. Tenancy Act and are not transferable unless such a provision was made in the terms of the theka, vide S. 213 (b) of the U. P. Tenancy Act.

It was, therefore evidently not such a right as could be the subject of partition. If any of these three brothers held the theka and it was joint family property, it was open to the others to claim a share of the profits from the others by a suit. On this ground also the arbitrators cannot be said to have acted improperly if they did not divide the theka.

(10) As regards the sum of Rs. 5,000/- said to have been deposited with Lakshmi Saraf, it is not disputed that this amount was deposited with this man who appears to be the same as Lachhman arbitrator. The arbitrators had, out of this sum which was jointly contributed by the three brothers, set apart a sum of Rs. 1,000/- for payment to the respondent as his jethansi share.

Baij Nath arbitrator states that the rest of the money was spent in the expenses of stamp duty and registration of the award and in payment to creditors who belonged to Lucknow, and all this was done with the consent of all the three parties. Not a single question challenging this statement of the arbitrator was put to him in cross-examination which clearly shows that the money which was held in deposit had been disposed of in the manner stated by the arbitrator. It has, however, been argued that no mention of it is to be found in the award.

It appears that items of property which had been given over to the parties directly at the time of the arbitration, or which had been disposed of in accordance with their wish and consent, have not all been shown in the award. A sum of Rs. 5,000/- or Rs. 6,000/- was found buried in the house & the arbitrators divided this money according to the wishes of the three brothers at the time when the money was found but no mention of it was made in the award.

No objection has been taken on that score to the validity of the award. If the amount of Rs. 5,000/- deposited with Lachhman Saraf had been properly disposed of, the mere fact that it was not mentioned in the award would not make the award invalid, nor would it lead to the conclusion that the arbitrators were guilty of misconduct.

It would thus appear that both the grounds on which the award has been challenged are untenable, and the inference drawn by the learned Civil Judge that the omission to divide the theka of village Beli, or of a mention of Rs. 5,000/- held by Lakshmi Saraf, go to show legal misconduct, is clearly incorrect.

(11) The learned Civil Judge has come to the conclusion that the arbitrators were guilty of having shown partiality to the plaintiffs and of legal misconduct on six circumstances detailed in his discussion on issue No. 7. Of these six points, two have already been disposed of. He has also come to the conclusion that the failure on the part of the arbitrators to inform the defendant of the award, and the division of the property by lots also led to the inference that the arbitrators were guilty of legal misconduct.

The omission to send a written notice of the award to the parties may be due to the ignorance of the arbitrators of the rules of procedure provided in the Indian Arbitration Act and cannot necessarily be referable to any deliberate misconduct on their part. The division of the properties was, it appears, to be made by drawing lots and the defendant-respondent himself objected to the validity of the award on the ground that the arbitrators had not carried out the partition of all items by drawing lots as agreed to between the parties.

It is a matter of common knowledge that allotment of shares which are equal is done by drawing lots after equal lots have been made, and this mode of division cannot be said to amount to wagering which was opposed to public policy. There is, therefore, no force in the contention that the division of the properties by lots, or that the omission of the arbitrators to serve a written notice of the delivery of the award, on the parties amounted to misconduct.

One of the grounds, which is ground No. 4, for holding the award bad is that the arbitrators parti-

tioned a kothi which had been obtained by a gift deed by the respondent.

It was open to the arbitrators to have found, as they did, that this transaction was farzi and that the property was joint property and no exception can be taken to such a finding in the court. It is not open to a Court to set aside findings of fact arrived at by arbitrators, and the only grounds on which an award can be challenged are those mentioned in the Indian Arbitration Act.

(12) I am unable, therefore, to agree that misconduct can be inferred from any of the six circumstances mentioned by the learned Civil Judge in his judgment while discussing issue No. 7 and am clearly of opinion that there was no valid ground to hold that the arbitrators were guilty of misconduct, judicial or otherwise, or of any partiality to any of the parties.

(13) The last and the only remaining submission on behalf of the appellants was that the finding of the lower court on the point of limitation was erroneous. Applications for the filing of an award under S. 14 of the Arbitration Act are governed by Art. 178 of the Limitation Act. The period of limitation provided is 90 days, and it starts running from the date of the service of the notice of the making of the award.

It is admitted that no written notice as required by S. 14(2) of the Arbitration Act was sent by the arbitrators to any of the parties to the reference. It has been argued on behalf of the respondent, and in support of the judgment of the lower court, that time began to run from the date when the applicants came to know of the award.

The period of limitation, used to be six months before the Arbitration Act, 1940, came into force, and the period ran from the date of the award. When a specific provision was made in the Arbitration Act for the service of a written notice to the parties to the award, the period of limitation was curtailed to 90 days, and the service of the notice was made the starting point of limitation, instead of the date of the award.

It could not be the intention of the legislature that the date of the award, or the knowledge of the award, should be the starting point of limitation, when the amendment was made in 1940. It has been argued on behalf of the respondents that if the knowledge of the award is not to be taken as the starting point for limitation it would be open to a party to wait indefinitely and file an application for the filing of the award years after the award is made if no notice in writing was served and such an interpretation would lead to a good deal of inconvenience.

Reliance has been placed on the interpretation of Statutes by Maxwell. No doubt if, of two interpretations, one appears to be more in accord with the intention of the legislature, or if there are other circumstances to infer the intention of the legislature, the interpretation which is consistent with such an intention should be put upon the words of the enactment.

In the present case, however, there is neither any ambiguity nor any absurdity in the plain meaning of the words in the enactment. If a party does not receive a notice of the award as prescribed by law he would evidently be within his rights to wait for the receipt of such a notice and if he finds after some time that no notice has been received by him, it would be open to him to make an application for the filing of the award even if no notice has been received, but in all such cases the application would not become barred by time unless it is presented more than 90 days after the receipt of a written notice of the award.

This view was taken by the Patna High Court in a recent case, — 'Jagdish Mahton v. Sundar Mahton', AIR 1949 Pat 393 (H). I agree with the view taken by the Patna High Court, with respect if I may say so, and am of opinion that the application which has given rise to this appeal was not barred by limitation, and the finding of the lower Court on the point of limitation is incorrect.

(14) No other point has been pressed in argument.

(15) As a result, I find that the award was not invalid as held by the Court below and that a decree should have been passed on the basis of the award. I would accordingly allow the appeal, set aside the order of dismissal passed by the lower Court and direct that a decree be passed in favour of the appellants in accordance with the award. The appellants should get their costs throughout.

(16) MOOTHAM C. J.: I agree.

(17) The most important question which has been raised in this appeal is whether the arbitrators' award dated the 13th January, 1947, has been proved. The award was filed in Court on the 25th August, 1943, by the Sarpanch Bachchu Lal, and it bears at the foot an endorsement made on the same date by the learned Judge "Denied by defendant's counsel".

The endorsement is ambiguous, but a consideration of the objections filed by the defendant and of the course of the proceedings in the lower Court leads me to the conclusion that what was being attacked was not the existence of the award but its validity. In paragraph 3 of the plaintiffs' application that the arbitrators be directed to file the award the plaintiffs said:

"3. That the panches and the sarpanch made the necessary and proper enquiries and gave the award on the 13th January, 1947, although Ganesh Dutt Misir did not affix his signature on the award. The said award was read over to the panches and they accepted it."

and in the objections filed by the defendant the answer to this paragraph is, "Is not admitted subject to additional pleas." The additional pleas referred to are presumably paragraphs 8 and 9. They read as follows:

"8. The Panch Ganesh Dutt Misir totally refused to work as a panch and did not participate in the sittings of the panchayat except one or two sittings in the beginning. Hence we gave information to the other panches and sarpanch under a notice that Mumtaz Thekedar be appointed panch in place of Ganesh Dutt Misir otherwise the decision will not be acceptable, and this notice was sent under registered post to the sarpanch but the panches and sarpanch did not pay any heed to it and the opposite party did not participate in the panchayat. The above decision is invalid and ineffective and is not fit to be endorsed."

"9. Besides this, the panches Moti Lal Sonar and Kodai Halwai did not participate in all the sittings nor were they called. All the proceedings were taken in their absence. The award is not according to their opinion nor did it come to their knowledge. For this reason also the award is invalid and ineffective."

(18) Nowhere in these objections is it stated specifically that the award was not made by the arbitrators; on the contrary the statements in paragraph 17 that "the panches knowingly did not mention it in the award in order to give benefit to the plaintiffs" and in paragraph 18 that "the panches having colluded with the plaintiffs did not give any notice regarding the award to the defendant nor did he come to know of it", indicate that it was not the contention of the defendant that the arbitrators had not made an award—the award before the court —but that the award was invalid.

(19) In view of the denial of the award by defendant's counsel the plaintiffs would have been

well advised to tender evidence is formal proof of the document, but this was not done and, it is to be observed, no issue was framed on the point. Two of the panches gave evidence but no question was put to them by either side for the purpose of proving the document.

This could very easily have been done by the plaintiffs and I have no doubt at all that had it been realised that the point would later be taken in argument the necessary questions would have been asked. The truth, I think, is that the proceedings in the lower court until the stage of final argument proceeded on the assumption that the award filed in Court was in fact the award made by the arbitrators. In my opinion the plaintiffs were, in view of the nature of the objections filed by the defendant, justified in making this assumption.

(20) I am further of opinion that in the circumstances of this case the Sub-Registrar's certificate of registration endorsed on the award is sufficient proof of due execution. A number of authorities were cited in the course of argument, but I think it necessary to refer to only two of such cases: 33 Ind App 60 (PC) (E) and AIR 1943 PC 83 (F), both decisions of the Privy Council.

In — 'Gangamoyi Debi's case (E)' the Board held that it will be presumed that all things done by the Registrar in his official capacity and verified by his signature have been done duly and in order:

"The registration", it said, "is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction; and all things done before him in official capacity and verified by his signature will be presumed to be done duly and in order."

In Gopal Das's case (F) the plaintiffs claimed as reversioners of one Parshotam Das. In 1881 a person claiming to be Parshotam Das presented a document for registration and the Registrar's endorsement made under sub-s. (2) of S. 60 of the Registration Act, 1877, showed that that person had admitted execution of the document. After stating that there was a presumption that the registration proceedings were regularly and honestly carried out, their Lordships said:

"It seems clear that any objections to the sufficiency of the proof upon this point would have been idle, the circumstances being such that the evidence of due registration is itself some evidence of execution as against the plaintiffs."

In my opinion the Registrar's certificate is evidence of admission of execution by the executant and that itself is evidence admissible to prove the due execution of the document. The question whether it is sufficient evidence must depend upon the circumstances. In the case before us there is no other evidence either way and there is nothing whatever in the surrounding circumstances to arouse suspicion. In my judgment the award must be held to have been proved.

(21) I agree with the order proposed.

BY THE COURT:

(22) We allow the appeal, set aside the order of dismissal passed by the lower Court and direct that a decree be passed in favour of the appellants in accordance with the award. The appellants are entitled to their costs throughout.

K.S.B. Appeal allowed.

AIR 1955 ALLAHABAD 578 (V 42 C 167 Oct.)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.
(27-4-1955)

Lakshmi Devi Sugar Mills Ltd., Applicant v. The State of Uttar Pradesh and others, Opposite Parties.

Civil Misc. Writ No. 7413 of 1951.

(a) Industrial Disputes — U. P. Industrial Disputes Act (28 of 1947), Ss. 2(1) and 3(b) — Doctor and Compounder are not "workmen" — G. O. No. 167(ST)(II)/XVIII, D/- 11-1-1950 — Validity of.

The persons of the medical staff, namely the doctor and the compounder, do not answer the definition of 'workman' as adopted by the Act by S. 2(1). It follows, therefore, that the State Government cannot by an order under S. 3(b) of the U. P. Industrial Disputes Act, 1947, give directions regarding their treatment and conditions of employment and that, therefore, so much of para 1 of the G. O. No. 167 (ST) (II)/XVIII dated 11-1-1950, is beyond the competence of the U. P. Government as relates to the doctor and compounder. (Para 7)

(b) Industrial Disputes — U. P. Industrial Disputes Act (28 of 1947), S. 3(b) — No power to Government to issue order having retrospective effect.

The State Government cannot make an order under S. 3(b) of the Act to be operative retrospectively. Hence, the direction given in para 2 of the G. O. No. 167 (ST) (II)/XVIII, D/- 11-1-1950 cannot be given by the State Government in the exercise of its powers under the Act. AIR 1954 All 538 (FB), Foll. (Para 8)

(c) Industrial Disputes — U. P. Industrial Disputes Act (28 of 1947), S. 3(b) — Regional Conciliation Board established under G. O. No. 781 (L)/XVIII, D/- 10-3-1948 — Findings under Para 15 of Order — Value of — Appeal to Labour Appellate Tribunal — Validity of its decision.

The findings of the Industrial Court under para 15 of the G. O. No. 781(L)/XVIII, dated 10-3-1948 do not amount to a decision or an award; they are mere findings which are submitted to the Government, which ultimately passes an order under S. 3 (b), U. P. Industrial Disputes Act. When the Industrial Court gives no decision, no appeal can validly lie to the Labour Appellate Tribunal against its findings; any order by the Labour Appellate Tribunal in such an appeal is invalid and deserves to be quashed. AIR 1954 All 705 and W. P. No. 54 of 1952, D/- 24-2-1955 (All), Foll. (Para 9)

(d) Constitution of India, Art. 226 — Certiorari against Regional Conciliation Board.

Where the Regional Conciliation Board acts in disregard of S. 3(b) of the U. P. Industrial Disputes Act, namely, that a Government Order under that provision can direct the observance of terms and conditions of employment in the future and not in the past and an order of the Board is passed in these circumstances, it can be quashed by a writ of certiorari. AIR 1954 SC 440, Foll. (Para 12)

Anno: AIR Com., Const. Ind., Art. 226 N. 163(k).

(e) Constitution of India, Art. 226 — Writ of certiorari — Question of law raised for first time before High Court.

A pure question of law affecting the rights of the petitioner and not dependent on any question of fact cannot be barred out of consideration on the ground that it is taken for the first time in a writ petition proceeding and not before the Tribunal against which the writ is sought. (Para 13)

Anno: AIR Com., Const. Ind., Art. 226 N. 42(j).

(f) Industrial Disputes — U. P. Industrial Disputes Act (28 of 1947), S. 3(b) — Regional Board should exercise its discretion and not merely follow directions given in Government Order.

Where the Regional Conciliation Board considers the directions given in the Government Order as good directions on equitable principles, there is nothing wrong in its giving effect to them. But the Board must consider freely on the merits of such directions before giving effect to them. The Board is not to give effect to those directions, for it should in its own discretion come to the conclusion that a decision on those lines would be just in connection with a particular industrial dispute. AIR 1952 SC 16, Rel. on. (Para 14)

CASES REFERRED: Paras

(A) (V41) AIR 1954 All 538: 1954 All LJ 452 (FB) 8

(B) (V41) AIR 1954 All 705 9

(C) ('55) Writ Petn. No. 54 of 1952, D/- 24-2-1955 : (AIR 1955 NUC (All) 3287) 9

(D) (V41) AIR 1954 SC 440 : 1955 SCR 250 (SC) 12

(E) (V39) AIR 1952 SC 16 : 1952 SCR 135 (SC) 14

G. S. Pathak, K. L. Misra, C. B. Misra and S. N. Diwivedi, for Applicant; S. C. Khare and Shanti Bhushan and Standing Counsel, for Opposite Parties.

RAGHUBAR DAYAL J.:

This is a petition under Art. 226 of the Constitution by the Lakshmi Devi Sugar Mills Ltd. against seven opposite parties in the following circumstances.

2. The original writ application was presented on 28-2-1951. Amendments were made to it subsequently to an appreciable extent and a consolidated petition was subsequently filed on 21-9-1954. The reliefs claimed in this petition relate to the quashing and enforceability of a certain G. O. issued by the U. P. State Government on 11-1-1950, and to the quashing of the orders of the Conciliation Board, Industrial Court and the Labour Appellate Tribunal.

3. The G. O. No. 167 (ST) (II)/XVIII, dated 11-1-1950, was issued by the Governor of the United Provinces in exercise of the powers conferred by S. 3, United Provinces Industrial Disputes Act, 1947 (Act No. 28 of 1947). The directions given are in two paragraphs.
Paragraph 1 enjoins that every vacuum pan sugar factory in the United Provinces shall from the date of the order allow certain festival holidays with wages to its employees notwithstanding anything contained in the standing orders. Paragraph 2 enjoins that if certain employees had not been granted holidays on those festivals during the period between 24-11-1948 and 11-1-1950, the date of the order, the factory will pay to its employees within a certain period one day's additional wage in lieu of and for each one day's holiday not so allowed.

4. On the basis of this G. O. the General Secretary of Chini Mill Mazdoor Sangh, Chitauni, referred certain industrial disputes to the Regional Conciliation Board (Sugar), Gorakhpur. Four matters were referred. We are at present concerned with two of them. They are items 1 and 2 of this reference and relate to the payment of wages to the medical staff and the watch and ward staff for the festival holidays not allowed to them in accordance with para 2 of the aforesaid G. O.

5. The Regional Conciliation Board gave its award on 7-8-1950, and ordered the factory to pay the wages claimed to the medical staff and to the watch and ward staff.

6. Against this award the petitioner went in appeal to the Industrial Court in view of para No. 12 of G. O. No. 781 (L)/XVIII, dated 10-3-1948. The Industrial Court gave its finding against the petitioner on these points on 18-9-1950. The findings were pronounced in open court. Against these findings which the Industrial Court termed as a decision and the petitioner also treated as a decision, the petitioner preferred an appeal to the Labour Appellate Tribunal of India.

The Tribunal dismissed the appeal on 2-12-1950. Thereafter the petitioner filed the present writ petition praying for the quashing of the orders of the Regional Conciliation Board, the Industrial Court and the Labour Appellate Tribunal of India and also the quashing of the G. O., dated 11-1-1950 and directing the State Government not to enforce this G. O. so far as it concerns the medical and the watch and ward staff.

7. The first question to determine is whether the State Government could issue an order under S. 3(b), U. P. Industrial Disputes Act, 1947, directing the employers to observe for certain period such terms and conditions of employment as may be determined in accordance with the Order with respect to the medical staff and the watch and ward staff.

The contention for the petitioner is that an order under S. 3 (b) of this Act could be with respect to the terms & conditions of employment of workmen only and that the medical and watch and ward staff do not answer the definition of 'workman' in the Industrial Disputes Act, 1947, which definition is adopted by the U. P. Industrial Disputes Act by S. 2, sub-s. (1). 'Workman' is defined in cl. (s) of S. 2, Industrial Disputes Act, 1947, to mean "any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward."

The contention for the petitioner was that this staff cannot be said to do manual or clerical work. The ultimate contention for the petitioner, however, is that the doctor and the compounder cannot be called 'workman' while the coolie and the peon attached to the medical department and the watch and ward staff do come within 'workman'. It appears from the award that it was not disputed by the petitioner before the Regional Conciliation Board that watch and ward staff did not come within the definition of 'workman'.

We have, therefore, to consider whether the doctor and the compounder can be said to be workmen for the purposes of the U. P. Industrial Disputes Act. We are of opinion that they cannot be said to be such employees who do manual or clerical work. They can be said to be workmen only if their main work be manual or clerical and not merely because such work is incidental to the carrying out of their main duties.

The doctor's main work is not merely to write prescriptions or to feel the pulse of a patient. His main work is to observe the patient, to hear his complaints, to diagnose his disease with the experience and knowledge at his command and then to prescribe medicine which he considers best for the patient. Similarly the compounder's work is not merely the taking out of medicines, mixing them in proper proportions as prescribed, and dispensing the prescriptions.

His main work too requires his knowledge of the medicines, the use of his capacity to weigh them, and to dispense them properly and to exercise general vigilance in the proper dispensing of medicines. We do not therefore consider that these two persons of the medical staff, namely

the doctor and the compounder, answer the definition of 'workman'.

It follows, therefore, that the State Government could not by an order under S. 3(b), U. P. Industrial Disputes Act, 1947, give directions regarding their treatment and conditions of employment and that, therefore, so much of para 1 of the aforesaid G. O., dated 11-1-1950, is beyond the competence of the U. P. Government as relates to the doctor and compounder.

(8) Paragraph 2 of the aforesaid G. O. gave directions with respect to something which had taken place in the past. It really ordered the application of para 1 of the G.O. from 24-11-1948, instead of from the date of the order, that is, 11-1-1950. It has been held by a Full Bench of this Court in the — 'Basti Sugar Mills Co. Ltd. v. State of Uttar Pradesh', AIR 1954 All 538 (A) that the State Government cannot make an order under S. 3(b) of this Act to be operative retrospectively. It follows, therefore, that the direction given in para 2 of the G. O. could not be given by the State Government in the exercise of its powers under the Act.

(9) The Regional Conciliation Board was established under G. O. No. 781(L)/XVIII, dated 10-3-1948. The reference by the Chini Mill Mazdoor Sangh was made to it under para 5 of this Order. Section 6, sub-s. (2), U. P. Industrial Disputes Act provides that the Provincial Government may enforce all or any of the decisions in the award, or remit it for reconsideration. It appears that the State Government gave a general order for the enforceability of the awards in para 16 of the G. O., dated 10-3-1948, in cases where no appeal was preferred against the award. We are, however, not concerned with these provisions as an appeal was filed against this award in view of para 12 of the same Order. Paragraph 13 of the Order provides what the Industrial Court has to do in the appeal. It has to record its findings and forward copies of the same to the various persons. Paragraph 25 of this Order is:

"For the purposes of this Order an appeal shall be deemed to have been decided on the date on which the Provincial Government shall notify the orders therein passed by it under S. 3(b), United Provinces Industrial Disputes Act, 1947."

It has been decided by this Court in — 'Lakshmi Devi Sugar Mills Ltd. v. U. P. Government', AIR 1954 All 705 (B) and in — 'Krishna Prasad Bhargava v. G. G. Industrial Mazdoor Union, Agra', Writ Petn. No. 54 of 1952, D/- 24-2-1955: (AIR 1955 NUC (All) 3287) (C), that the findings of the Industrial Court under para 15 of the G. O. do not amount to a decision or an award and that they are mere findings which are submitted to the Government, which ultimately passes an order under S. 3(b), U. P. Industrial Disputes Act, and, by passing such an order, puts an end to the appeal. It was further held in the later case that when the Industrial Court gives no decision, no appeal can validly lie to the Labour Appellate Tribunal against its findings and that any order by the Labour Appellate Tribunal in such an appeal was invalid and deserved to be quashed. According to this view, which we approve, the order of the Labour Appellate Tribunal, dated 2-12-1950, deserves to be quashed. There does not appear to be any necessity for formally quashing the findings arrived at by the Industrial Court both because they are just findings for the use of the Government and because of the reason that we propose to quash the award itself against which the appeal in which these findings were given was filed.

(10) In the view of the matter we have taken it is not necessary for us to say anything at the moment about the validity of the provisions of para 12 of the G. O. of 1948 or whether the award is enforceable during the period such an appeal remains pending.

(11) The learned counsel for the opposite party, Chini Mill Mazdoor Sangh, has referred us to S. 18, Industrial Disputes (Appellate Tribunal) Act, 1950, and submitted that this award of the Regional Conciliation Board is enforceable when no appeal lay to the Industrial Court in view of no appeal being contemplated by the Act; and that no appeal was filed to the Labour Appellate Tribunal against the award to which it could be appealable under S. 7, read with S. 2(c), Industrial Disputes (Appellate Tribunal) Act, 1950, and there being no stay order under S. 14 of the Act. This seems to be the position; but we need not finally adjudicate upon it.

(12) The last question to determine is whether the award of the Regional Conciliation Board deserves to be quashed because it has taken the view that para 2 of the G. O., dated 11-1-1950, was good and applicable to the medical and the watch and ward staff of this Factory. It is contended that there was no error apparent on the face of the record which would justify a writ of certiorari quashing that order. We do not agree with this contention. It is clear from the award that the Regional Conciliation Board felt bound by the terms of the G. O. and consequently held that the medical staff and the watch and ward staff were entitled to the festival holidays and to the wages for such holidays which were not allowed to them in the past. There is nothing in the award to indicate that the Board itself considered the merits of the question, applied its mind to the problem and then thought it just that such staff should be allowed such holidays and compensation independently of the directions given in the Government Order. This indicates that the Board acted in disregard of the law, that is of the provision of S. 3(b), U. P. Industrial Disputes Act that a Government Order under that provision can direct the observance of terms and conditions of employment in the future and not in the past. When an order of the Board is passed in these circumstances, it can be quashed by a writ of certiorari in view of the case reported in — 'T. C. Basappa v. T. Nagappa', AIR 1954 SC 440 (D). It is said at p. 444

"An error in the decision or determination itself may also be amenable to a writ of 'certiorari', but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision."

(13) It was also urged for the opposite party that this legal objection to the validity of the G. O., dated 11-1-1950, had not been taken before the Regional Conciliation Board and that therefore we should not allow this point to be raised here. We again do not agree with this contention. The point is a pure question of law. It is not dependent on any question of fact. When it affects the rights of the petitioner there seems to be no justification for barring it out of consideration. It may also be mentioned that the occasion for issuing a writ of certiorari when the Tribunal concerned ignores any law must arise only when its attention is not drawn to that law by any of the parties which itself may have thought of it subsequently. It is true as urged for the opposite party that a writ of certiorari will not ordinarily issue merely to correct a wrong

decision on a point of law as in that case it would appear that the Court would be acting as an appellate court, and it is a well-known restriction on the exercise of the power of issuing writs in the nature of certiorari that the Court should not constitute itself into a court of appeal.

(14) Lastly, it was said that if the Regional Conciliation Board considers the directions given in the Government Order as good directions on equitable principles, there is nothing wrong in its giving effect to them.

It may be so, but the Board must consider freely on the merits of such directions before giving effect to them. In fact the Board is not to give effect to those directions. The Board should in its own discretion come to the conclusion that a decision on those lines would be just in connection with a particular industrial dispute. Such, as has already been explained, has not been the case with the award under discussion. The Regional Conciliation Board just acted upon the directions given in the G. O., dated the 11-1-1950. Reference may be made to the observations made in the case reported in — 'Commissioner of Police, Bombay v. Gordhandas Bhanji', AIR 1952 SC 16 at p. 21 (E).

"We have held that the Commissioner did not in fact exercise his discretion in this case and did not cancel the licence he granted. He merely forwarded to the respondent an order of cancellation which another authority had purported to pass. It is evident from these facts that the Commissioner had before him objections which called for the exercise of the discretion regarding cancellation specifically vested in him by R. 250. He was therefore bound to exercise it and bring to bear on the matter his own independent and unfettered judgment and decide for himself whether to cancel the licence or reject the objections. That duty he can now be ordered to perform under S. 45".

(15) In view of the above we make the following orders:

1. We direct a writ of mandamus to issue to the State Government not to enforce para 1 of G. O. No. 167 (ST)/(II)/XVIII, dated 11-1-1950, with respect to the doctor and compounder. This will not affect its enforcement in respect of the rest of the staff of the medical department and the watch and ward staff.

(2) In exercise of our powers of issuing writs of certiorari we quash the award of the Regional Conciliation Board (Sugar), Gorakhpur dated 7-8-1950, and the order of the Labour Appellate Tribunal of India, dated 2-12-1950.

(3) A writ of mandamus will issue to the State Government not to enforce para 2 of the aforesaid G. O. of 11-1-1950 at all.

(16) We order the State of Uttar Pradesh, opposite party No. 1, to pay the costs of the petitioner, which we assess at Rs. 400.

V.S.B. Writs issued.

AIR 1955 Allahabad 581 (V 42 C 168 Oct.)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.

(2-3-1955)

Jiwan Mal & Co., Petitioners v. Secretary, Kanpur Loha Mills Karamchari Union, Congress Labour Centre, Darshanpurwa Kanpur and others, Opposite Party.

Civil Misc. Writ No. 1014 of 1953.

(a) Industrial Employment (Standing Orders) Act (20 of 1946), Ss. 3, 4, and 5 — Powers of Certifying Officer to deal with draft standing orders submitted to him — Modification of draft standing orders.

The conditions for the certification of the standing orders are laid down in S. 4 of the Act clause (b) of which requires the standing orders not only to be in conformity with the model standing orders, if any, but to be in conformity with the provisions of the Act. The Certifying Officer, therefore, has to see before certifying the draft standing orders that the conditions of S. 4 are satisfied. The procedure which he has to follow before certifying the draft standing orders is laid down in S. 5. (Para 6)

The Certifying Officer has not merely to see, that the draft standing orders deal with every matter set out in the Schedule applicable to the industrial establishment and that the draft standing orders resemble in form the model standing orders, if any, but that he has really to consider whether the draft standing orders were in conformity with the model standing orders so far as practicable. It follows that in case there is a departure from the model standing orders, the framers of the draft standing orders have to satisfy the Certifying Officer that it was not practicable to follow the model standing orders in full and that is why the departure has been made.

The provision of S. 3, Sub-S. (2) or of S. 4, Cl. (b), cannot be interpreted to mean that the draft standing orders have to be merely similar in form and not to be the same as the model standing orders in case it was practicable to adopt the model standing orders in their entirety. (Para 6)

It is true that under S. 4 the Certifying Officer has not to adjudicate upon the fairness or reasonableness of the provisions of any standing orders. What the Certifying Officer does in deciding whether the draft standing orders are in conformity with the model standing orders does not amount to his adjudicating upon the fairness or reasonableness of the draft standing orders.

It is not his function as to what the standing orders should be in case the appropriate Government had not prescribed the model standing orders. Of course, even in such cases he has to see that the draft standing orders contain provision for every matter set out in the Schedule applicable to the industrial establishment. (Para 7)

Held that neither the model standing orders which laid down the conditions of employment were ultra vires of the Government prescribing them nor the Certifying Officer and the Industrial Tribunal, the appellate authority, acted beyond their jurisdiction in modifying the draft standing orders of the petitioner company in accordance with the model standing orders. (Para 10)

(b) Industrial Employment (Standing Orders) Act (20 of 1946), Pre. and S. 3 — Purpose of Act.

The contention that the purpose of the Act was to provide for the laying down of the conditions of employment with sufficient precision and not to lay down the conditions themselves cannot be accepted. It was expedient to define the conditions of employment and to make the said conditions known to workmen and that is why this Act was enacted. The expression "with sufficient precision" between the words "define" and "the conditions" may lead to the supposition that greater emphasis was laid on precision than on the conditions.

But precision of expression alone could not have been the subject-matter of an enactment.

The enactment must be with reference to the conditions of employment. Of course, it is always desirable that such conditions be formally laid down and expressed with as great precision as possible. It was to emphasise this aspect that this expression "with sufficient precision" was used in the preamble.

Support for such an interpretation of the preamble, even if the preamble was open to more than one interpretation, can be found from the language of the heading of the Act which says that this is "an Act to require employers in industrial establishments formally to define conditions of employment under them" and also from the expressions used in Sub-S. (2) of S. 3.

(Para 8)

The terms of the standing orders or the conditions of employment laid down in the draft standing orders should, therefore, be in conformity with the terms in the model standing orders relating to those matters. This should mean that the model standing orders should provide not only a mere draft language for actual standing orders but should provide for the conditions of service which were to be expressed in that language.

(Para 8)

CASE REFERRED: Paras

(A) (V36) AIR 1949 All 504: 1949-50-1 FJ R. 202 3, 7

Rajesh Ji Verma and P. M. Verma, for Petitioners; Shanti Bhushan, for Opposite Party.

RAGHUBAR DAYAL, J.:

This is a petition under Art. 226 of the Constitution praying for the issue of a writ of certiorari quashing the order of the State Industrial Tribunal in a certain appeal in so far as it effected a modification or amendment of certain draft standing orders submitted by the petitioner company to the Certifying Officer and for the issue of a direction to the State Industrial Tribunal to declare that the said draft standing orders were certifiable under S. 4 of the Industrial Employment (Standing Orders) Act (Act XX of 1946).

(2) The petitioner-company submitted certain draft standing orders to the Certifying Officer for certification in view of S. 3 of the Industrial Employment (Standing Orders) Act, 1946, which provides that within six months from the date on which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in his industrial establishment.

The Certifying Officer passed an order under S. 5, Sub-s. (2) of the Act modifying two draft standing orders, namely draft Standing Orders Nos. 15(a) and 16(a). The petitioner went in appeal to the appellate authority which is the industrial court. The appeal with respect to the modifications to these two draft standing orders was rejected by the State Industrial Tribunal, U. P., at Allahabad. It is this order of the Industrial Tribunal which the petitioner desires to be quashed by this Court.

(3) The sole point for consideration is with respect to the power of the Certifying Officer in dealing with the draft standing orders submitted to him. It is contended for the petitioner that the Certifying Officer has merely to see whether the draft standing orders contain provision for every matter set out in the Schedule applicable to the industrial establishment and whether the standing orders were otherwise in conformity with the provisions of the Act and that the Certifying Officer could not look into the fairness or reasonableness of the provisions of any standing orders. This contention is based on the provisions of S. 4 of the Act, which is

"(4) Standing orders shall be certifiable under this Act if

(a) provision is made therein for every matter set out in the Schedule which is applicable to the industrial establishment, and (b) the standing orders are otherwise in conformity with the provisions of this Act; and it shall not be the function of the Certifying Officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders".

Reliance is also placed on the case reported in — 'Electric Workers Union v. U. P. Electric Supply Co.,' AIR 1949 All 504 (A). It is argued that the purpose for which this Act was enacted is to define with precision the conditions of employment, that is to say, to provide for an unambiguous expression of the terms and that, therefore, the Certifying Officer could not have modified the terms of the draft standing orders.

(4) The contention for the petitioner is met for the opposite parties on the ground that S. 3, sub-s. (2) of the Act provides that draft standing orders should conform, as far as practicable, to the model standing orders whenever model standing orders have been prescribed and that in case the draft standing orders are not in conformity with the model standing orders the Certifying Officer can modify the draft standing orders. Support is sought for this contention in the provisions of S. 5, sub-s. (2) of the Act.

(5) Sub-S. (2) of S. 3 of the Act is:

"Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed, shall be, so far as is practicable, in conformity with such model".

Section 5 of the Act is:

"5. (1) On receipt of the draft under S. 3, the Certifying Officer shall forward a copy thereof to the trade union, if any, of the workmen, or where there is no such trade union, to the workmen in such manner as may be prescribed, together with a notice in the prescribed form requiring objection, if any, which the workmen may desire to make to the draft standing orders to be submitted to him within fifteen days from the receipt of the notice.

(2) After giving the employer and the trade union or such other representatives of the workmen as may be prescribed an opportunity of being heard, the Certifying Officer shall decide whether or not any modification of or addition to the draft submitted by the employer is necessary to render the draft standing orders certifiable under this Act, and shall make an order in writing accordingly.

(3) The Certifying Officer shall thereupon certify the draft standing orders, after making any modifications therein which his order under sub-s. (2) may require, and shall within seven days thereafter send copies of the certified standing orders authenticated in the prescribed manner and of his order under sub-s. (2) to the employer and to the trade union or other prescribed representatives of the workmen".

It appears to us that the framers of the draft standing orders should see that they make provision for every matter set out in the Schedule and applicable to that particular industrial establishment and also that such orders be, so far as practicable, in conformity with the model standing orders if prescribed.

(6) The conditions for the certification of the standing orders are laid down in S. 4 of the Act

whose clause (b) requires the standing orders not only to be in conformity with the model standing orders, if any, but to be in conformity with the provisions of the Act. The Certifying Officer, therefore, has to see before certifying the draft standing orders that the conditions of S. 4 are satisfied.

The procedure which he has to follow before certifying the draft standing orders is laid down in S. 5, and requires him to forward a copy of the draft standing orders to the trade union of the workmen, or, in the absence of any trade union, to the workmen, who have to submit to him any objection within a certain time and then, after affording an opportunity to the employer and the trade union or the representatives of the workmen for a hearing, to decide whether any modification of or addition to the draft standing orders was necessary or not to render the draft standing orders certifiable under the Act.

All this means, therefore, that the Certifying Officer has not merely to see, as contended for the petitioner, that the draft standing orders deal with every matter set out in the Schedule applicable to the industrial establishment and that the draft standing orders resemble in form the model standing orders, if any, but that he has really to consider whether the draft standing orders were in conformity with the model standing orders so far as practicable.

It follows that in case there is a departure from the model standing orders, the framers of the draft standing orders have to satisfy the Certifying Officer that it was not practicable to follow the model standing orders in full and that is why the departure has been made. We are not prepared to interpret the provision of S. 3, sub-s. (2) or of S. 4, Cl. (b), to mean that the draft standing orders have to be merely similar in form and not to be the same as the model standing orders in case it was practicable to adopt the model standing orders in their entirety.

(7) It is true, as laid down in AIR 1949 All 504 (A), that the Certifying Officer has not to adjudicate upon the fairness or reasonableness of the provisions of any standing orders. This has been laid down in S. 4 of the Act itself. What the Certifying Officer does in deciding whether the draft standing orders are in conformity with the model standing orders does not amount to his adjudicating upon the fairness or reasonableness of the draft standing orders.

He simply sees whether the draft standing orders conform to or are in accordance with the model standing orders. No occasion arises for him to decide upon the fairness or reasonableness of the draft standing orders. Such an occasion may have arisen if there were no model standing orders because in that case the Certifying Officer had to certify the draft standing orders and might have been tempted to look into the propriety of those orders.

The Act provides that he is not to look into it. It is not his function as to what the standing orders should be in case the appropriate Government had not prescribed the model standing orders. Of course, even in such cases he has to see that the draft standing orders contain provision for every matter set out in the Schedule applicable to the industrial establishment.

(8) Lastly, it was urged that the preamble to this Act indicates that the object of the Act was simply to provide for precise expression of the conditions of employment and not to provide for the fixing of conditions of employment and that, therefore, the model standing orders which in a way lay down the conditions of employment are beyond the scope of the Act and consequently the rule-making power of the appropriate Government under S. 15, which empowers it to make rules to carry out the purposes of the Act. The heading of the Act is

"An Act to require employers in industrial establishments formally to define conditions of employment under them".

The preamble reads :

"Whereas it is expedient to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them".

It is argued for the petitioner that the purpose of the Act was to provide for the laying down of the conditions of employment with sufficient precision and not to lay down the conditions themselves. We are not prepared to agree with this contention. It was expedient to define the conditions of employment and to make the said conditions known to workmen and that is why this Act was enacted.

The expression "with sufficient precision", between the words "define" and "the conditions" may lead to the supposition that greater emphasis was laid on precision than on the conditions. But precision of expression alone could not have been the subject-matter of an enactment. The enactment must be with reference to the conditions of employment. Of course, it is always desirable that such conditions be formally laid down and expressed with as great precision as possible.

It was to emphasise this aspect that this expression "with sufficient precision" was used in the preamble. We find support for such an interpretation of the preamble, even if the preamble was open to more than one interpretation from the language of the heading of the Act which says that this is "an Act to require employers in industrial establishments formally to define conditions of employment under them" and also from the expressions used in sub-s. (2) of S. 3.

This sub-section requires that the provision in such draft standing orders shall be, so far as is practicable, in conformity with such model where model standing orders have been prescribed. The word "provision" connotes the details of the standing orders and not merely their form.

The terms of the standing orders or the conditions of employment laid down in the draft standing orders should, therefore, be in conformity with the terms in the model standing orders relating to those matters. This should mean that the model standing orders should provide not only a mere draft language for actual standing orders but should provide for the conditions of service which were to be expressed in that language.

(9) The fact that provision has been made in the Act for inviting objections from the trade union or workmen to the draft standing orders and for an appeal against the order of the Certifying Officer indicates that great importance was attached to the work which the Certifying Officer had to do in connection with the certification of the standing orders.

Such importance must be on account of the conditions of employment embodied in the standing orders and not on account of the mere language in which the proposed conditions of employment were expressed. A mere correction of the language in order to make it more clear and precise would not have necessitated the inviting of objections from the workmen and an appeal against the order of the Certifying Officer.

(10) We are, therefore, of opinion that neither the model standing orders which lay down the conditions of employment are ultra vires of the Government prescribing them nor the Certifying Officer and the Industrial Tribunal, the appellate authority, acted beyond their jurisdiction in modifying the draft standing orders in accordance with the model standing orders. We, therefore, dismiss this petition with costs, which we assess at Rs. 200/-.

K.S.B. Petition dismissed.

AIR 1955 ALLAHABAD 584 (V 42 C 169 Oct.)

MOOTHAM C. J. AND AGARWALA J.

(21-7-1955)

Nathumal, Plaintiff-Appellant v. Mohd. Nazir Beg and another, Defendants-Respondents.

Letters Patent Appeal No. 6 of 1948, against decree of Wanchoo J. in Second Appeal No. 406 of 1946, D/- 5-12-1947.

Civil P. C. (1908), O. 32 R. 3 — Non-representation.

Where in a suit not only the service of notice on the proposed guardian is defective but no order is made by the Court under O. 32 R. 3, a decree passed against the minor in such circumstances is void and may be ignored. 30 Cal 1021 (PC) Distinguished. (Paras 4, 5, 7)

Anno: AIR Com. C. P. C., O. 32 R. 3 N. 5 Pts. 1 and 3.

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 372: 1950 All LJ 719 (FB) 5, 7

(B) ('09) 36 Ind App 168: 31 All 572 (PC) 5

(C) ('13) 40 Ind App 182: 35 All 487 (PC) 5

(D) ('03) 30 Ind App 182: 30 Cal 1021 (PC) 6

P. N. Shukla, for Appellant; Mukhtar Ahmad, for Respondents.

MOOTHAM C. J.:

This is an appeal, by leave, from a judgment of learned Judge of this Court dated 5-12-1947.

(2) On 24-1-1941, the appellant purchased from one Kailash Chand the latter's two-thirds share of a house. Thereafter the appellant brought a suit against the respondents for partition of his two-thirds share. The suit was contested, the second respondent's defence being that he was the owner of Kailash Chand's two-thirds share, having purchased that share at two sales in execution of two decrees obtained against Kailash Chand, then a minor.

He purchased a half share on 5-4-1939, and the remaining one-sixth share on 16-8-1940. In answer to this defence the appellant averred that the decrees on the basis of which the sales to the second respondent were effected were void, as Kailash Chand was not properly represented in the suits. It is common ground that Kailash Chand was a major on 24-1-1941, the date of the conveyance to the appellant.

(3) We are concerned in this appeal only with the validity of the acquisition by the second respondent on 5-4-1939, of the minor's half share.

(4) The decree was passed ex parte by a Revenue Court on 14-11-1938, and the lower Courts have found not only that service of notice on the proposed guardian was defective but that no order had been made by the Court under O. 32, R. 3 appointing a guardian for the suit for the minor. "The whole case", in the words of the learned District Judge, "was conducted with complete indifference to the interests of the minor." These conclusions have not been challenged before us.

(5) In these circumstances there can, we think, be no doubt that the decree passed against the minor by the Revenue Court was void. Order 32, Rule 3, provides that

"Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor."

If a guardian has been appointed by the Court and if owing to his gross negligence a decree is obtained against the minor, that decree will be voidable and not void, for the minor is a party to the decree: — 'Rameshwar Prasad v. Ram Chandra', AIR 1951 All 372 (FB) (A).

But if no service has been effected on the guardian and the Court has not appointed a guardian the minor is not represented in the suit at all and he is accordingly not a party to the suit in the proper sense of the term; and if he be no party to the suit a decree passed against him in that suit is passed without jurisdiction and is null and void: — 'Rashid-Un-nissa v. Muhammad Ismail Khan', 36 Ind App 168 (PC) (B); — 'Partab Singh v. Bhabuti Singh', 40 Ind App 182 (PC) (C).

(6) Learned Counsel for the respondent has sought to argue, on the basis of — 'Walian v. Banke Behari', 30 Ind App 182 (PC) (D), that the absence of an order of appointment renders the decree voidable only and not void. In our opinion Walian's case (D) is clearly distinguishable. In that case service on the minors' mother who was named as their guardian had been effected through the minors' major brother who was the manager of the joint Hindu family of which the minors were members, and although no formal order had been made appointing the mother as guardian, she had effectively represented them in the suit, and with the sanction of the Court.

It was in these circumstances that the Privy Council held that the absence of a formal order of appointment was not fatal to the suit unless it was shewn that that defect prejudiced the minors. In the present case, as we have already pointed out, no service was effected on the guardian at all and the proceedings in the Revenue Court were conducted with complete indifference to the interests of the minor.

(7) The learned single Judge allowed the respondent's second appeal on the ground "a third person who has taken a transfer from the minor cannot come forward and claim avoidance of a decree passed against the minor, even though the decree may have been passed in an irregular manner, on the ground that the decree was void ab initio", and he was accordingly of opinion that the purchaser was not entitled to obtain possession without the minor first having taken steps to avoid the decree.

We are unable to agree with this view. In our opinion a void decree is a decree which has no existence in the eye of the law and is a decree which therefore may be ignored; see AIR 1951 All 372 at p. 373 (A). It was not therefore necessary, in our opinion, for Kailash Chand on attaining majority to file a suit to have the decree declared void; he was entitled to disregard it.

(8) In the result this appeal is allowed with costs; the judgment of the learned single Judge is set aside and that of the lower appellate Court restored.

V.R.B. Appeal allowed.

(S) AIR 1955 ALLAHABAD 585 (V. 42, C. 170 Nov.)

AGARWALA AND M. L. CHATURVEDI JJ.

Firm Jaswant Rai Jai Narain, Applicants v. Sales Tax Officer and others, Opposite Party.

Civil Misc. Writ No. 220 of 1952, D/- 29-4-1955.

(a) Sales-tax — U. P. Sales-tax Act (15 of 1948), S. 3 — U. P. Government Notification No. St 1798/X-902(51)-49 dated 1-7-1951 — "Cloth manufactured on handlooms."

What is exempted under the Notification is 'cloth' and not 'clothes'.

Where a dealer takes handloom cloth and either cuts it into specific sizes or manufactures them into specific sizes, so that the pieces can be used as saris, bed covers, lihafs (quilt covers) etc. and then prints them so that they can be readily used for the purpose for which they are meant, the articles sold by such dealer are 'clothes' or garments and cannot be treated as "cloth manufactured on handlooms" within the meaning of the Notification. (Para 10)

(b) Constitution of India, Art. 14 — Applicability.

The principles governing Art. 14 not only apply between individual and individual but also between one individual and a corporation or the State itself, and when the State itself descends into the arena of competition with private persons, it must compete with them on equal terms and not claim preferential treatment. AIR 1951 All 257 (FB), Rel. on. (Para 11)

Anno: AIR Com., Const. of India, Art. 14 N. 11.

(c) Sales-tax — U. P. Sales-tax Act (15 of 1948), Ss. 2(c) and 4(1)(b) — Sections 2(c) and 4 (1)(b) do not offend against Art. 14, Constitution of India — (Constitution of India, Art. 14).

The State in carrying on a commercial or industrial activity, not from a business or profit-making motive but purely with the object of encouraging cottage industries may legitimately claim to be a class apart from the dealers who carry on their business with the object of profit-making. The legislature could validly classify the State and Central Governments for the purposes of the Sales-tax Act as a separate class different from ordinary dealers. Similar remarks apply to the cases of the Spinners Association and the Gandhi Ashram, Meerut.

Hence the exemption from payment of sales-tax of the departments of the State or Central Governments in S. 2(c) in the definition of the word 'dealer' and of the two specified institutions, the Spinners Association and the Gandhi Ashram, Meerut, in S. 4(1)(b) cannot be said to be unjustifiable on the ground that it is not based on any reasonable classification. (Paras 11 & 12)

(d) Sales-tax — U. P. Sales-tax Act (15 of 1948), Ss. 3, Proviso 1 and 4(1)(b) — Notification under, not issued — Validity cannot be challenged.

As regards the provisions of S. 3, proviso (1), as it stood in 1951, and the other provisions of S. 4(1)(b), until notification has been made under them, they cannot be challenged as creating an unfair discrimination. The discrimination is conditional upon the notification being issued by the State Govt. and so long as that condition is not fulfilled, it cannot be said that the Act, as it stands, creates any discrimination as to taxation. (Para 13)

(e) Sales-tax — U. P. Sales-tax Act (15 of 1948), Ss. 3, Proviso 1 and 4(1)(b) — Sections 3, Proviso 1 and 4(1)(b) can be severed from the rest of the Act — (Interpretation of Statutes — Taxing statutes).

In taxing statutes, the presumption is that the legislature's predominant intention was to tax and the exemptions granted were secondary in importance. If the exemptions are found to be invalid, the presumption is that the legislature would still have intended that the rest of the statute should be enforced. (Para 20)

Sections 3, Proviso 1 (as it stood in 1951) and 4 (1)(b) of U. P. Sales-tax Act can be severed from the rest of the Act which can be given effect to. (Para 20)

CASES REFERRED: Paras

(A) (V39) AIR 1952 SC 235 : 1952 Cri LJ 1167 (SC) 11
(B) (V38) AIR 1951 All 257 : ILR (1951) 1 All 269 (FB) 11
(C) (V41) AIR 1954 SC 314: 1954 SCR 1117 (SC) 11
(D) (V37) AIR 1950 SC 27 : 51 Cri LJ 1383 (SC) 16
(E) (V39) AIR 1952 SC 252 : 1952 SCR 889 (SC) 16
(F) (1891) 36 Law Ed 294: 143 US 649 17
(G) (1931) 76 Law Ed 1038: 286 US 165 18
(H) (1902) 46 Law Ed 679: 184 US 540 19
(I) (1940) 84 Law Ed 1114: 310 US 141 19

S. K. Verma and B. N. Sapru, for Applicants; S. N. Dwedi, for Opposite Party.

AGARWALA, J.:

This is a petition under Art. 226 of the Constitution praying that the U. P. Sales Tax Act, 1948, be declared ultra vires the Constitution and that a writ of mandamus direction or other writ requiring the opposite-parties to desist from demanding and realising the sales tax from the applicant on the sale of printed cotton or silk cloth be issued.

(2) The applicant is a firm carrying on business at Farrukhabad in printed cloth, both handloom and mill-made cloth and then prints it and sells it as Saris, Lihafs, Fards, bed-covers etc. The applicant firm is a wholesale dealer. It holds a licence under the U. P. Hand Printers and Hand Dyers Licensing Order, 1949. On 1-7-1951, the Government issued a Notification No. ST-1798/X-902(51)-49 wherein the Governor of the U. P. State notified that no tax was payable on the sale of cloth manufactured on handlooms with artificial silk, linen, flax and cotton or wool. In October, 1951, the applicant was required to pay the tax under the U. P. Sales Tax Act (U. P. Act No. XV of 1948).

(3) It is the applicant's case that the handloom silk cloth sold by it does not lose its character of handloom silk cloth by the mere fact that it has been printed and put in the form of saris, covers for quilts and bed-covers and the sale of such cloth cannot be subjected to the payment of tax under the U. P. Sales Tax Act. Further, the applicant contends that inasmuch as

(I) Under S. 2(1), U. P. Sales Tax Act, the departments of the State and the Central Governments have been excluded from the definition of a 'dealer' and thus, exempted from the payment of the sales tax,

(II) Under S. 3 and 4 of the Act, the Government has been given the power (which power is entirely unrestricted and arbitrary) to reduce the tax of or exempt any person or class of goods from the liability of payment of sales tax, and

(III) Under S. 4, the Spinners Association and Gandhi Ashram and its branches have been exempted from payment of tax under the Act, the Act as a whole is discriminatory and has, therefore, become void under Art. 14 read with Art. 13 of the Constitution.

(4) Section 2(c) of the Act defines a 'dealer' as follows:

"2(c) 'Dealer' means any person or association of persons carrying on the business of buying or selling goods in Uttar Pradesh whether for commission remuneration or otherwise, and includes any firm

or Hindu Joint Family and any society, club or association, which sells goods to its members; but does not include any department of the State Government or of the Indian Union (hereinafter called the Central Government)."
The applicant's objection is to the clause underlined (herein ' ') above.

(5) Section 3 is charging section and reads as follows:

"3(1) Subject to the provisions of this Act, every dealer shall, in each assessment year, pay tax at the rate of 3 pies per rupee on his turnover of the previous year which shall be determined in such a manner as may be prescribed."

(6) Then follow several provisos. The first proviso, as it stood in the year 1951 when the cause of action for the applicant arose, was as follows:

"Provided that the Provincial Government may, by notification in the official Gazette, reduce the rate of tax on the turnover of any dealer or class of dealers or on the turnover in respect of any goods or class of goods."
This proviso is at present the second proviso and is in the following terms:

"Provided, secondly, that the State Government may, by notification in the official Gazette, reduce the rate of tax on the turnover in respect of any goods or class of goods, and thereupon the tax shall be payable on such turnover at the reduced rate."
It will be noticed that the words 'any dealer or class of dealers' have been omitted from the proviso as it stands at present.

(7) Section 4, sub-s. (1) is as follows:

"4(1) No tax shall be payable on

(a) .... and

(b) the sale of any goods by the All India Spinners Association or Gandhi Ashram, Meerut, and their branches or such other persons or class of persons as the State Government may from time to time exempt on such conditions and on payment of such fees, if any, not exceeding one thousand rupees annually as may be specified by Notification in the official Gazette."
Under S. 8A, the tax payable by a dealer may, if he has got himself registered under the Act, be recovered from purchasers.

(8) The applicant's case is that the exemption of the All India Spinner's Association and the Gandhi Ashram, Meerut, and their branches and of such other persons or class of persons as the State Government may notify materially affects the applicant inasmuch as the price payable to the applicant by purchasers would be higher than the price which a purchaser would have to pay, if he were to purchase his goods from persons exempted or whose tax might be reduced under the provisions of Ss. 3 and 4 quoted above and this would adversely affect the sales by the applicant.

(9) The defence of the opposite parties, who are the Sales-tax Officer, Fatehgarh, the State of Uttar Pradesh and the Commissioner, Food and Civil Supplies, Government of Uttar Pradesh, is

(i) that the printed handloom articles sold by the applicant are not cloth but ready made garments fit for personal wear and use and are, therefore, not covered by the aforementioned notification;

(ii) that the Government can reasonably be placed in a classification separate from other dealers on the ground that it sells only handloom goods for the purpose of encouraging cottage industries, as required by Art. 43 of the Constitution, and does not make any profits;

(iii) that, for the same reasons, the Spinners Association and the Gandhi Ashram, Meerut, can also be put in a category separate from other dealers; and

(iv) that the power reserved with the Government to exempt any dealer or class of dealers from payment of tax or to reduce taxes payable by them is intended for the protection of desirable industries and the discouragement of the undesirable ones and, therefore, there is a rational basis for the discrimination and the impugned Act has not become invalid under Art. 14 of the Constitution.

It has also been contended on behalf of the opposite parties that the impugned provisions of the various sections referred to above, even if invalid on the ground of being discriminatory under Art. 14 of the Constitution, are severable from the rest of the Act and, therefore, do not affect the applicant in any way because its liability to pay the tax remains as it is; and further that since the Government has not taken action under the powers conferred upon it by the proviso to S. 3 and S. 4(1)(b), no discrimination has, in fact, been brought into existence and the applicant can have no grievance on that score, even assuming that the provisions aforesaid are invalid.

(10) The first point to be decided is whether the articles sold by the applicant can be treated as 'cloth manufactured on handlooms' within the meaning of the notification mentioned above. We are of opinion that they cannot be so treated. The word 'cloth' is to be distinguished from 'clothes' or garments. Cloth is the fabric or material from which 'clothes' are made as wearing apparel or as other articles of personal use. What is exempted under the notification is 'cloth' and not 'clothes'. What the applicant does is to take handloom cloth and either cut it into specific sizes, or to have them manufactured into specific sizes, so that the pieces can be used as saris, bed covers, lihafs (quilt covers) etc., and then to print them so that they can be readily used for the purpose, for which they are meant. It is quite obvious that the articles in which the applicant deals are 'clothes' or garments and not 'cloth' within the meaning of the notification.

(11) The next point to be considered is whether the exemption from payment of sales tax of the departments of the State or Central Governments in S. 2(c) in the definition of the word 'dealer' and of the two specified institutions, the Spinners Assocation and the Gandhi Ashram, Meerut, in S. 4(1)(b) is unjustifiable as it is not based on any reasonable classification.

The departments of the State or Central Governments mentioned in S. 2(c) clearly refer to the State or the Central Governments themselves. It is an error to think that a department of the State Government can be treated as a person in the absence of any law to that effect. The person is the State itself and not its department which is merely its agency.

The mention of the word 'department' in S. 2 was not quite accurate but the intention of the legislature is clear that the State and the Central Governments are exempted from being considered as 'dealers' within the meaning of the Act. They have been treated separately from other dealers. A State acts in two capacities-sovereign and commercial. In its sovereign capacity it exercises the legislative, judical and executive functions properly so called.

In that capacity, it must necessarily be placed in a different category from private individuals. When, however, the State acts as a commercial concern, it can sue and be sued like any other private person and it can be put on the same footing as the latter. Any discrimination between the State acting in its commercial capacity and another individual engaged in an activity in which the State is engaged must be justified upon principles now well settled, namely,

1. that the classification made by the statute must be founded on an intelligible differentia and

2. that the differentia must have a rational relation to the object sought to be achieved by the enactment.

See — 'Lachmandas Kewalram v. State of Bombay', AIR 1952 SC 235 (A). As was observed by one of us (Agarwala, J.) in — 'Moti Lal v. Govt. of the State of U. P.', AIR 1951 All 257 (FB) (B), the principles governing Art. 14 "not only apply between individual and individual but also between one individual and a corporation or the State itself", and that "when the State itself descends into the arena of competition with private persons, it must compete with them on equal terms and not claim preferential treatment".

It was urged on behalf of the opposite parties that this view is no longer correct in view of what the Supreme Court has observed in — 'V. M. Syed Mohammad & Co. v. State of Andhra', AIR 1954 SC 314 (C). We do not consider that the observations of the Supreme Court have the effect contended for. All that was held in that case was that the State does not cease to be a State when it undertakes a commercial activity.

It was not held in that case that the State cannot be treated as a 'person' so as to be subject to the law against unjustifiable discrimination as laid down in Art. 14 of the Constitution. While we do maintain that the law laid down in Moti Lal's case (B), by one of us still holds the field, we do not consider that it applies to the facts of the present case. It must be noted that the observations of Agarwala J., were made in connection with a case which fell to be determined under the provisions of the Motor Vehicles Act.

The State Vehicles carried on the activity of carrying passengers in the same way as any ordinary bus-owner. It was not shown that this activity was not done in the ordinary commercial manner or that no profit was made. In those circumstances, it was held that the discrimination between an 'ordinary carrier' and the State could not be sustained.

In the case in hand, there is evidence on the record that the activity of the State in so far as it concerns the sale of articles taxable under the Sales-tax Act is done with an object which has been enjoined by the Constitution to be the duty of the State. From the affidavit filed on behalf of the opposite parties, it is clear that the State Government engages itself in the sale of handloom cloth. The Uttar Pradesh Government has got about a dozen U. P. Government emporiums in some of the important towns of the State.

These emporiums are maintained primarily in the form of show-rooms with the object of giving encouragement to cottage industries. Goods manufactured from handloom cloth are put on view to show the advance which is being made from time to time in the cottage industries of the State. The Government purchases goods manufactured from handloom cloth and the sale is made not from a business point of view or from a profit motive but goods are sold at cost price which means the price at which they have been purchased, plus the incidental charges.

A body which is carrying on a business in this spirit and with this objective must surely stand on a footing different from a person who carries on business solely for his own benefit. Article 43 of the Constitution lays it down as the duty of the State legislatures and Governments to endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

The object of the statute in exempting the State Government from being classed as a 'dealer' is to encourage cottage industries. The classification has a direct relation with this objective. If a body, which carries on business in this manner, is to be encouraged, one of the means of doing so is to exempt its activities from taxation.

In our opinion, the State in carrying on a commercial or industrial activity, not from a business or profit-making motive but purely with the object of encouraging cottage industries may legitimately claim to be a class apart from the dealers who carry on their business with the object of profit-making. There is no evidence on the record to show that the Central Government acts in any different manner in the matter of sale of handloom cloth.

(12) In our opinion, the legislature could validly classify the State and Central Governments for the purposes of the Sales-tax Act as a separate class different from ordinary dealers. Similar remarks apply to the cases of the Spinners Association and the Gandhi Ashram, Meerut. It is well known that both these institutions are dedicated to the object of encouragement of cottage industries in hand-woven and hand-spun yarn and cloth.

It has not been shown to us that there was no reason at all for putting them in a separate class and we do not consider that the applicant is necessarily adversely affected by the exemption afforded to them. Moreover, they have not been impleaded in his petition, and it would be unfair to them to declare their exemption invalid in their absence.

(13) As regards the provisions of S. 3, proviso (1), as it stood in 1951, and the other provisions of S. 4(1)(b), it may be pointed out that no notification having been made under them, they could not be challenged as creating an unfair discrimination. The position would be the same as if those provisions did not exist in the Act.

The legislature, by merely empowering the State Government to make a notification which might have created an unfair discrimination as between the applicant and other persons has not itself created a discrimination. The discrimination is conditional upon the notification being issued by the State Government and so long as that condition is not fulfilled, it cannot be said that the Act, as it stands, creates any discrimination as to taxation and no relief can be given to the applicant unless the Government creates a discrimination by the issue of a notification.

It has not been urged in the petition that any such notification has been issued. In the arguments before us, it was suggested that some such notification has been made in favour of certain institutions, but no affidavit was filed and we have no proof of the same. We must, therefore, hold that as matters stand at present, the applicant is not entitled to question the validity of the said provisions.

(14) We are further of opinion that it is unnecessary for us to pronounce upon the validity of the aforesaid provisions of Ss. 3 and 4 of the Act, as, assuming that those provisions are discriminatory and void, they can be severed from the rest of the Act.

(15) It may be noted at the outset that the Sales-tax Act is a piece of legislation intended primarily for the raising of revenue for the State. It is an Act which charges certain persons with the liability for the payment of tax upon sales of certain goods. The charging provisions are general. Every person who falls within the definition of a 'dealer' is liable to pay the tax under certain conditions. This general provision is followed up by a number of exceptions.

These exceptions are in the nature of affording relief to certain dealers or class of dealers or in respect of the sale of certain goods or class of goods. It is in the light of these facts that we have to consider whether the provisions relating to the exemptions, which are challenged as creating

unreasonable discrimination, can be separated from the general provisions of the Act.

(16) The principles, upon which the severability of an impugned provision of an Act is judged are well settled. As was observed by the Supreme Court in — 'Gopalan v. State of Madras', AIR 1950 SC 27 (D), what we have to see is whether the omission of the impugned portions of the Act will "change the nature or the structure or the object of the legislation". In the words of Mahajan J. in — 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252 at p. 277 (E),

"The real question to decide in all such cases is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or, it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted at all that which survives without enacting the part that is 'ultra vires'."

(17) In — 'Marshal Field & Co. v. Clark', (1891) 36 Law Ed. 294 (F), the Supreme Court of America had to consider a somewhat similar question. By the 14th section of the Act of June 26th, 1884, Chapter 121, certain tonnage duties were imposed upon vessels entering the United States from any foreign port. There was, however, a provision that, in respect of sugar, there shall be paid a bounty of two cents per pound from the duties so realised. The contention was that the payment of the bounties created an unfair discrimination.

It was observed by Harlan, J., delivering the opinion of the Court that

"even if the position of the appellants with respect to the power of Congress to pay these bounties were sustained, it is clear that the parts of the Act in which they are interested, namely, those laying duties upon articles imported, would remain in force. It cannot be said to be evident that the provisions imposing duties on imported articles are so connected with or dependent upon those giving bounties upon the production of sugars in this country that the former would not have been adopted except in connection with the latter.

While in a general sense, both may be said to be parts of a system neither the words nor the general scope of the Act justifies the belief that Congress intended they should operate as a whole, and not separately for the purpose of accomplishing the objects for which they were respectively designed.

Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country."

(18) In — 'Utah Power & Light Co. v. Emmitt Pfost', (1931) 76 Law Ed. 1038 (G), section 1 of the Tax of the United States provided that

"any individual, corporation, etc., engaged in the generation, manufacture or production of electricity and electrical energy, by any means, for barter, sale or exchange, shall, at a specified time, pay a certain licence tax."

Section 5 provided that

"all electricity and electrical energy used for pumping water for irrigation purposes to be used on lands in the State of Idaho is exempt from the provisions of this Act, except in cases where the water so pumped is sold or rented to such irrigated lands."

The validity of the Act was challenged on the ground that the exemption created an unfair discrimination. It was held that the primary object of the State statute being to raise revenue, the exemptions made by S. 5 were merely secondary. It was observed:

"We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the Act, was to be preserved even though the specified exemptions should fall for lack of validity."

It is true that in that case it was held that the exemption was valid and not ultra vires, and it is also true that in the Act there was a provision in S. 11 that an adjudication, that any provision of the Act is unconstituional, shall not affect the validity of the Act as a whole, or of any other provision or section thereof". Nevertheless, the reasoning of the Court as to the nature of the exemption and whether it was interdependent upon or independent of the main provisions of the Act is worthy of note.

(19) On behalf of the applicant reliance was placed on the case in — 'Connolly v. Union Sewer Pipe Co.', (1902) 46 Law Ed. 679 (H). In that case, a law against the creation of trusts was enacted and the breach of it was made an offence but there was an exception in favour of producers and raisers of agricultural products and live-stock. It was held that "the Act was discriminatory in its nature and, therefore, invalid as contravening the 14th amendment".

It was further held that

"the exemption could not be separated from the main Act, and that the whole Act was bad because if the sections which exempted the agricultural or live-stock dealers from the penalties of the Act were eliminated as unconstitutional then the Act would apply to agriculturists and live-stock dealers and those classes would in that way be reached and fined, when evidently the legislature intended that they should not be regarded as offending against the law even if they did not combine their capital, skill, or acts in respect of their products or stock in hand."

It is interesting to note that the view of the Court that the exemption was invalid was overruled in a later decision of the Supreme Court in — 'Tigner v. State of Texas', (1940) 84 Law Ed. 1124 (I), where it was observed that

"Connolly's case has been worn away by erosion of time and is no longer controlling."

(20) No Government can be carried on without taxation. In taxing statutes, the presumption is that the legislature's predominant intention was to tax and the exemptions granted were secondary in importance. If the exemptions are found to be invalid, the presumption is that the legislature would still have intended that the rest of the statute should be enforced. On the other hand, in statutes creating offences, if the exemptions are invalid, and by reason of their invalidity, certain objects or activities would be rendered unlawful and subject to punishment, no such presumption can be raised.

In such cases, both the objects must be held to be equally important. Applying these principles to the provisions of the impugned statute, we find that the dominant motive of the legislature in placing the Act on the statute book was to raise revenue, more particularly because, in the Act, the charging section is general in its scope.

A secondary and subordinate intention also appears, namely, that certain specified persons or institutions and such other persons as may be notified by the Government be exempted from taxation but the two portions of the Act are not so interdependent that it could be said that if the exemp-

ions are eliminated, the legislature would still have not passed the main enactment.

We think that the exempted clauses can be separated from the rest of the Act which can be given effect to and all that will happen will be merely that a few exempted persons would be liable to pay the tax.

(21) No other point was urged before us in arguments.

(22) In the result, we dismiss this petition but, in the circumstances of the case, make no order as to costs.

D.S.P. Petition dismissed.

(S) AIR 1955 Allahabad 589 (V. 42, C. 171 Nov.)

CHOWDHRY AND UPADHYA JJ. (23-5-1955)

Girja Prasad Sunder Lal, Applicant v. Divisional Forest Officer, Dudhi and others, Opposite Parties.

Supreme Court Appeal No. 149 of 1955.

(a) Civil P. C. (1908), O. 45, R. 13 — Directions if can be given pending application for certificate.

There is nothing in O. 45 in general or in R. 13 in particular restricting the exercise of the powers under R. 13 to only where the certificate for leave to appeal to the Supreme Court has been granted. The filing of an application for leave to appeal to the Supreme Court invests the Court with the jurisdiction to pass such orders as it may become necessary to pass in connection with such an application, including orders in exercise of powers pending appeal provided by R. 13. (Para 9)

Anno: AIR Com.: C. P. C., O. 45 R. 13 N. 10.

(b) Civil P. C. (1908), O. 45, R. 13 — Pendency of appeal from decision under Art. 226, Constitution of India — Applicability of Rule 13.

There is no warrant for the view that O. 45, R. 13 does not apply to cases where the appeal, during the pendency of which the Court is asked to exercise powers under that rule, is an appeal from a decision under Art. 226 of the Constitution. A final order is a decree within the special definition of that term in R. 1 of O. 45. That being so, the provisions of that order are applicable where the appeal contemplated is one from a decision under Art. 226 of the Constitution. AIR 1933 PC 58, Rel. on. (Para 10)

(c) Civil P. C. (1908), O. 45, R. 13(2)(d) — High Court's power to restrain respondent.

The High Court is empowered under O. 45, R. 13(2)(d), C. P. C., to restrain the respondents from interfering with the petitioner's right pending disposal of the petitioner's application for leave to appeal to the Supreme Court, provided the interests of the respondents are at the same time sufficiently safeguarded. Case law discussed. (Para 12)

Anno: AIR Com.: C. P. C., O. 45 R. 13 N. 10.

(d) Civil P. C. (1908), O. 45, R. 13 (2) (d) — Power of High Court under R. 13(2)(d) — AIR 1953 Mad 475, Dissented from.

Order 45, R. 13 (2), Cl. (d) consists of two parts under both of which the Court might pass such orders as it thinks fit respecting the subject-matter of the appeal, but while the first part speaks of placing the party seeking the assistance of the Court under such conditions as the Court thinks fit, the other part, which is quite independent of the first, does not speak of any such party but only generally of the Court giving such other direction as it thinks fit. There is nothing in the second part of the clause to restrict the powers of the Court. AIR 1953 Mad 475, Dissent. from. (Para 16)

Anno: AIR Com.: C. P. C., O. 45 R. 13 N. 10.

CASES REFERRED: Paras

(A) (V20) AIR 1933 PC 58: 60 Ind App 76 (PC) 10

(B) (V18) AIR 1931 Cal 79: 129 Ind Cas 833 13

(C) (V26) AIR 1939 Mad 50: ILR (1939) Mad 135 13, 14, 15

(D) (V29) AIR 1942 Cal 488: ILR (1942) 1 Cal 67 13, 15

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(G) (V21) AIR 1934 All 585: 56 All 907 17

(H) ('09) 13 Cal WN 690: 1 Ind Cas 812 17

(I) (V41) AIR 1954 Orissa 114: 20 Cut LT 424 18

(J) (V41) AIR 1954 Raj 301 19

Ambika Prasad and Man Singh, for Applicant; Jagdish Narain Agarwala and N. D. Pant, for Opposite Party.

CHOWDHRY J.:

This is an application under O. 45, R. 13, C. P. C., by firm Girja Prasad Sunder Lal, whose writ petition under Art. 226 of the Constitution was dismissed on 3-2-1955 and a special appeal against that order was summarily dismissed on 11-4-1955. The petitioner firm then applied for a certifcate for appeal to the Supreme Court and preferred at the same time the present application.

(2) The petitioner obtained on 8-4-1953 for a period of seven years a theka from the Raja of Singrauli for collection of tendu leaves for manufacture of biris from a forest in Mirzapur district. The provisions of the U. P. Zamindari Abolition and Land Reforms Act, 1951, which came into force on 26-1-1951, were extended to the area in question on 1-7-1953, and, as the right, title and interest of the Raja vested in the State under S. 6 of that Act, and as the theka had been effected after 8-8-1946, the Divisional Forest Officer concerned issued on 29-11-1953 a notification under S. 8 nullifying such thekas and calling upon the thekadars to enter into fresh contracts with him.

Negotiations in this regard between the petitioner firm and the Forest Officer having failed, the right to collect leaves was auctioned and purchased by Behari Lal on 9-4-1953 at Rs. 2,000/- per annum. It is a matter of controversy whether the purchase by Behari Lal was only for that year or for a period of four years.

(3) On 20-4-1954 the firm filed a writ petition under Art. 226 of the Constitution against the Divisional Forest Officer and the State of Uttar Pradesh for a writ or direction to restrain them from interfering with the petitioner's right. An interim order to that effect was issued the same day which was to remain in force till the end of June, 1954, on condition of the petitioner depositing Rs. 2,500/- with the Divisional Forest Officer. The season of collection of the leaves is in May and June every year.

On 27-7-1954 Behari Lal made an application to be impleaded as a respondent, which application was allowed the same day that the writ petition was dismissed, i.e., on 3-2-1955. Before that the interim order had been vacated on 17-1-1955 as having exhausted itself. The writ petition was dismissed because the contentons of the petitioner that S. 8 did not apply to the forest or the theka in question were found untenable.

The petitioner sought to raise another plea at the time of arguments, namely, that the area in question did not constitute an "estate" as defined in S. 3(8), but he was not permitted to do so. The same pleas were unsuccessfully raised by the petitioner in a special appeal which, as adverted to above, was summarily dismissed on 11-4-1955.

(4) An application for leave to appeal to the Supreme Court, accompanied by the stay application which is the subject-matter of the present order, was filed by the petitioner on 29-3-1955. Notices have been issued on that application, but it has not yet been disposed of. By the common consent of Sri Man Singh, learned counsel for the petitioner, and Sri N. D. Pant, learned Junior Standing Counsel, an interim order in the same terms as the one dated 20-4-1954 was passed on 6-5-1955 against the Divisional Forest Officer and the State of U. P.

This order was to remain in force till 30-6-1955. Behari Lal, behind whose back that order was passed, put in an application on 12-5-1955 that the order be set aside, and that is how the petitioner's aforesaid application under O. 45, R. 13, C. P. C., is again before us for disposal.

(5) It was contended in limine by the learned counsel for the petitioner firm that the writ petition having been directed against certain actions of the State and its employee, the Divisional Forest Officer, and the stay order dated 6-5-1955 having been passed with the consent of the learned Junior Standing Counsel, that order is final and Behari Lal has no locus standi to challenge it. Now, there is no doubt that the parties primarily at issue are, on the one hand the Divisional Forest Officer, who issued the notification under S. 8, and the State of U. P., at whose instance the notification was issued, and on the other the petitioner, who is being deprived of his rights under the notification.

Once having been impleaded, however, Behari Lal's right to be heard respecting any order concerned with the subject-matter of the case has been recognised, how feeble so ever be the voice with which he may speak as compared to that of the State through whom he derives his title. He had therefore the locus standi to be heard in the matter of the petitioner firm's application under O. 45, R. 13, C. P. C., respecting the right of collection of tendu leaves pending disposal of the petitioner's application for leave to appeal to the Supreme Court.

The order dated 6-5-1955 was however passed without any notice to him. That order had therefore not the sanctity of even an ex parte order so far as he was concerned. So far as he was concerned, it was on the contrary, an order passed against principles of natural justice. The aforesaid objection raised by the learned counsel for the petitioner is therefore untenable.

(6) Before coming to the merits of the case, there is for disposal a short point of order raised by the learned Junior Standing Counsel, Sri N. D. Pant. He objected to the following sentences appearing in para 9 of Behari Lal's counter-affidavit: "That in order to achieve his ulterior object the applicant has filed the petition of leave to appeal to the Supreme Court along with a stay application. He somehow obtained the consent of Shri N. D. Pant Junior Standing Counsel for the State at the time of the ex parte interim stay order dated 6-5-1955. It appears that the learned Junior Standing Counsel was altogether ignorant of the fact that the deponent had purchased the forest in dispute on 9-4-1954 and was actually in possession of the forest and that the deponent's servants had actually started works in the forest from 1-5-1955, in pursuance of the auction purchase by the deponent."

Now, unless justified, the insinuation contained in the opening words of the second sentence is certainly objectionable, specially when the insinuation is against an honourable member of the Bar of this Court. It appears that the consent to the passing of the order dated 6-5-1955 was given by Sri N. D. Pant on foot, of a telegram which he had received from the Legal Remembrancer. Even if no such telegram had been forthcoming it could not be doubted that the only thing that could have actuated Sri Pant in giving his consent should have been the best interests of his clients.

The point need not, however, be pursued any further since, far from pleading any justification, the learned counsel appearing for Behari Lal gave the assurance that nobody ever really meant to make the insinuation which the words were unhappily capable of conveying. In the hope that care and circumspection never cease to be bestowed on the drafting of pleadings and petitions, and in the trust that the said assurance fully vindicates the honour of a learned member of the Bar of this Court, the matter is dropped at that.

(7) Coming to the merits of the petitioner's application, there are two questions that arise for determination on the arguments advanced: (1) Whether this court is empowered under O. 45, R. 13, C. P. C., or otherwise, to restrain the defendants from interfering with the petitioner's rights pending disposal of its application for leave to appeal to the Supreme Court, and (2) If it is so empowered, whether any, if so what, interim injunction should be passed, regard being had to the facts and circumstances of this case?

(8) Rule 13 of O. 45, C. P. C., is to the following effect:

"13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the court.—

(a) impound any movable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which the Supreme Court may make on the appeal, or

(c) Stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any decree or order which the Supreme Court may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise."

Now, sub-r. (1) of this rule, while recognising the basic principle of a successful party being entitled uncondiitonally to execute his decree despite the grant of a certificate for the admission of an appeal to the Supreme Court, empowers the court, by which of course is meant the High Court, to direct otherwise, i. e. to stay execution of the decree.

Sub-rule (2) provides, so to say, an exception to the said unconditional right of the successful party to execute his decree, and lays down the various powers the court may exercise in derogation of the said right of the successful party, if it thinks fit to do so, either on special cause shown by the party interested or even otherwise. Clauses (b) and (c) deal with these powers relating to the execution of the decree appealed from, the former allowing execution conditionally and the latter staying execution on terms.

Clauses (a) and (d) grant powers which have nothing to do with the execution of the decree

since the former provides for the impounding of disputed moveable property and the latter for the placing of any party seeking the assistance of the court under such conditions or the giving of such other directions respecting the subject-matter of the appeal as the court may think fit, appointment of a receiver being cited as only one of the ways in which such directions respecting the subject-matter of the appeal may be given.

(9) It is not necessary to consider in the present case whether the powers under R. 13 can be exercised by the Court even when no application for leave to appeal has been preferred either before it or before the Supreme Court. But there appears to be no doubt that in a case like the present, where an application for such leave has been filed before the court, it would have the jurisdiction, in a proper case, to exercise any of the powers conferred by that rule since there is nothing in O. 45 in general or in Rule 13 in particular restricting the exercise of those powers to only where the certificate for leave to appeal has been granted.

There is no doubt that Sub-r. (1) of R. 13 speaks of "notwithstanding the grant of a certificate", but, in the first place, these words are limited in their application to that sub-rule and do not govern the provisions of Sub-r. (2), and, in the next place, even in Sub-r. (1) these words seem to have been used only to emphasize the aforesaid basic principle of a successful party being entitled unconditionally to execute his decree. Whatever may be the position otherwise, the filing of an application for leave to appeal to the Supreme Court would seem to invest the Court with the jurisdiction to pass such orders as it may become necessary to pass in connection with such an application, including orders in exercise of powers pending appeal provided by Rule 13.

(10) Before dealing with the relevant provisions of Rule 13, it should be stated that there seems to be no warrant for the view that it does not apply to cases where the appeal, during the pendency of which the court is asked to exercise powers under that rule, is an appeal from a decision under Art. 226 of the Constitution. The various provisions of the rule speak of a party, suit and decree appealed from.

Since powers under that rule come in for application after a decree has been passed from which an appeal to the Supreme Court is contemplated, the prerequisite to the application of the provisions of that rule would seem to be the passing of such a decree.

But a decree for purposes of O. 45 has been given in R. 1 a special and a wider meaning than given to it in its definition under S. 2(2) of the Code, since the expression shall include a final order. The test of what a final order connotes was laid down by Sir George Lowndes in — 'Abdul Rahman v. D. K. Cassim and Sons', AIR 1933 PC 58 at p. 60 (A), in these words:

"The finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under S. 109 (a)".

Now, after the decision of this Court dated 11-4-1955 the special appeal was no longer a live appeal in which the rights of the parties had still to be determined. That decision was therefore a final order and therefore a decree within the special definition of that term in R. 1 of O. 45. That being so, the provisions of that Order would be applicable where the appeal contemplated is one from a decision under Art. 226 of the Constitution.

(11) The provisions of R. 13 being thus applicable in the present case, the question is whether the said relief could be granted to the petitioner firm under any of its provisions. The relevant provision would of course be the one or the other of Sub-r.(2), and not that of Sub-r. (1), since the court is being required to direct otherwise, i. e. to put a restriction on the right of the successful parties, the respondents, to reap unconditionally the fruits of the final order in their favour.

Clauses (a) to (c) have obviously no application since no question of impounding disputed moveables or of conditional execution or stay of execution of decree arises. The residuary cl. (d), however, confers wide powers and would seem to give the necessary powers to grant the aforesaid relief to the petitioner firm. An analysis of the provisions of sub-rule (2) (d) would show that

"Provided the Court thinks fit, on a special case shown by any party interested in the writ petition or otherwise appearing to the court, it may (1) place any party seeking the assistance of the court under such conditions, or (2) give such other direction respecting the subject-matter of the appeal as it thinks fit, by appointment of a receiver or otherwise."

Now, whether a special cause has been shown by the petitioner firm, which is no doubt a party interested, and whether this is a fit case in which to grant relief, are matters of detail which will be considered when dealing with the second of the two questions enumerated above. So far as the applicability of the clause is concerned, the case does seem to belong to the second category since the petitioner prays for an injunction to restrain the respondents from interfering with its rights of collecting tendu leaves, which is the same thing as, seeking a direction respecting the subjectmatter of the appeal.

This inference is confirmed by the fact that the particular portion of Cl. (d) mentions appointment of a receiver as one of the directions which a Court may give respecting the subject-matter of the appeal. Generally speaking, a receiver is appointed to preserve the subject-matter of the litigation pending determination of the rights of the parties in that litigation in order that the status quo ante may be maintained. Any order or direction that may be necessary for the preservation of the subject-matter of the litigation may therefore be passed or given under the second part of Cl. (d).

Preservation of course means keeping the subject-matter of the litigation safe from harm to the rights of either and not only one, of the parties of the litigation, for at the time that the order of direction of court is prayed for it is not possible to foresee which party would eventually succeed.

One way of doing it can be to allow a party which has been in enjoyment of the right in question under a semblance of title, even though disputed title, to continue to exercise that right pending final determination of the rights of the parties but at the same time to take such security from that party as would compensate the opposite party in the event of the latter eventually succeeding.

(12) The answer to the first question should therefore be in the affirmative, and it should be held that this Court is empowered under O. 45, R. 13 (2) (d), C. P. C., to restrain the respondents from interfering with the petitioner's right pending disposal of its application for leave to appeal to the Supreme Court, provided that interests of the respondents are at the same time sufficiently safeguarded. The question of this Court exercising that power otherwise than under that rule does not arise.

(13) The above view finds support from the decisions in — 'Sarat Kumar Roy v. Official Assignee of Calcutta', AIR 1931 Cal 79 (B); — 'Ramanathan Chettiar v. Viswanathan Chettiar', AIR 1939 Mad 50 (C); and Ramendra Narayan Roy v. Smt. Bibhabati Debi', AIR 1942 Cal 488 (D). In the first mentioned case a mortgage-decree having been passed, one of the defendants filed a suit for setting aside the decree on the ground that it had been obtained by fraud. This second suit was dismissed by the trial court, but on appeal the High Court reversed the judgment and decree of the trial court and directed that the decree in the mortgage suit should stand set aside and that the suit should be reheard.

The mortgagee obtained leave to appeal to the Privy Council against the High Court's decision and applied under O. 45, R. 13, C. P. Code, for stay of further proceedings in the first mortgage suit. This application was allowed both under the provision just cited and under S. 151, C. P. C. The contention that the aforesaid relief could not be granted under O. 45, R. 13, was repelled and it was observed as follows:

"As regards the first contention, namely, that an order such as has been prayed for cannot be made under the provisions of O. 45, R. 13, C. P. C., all that I need say is that, it seems to me that the words are wide enough to cover a case like the present. It has been ruled in several cases that an order such as may be necessary in the circumstances of a particular case pending the hearing of an appeal to His Majesty in Council may be made under the provisions of this section. Each case must depend on its own facts and it is not possible to set out exhaustively the cases that may be brought within the ambit of this section from time to time."

(14). In AIR 1939 Mad 50 (C) cited above a final decree having been passed during the pendency of an appeal to the Privy Council from a preliminary decree in a mortgage suit, the High Court allowed an application of the appellant under O. 45, R. 13 (d) and stayed execution of the final decree and safeguarded the interests of the respondent by requiring the appellant petitioner to furnish security.

It will be observed that the decree whose execution was stayed was not the decree appealed from, so that the High Court acted under cl. (d) of Sub-r. (2) of the rule with reference to the subject matter of the appeal. In repelling the contention that such stay could be granted only in respect of the decree appealed from it was observed as follows:

"It is noticeable, under this clause the Court has power to give whatever direction it thinks necessary respecting the subject-matter of the appeal as it thinks fit by the appointment of a receiver or otherwise, whereas sub-cls. (b) & (c) contemplate action by the Court with reference to the decree appealed from. Under sub-cl. (d) action may be taken by the Court and directions may be issued with reference to the subject-matter of the appeal. The subject-matter of the appeal in the present case is the property involved in the suit. It is not stated that the direction is with reference to the decree that is appealed from but it is with reference to the subject-matter of the appeal. If the Court has power to pass orders which it thinks should be passed in a particular case with respect to the subject-matter of the appeal, then we think that this Court has power to pass orders with respect to the property involved in the suit, if we think on the merits such order should be passed."

(15) In AIR 1942 Cal 488 (D) cited above, it was held, relying upon the above 1939 Mad case (C), that pending appeal to the Privy Council the Court had ample power under O. 45, R. 13(2)(d) to make such order as it considered necessary with respect to the monies lying in Court as income of the decretal property as such monies constituted the subject-matter of the appeal.

(16) The learned counsel for Behari Lal cited a number of rulings in support of his contention that the relief prayed for by the petitioner firm in the present case could not be granted under O. 45, R. 13. The first case cited by him was — 'Rajahmundry Electric Supply Corporation Ltd. v. State of Madras', AIR 1953 Mad 475 (E). It would appear that the Electric Supply Corporation's writ petition impugning a certain order of the State by which it was directed that the Corporation shall vest in the State was dismissed, and thereupon it applied both for leave to appeal to the Supreme Court and for stay of operation of the State's vesting order.

The High Court gave leave to appeal but rejected the application for stay on two grounds: (1) the relief asked for had nothing whatsoever to do with the execution of the final order of the Court, and (2) Cl. (d) did not empower the Court to place the party other than the party seeking the assistance of the court under any conditions or to give any direction to such a party preventing him from enjoying the fruits of the order against which the appeal is pending.

Now, the first ground may have reference to cls. (b) and (c) but it has nothing to do with cl. (d) which does not speak either of execution or of the decree appealed from. As regards the second ground, Cl. (d) consists of two parts under both of which the court might pass such orders as it thinks fit respecting the subject-matter of the appeal, but while the first speaks of placing the party seeking the assistance of the court under such conditions as the court thinks fit, the other part, which is quite independent of the first, does not speak of any such party but only generally of the court giving such other direction as it thinks fit.

In other words, under the second portion it is open to court, at the instance of any party, to give such direction respecting the subject-matter of the appeal as it thinks fit. That being so, it is open to the court under this part of the clause to give the requisite direction at the instance of the appellant against the successful respondent, and such direction may even be to prevent the latter from reaping the fruits of the decree in his favour pending the disposal of the appeal, his interests being of course otherwise safeguarded.

There is nothing in the second part of the clause to restrict the powers of the Court in the manner suggested in the ruling. With great respect, it is not possible to subscribe to the view expressed in this ruling.

(17) The next ruling cited by the learned counsel for Behari Lal was — 'Jitendra Narayan v. State of Assam', AIR 1953 Assam 159 (F). A writ petition under Art. 226 of the Constitution impugning the Assam Management of Estates Act, 1949, having been dismissed, and the petitioner's application for leave to appeal to the Supreme Court having been granted, his application under O. 45, R. 13(2)(d) to restrain the State from taking possession of the estates was rejected on the ground that the said provision of the Code was not applicable.

It was further held that stay of further proceedings could not also be granted under inherent powers. For the view that O. 45, R. 13, was not applicable reliance was placed on — 'Atma Ram v. Beni Prasad', AIR 1934 All 585 (G) and — 'Lalite-

ssur Singh v. Bhabessur Singh', 13 Cal WN 690 (H).

In the former case an application under O. 45, R. 13 (2) (d), for stay of suit in the trial court pending disposal of an appeal to the Privy Council from an order of the High Court directing that a certain party be brought on record as plaintiff was dismissed on the ground that Sub-rule (2) (d) did not apply since it referred to cases where a party is to be put to certain terms or some order has to be made regarding the custody or disposal of the subject-matter of the appeal.

Neither in AIR 1953 Assam 159 (F) referred to above, nor in the present, was there any question of stay of proceedings. On the contrary, an order was solicited regarding "disposal of the subject-matter of the appeal." That being so, the AIR 1934 All 585 ruling (G) really supported the granting, rather than refusing, the prayer under O. 45 R. 13(2)(d). For the same reason the ruling in 13 Cal WN 690 (H) has no application. It would appear therefore that the decisions on the basis of which relief in AIR 1953 Assam 159 (F) was disallowed had no application to the facts of that case.

(18) The next case cited was — 'Purna Chand Sahu v. Chamra Bariah', AIR 1954 Orissa 114 (I). In that case stay of execution of decree was not allowed because it was held that the court had no jurisdiction to grant such a prayer after it had rejected the application for leave to appeal to the Supreme Court. No such considerations arise in the present case since the application for leave to appeal to the Supreme Court has not yet been disposed of.

(19) Finally, the learned counsel for Behari Lal cited — 'Sajjan Singh v. State of Rajasthan', AIR 1954 Raj 301 (J). In this case an application under Art. 226 of the Constitution challenging the validity of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952, having been dismissed, the applicant applied under S. 151 and O. 45, R. 13, C. P. C., during the pendency of his application for leave to appeal to the Supreme Court, that the State be restrained from interfering in any manner with the applicant's possession over his Jagir. The application was dismissed.

The ruling dealt at lenght with the question whether it had the power under S. 151 of the Code to pass the order which the applicant desired, and it was eventually held that the court had no such power. So far as the provisions of O. 45, R. 13, are concerned, the matter was disposed of by simply remarking that the language of that rule made it quite clear that it was not applicable in terms to the case since it only gives certain powers to the court, including the stay of the execution of a decree.

It appears that the applicant in that case relied mainly upon S. 151 of the Code. This decision is therefore no clear authority for the view that O. 45 R. 13, is inapplicable. Towards the end of the decision there appear the following remarks which might possibly have been meant to apply both to S. 151 and O. 45, R. 13 of the Code:

"So long as the writ petition was pending, we could grant an interim relief to the applicant staying the application of the Act till we decided its validity; but once we have decided that the Act is valid, and have dismissed the petition, there is, in our opinion, no scope for grant of any interim relief by us on the ground that an application for leave to appeal to the Supreme Court has been filed. .....It is only the Supreme Court which can now grant any relief to the applicant."

As stated above, the stay application had in that case been filed and disposed of during the pendency of the application for leave to appeal to the Supreme Court. As regards the above quoted view that an interim relief could only be granted during the pendency of the writ petition, and not after it had been dismissed, it would appear to be against the specific provisions of O. 45, R. 13, since the provisions of this rule would come in for application only after the writ petiton has been dismissed and an application for leave to appeal to the Supreme Court has been filed.

The interim relief referred to in the Rajasthan ruling as granted to a party during the pendency of a writ petition would not be a relief granted under O. 45 of the Code. It would appear therefore that O. 45, R. 13, was not the basis of the decision in the Rajasthan case. On the whole, therefore, this decision is not helpful. In the result, therefore, there seems to be no reason to depart from the view expressed above namely, that this Court is empowered under O. 45, R. 13(2)(d) to grant the relief prayed for by the petitioner firm.

(20) It only remains now to see whether this is a fit case in which such a relief should be granted. It is a matter of controversy whether Behari Lal has purchased the rights in question in the auction sale dated 9-4-1954 for only one year or for four years. That is however immaterial. Admittedly, the petitioner firm had been in enjoyment of the right in question since before that, i.e., since 8-4-1953.

It is only by virtue of a subsequent notification under S. 8, U. P. Zamindari Abolition and Land Reforms Act, 1951, that the petitioner is being sought to be deprived of his rights. The validity of the notification is being seriously challenged by the petitioner. The learned Junior Standing Counsel has drawn our attention to a telegram which is said to have been received from the Legal Remembrancer at Lucknow on 17-5-1955. This telegram requires that the Court be informed of the correct facts an intimated by the Divisional Forest Officer in an earlier telegram dated 7-5-1955. All that was stated in the latter telegram was that the Divisional Forest Officer was not willing as the right in question had already been sold for four years and any such contract will be against the terms of contract between him and Behari Lal.

It is, however, not contended by the Divisional Forest Officer or the State that possession had been given to Behari Lal. It is also noteworthy that the stay order dated 6-5-1955 which has already been passed was passed with the consent of the State of U. P. through whom Behari Lal derives his title. In view of these facts and circumstances, Behari Lal's application for setting aside that order deserves to be dismissed and the stay order dated 6-5-1955 should be maintained.

As regards the terms and conditions on which that order should be maintained the petitioner firm has under that order been directed to deposit a sum Rs. 2500/- with the Divisional Forest Officer and to hand over to him a document in writing agreeing to the amount being paid to the Government in case the application for leave to appeal to the Supreme Court fails, or, if leave is granted, the appeal to the Supreme Court itself fails.

We are told that the said sum of Rs. 2500/- has already been deposited by the petitioner firm. There seems to be no reason to impose any further conditions on the petitioner firm. It may be that the amount of profit which Behari Lal would have derived if he had been allowed to gather the leaves might have been larger than Rs. 2500/-; but that is a matter between him and the State of U. P.

So far as the petitioner firm is concerned, its writ petition was directed only against the act of

the State of U. P., and with regard to that the sum of Rs. 2500/- which the petitioner has already deposited affords sufficient security.

(21) The application of Behari Lal dated 12-5-1955 is dismissed with costs and the order dated 6-5-1955 passed by this Court is maintained.

V.S.B. Order accordingly.

(S) AIR 1955 Allahabad 594 (V. 42 C. 172 Nov.)

AGARWALLA AND MULLA JJ. (24-2-1955)

L. Nawal Kishore, Defendant-Appellant v. Rameshwar Nath and others, Plaintiffs-Respondents.

Second Appeal No. 447 of 1952, against decree of Dist. J., Agra, D/- 20-11-1951.

(a) Tort — Damages — Joint tort-feasors — Liability — (Married Women and Tort-feasors Act, 1935 (25 and 26 Geo. V. C. 30), S. 6 (1) (b)).

There is no statutory law of torts in India. The Courts here act on the principle of equity, justice and good conscience in matters which are not covered by statute and rely upon the principles established under the English law to find out what the rule of justice, enquity and good conscience is. Any technical rule or statutory law of England is not, as such considered to be based on the principle of equity, justice or good conscience, unless it appears to be so to the judge deciding the case. The rule of law indicated in Cl. 6 (1) (b) is not necessarily based on any principle of equity, justice or good conscience.

There is no justifiable reason why in the subsequent suit, if more than one suit is brought for damages against different persons, the plaintiff should be restricted to the amount decreed against one joint tort-feasor in his suit against the other joint tort-feasors against whom the cause of action is not only joint but joint and several. (Para 5)

Where, however, a suit for damages for wrongful attachment of property was brought against N and the Official Receiver but the decree against the Official Receiver could not be passed because of the bar of limitation;

Held that it was no reason for not passing a decree against N. Held further that there was no reason why if the Official Receiver because of his official position was considered to be liable to some extent, N who did not occupy that position, should be deemed to be liable only to that extent and not to the whole extent to which he would otherwise be liable. (Para 5)

(b) Tort — Damages — Joint-Tort-feasors — Liability — Attachment of house by N in insolvency proceedings — House locked — Official Receiver unable to let out house — Suit for damages by owner of house — Liability.

Where in the insolvency proceedings the property was attached at the instance of one N and it remained locked up as the Official Receiver could not let out a major portion of it to anyone in spite of his efforts in that direction, the damage caused to the building was the direct consequence of the attachment and its being locked up by N and he alone must be held responsible. (Para 6)

(c) Civil P. C. (1908), Ss. 100 and 101 — Question of fact — Assessment of damages.

That the assessment of damages done by the lower Court is wrong is a pure question of fact and the decision of the Court below cannot be interfered with in second appeal. (Para 7)

Anno: AIR Com., C. P. C., S. 100 N. 52.

CASES REFERRED: Paras

(A) (V6) AIR 1919 All 70: 17 All LJ 856 6
(B) (V8) AIR 1921 All 89: 19 All LJ 277 6
(C) (V18) AIR 1931 PC 28: 1931 All LJ 541 (PC) 6
(D) ('44) 1944 All LJ 273 6

N. P. Asthana and J. S. Gupta, for Appellant; H. Swarup and B. Dayal, for Respondents.

AGARWALA J.:

This is a defendant's appeal arising out of a suit for recovery of damages for wrongful attachment of property. The facts, briefiy stated, are as follows:

(2) Two persons, Khawja Baksh and Riaz Uddin, were adjudged insolvents on the application of the appellant Nawal Kishore. In the insolvency proceedings certain property was attached by the Official Receiver as belonging to the insolvents. This property consisted of a big building in which was housed a printing press and which contained nineteen shops. Eleven of the shops and the hall housing the printing machines had been purchsed by Bishambar Nath Khazanchi, the original plaintiff in the suit, prior to the insolvency proceedings.

Bishambar Nath Khazanchi objected to the attachment and sent a notice to the Official Receiver to release the property. As the property was not released he filed a suit for the declaration of his title on 11-4-1935. The property was, however, released during the pendency of the suit on 10-11-1936. The plaintiff got the plaint amended, and the suit after the amendment was for damages on two counts, Rs. 2000/- for damages to the building and Rs. 1884/14/- at the rate of Rs. 333/5/4 per month for loss of income from the building which the plaintiff suffered on account of its being in possession of the Official Receiver. He also claimed 'pendente lite' and future mesne profits at the same rate.

The trial Court dismissed the whole suit. The lower appellate Court maintained the decree of dismissal against Nawal Kishore but decreed the suit against the Official Receiver for a sum of Rs. 812/8/-. The Official Receiver appealed to this Court against the decree passed by the lower appellate Court, and the plaintiff also appealed to this Court both as against Nawal Kishore and the Official Receiver. The appeal filed by the Official Receiver abated while it was pending in this Court because Bishambar Nath Khazanchi died during that time and his heirs were not brought on the record within time.

In the appeal brought by the plaintiff his heirs were brought on the record and so that appeal proceeded and it was held by this Court that Nawal Kishore was equally liable along with the Official Receiver and the dismissal of the suit against him was set aside and the case was remanded to the Court below for passing a decree for damages. As against the Official Receiver however it was held that the limitation for a suit against him had expired before the suit had been brought in the Court below. No relief, however, could be given to the Official Receiver because his own appeal had abated and the decree of the Court below passed against him, therefore, became final.

(3) On remand the lower appellate Court held that Nawal Kishore was liable to pay a sum of Rs. 1,900/- on account of the damage caused to the building, and to damages for loss of income from 21-10-1934 to 10-11-1936 at the rate of Rs. 333/5/4- per month.

(4) Three points have been uregd on behalf of the appellant by Dr. Asthana. The first point

urged is that it was not open to the Court below to pass a decree against Nawal Kishore for an amount in excess of Rs. 812/8/- for which a decree had been passed against the Official Receiver. This argument was based upon S. 6 (1) (b) of an English Act entitled (Married Women and Tort-feasors) Act, 1935 (25 and 26 Geo. V, C. 30). The common law of contribution between joint tort-feasors was amended by that Act in England. S. 6 (1) (b) is to the following effect:

"(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tort-feasors liable in respect of the damage (whether as joint tort-feasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action;"

This section has been relied upon by Clerk and Lindsell in their book on Torts, Edn. 10, at p. 103 where the learned authors say:

"Although it is possible to bring separate actions against the joint tort-feasors by virtue of this provision and therefore to recover separate judgments, the sums recoverable under those judgments by way of damages are not in the aggregate to exceed the amount of the damages awarded by the judgment first given;"

(5) Clause (b) of S. 6 (1) in express terms refers to more than one action and provides that in the second and subsequent actions taken together not more than the amount decreed in the first action shall be decreed. We are not concerned with more than one action because in the present case there was only one action against the two defendants. The section, therefore, would not apply to a case of the present nature. Moreover, there is no statutory law of torts in this country and the Act aforesaid is not applicable here.

The Courts of this country act on the principle of equity, justice and good conscience in matters which are not covered by statute and rely upon the principles established under the English law to find out what the rule of justice, equity and good conscience is. Any technical rule or statutory law of England is not, as such, considered to be based on the principle of equity, justice or good conscience, unless it appears to be so to the judge deciding the case.

It appears to us that the rule of law indicated in Cl. 6 (1) (b) of the Act mentioned above is not necessarily based on any principle of equity, justice or good conscience. There is no justifiable reason why in the subsequent suit, if more than one suit is brought for damages against different persons, the plaintiff should be restricted to the amount decreed against the joint tort-feasor in his suit against the other joint tort-feasors against whom the cause of action is not only joint but joint and several.

However that may be, as stated by us above, in the present case there was one suit against both the joint tort-feasors. The decree against the Official Receiver may not have been passed at all because of the bar of limitation. That would have been no reason why no decree could be passed against the other defendant against whom the period of limitation was different.

Similarly there is no reason why if the Official Receiver because of his official position was considered to be liable to some extent, the other defendant who did not occupy that position, should be deemed to be liable only to that extent and not to the whole extent to which he would otherwise be liable. This plea, it may be noted further, was not taken on behalf of the appellant in the Court below. For all these reasons we think that this contention of learned counsel is not sound.

(6) The second contention raised is that Nawal Kishore could not be held responsible for the damage caused to the building on account of the negligence of the Official Receiver. The amount of Rs. 1,900/- decreed on account of the damage caused to the building was said to be due to the fact that after attachment no care was taken to have the building kept in proper repair. It was alleged that this was the fault of the Official Receiver and not the fault of Nawal Kishore.

In our opinion this contention is also not sound because the property was attached at the instance of Nawal Kishore and it remained locked up as the Receiver could not let out a major portion of it to anyone in spite of his efforts in that direction. The damage caused to the building was the direct consequence of the attachment and its being locked up. Nawal Kishore, who got the property attached and locked up, must be held responsible for the consequences which arose out of his own action. In the judgment delivered by the Bench of this Court in this very case on the previous occasion it was clearly held that Nawal Kishore was responsible for the consequences of his act.

It was observed that Nawal Kishore, who was responsible for the attachment, was liable for the damages claimed, and reference was made to several decisions, namely — 'Abdur Rahim v. Sital Prasad', AIR 1919 All 70 (A); — 'Binda Pershad v. Ramchander', AIR 1921 All 89 (B); — 'Ramanathan Chetty v. Mira Sailo Marikar', AIR 1931 PC 28 (C); and — 'Manak Lal Nihal Chand v. Hamid Ali', 1944 All LJ 273 (D).

(7) The last contention is that the amount of damages determined by the Court below is too high. We think that this contention is not open to the appellant because even if the assessment is wrong it is a pure question of fact and the decision of the Court below cannot be interfered with in second appeal.

(8) We, therefore, find no force in this appeal and dismiss it with costs.

H.G.P. Appeal dismissed.

(S) **AIR 1955 Allahabad 595 (V. 42 C. 173 Nov.)**

UPADHYA J. (17-6-1955)

Amrita Bazar Patrika Ltd., Petitioner v. Board of High School and Intermediate Education, U. P. and another, Respondents.

Civil Misc. Writ Appln. No. 512 of 1955.

†(a) **Constitution of India, Arts. 5(c) and 19 — Citizen — Corporation if citizen — AIR 1953 Raj 188, Dissent. from.**

Article 5 applies to natural-born persons and not to artificial persons. Hence a corporation cannot be held to be a "citizen" within the meaning of Art. 19. AIR 1952 Punj 9, Rel. on. AIR 1953 Raj 188, Diss. from. AIR 1951 SC 41 and AIR 1954 SC 119, Explained. (Para 32)

Anno: AIR Com.: Const. of India, Art. 5 N. 3 Pts. 2 and 4; Art. 19 N. 15 Pt. 1.

(b) Constitution of India, Art. 14 — "The State" — Board of Education if State.

The Board of High School and Intermediate Education, U. P. is not the State and hence it is not possible to claim any relief under Art. 14 against the Board. (Paras 35, 36)

Anno: AIR Com.: Const. of India, Art. 14 N. 10 Pt. 5.

(c) **Constitution of India, Art. 14 — Board of Education selecting particular press for doing confidential priting work — If discrimination — (U. P. Intermediate Education Act (2 of 1921), S. 7(7)).**

If the Board selects a particular press for doing confidential printing work the other presses carrying on similar trade cannot contend that the Board has offeneded against the law prohibiting discrimination. (Para 38)

Anno: AIR Com.: Const. of India, Art. 14 N. 42.

(d) **Constitution of India, Art. 226 (1) — Mandamus — Publication of results in newspaper if done in performance of statutory duty — High Court if can prescribe manner in which Board should publish results — (U. P. Intermediate Education Act (2 of 1921), S. 7(7)).**

The publication of the results in the newspaper is not done in performance of the statutory duty imposed on the Board by S. 7(7). This statutory duty is performed by the Board when it publishes the results in the Government Gazette. Under the general law of the land also no newspaper has a right to have access to the results of the Board as soon as they are passed by the Results Committee. When the newspaper takes up the work of publishing the results, it does so in furtherance of its own trading activities and not as an agent employed by the Board in the course of the performance of its legal duties under S. 7 (7).

Therefore it is not for the High Court to prescribe the manner in which the Board is to perform its duties in the exercise of its powers conferred by S. 7(7). (Paras 44, 45, 49)

Anno: AIR Com.: Const. of India, Art. 226 N. 113(a).

CASES REFERRED: Paras

(A) (1880) 5 AC 214: 49 LJ QB 577 7
(B) (V37) AIR 1950 SC 218: 1950 SCR 536 (SC) 8
(C) (1860) 10 Ir Ch R 510 9
(D) (1902) 86 LT 764: 18 TLR 525 9
(E) (1840) 6 M and W 473: 151 ER 498 9
(F) (1831) 1 B and Ad 847: 109 ER 1001 9
(G) (1935) 1935 AC 532: 104 LJ PC 82 9
(H) (1937) 303 US 444: 82 Law Ed 949 10
(I) (V37) AIR 1950 SC 124: 51 Cri LJ 1514 (SC) 10
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(N) (V41) AIR 1954 SC 119: 1954 SCR 674 (SC) 25
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(P) (1906) 1906 AC 455: 75 LJ KB 858 34
(Q) (V39) AIR 1952 SC 59: 1952 SCR 391 (SC) 35
(R) (1894) 39 Law Ed. 160: 155 US 303 41

A. P. Pandey, S. D. Pande and S. K. Srivastava, for Petitioner; K. L. Misra, Advocate-General and J. Sarup, Sr. Standing Counsel (for No. 1) and S. S. Dhavan and B. M. Lal Srivastava (for No. 2), for Respondents.

OREDR: This is an application by the Amrit Bazar Patrika, Limited, a Private Limited company which owns the Amrita Bazar Patrika Press situate at Allahabad and publishes the English daily newspaper known as the Amrita Bazar Patrika, for the issue of an order, direction or a writ in the nature of a writ of Mandamus commanding the respondent No. 1, the Board of High School and Intermediate Education, U. P., to allow the petitioner to have access to the results of the High School and Intermediate Examinations held by the said Board this year after the same have been passed by the Results Committee of the Board with privileges, facilities, conveniences, and opportunities which have been made available by the said Board to the respondent No. 2, the Newspaper Limited, which publishes the daily Newspaper called the 'Leader'.

The petition also prays for the issue of an order, direction, or a writ in the nature of a writ of certiorari to the respondent No. 1 to transmit the record of the correspondence and resolutions bearing on the subject of the publication of the aforesaid result of the year 1955 to this Court to the end that the decision of the respondent No. 1 embodied in the letter dated 3-5-1955 be quashed. The petition further prays for the passing of any other order or direction that may be found to be appropriate and suitable in accordance with the exigencies of the case.

(2) The petition urges that on several occasions in the past the results of the High School and Intermediate Examinations held by respondent No. 1 have been published in the columns of the Amrita Bazar Patrika and that on 18-2-1955, the Board enquired from the petitioner whether it was ready and willing to undertake the publication of the results. The petitioner signified its consent and thereupon on 7-3-1955 the Results Sub-Committee of the Board met to consider the acceptance of the newspapers to publish the results and the representative of the Amrita Bazar Patrika viz., Sri S. N. Chanda was invited to attend the meeting.

It is alleged that Sri Chanda accepted all the terms and conditions proposed by the Board and agreed to publish the results and the Sub-Committee assured the representative that its final decision would be communicated in due course. It is said that with a view to carry out the work of publication with the requisite degree of efficiency & due promptitude the petitioner incurred substantial expenses in making preparation and collecting materials as set out in the affidavit.

The respondent No. 1, the Board, failed to communicate its decision for about two weeks and a reminder was sent on or about 25-3-1955 to the Board to which the Board replied that the matter was fully considered at its meeting on 11-4-1955. On 3-5-1955, an intimation was received by the petitioner from the Secretary of the Board to the effect that the Board refused to allow the petitioner to publish the results in the columns of the Amrita Bazar Patrika.

The petitioner urges that the Board is under a statutory obligation to make the results available to the public after they have been passed by the Results Committee and after they have been so passed they ceased to be the property of the Board and become the property of the public, that it is not within the competence of the Board to confer the right of monopoly and the exclusive right of publication of the results on any individual newspaper to the exclusion and prejudice of other newspapers and that the petitioner has a fundamental right of having access to the results in order to carry on its business and render service and discharge its duties to its constituents in general and to readers, exa-

minees and their guardians and those who are interested in the results in particular.

It is further urged that to confer the exclusive right of publication of the results amounts to discrimination against the petitioner & other newspapers & that conferring of such exclusive right of publication precludes the petitioner from being eligible to perform its duties as a newspaper and is destructive of and incompatible with the democratic principles and public policy and constitutes a gross violation of the petitioner's fundamental right to carry on its business.

It is stated that a statutory corporation, it was incumbent on the Respondent No. 1 to allow every newspaper to have access to the results with equal facilities and to refrain from discriminating one paper against another and mete out preferential treatment to that particular newspaper. The affidavit further states that near about 1946 the results were published by the Government Press and the newspapers purchased result-sheets from the Government Press & supplied to their readers those result sheets along with their papers. It is urged that this was due to the fact that the newspapers were not in a position to publish the result-sheets because of shortage of newsprint and several other difficulties.

In 1947 none of the local papers of Allahabad published the results and these were published by the Hindustan Times, New Delhi. In 1948 the Leader, as a result of discriminatory treatment meted out by the Board, published the results. In 1949 and 1950 the Amrita Bazar Patrika published the results and so did the Leader. The issues of the Amrita Bazar Patrika containing the results of 1949, popularly known as Results Supplement were supplied to the public considerably before the Leader could make the Result supplement available to the public, notwithstanding the fact that the Board had imposed a time lag on the publication of the results.

In 1951, 1952 and 1953 neither the Leader nor the Patrika published the results. The Bharati Bhandar, a publication branch of the Leader published the results of 1952. In the months of April and June, 1953, it is stated that the petitioner received certain number of letters including one dated 30-4-1953, on the subject of the publication of results. This letter mentioned that the exclusive right of publication of results has been abandoned.

Eventually in that year (1953) neither the Leader published the results nor the Amrita Bazar Patrika.

In that year the results were published by the Hindustan Times of Delhi and some others papers of Delhi but some of the important details of the results had been omitted, e.g., names of the successful candidates, the division secured by them at the High School Examination except those who had been placed in the first division. These were not to the satisfaction of the persons interested. It is stated that in 1954 both the Leader and the Patrika suggested to the Board that the results may be given to any one of the aforesaid two papers with the exclusive right of publication.

Eventually the Leader published the results but the Result Supplements were available to the public at many centres a bit late after the arrival of the result-sheets supplied by the Board to those centres.

It is then stated that in the year 1955 on an invitation from the Board the Patrika had sent its representative and had agreed to publish the results on the terms proposed. It is claimed that in point of efficiency, of prompt and expeditious printing publication, reaching the result-sheets to the far and distant stations, the Amrita Bazar Patrika does not yield superiority to any other paper and the record of its performance in the matter of publication of the results had been good and there was no justification for the preferential treatment meted out to the Leader against the Patrika this year.

(3) Notices were issued on 23-5-1955 on the petition by my brother Oak J. and he directed that a date for hearing be fixed in the first week of June 1955.

(4) This case was listed for hearing on 6-6-1955 when it was found that counter-affidavit had been filed by the respondent and the petitioner wanted time for filing a rejoinder. The case was therefore postponed and after the rejoinder was filed the case came up for hearing on the 9th instant.

(5) At the commencement of the hearing, the learned Advocate General raised preliminary objections. He invited attention to paragraph 24 of the petitioner's affidavit wherein the petitioner had stated that he did not claim any relief as against the Leader and that the petition was filed with the sole object of vindicating its right to have access to the results, after they have been 'announced' by respondent No. 1 and to have aqual facilities and equal privileges of publishing the same. It was urged that the relief claimed was only against respondent No. 1. The petitioner knew that under an agreement with the Board the respondent No. 2 had acquired the exclusive right of publishing the results and was proceeding to act on that basis and yet if no relief was claimed against the Leader it should be construed that the petitioner did not want any modification of the exclusive right so acquired by respondent No. 2.

In the circumstances the relief claimed against the Board would be meaningless unless it was also intended to effect a modification of the rights of the respondent No. 2. In the absence of a claim that the rights of the respondent No. 2 be modified, the relief claimed would be in the nature of a mere declaratory relief for which no mandamus can properly be issued.

The second objection raised is that the issue of mandamus is possible only when there is a statutory or legal duty. The petition, it was urged, did not show the existence of any legal right founded on any statute or other law. The learned Advocate General urged that sub-section (7) of S. 7, Intermediate Education Act (Act II of 1921) said that subject to the provisions of the Act the Board shall have the power to publish the results of its examinations.

This power conferred on the Board created a corresponding duty to publish the results. The manner in which this was to be done was within the exclusive competence of the Board to decide and no right was created by that Act or by any other Act in favour of the petitioner. It was urged that unless the petition showed the existence of such a right founded on law the petitioner was not entitled to claim the issue of any writ.

The third objection raised was that in paragraph 24 of its affidavit the petitioner stated that it wants the vindication of its rights to have access to the results after they have been 'announced'. It was urged that 'announcement' of the results meant nothing else than conveying the results to others. The agency for this 'announcement' appointed by the Board was the Leader and if the petitioner wanted to have access of the results after the 'announcement' the respondent Board could have no objection and the petition itself does not show that at any time the respondent Board expressed any objection to the petitioner having access to the results after such 'announcement' by the Leader. On this ground too it was urged that the petition was not maintainable.

The learned Advocate General further argued that the facilities etc., referred to by the petitioner

were such as were essential for the timely publication of the results. Having regard to the very large number of candidates appearing at the Intermediate and High School Examinations and the accuracy required in publishing the results, the arrangement was that the rolls of candidates appearing at the examinations were furnished to the newspaper concerned so that the necessary printing might be started and. after the results were passed by the Results Committee, they were to be passed on to the newspaper concerned so that with the necessary modification of the rolls printed by them the results might be published with the least possible delay.

The learned Advocate General stated that the results were about to be passed by the Committee and the Leader expected to publish them or at least those of the Intermediate Examination on or about the 17th instant. He said that having regards to the immensity of the task for the petitioner to publish the results on that date even if they were made available to him simultaneously with the leader, it was not possible now to give the same facilities because facilities had already been given to the Leader and it was not possible to do for the petitioner that which had already been done for the Leader. He said that this part of the prayer was impossible and he said that the Court cannot be requested to grant a relief which by the very nature of things has become infructuous.

The learned Advocate General said that the decision of the Board was communicated to the petitioner on 21-4-1955 and the petitioner did not take action for quite a long time and it has now become impossible to grant the relief as an effective relief because of laches on the part of the petitioner. He therefore urged that on this ground too the petition as moved now, was not maintainable and should be rejected without considering it on merits. He further urged that no judicial proceedings were in question and no case had been made out for the issue of a writ of certiorari. The prayer for the issue of that writ was not maintainable at all.

(6) Sri A. P. Pandey, learned counsel for the petitioner, in reply said that the objections raised by the learned Advocate General were not preliminary in their nature at all. The questions raised by him involved the determination of the rights of the petitioner and if the examination of the rights could be called preliminary such preliminary objections may be raised in every petition for the issue of a writ. With reference to paragraph 24 of the petitioner's affidavit, learned counsel argued that the petitioner refrained from seeking relief against the Leader because the petitioner's contention is that the Board's action in violation of the petitioner's fundamental rights was illegal & as such the alleged agreement between the Board and the Leader could not be effective in law at all.

The Leader, it was urged, could lay no valid claim to the exclusive right of publishing the results and as such it was not necessary to claim any relief against the Leader and if the relief as prayed for against the respondent No. 1 is granted by the Court the petitioner would get all that it wanted.

The Leader, it was contended, had not acquired any right at all in the eye of law and as such it was absolutely unneccessary to claim any relief against the Leader.

It was urged that the petitioner was opposed to the grant of exclusive right of publishing the results but was not opposed to the Leader also having the right to publish the results in the same manner as was claimed by the petitioner and therefore the petitioner did not claim that the Leader should be ordered not to publish the results. The petition, in consequence, could not be rejected on the first ground urged by the Advocate-General.

(7) The second preliminary objection, Sri Pandey contended, necessitated the examination of the very foundation of the petitioner's claim. If the petitioner did not succeed in establishing that it had a constitutional or legal right and failed to show that the respondent No. 1 was under a corresponding obligation to perform a duty, the objection must fail. But this should properly be done when the case is heard on merits in full and not as a preliminary matter.

Learned counsel urged that in order to obtain a writ of mandamus the applicant must satisfy certain conditions according to well-established principles in English Law. The applicant must show that he has a legal right to the preformance of his legal duty by the respondent. The right must be a public right and the duty sought to be enforced must be of a public nature, the right to compel the performance of the public duty should be shown to reside in the applicant and the applicant must have moved the Court in good faith and not on behalf of a third party or for an indirect purpose.

Learned counsel said that the duty may not be necessarily created by a statute but should be wellfoumded in law. He said, S. 7(7) Intermediate Education Act (U. P. Act No. II of 1921) made it a duty of the respondent No. 1 to publish the results and the petitioner was, both in its capacity as a member of the public and as a newspaper, entitled to the right of having the results published and to get the said duty performed by the respondent Board.

Learned counsel contended that regard being had to the interest that a large section of the public has naturally in these results and the fact that the statute empowers the Board to publish the results, it becomes the duty of the Board to perform its duty. It cannot be properly contended that it is open to the Board to exercise that power or not to exercise it at all.

Further it is not open to the Board to exercise that power in the manner it chooses regardless of the inconvenience that it may cause to others or the effect that the choice of the manner may have on the rights, previleges or professional or trading activities of others. The object of the porvision made in the statute, the subject-matter concerned and the class and number of persons interested requires that the power conferred by the statute must be exercised and the conferring of the power by the statute creates a duty which the Board is bound to perform.

Learned counsel cited the decision of the House of Lords in —'Julius v. Lord Bishop of Oxford' (1880) 5 AC 214 (A), where the Lord Chancellor (Earl Cairns) considering the import of the words "it shall be lawful" observed that while these words in themselves confer a faculty or power only there may be other circumstances making it a duty of that authority or person concerned to exercise that power. The Lord Chancellor said:

"But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed „ to exercise that power when called upon to do so."

(8) Those observations were quoted with approval by Kania C. J. in the — 'Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd.', AIR 1950 SC 218 (B). The learned Chief Justice was considering the powers of a Revenue Authority to make a reference to the High Court under

the Stamp Act and the language of S. 57, Stamp Act, where it says that the Chief Controlling Revenue Authority 'may' state any case referred to it etc. came up for consideration and the learned Chief Justice observed:

"In our opinion, in the present case the power to make a reference under Section 57 is not only for the benefit of the appeliant. It is coupled with a duty cast on him, as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so it is within the power of the Court to direct him to discharge that duty and make a reference to the Court."

Learned counsel contended that the Intermediate Board having the power was also required to exercise that power as a matter of duty and if the Board was under an obligation to publish the results, those who were entitled to know the results of such publication were also entitled to argue that the power should be required to perforn that duty. Learned counsel said that as the manner in which the duty is to be performed may not be arbitrary or unreasonable, the petitioner is competent to move the Court to see that the Board performs this duty in a proper manner. Learned counsel therefore urged that the duty of the Board having been enacted the petition could not be dismissed on a preliminary ground as raised by the learned Advocate-General.

(9) The learned counsel for the petitioner dwelt at some length on the meaning of the word 'publish'. He referred to various dictionaries and tried to show that the word would have different connotations in different circumstances. Referring to Stroud's Judicial Dictionary, Vol. III, learned counsel argued that this dictionary dealt with several objects and publications and there were some of these objects which were similar to the publication of results.

He contended that the meaning of 'publication' or 'publishing' should be considered to be similar as that used in clauses (6) and (9) which read as follows :

"(6) A Sculpture, or bust, is published (Sculpture Copyright Act 1813 (54 Geo. 3., c. 56), S. 1) by being publicly exhibited — ('Turner v. Robinson', (1860) 10 Ir. Ch. R. 510 (C)). See Produced. See further — 'Britain v. Hanks Bros. & Co.', (1902) 86 LT 764 (D)."

"(9) An award is published, and "ready to be delivered", as soon as it is completed and & executed by the arbitrator — ('Brooke v. Mitchell', (1840) 6 M. & W. 473 (E); Russell on Arb. (15th ed.), 203); but, semble even where the words used are 'ready to be delivered", the award may be parol (See Deliver).

Shri Pande contended that it is the duty of the Board to publish the results and make them available to the public immediately after they are passed by the Results Committee. He said that in this case the Board had invited several newspapers including the petitioner to take up the work of printing, publishing and distributing the results at the various centres of examination and he contended that the moment the Board invites the representatives of one newspaper to take the results from the office of the Board the results are public and they are no more a secret and they become public property in the sense that they become public news.

Learned counsel contended that it was incompetent for the Board to exclude the petitioner from getting the results at that stage, and if the Board which is a body corporate acted in this manner it amounted to discrimination between two newspapers. The making available of the rolls etc., in advance is Shri Pande contended, an integral and inseparable part of the obligations of the Board to publish the results.

There is a public obligation resting on the Board and the moment it becomes unnecessary to keep the results a secret there is the duty to publish them and this duty of the Board is a duty to the public or a public duty.

Shri Pande urged that every newspaper has a right to go and have access to the news. He says that the right is a fundamental right under he Constitution. In the alternative he says it is a right based on the general law of the land which recognises the right of newspapermen to have access to all sources of news. Learned counsel referred to several books and cases relating to the American Law on the subject and he said that in the United State of America the rights of the press are fairly well recognised in this respect.

Reliance was placed on a quotation from the judgment of Lord Tenterden C. J. in — 'Doe d. Bishop of Rochester v. Bridges', (1831) 1 B. & Ad. 847 at p. 859 (F), quoted with approval by the Privy Council in — 'Attorney General of Trinidad and Tobago v. Gardon Grant and Co.,' 1935 A.C. 532 at p. 537 (G) :

"Where an act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."

Learned counsel contended that if the manner in which the results are to be published is not set out in the statute the publication is to be done according to the common law in a mode or manner suited to the particular nature of the case. It was contended that in modern times when the press is so efficient no better manner of publishing the results could be available than to let the newspapermen have access to the results and without granting to any one newspaper any sort of monopoly over the news the papers generally should be allowed to publish the results.

Learned counsel contended that that would be the most efficient and effective manner in which the statutory duty cast on the Board could be discharged. He said, therefore, that the duty had to be discharged in a proper manner and not in a manner which would be arbitrary or unreasonable or even partially affecting the object for which the provision is made creating that duty. Learned counsel contended that the preliminary objection was no preliminary objection at all and the merits of the case would have to be considered in deciding the questions that arose.

(10) Reference was made to Article 19(1) (a) and (g) of the Constitution of India. Learned counsel urged that the petitioner had a fundamental right of freedom of expression. Learned counsel relied on — 'Lovell v. Griffin', (1937) 303 U.S. 444 (H), and — 'Romesh Thappar v. State of Madras', AIR 1950 SC 124 at p. 126 (I), in support of his contention that the freedom of speech and expression includes freedom of publication. The right of expression includes publication, circulation, distribution and dissemination of the news.

Learned counsel urged that if the petitioner had been guaranteed the freedom of right of expression under the Constitution, it was implied that

there would be no impediment placed by anybody in the exercise of that right. He contended that it was not possible at all for the petitioner to exercise that right if he was denied access to news.

Referring to cl. (g) of Art. 19 he said that as a newspaper the petitioner could not possibly exercise the profession or carry on the occupation or trade or business of a newspaper if respondent No. 1 denied to the petitioner access to the results and allowed such access only to the Newspapers Limited and the Leader. The petitioner was denied the opportunity of exercising his fundamental rights. When the rights were guaranteed, he said, nothing can be done by anybody to impede the effective enjoyment of that right. Learned counsel urged that the matter was not one which could be disposed of on a preliminary ground and it could not be urged that prima facie the petitioner had no case.

(11) Adverting to the objection of the learned Advocate General that fundamental rights under Art. 19 were not available to the petitioner as the petitioner was a corporation and not a natural person and therefore not a citizen within the meaning of the Constitution, learned counsel said that though the Advocate General had promised to cite Supreme Court decisions to support his contention the only one case that was mentioned by him was a decision of the Madras High Court in — 'Sree Meenakshi Mills Ltd, Madurai v. State of Madras', AIR 1951 Mad 974 (J).

Learned counsel said that another case published in — 'Jupiter General Insurance Co., Ltd. v. Rajagopalan', AIR 1952 Punj 9 (K), was also being mentioned. No decision of the Supreme Court had been placed before the Court. Shri Pande referred to Art. 5 of the Constitution and said that though a corporation did not satisfy the requirements of clauses (a) and (b) of the said Article it could not be said that it did not satisfy the requirements of clause (c).

The residence of a corporation in India could be proved as required by that clause and the corporation therefore could be treated as a citizen of India. Learned counsel referred to a decision of the Supreme Court in — 'Charanjit Lal Chowdhry v. Union of India', AIR 1951 SC 41 (L), and referred to certain passages from the opinions of the learned Judges in that case. He also referred to a case reported in — 'Maharaja Kishangarh Mills Ltd. v. State of Rajasthan', AIR 1953 Raj 188 (M), which had followed the decision of the Supreme Court.

Learned counsel further urged that apart from the fundamental rights of the petitioner it had a legal right to get the news from all sources of public information and it was incompetent for the Board to exclude the petitioner from having access to the results.

(12) The fourth preliminary objection raised by the Advocate General relating to laches in moving the Court was, according to Shri Pande not a valid objection. He said that on 18-2-1955 the Board sent a circular letter to several newspapers and the petitioner sent its reply on 28-2-1955 intimating its willingness to substantially accept the terms of the Board. On 7-3-1955 the News-Editor of the Patrika attended a meeting and he said after making certain proposals that he agreed without reservation to the proposals of the Board.

On 11th, 12th and 13th March meetings of the Board were held and on 3rd May the petitioner was sent a letter informing him of the decision taken by the Board to grant the exclusive right of publishing the results to the Leader. This letter was received by the Secretary of the petitioner on 5th May. Considerable expenses had been incurred in making preparations for publishing the results and the petitioner sought legal advice as to the course to be adopted.

Necessary material for preparing the affidavit had to be collected and on 23rd May the petition was moved in this Court. Learned counsel urged that it was hardly fair to brand this petition as bad because of laches and the learned Advocate General was not justified in asking the Court to reject it in limine on that ground.

(13) After Shri Pande had submitted his reply to the preliminary objections Shri S. S. Dhawan, counsel for the respondent No. 2, raised certain other preliminary objections on behalf of his client. He said that the petition was mala fide and because of material misrepresentation in the affidavits, and the petitioner's conduct as revealed by the facts in the affidavit, the petitioner was disentitled to be heard on merits. Learned counsel for respondent No. 2 urged that the petitioner had been trying to secure an exclusive right of publication for itself since 1953 and the petitioner had always been in favour of exclusive right of publication of the results.

The petitioner, counsel stated, had actually written to the Board that the Board would not get the co-operation of the newspapers unless the Board adopted the principle of exclusive right of publication. Several letters were placed before the Court and learned counsel urged that the petitioner had acted improperly in not placing in full these facts before the Court when asking for the issue of a writ.

Fundamental rights could also be waived and if the past conduct of the petitioner in 1953 and 1954 shows that he had been pressing the Board for an exclusive right of publication being granted, it was necessary that the petitioner should have placed before the Court the necessary facts showing such conduct. Learned counsel referred to the affidavits and counter affidavits filed in the case and several Annexures to substantiate his allegations.

(14) Shri Dhawan invited my attention to certain allegations against the General Manager of respondent No. 2 relating to certain matters under the Factories Act and protested that these allegations were irrelevant and ought not to have been made in this case. He requested that he may be permitted to file an affidavit and prove the similar allegations can be made against the officers of the petitioner as well. I have considered the matter and no useful purpose would be served by unnecessary mudslinging. In my opinion, the petitioner could have avoided making these allegations without any detriment to the case.

(15) The petitioner in paragraph 9 of the affidavit accompanying the petition has stated that in the year 1954 both the Leader and the Amrita Bazar Patrika had suggested to the respondent Board that the results might be given to any one of the aforesaid two papers with the exclusive right of publication. It cannot be said that the petitioner had hidden from the Court its attitude towards the exclusive right of publication in the past and though the facts could have been more fully set out it cannot be said that lack of such details was of such a nature as to disentitle the petitioner to a hearing.

(16) The preliminary objections were not allowed to prevail. Notice had already been issued in the case and the parties had put in affidavits, counter affidavits and rejoinder affidavit with such annexures as they considered relevant. Having heard the case at some length in the course of the preliminary objections I was of opinion that having regard to the questions raised it

would be fair to hear and decide the case on merits.

(17) Sri A. P. Pande for the petitioner urged that the petitioner was a private limited company which had been issuing from Calcutta the "Amrita Bazar Patrika", an English daily, for the last 87 years. In 1943 the petitioner started issuing the "Amrita Bazar Patrika" from Allahabad also, calling it the Northern India edition. The petitioner, it was urged, had a large press and that its efficient organization was perfectly capable of copying with the requirements of publishing the results of the Board examinations.

The petitioner urged that in the years 1943-46 the Board published the results in the Government Gazette. In 1947 the results were published in the "Hindustan Times" of Delhi. In 1948 they were published in the "Leader" and its Hindi version the "Bharat", which belongs to the respondent No. 2. In 1949 the results were published in the "Leader", the "Amrita Bazar Patrika", the "Hindusthan Times", the "Indian News Chronical" and the "Aj" of Banaras.

In 1950 the results were published in the "Leader", the "Amrita Bazar Patrika", the "Hindusthan Times", and the "Aj". In 1951, they were published in the "New Bharat", the "Hindusthan Times", the "Sansar" and the "Aj". In 1952 the Bharati Bhandar, a department of the Newspapers Ltd. — respondent No. 2 — published the results. In 1953 there was some correspondence between the Board and the petitioner, and the petitioner did not publish the results but they were published by the "Hindusthan Times".

In 1954, the exclusive right of publishing the results was given to the "Leader". In the year 1955 the petitioner states, the Board invited newspapers, including the "Amrita Bazar Patrika" and the "Leader", to take up the work of publishing the results and there was some correspondence between the Board and the petitioner. The petitioner urges that though it did make certain proposals requesting a modification of the terms offered by the Board the petitioner ultimately did agree in an unqualified manner to accept the Board's proposal and to publish the results.

(18) The petitioner, it is contended, made certain preparations at considerable expense for the purpose and to its surprise it received on 5-5-1955, an intimation from the Board that the exclusive right of publication had been granted to the "Leader". This, the petitioner contends, is in violation of its fundamental rights and its rights under the general law applicable to newspapers to have access to the results which are public news and hence the petition. The petitioner prays for the issue of a writ of mandamus.

In the petition there was a prayer, as stated before, for the issue of a writ of certiorari upon the respondent No. 1. Learned counsel for the petitioner stated that a writ of mandamus could effectively grant him the relief needed and he did not ask for a writ of certiorari for the purpose.

(19) The petition is opposed both by the Board, respondent No. 1, and by the Newspapers Ltd., respondent No. 2, which runs the newspaper entitled the "Leader".

(20) The petitioner has laid claim to a fundamental right of having access to the results of the respondent Board. Learned counsel relies on clauses (a) and (g) of Art. 19(1) of the Constitution of India which read as follows :

"19(1) All citizens shall have the right —

(a) to freedom of speech and expression;

(g) to practise any profession, or to carry on any occupation, trade or business."

(21) The first question which requires consideration is whether the petitioner is a 'citizen' within the meaning of the Article. Citizenship is dealt with in Part II of the Constitution. Article 5 says :

"(5) At the commencement of this Constitution, every person who has his domicile in the territory of India and

(a) who was born in the territory of India, or

(b) either of whose parents was born in the territory of India; or

(c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India."

The other Articles 6 and 7 deal with the rights of citizenship of certain persons who have migrated to India from Pakistan and the rights of citizenship of certain migrants to Pakistan. Article 8 deals with the rights of citizenship of certain persons of Indian origin residing outside India. Article 9 lays down that no person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.

Article 10 merely says that a person who is or is deemed to be a citizen under the foregoing provisions shall continue to be such citizen subject to the privision of any law that may be made by Parliament. Article 11, which is the last article in this Part, only states that nothing in this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citzenshp.

(22) In this particular case learned counsel contended that this company was in existence for more than five years immediately preceding the commencement of the Constitution and it had its registered office at Calcutta in the territory of India all these years and was ordinarily resident in the territory of India and is, therefore, a citizen within the meaning of Article 5(c). Learned counsel conceded that clause (a) required the qualification of birth and obviously was applicable to natural persons.

Clause (b) also stated the qualification to be the birth of any of the parents in the territory of India and this also was, according to him, a qualification which could be possible only for a natural person to possess. Coming to clause (c) he said that every person who has his domicile in the territory of India and who has been ordinarily resident in the territory of India for the period mentioned in the clause was a citizen of India. He argued that the petitioner, a corporation, was a juristic person and was a 'person' within the meaning of that word as used in Article 5.

The petitioner was resident according to the law relating to companies. The company could be legally held to reside at the place where its registered office was a situate. The word 'ordinarily', counsel submitted, was a word used to distinguish the residence from occasional or casual residence. He stated that in the case of the petitioner company the registered office had all along been at Calcutta and there was nothing to indicate that that was not the ordinary residence of the petitioner. It was urged that the petitioner, therefore, though not a natural person was entitled to be called a citizen within the meaning of Art. 5(c) of the Constitution.

Learned counsel for the petitioner relied on a decision of the Supreme Court reported in AIR 1951 SC 41 (L). In this case an application for a writ of mandamus and certain other reliefs under

Art. 32 of the Constitution was made by the holder of one ordinary share of the Sholapur Spinning and Weaving Company Ltd. The authorised capital of the company was Rs. 48 lakhs and the paid up capital was Rs. 32 lakhs, half of which was made up of fully paid ordinary shares of Rs. 100 each.

On 27-7-1949 the directors of the Sholapur Spinning and Weaving Company Ltd., gave a notice to the workers that the mills would be closed and pursuant to that notice the mills were, in fact, closed on 27th August following. On 9-1-1950, the Governor-General of India promulgated an Ordinance which purported to make special provisions for the proper management and administration of this company.

The petitioner in his petition challenged the constitutional validity of both the Ordinance and the Act that was subsequently passed. The main ground put forward was that the pith and substance of the enactments was to take possession of and control over the mills of the company which were its valuable assets and such taking of possession of property was entirely beyond the powers of the Legislature.

The petitioner urged that the provisions of the Act amounted to deprivation of property of the share-holders as well as of the company within the meaning of Art. 31 of the Constitution, and the restrictions imposed on the rights of the shareholders in respect to the shares held by them constituted an unjustifiable interference with their rights to hold property and as such were void under Art. 19(1) (f) of the Constitution. Learned counsel has invited my attention to the following passage from the judgment of Mukherjea J.

"The fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons. An incorporated company, therefore, can come up to this Court for enforcement of its fundamental rights and so may the individual shareholders to enforce their own; but it would not be open to an individual shareholder to complain of an Act which affects the fundamental rights of the Company except to the extent that it constitutes an infraction of his own rights as well."

His Lordship held that the rights that could be enforced under section 32 must ordinarily be the rights of the petitioner himself who complains an infraction of such rights and approaches the Court for relief. His Lordship observed that the properties did not belong to the shareholders but to the company and the company though a party and one of the respondents did not only not ask for any relief but opposed the petition. His Lordship considered certain other matters and held that the petition was incompetent.

(23) Learned counsel has also referred to a passage from the judgment of Fazl Ali, J. at p. 44 in the same case which runs as follows :

"The company and the shareholders are in law separate entities and if the allegation is made that any property belonging to the Company has been taken possession of without compensation or the right enjoyed by the Company under Art. 19(1) (f) has been infringed, it would be for the Company to come forward to assert or vindicate its own rights and not for any individual shareholder to do so.

In this view, the only question which has to be answered is whether the petitioner has succeeded in showing that there has been an infringement of his rights as a shareholder under Arts, 31 and 19(1) (f) of the Constitution. This question has been so elaborately dealt with by Mukherjea J. that I do not wish to add anything to what he has said in his judgment, and all that is necessary for me to say is that I adopt his conclusions, without committing myself to the acceptance of all his reasonings."

Learned counsel also drew my attention to the fact that Kania, C. J., expressed agreement with the line of reasoning adopted by Mukherjea, J., and with his conclusions.

(24) As the law declared by the Supreme Court is binding on me, I have given most anxious consideration to the weighty pronouncements made in the case cited to find if their Lordships of the Supreme Court have declared the law on the subject and the point now before me. When Mukherjea, J., laid down that fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well, his Lordship in all probability was considering the various Articles in Part III of the Constitution which deal with fundamental rights.

Among these articles, in Article 14 the right to equality before the law is guaranteed to every 'person'. Article 15 which prohibits discrimination on the grounds of religion, race, caste, sex or place of birth, guarantees the right to every 'citizen'. The language used is that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The further provisions of that Article say that no citizen shall on the grounds enumerated be subject to any disability, liability, restriction or condition as mentioned in that Article.

The next article, i.e., Article 16 also guarantees equality of opportunity in matters of public employment to all 'citizens'. Article 19(1) similarly specifically relates to 'citizens' and states the right of freedom guaranteed to them by that Article. When we come to Art. 20, which deals with protection in respect of conviction for offences, we again find the word 'person' used and the Article guarantees protection to all 'persons' and not to 'citizens' only. Article 21 guarantees protection of life and personal liberty of all persons.

Article 31 says that no person shall be deprived of his property save by authority of law; and Art. 32 grants the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. Their Lordships of the Supreme Court must have considered that the provisions of Part III did not all relate to citizens only and persons other than natural persons were also guaranteed certain rights and granted certain protection as fundamental rights in that Part of the Constitution.

Therefore the observations made by Mukherjea, J., cannot be construed to mean, in my opinion, that each and every fundamental right guaranteed to individual citizens is also guaranteed to corporate bodies as well. In fact, his Lordship has been pleased to add in that very sentence the clause

"except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons."

In my view these pronouncements do not declare the law that a corporation or a company is also a citizen within the meaning of Article 5 of the Constitution.

The observations made by Fazl Ali, J., similarly to my mind do not declare such law. His Lordship states that the company and the shareholders are separate entities, and then proceeds to observe that if the allegation is made that any

property belonging to the company has been taken possession of without compensation or the right enjoyed by the company under Article 19(1) (f) has been infringed, it would be for the company to come forward to assert or vindicate its own rights and not for any individual shareholder to do so.

In the case before his Lordship, a shareholder had approached the Court for a writ and the findings was that he had no rights under Art. 19(1) (f) as claimed by him.

His Lordship observed that the petitioner was not competent to move the Court and if the allegation is made that the property of the company is taken without compensation or the right enjoyed by the company under Art. 19(1)(f) has been infringed (as the petitioner stated his rights under Art. 19(1) have been infringed), it would be for the company and not for the shareholder to move the Court.

This, I submit with very great respect, cannot be considered to amount to a declaration of the law by his Lordship that the company did have any right under Art. 19(1)(f) which could be infringed. In fact, his Lordship was merely stating an allegation that may be made by the company similar to the allegation made by the petitioner in that case.

His Lordship was not invited to decide as to whether the company had or did not have any right guaranteed under Art. 19(1)(f), and the observation, I feel, does not amount to an enunciation or pronouncement of the law by his Lordship. I, therefore, feel that this case cannot be relied on as an authority for the proposition that a corporation is a 'citizen' within the meaning of Art. 19 of the Constitution.

(25) Sri Pandey also referred to the decision of Supreme Court in — 'Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co., Ltd. AIR 1954 SC 119 (N) and contended that the Supreme Court approved of its earlier decision given in AIR 1951 SC 41 (L). I have studied this case carefully. The suit out of which this appeal to the Supreme Court arose was decided by the High Court of Bombay during the pendency of Chiranjit Lal Chowdhuri's petition (L) in the Supreme Court.

The plaintiff in this case held preference shares in the Company and he brought the suit, inter alia, on the allegation that the Ordinance impugned was illegal, ultra vires and invalid. Mahajan J. formulated the principal questions for consideration in the appeal as follows:

"1. Whether the provisions of the Ordinance for taking over the management and administration of the Company contravene the provisions of Article 31(2) of the Constitution, and

2. Whether the Ordinance as a whole or any of its provisions infringed Articles 14 and 19 of the Constitution."

After considering the relevant questions relating to the validity of the Ordinance his Lordship observed:

"For the reasons given above I am of the opinion that the impugned statute has over-stepped the limits of legitimate social control legislation and has infringed the fundamental right of the company guaranteed to it under Art. 31 (2) of the Constitution and is therefore unconstitutional."

(26) After considering various Articles in Part III of the Constitution his Lordship said:

"In considering Article 31 it is, significant to note that it deals with private property of 'persons' residing, in the Union of India, while Art. 19 only deals with 'citizens' defined in Article 5 of the Constitution. It is thus obvious that the scope of these two Articles cannot be the same as they cover different fields ..... Art. 31 deals with the field of eminent domain and the whole boundary of that field is demarcated by this Article. In other words, the State's power to take the property of a person is comprehensively delimited by this article."

Concluding his judgment Mahajan, J. observed:

"For the reasons given above I would allow this appeal, set aside the judgment of the High Court and decree the plaintiff's suit with costs. It is not necessary to give any decision on issue 2 in view of the decision reached above, viz., whether the law is void because it infringes the fundamental rights under Articles 14 and 19."

It is thus clear that his Lordship gave no decision as to the applicability of Articles 14 and 19 at all. In the same case, Bose, J. agreeing with Mahajan, J. held that the impugned Ordinance and Act did offend Article 31(2) of the Constitution and observed, in the course of his short judgment, as follows:

"Article 19(1) (f) confers a certain fundamental freedom on all citizens of India, namely the freedom to acquire, hold and dispose of property. Article 31(2) is a sort of corollary, namely that after the property has been acquired it cannot be taken away save by authority of law. Art. 31 is wider than Article 19 because it applies to everyone and is not restricted to citizens. But what Art. 19(1) (f) means is that whereas a law can be passed to prevent persons who are not citizens of India from acquiring and holding property in this country no such restrictions can be placed on citizens. But in the absence of such a law non-citizens can also acquire property in India and if they do then they cannot be deprived of it any more than citizens, save by authority of law."

(27) These pronouncements clearly show that this case is not an authority for the proposition that a Company incorporated under the Indian Companies Act is a citizen within the meaning of Art. 5 or entitled to any right under Art. 19 of the Constitution.

(28) Learned counsel next cited a case reported in — 'Indian Metal and Metallurgical Corporation v. Industrial Tribunal, Madras', AIR 1953 Mad 98 (O), and he urged that in that case the Corporation had been granted the leave claimed on the allegation that its rights under Art. 19(1) (g) were infringed. This case has been referred to by a Division Bench of the Rajasthan High Court in — 'AIR 1953 Raj 188 (M). In that case attention of Ranawat, J. was invited to a case reported in — 'AIR 1951 Mad 974 (J)', where Rajamanner, C. J. had expressed certain doubts as to whether the rights guaranteed under Art. 19 could be claimed by a corporation. Ranawat J. referred to — 'AIR 1953 Mad 98 (O),' and observed as follows:

"....but in — 'AIR 1953 Mad 98 (O)', the same court (Madras) on an application of a Company, came to the conclusion that its rights under Article 19 (1) (g) had been infringed. In other words the Corporation was taken to be a citizen in the meaning of Article 19(1) (g) of the Constitution of India."

(29) Learned counsel for the petitioner relied on this reference by Ranawat, J. to show that the Madras High Court had in fact held that Article 19(1) (f) was available to a Corporation also and that a Corporation was thus a citizen. I have gone through the report of the case reported in — 'AIR 1953 Mad 98 (O). This case related to an application made under Art. 226 of the Constitution praying for the issue of a writ to the Industrial Tribunal, Madras and to quash the award made in that case.

The petitioner — The Indian Metal and Metallurgical Corporation is not a corporation in law, and the judgment clearly says that the petitioner was 'a partnership firm' and it appears that the attention of their Lordships of Rajasthan High Court was not invited to this fact and they were obviously misled by the word "corporation" used by the firm as a part of its name. The Madras case says nothing to support the petitioner's contention.

(30) A Division Bench of the Rajasthan High Court in — AIR 1953 Raj 188 (M), has no doubt taken the view that a corporation is a citizen within the meaning of Art. 19 of the Constitution. Counsel for the opposite party in that case had raised the question that the petitioner being a corporation was not a citizen and therefore not entitled to any right under Art. 19 (1) (g) and therefore not entitled to move the Court for the issue of a writ. The learned Judges referred to certain observations in — 'AIR 1951 SC 41 (L)', and considered that their Lordships of the Supreme Court laid down the law that a corporation was a citizen within the meaning of Art. 19.

One of the passages relied upon by the learned Judges is from the judgment of Fazl Ali J. already quoted by me earlier in this judgment.

Fazl Ali J. had observed that if the allegation is made that any property belong to the Company had been taken possession of etc., it would be for the Company to come forward to assert or vindicate its own right. This observation as I have already stated cannot be properly construed to mean that his Lordship was considering the question as to whether the Company was a citizen or not, nor did he in any manner indicate that if the allegation was made as stated by him it would be accepted as correct or tenable. The only question that was being considered by his Lordship was as to whether the petitioner in that case, a share-holder, was entitled to relief when not his rights to the property but the rights of the Company were alleged to be affected. His Lordship was not asked to consider as to whether Art. 19 would apply to the case of the Company or whether the Company could or could not pray for the necessary relief under Art. 31 of the Constitution.

(31) Another passage referred to by the learned Judges of the Rajasthan High Court is the passage from the judgment of Mukherjea, J. where his Lordship says that fundamental rights are available to corporate bodies as well. This passage I have already quoted in an earlier part of my judgment and I have tried to show how the observations contained therein do not support the petitioner's contention in this case. I have read carefully the decision given by the Rajasthan High Court in the above case but with great respect I am unable to agree that the Supreme Court laid down the law relating to corporate bodies being citizens as construed by the learned Judges.

Nor were the learned Judges correct, if I may say so with great respect, in holding that the Madras High Court was dealing with a Company in — 'AIR 1953 Mad 98 (O)'. A case decided by a Division Bench of the Punjab High Court reported in — 'AIR 1952 Punj 9 (K)', was also placed before the learned Judges of the Rajasthan High Court and that case laid down very clearly that a corporation is not a citizen. The learned Judges of the Rajasthan High Court thought that the observations of the learned Judges of the Supreme Court in — 'AIR 1951 SC 41 (L)', were not brought to the notice of the Punjab High Court when that case was decided.

Referring to the separate judgments given by Harnamsingh and Soni JJ., in the Punjab case I find that the decision of the Supreme Court in — 'AIR 1951 SC 41 (L)', was cited before them and each one of the learned Judges has referred to that decision at several places in his judgment. Obviously the attention of the learned Judges of the Rajasthan High Court was not invited to these references in the judgment of the learned Judges of the Punjab High Court.

(32) Counsel for the respondent No. 1 has placed before me the decision of the Punjab High Court reported in — 'AIR 1952 Punj 9 (K). That case was argued by Mr. P. R. Das of the Patna Bar and by Mr. Amin Advocate General of Bombay and Mr. Choudhry of Calcutta. Various provisions of the Constitution were placed before the learned Judges and a large number of text-books and reported decisions were cited. One of the questions for decision in that case was whether the expression 'citizen' used in Art. 19, Constitution of India, includes a corporation and Harnamsingh J. after stating his reasons held as follows:

"I think that a corporation is not a citizen within Art. 19, Constitution of India. That being so, the Companies cannot raise the question that the impugned legislation takes away or abridges the rights conferred by Art. 19 (1) (f) and (g), Constitution of India."

Soni J. observed in that case:

"I am of the view that Art. 5 applies to natural born persons and not to artificial persons and a reading of the next Article of Part II in which Article 5 finds a place makes it abundantly clear that what is intended by the word 'citizen' is a natural born person and not an artificial person."

I am in respectful agreement with the views expressed in the decision by the learned Judges of the Punjab High Court and in my opinion a corporation cannot be held to be a 'citizen' within the meaning of Art. 19 of the Constitution of India.

(33) Learned counsel for respondent No. 1 cited certain well-known text-books in support of the contention that in the United States of America corporations were not given the status of citizens. Willis in his Constitution Law of the United States at page 849 says:

"Corporations are not citizens of the United States under the definition of a citizen in Section 1 of the Fourteenth Amendment to the Constitution, and probably for this reason are not protected by the clause relating to the abridgment of privileges or immunities of citizens of the United States."

Corporations are not citizens of any state within the meaning of Section 2, Article IV, of the United States of Constitution so as to be entitled, in states other than that of their creation, to all the privileges and immunities which such states give to their own citizens".

(34) To the same effect was the view expressed by Beale in his Conflict of Laws, Vol. II at page 733. Learned counsel referred to Schmitoff on Conflict in English Laws at pages 347 — 354 where the residence of a corporation as understood in English law has been fully dealt with. The learned author has tried to show that the residence of a corporation may be different for (a) purposes of taxation (b) purposes of jurisdiction and (c) purposes of attribution of the character of an enemy alien. In — 'De Beers Consolidated Mines Ltd. v. Howe', 1906 A. C. 455 (P), Lord Loreburn said:

"I will merely add that I agree with the Master of the Rolls that residence of a company within the meaning of the Income-Tax Acts is not necessarily the same as residence for the purpose of serving a writ."

It was urged that the fact that the company had its residence within a state did not 'ipso facto' confer the right of citizenship on the company. In

India too under the Indian Income-Tax Act the residence of a company was determined on a certain basis as mentioned in S. 4-A (c) and S. 4-B, Indian Income-tax Act.

(35) Learned counsel for respondent No. 1 argued that even if it be assumed that the petitioner is a citizen within the meaning of Art. 19 (1) (a) of the Constitution other questions would arise in the way of its claim. One of the questions arising, according to him, would be whether a writ may be asked for against a statutory body as the fundamental rights guaranteed in Pt. III are guaranteed against the state only and a state has been defined in Art. 12 of the Constitution which reads as follows:

"In this Part unless the context otherwise requires "The State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

Learned counsel argued that a corporate body cannot be called 'a State' within the meaning of this Article. The State, according to him is an abstraction in law known to jurisprudence. The Government carries on the administration and the legislature makes the laws for the State and it is these two organs of the State, the Government and the Legislature, that are to be prevented from asking or causing any infringement of the rights guaranteed in Part III of the Constitution.

Article 154 of the Constitution states that the executive power of the State shall be vested in the Governor and shall be exercised by him directly or through other officers subordinate to him. The Secretary or other office-holders of the Board passing the order complained of cannot be said to be officers subordinate to the Governor within the meaning of Art. 154 and any action taken or order passed by the Board could not be considered in law to be an action taken or order passed by the Governor.

Learned counsel for the petitioner, at this stage conceded that it was not his case that the Board which is a statutory body was a State and the Standing Counsel appearing for respondent No. 1 said that in view of this concession made on behalf of the petitioner the claims based on the alleged fundamental rights must fail. If the Board is admittedly not a State and the State has made no law and passed no order affecting the alleged fundamental rights of the petitioner no petition for the issue of mandamus may lie. Learned counsel for the petitioner relied on — 'P. D. Shamadasani v. Central Bank of India, Ltd.', AIR 1952 SC 59 (Q),where Pantanjali Shastri C. J., stated the law as follows:

"The language and structure of Art. 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms against the State's action other than in the legitimate exercise of its power to regulate private rights in the public interest and the violation of rights of property by individuals is not within the purview of the Article."

The learned Standing Counsel urged that the language of Art. 14 was quite plain and showed that the State was enjoined not to deny equality before the law and equal protection of the laws to any person. This duty was on the State only and if the State did not act in conformity with Art. 14 the relief could be sought only against the State. As it had been conceded that the Board was not the State it was not possible to claim any relief under Art. 14 against the Board.

(36) In my opinion, this contention of the learned Standing Counsel must prevail for the reasons urged by him.

(37) Another question raised in the case is as to whether the Board had any property in the results and could grant the right of publication to one newspaper to the exclusion of others. Learned counsel for the petitioner urged that the results of the examinations held by the Board were not the property of the Board at all. The examinees, the institutions sending up those examinees, and the guardians of the minor examinees were persons interested in the results and entitled to them.

Having regard to the nature of the examinations and the number of candidates and the general interest legitimately taken by the public generally, the result when passed by the Board becomes public news and as a newspaper the petitioner was entitled to have access to the news and to publish them in the course of its business. Attention of the learned counsel for the petitioner was invited to ground (b) of petition which reads as follows:

"(b) Because the results after they have been passed by Results Committee cease to be the property of respondent No. 1 and at once became the property of the public."

(38) This ground did show that the petitioner accepted the position that the results were the property of respondent No. 1 upto a certain point of time and thereafter became the property of the public. Undoubtedly it is the Board that holds the examinations, appoints examiners, collects the marks as awarded by the examiners, gets the results tabulated and these results are placed before the Results Committee appointed by the Board for being finalised.

It is not disputed that upto this stage everything that is done by the Board is within its competence. If the Board selects a particular press for doing confidential printing work the other presses carrying on similar trade cannot contend that the Board had offended against the law prohibiting discrimination.

When the results were passed by the Results Committee the Board was under a statutory duty to publish them under S. 7, sub-s. (7) of the Intermediate Education Act. The material question is as to whether the Court has jurisdiction to direct the Board to perform this duty in a particular manner.

There was considerable discussion on this question but I am unable to see how in the circumstances of the case when a statutory duty is to be performed by the Board the discretion as to the manner of performing that duty should not be held as vested in the Board. The Constitution of the Board is given in the Act and the Board consists of responsible officers of the Education Department and other equally responsible persons.

It is hardly fair to assume with such a constitution the Board will not be able to decide properly the manner in which the duty of publishing the results may be performed. The Board has obviously to take into consideration the fact that the results should be published as soon as possible after they are ready and made final.

The Board has further to take into consideration that this publication of the results is as accurate as possible and that the results are published in a manner so as to ensure due publicity having regard to the large number of candidates appearing at the examinations and the considerable number of centres and institutions sending up those examinees.

It may be mentioned that the Board collects a fee of rupee one from each candidate appearing through an institution and Rs. 2/- from each pri-

vate candidate as fee for sending the marks obtained by those candidates to them. This is done, I was told, soon after the results are communicated to the centres. Apart from this every year the Board gets published in the Government Gazette the results of its examinations and these results so published in the Gazette are supposed to be the most authentic publication thereof.

But as the candidates are naturally anxious to know the results of their examinations as early as possible for several reasons including the desire to secure their admission to colleges etc. for higher education, the Board has always resorted to publishing the results in the newspapers.

(39) The question is as to whether this publication of the results in the newspaper at the instance of the Board is on behalf of the Board itself and in compliance with its statutory duty as laid down in S. 7, Sub-s. (7) of the Intermediate Education Act or this publication is by the newspaper itself in the course of its own business as a newspaper. Learned counsel for the petitioner says that the Board actually publishes the results as soon as the results are passed on to the representative of the newspaper in which it is to be printed and published.

The representative of the newspaper receives the results not as an agent of the Board but as an agent of the newspaper. The results are taken by him not to enable the Board to perform its duty as laid down in the statute but for the purpose of carrying on its own business as a newspaper. Learned counsel therefore says that the Board did not act rightly or legally when it agreed to pass on the results to respondent No. 2 alone to the exclusion of the petitioner which runs a very important daily newspaper which published the results of the Board in some earlier years and publishes the results of the various Universities and other examinations in the course of its business.

(40) Certain facts were stated to be relevant in this connection. It was urged that when the Board passed on the results to the newspapers of the respondent No. 2 the agreement was that till the results were published in the paper its secrecy would be maintained and that the result supplements to be issued by the newspaper would be sold at a price approved by the Board.

Learned counsel for the respondent argued that the petitioner was not entitled to question the decision of the Board as to the manner in which the Board would publish the results as required by S. 7(7) of the Intermediate Education Act. Learned counsel urged that while the law was clear that the legal duty may be enforced the manner in which that legal duty is to be performed cannot be prescribed.

(41) Learned Standing Counsel further argued that in effect what the petitioner wanted was not only that the respondent Board should be directed to do its duty but also that the Court should be pleased to direct that Board to perform that duty in a particular manner. He relied on the case reported in — 'United States v. Lamont', (1894) 39 Law Ed. 160 (R), to support his contention that mandamus may be issued if the duty to do that particular act is clearly and in an unmistakable manner laid down by law.

Learned counsel contended that the law has nowhere laid down that the Board should publish the results in a newspaper or newspapers generally or in any particular manner. All that the Board was required by law to do was to publish the results. The petition, therefore, as framed was not maintainable.

(42) It was also contended that if respondent No. 2 was granted the right of exclusive publication of the results, the position in law of the respondent No. 2 so far as the work of publishing the results is concerned was that of an agent of the respondent No. 1. So that when the results were actually printed and published by the respondent No. 2, it was doing so in the capacity of an agent of the respondent Board.

Learned counsel contended that confidentially handing over the results to one representative of the respondent No. 2 could not reasonably be called "publishing" of the results by the Board. In fact the publishing takes place when the results are printed and distributed. The learned Standing Counsel further argued that the Court should not by the issue of a mandamus disturb the working of an agreement between the respondents. He said that the petitioner was not entitled to ask the court to exercise its jurisdiction to issue writs for such a purpose.

(43) Learned counsel for the petitioner urged that the work of printing and publishing the results that was to be done by the respondent No. 2 was to be done by that respondent in furtherance of its own trade. No remuneration passed from the respondent No. 1 to respondent No. 2 and the respondent No. 2 in fact was gaining in taking up this business of publishing the results. He said that newspapers are the well-known popular organs in modern society of distributing news and if the representative of a newspaper receives the results with the avowed object of giving it wide publicity it is not correct to contend that so far as the Board is concerned it has not made the results public.

He said if the Board as a statutory body had a press of its own and had embarked upon the task of printing and publishing the results itself, the press would have been an integral part of the Board and it could not then be contended that when the results were sent to the press for printing they were communicated to any other person.

The position, it was contended, is entirely different when negotiations were started with several newspapers and they were invited to take the results and publish them. It was clear that the Board did not want to take upon itself any other mode of publishing the results than that of sending the mark sheets as mentioned above and of printing and publishing the results in the Government gazette. Learned counsel contended that the results when ready were to be given away as news to the newspapers and it is for this purpose that several newspapers were invited by the Board.

Having done that and the petitioner having agreed, though after some discussions, to publish the results subject to the terms imposed by the Board it was not competent for the Board to withhold the news from one newspaper and to release it only to another.

(44) Learned counsel for the petitioner raised an important question of law as to the rights of the Press in India to have access to the sources of news. The position in the United States of America is however different and it does not appear safe to follow the authorities cited by learned counsel in support of his contention from American law. Learned counsel also placed before me certain passages from the report of the Press Commission where the important role played by the Press in India has been recognised and the Commission has sympathetically considered the grievance of the Press and the difficulties experienced by the Press in obtaining news.

Access to official sources of information has also been discussed but I fear it is not for a Court to express any opinion as to what should be the law. The Court has to accept the law as it is and to apply it. Learned counsel has not been able to place before me any authority in support

of the contention that the petitioner has in law a right to have access to the news even if the results passed by the Results Committee were held to be such news.

To my mind the publication of the results in the newspaper is not done in performance of the statutory duty imposed on the Board by S. 7, sub-s. (7). It appears that this statutory duty is performed by the Board when it publishes the results in the Government Gazette. As the Government Gazette takes a very long time to publish the results I am told in 1954 it took nearly eight months the Board feels that it should let the examinees know the results of their examinations as early as possible.

Having regard to the nature of the work the Board agrees to let the newspapers print and publish the results and distribute them in such a manner that all concerned may, if they care, be acquainted therewith. The conduct of the Board in the past several years also shows that this wide publicity of the results as soon as possible after the results were ready was the objective aimed at. In fact in some years the Board requested several papers to publish the results simultaneously.

Apparently the Board was not appointing so many agents. The newspapers in the course of their own business and for the purposes of their own trade were called upon to take up this work if they pleased. The difficulty of the task in fact made some papers refuse the offer in some years. In 1953 when the petitioner and respondent No. 2 communicated to the Board their agreed opinion that the result should be given for publication exclusively to one paper they obviously considered that unless that was done it would not be worthwhile for a newspaper to take up that job.

(45) Besides, when the Board is under a duty to publish the results it may discharge that duty not only by printing and publishing the results itself but by passing on the results to newspapers who may print and publish them as well. The power to 'publish' the results includes the power to get them published, and when the newspapers take up the work of printing and publishing the results, it does not necessarily follow that they do so as the agents of the Board. Some tests may be applied to find the legal position.

If the name and roll number of a successful minor examinee is by mistake omitted in the newspaper publication from the list of successful candidates and the minor commits suicide in utter disappointment, is the guardian entitled to any remedy against the Board if he is able to establish that the paper was negligent in publishing the news and had not applied the necessary degree of skill and care essential for the work? The agreement between the Board and the respondent No. 2 does not throw any light on this question.

If some official of the press discloses the results to some candidates is the Board entitled to take any action against him or to sue him for damages? Is the newspaper liable to render any account to the Board in respect of the publication and is not the newspaper itself entitled to all the gains and liable for all the losses incidental to such publication? Instances could be multiplied and to my mind when the newspaper takes up the work of publishing the results it does so in furtherance of its own trading activities and not as an agent employed by the Board in the course of the performance of its legal duties under S. 7(7).

(46) It is not for me to pronounce any judgment on the propriety or otherwise of the decision taken by the Board to confer exclusive right of publication on the respondent No. 2. The Board is a responsible body and is expected to act in a responsible manner. It was perfectly competent for the Board to take into consideration the nature of the work involved. Counsel for the Board invited my attention to passages in the affidavits saying that in an earlier year when the work of publishing the results was given both to the Leader and the Amrita Bazar Patrika the arrangement was not found satisfactory.

The Board found that there was unhealthy competition or a sort of race to publish the results early and this caused many mistakes and thousands of telegrams were received by the Board about such mistakes. The Board had before it the immensity of the task. The number of candidates appearing at the High School examination this year, I am told is nearly three lakhs and the number that appeared at the Intermediate examination exceeded 80,000.

There are very large number of centres and with the expansion in educational activities, schools and Intermediate Colleges in the outlying rural places in the districts also have sent up examinees. The Universities and Colleges start admissions in July or even in June and the Board considering all these facts has to choose the arrangement it would consider necessary and proper to have the results published as correctly and as widely as possible.

It was for the Board, therefore, to decide as to the manner in which it should act in this regard. I, therefore, think that it is not possible for me to interfere. No authority has been cited to support the contention that the Board was bound to pass on the results to the newspapers generally or that the petitioner had any legal right to get the results from the Board at any particular point of time.

(47) It may be that the Board itself may consider in future the advisability or otherwise of refusing access to the results to a popular newspaper which has such a wide circulation as the Amrita Bazar Patrika. But this is not a matter in which the Court may issue any direction, order or writ.

(48) Another point urged by the Standing Counsel and also by the counsel for the respondent No. 2 was that the writ prayed for could not possibly be issued having regard to the very short time available. I have considered the correspondence between the Board and the Amrita Bazar Patrika and I am not satisfied that there was any laches on the part of the Amrita Bazar Patrika in coming to Court. The allegation in the affidavit filed on behalf of the petitioner that it had made preparations at considerable cost in the hope that the negotiations between the petitioner and the Board would materialise and the Board would give the results for publication to the petitioner as well as to the Leader has not been controverted.

The reason given by the Board in the affidavit filed on its behalf is that in the light of its past experience of simultaneous publication in several papers the Board did not consider it proper to adopt the same method this year. Perhaps this decision could have been taken by the Board before issuing a general invitation to several newspapers.

In the circumstances I do not uphold the respondents' contention that the petition may be thrown out on the ground of laches. As to the shortness of time the very nature of things was such that it was not possible to have a decision earlier. The affidavits, counter-affidavits and the rejoinders were filed by the parties without delay. The case raised rather important questions of law and it naturally took some time to give a full hearing and it was only yesterday that the hearing was concluded.

Last evening I was surprised to get a copy of a special suplement of the Leader publishing the results of the candidates who appeared at the Intermediate Examination from Allahabad. It appears, therefore, that the results are now being published. As I am not disposed to allow the petition on the grounds mentioned above it is not necessary to consider the question as to whether the petition has become infructuous because of the shortness of time.

(49) As stated above I hold that the petitioner is not a citizen within the meaning of Art. 19 of the Constitution. The petitioner has not been able to substantiate its allegations that under the general law of the land it has a right to have access to the results of the respondent Board as soon as they are passed by the Results Committee. I also hold that it is not for this Court to prescribe the manner in which the respondent Board is to perform its duties in the exercise of its powers conferred by S. 7(7) of the Intermediate Board Education Act. In view of these findings the petition must fail.

(50) Before parting with this case I must express my thanks to learned counsel for the parties for the illuminating arguments addressed by them which have been of considerable assistance to me in deciding this case.

(51) Learned counsel for the respondent No. 2 claimed special costs I do not think that the circumstances of the case justify the award of special costs.

(52) The petition is dismissed with costs. The petitioner will bear his own costs and will pay Rs. 500 as costs to respondent No. 1 and another sum of Rs. 500 as costs to respondent No. 2.

V.R.B. Petition dismissed.

(S) AIR 1955 Allahabad 608 (V. 42, C. 174 Nov.)

ASTHANA J. (1-10-1954)

State v. Nihar Ranjan Guha, Opposite Party.

Criminal Misc. No. 1230 of 1954.

Penal Code (1860), S. 193 — False affidavit — Allegation on false information.

Where in an affidavit the deponent makes certain allegations based on information conveyed to him by other persons, even if the information which was given to him was wrong he cannot be held liable unless at the time he swore the affidavit he knew that it was wrong and in spite of that knowledge he swore the affidavit.

In such a case the deponent cannot be prosecuted under S. 193, I. P. C. (Paras 11, 12)

Anno: Penal Code, S. 193 N. 2.

J. R. Bhatt, Asst. Govt. Advocate, for Applicant; R. C. Ghatak, for Opposite Party.

ORDER : The complainant in this case is one Shri Mohan Lal, a retired Station Master. In 1943 he sent Rs. 2,500/- to the Mica Mining and Trading Company Limited, Calcutta, for the purchase of one hundred shares of the value of Rs. 25/- per share: Shri Nikhil Ranjan Guha Thakurta was the Managing Director of this company at that time. The shares required by the complainant could not be purchased for some reason and so the sum of Rs. 2,500/- together with interest amounting to Rs. 2,612/8/- was sent to him by a cross-cheque. The complainant instead of presenting the cross-cheque through a bank wanted to cash it personally which he could not do.

He, therefore, returned the cheque to the above company. Thereafter, the company sent a circular letter intimating to the complainant that negotiations were going on for the purchase of the Premier Mica Company Limited; a copy of this circular letter has been filed in this case. After the receipt of this circular letter it appears that the complainant asked the company to purchase one unit of shares worth Rs. 5,000/- for him. This letter was probably sent to the company on 9-9-1944.

In reply to this letter the complainant was informed that one unit of 10 shares would be worth Rs. 5,000/- and the complainant was asked to send the balance of Rs. 2,387/8/- in order to make up the total amount of Rs. 5,000/-. It is not known when this balance of Rs. 2,387/8/- was actually sent by the complainant to the company. The company purchased one unit of 10 shares for Rs. 5,000/- and sent share certificates to the complainant in 1944. In 1952 the complainant filed a complaint under S. 420, I. P. C. against Nikhil Ranjan Guha Thakurta and others that they had cheated him and instead of purchasing shares worth Rs. 5,000/- they had purchased shares which were really worth Rs. 1,000/- as the face value of the 10 shares which were purchased was only Rs. 1,000/-.

After this complaint was filed a summons was issued to Nikhil Ranjan Guha Thakurta alone and he moved an application under S. 561A, Cr. P. C. in the High Court for quashing the proceedings on the ground that it was an abuse of the process of the Court and had been started against him in order to harass him. This application was made on 16-6-1953 and 4-1-1954 was fixed for its disposal.

Notice of this application was served on the complainant opposite party and he appeared through a counsel on 4-1-1954 and prayed for three weeks' time to file a counter affidavit denying the allegations contained in the affidavit which had been filed on behalf of Nikhil Ranjan Guha Thakurta in support of the application under S. 561A, Cr. P. C. The prayer was allowed and the case was adjourned to 16-2-1954. It appears that on that date no counter-affidavit was filed on behalf of the complainant.

The application under S. 561A, Cr. P. C. was allowed on 16-2-1954 and the proceedings in the Court of the Magistrate were quashed.

(2) On 13-5-1954 Mohan Lal complainant moved an application for the rehearing of the case under S. 561A, Cr. P. C. and also for the prosecution of Sri Nihar Ranjan Guha Thakurta for making certain false allegations in the affidavit which had been filed by him in support of the application under S. 561A, Cr. P. C. It appears that no notice of this application was served on the opposite party.

(3) On 14-7-1954 after perusing the affidavit filed by Mohan Lal complainant, Harish Chandra J. was of the opinion that the allegations contained in paras 3, 7, 12 and 16 of the affidavit of Nihar Ranjan Guha Thakurta were prima facie false. He, therefore, ordered that a notice might be issued to him to appear and show cause why a complaint should not be made against him for his prosecution under S. 193, I. P. C. for making deliberate false statements in the affidavit.

In response to this notice he has appeared through a counsel. It is contended on his behalf that no prima facie case under S. 193, I. P. C. has been made out and that it is not expedient in the interest of justice that this prosecution should be ordered.

(4) In order to decide the application it is necessary to mention the allegations made in paras 3, 7, 12 and 16 of the affidavit filed by the opposite party Nihar Ranjan Guha Thakurta on 5-6-1953.

"3. That the complainant, a retired Station Master, 'who did' speculations in the Calcutta Share Market and had had dealings with the Bengal Share Dealers Syndicate Ltd., a share broker firm

of Calcutta, negotiated through the said Syndicate, the purchase of 100 shares of Rs. 25/- each of the Mica Mining and Trading Co. of India Ltd., and sent on 27-4-43 to the said Company a sum of Rs. 2,500/- along with an application for the shares.

7. That owing to the Mica boom, the Mica Mining & Trading Company of India Ltd. with a view to expanding its business decided to purchase the goodwill & assets of the Premier Mica Co. Ltd., Kodarama (Bihar), a very old and reputed concern, and the Company issued in May 1944, a printed circular marked 'confidential' to share-brokers informing that N. R. Guha Thakurta (applicant) the founder and Managing Agent of the Mica Mining and Trading Company of India Ltd. had completed the negotiations for the purchase of the goodwill and assets of the Premier Mica Co. Ltd., and that the said N. R. Guha Thakurta was the proposed Managing Director of the combined companies.

The circular further informed that one unit of shares of the said Premier Mica Co. Ltd. was of 10 original shares of Rs. 100/- each, which were being negotiated at a premium and at five times the original value.

12. That between 1944 and 1949, the applicant applied for and obtained balance sheets of the Company and never complained that he had been given share of the face value of Rs. 1,000/- only as against Rs. 5,000/- paid by him.

"16. That for the first time the applicant received a letter of a lawyer on behalf of the complainant opposite party dated 14-7-1950 (but redated 29-8-1950) alleging that the share certificate No. 46 issued to his client was worth only Rs. 1,000/- and his client was not satisfied about the remaining Rs. 4,000/-. ....."

(5) It appears from the verification at the foot of the affidavit that paras 3 to 12 were verified as correct not upon personal knowledge but upon information received from the Bengal Share Dealers Syndicate Ltd. and from Sri Nikhil Ranjan Guha Thakurta. The allegation in para 16 was verified on personal knowledge.

(6) In the counter-affidavit which was filed in support of the application made for the prosecution of the opposite party Nihar Ranjan Guha Thakurta under S. 193, I. P. C. it was denied that the complainant ever did any speculation in the Calcutta Share Market or had had dealings with the Bengal Share Dealers Syndicate Limited or that he made negotiations through the said Syndicate.

It was also denied that the circular which was received by the complainant conveyed the information that one unit of shares of the said Premier Mica Company Limited was of 10 original shares of Rs. 100/- each and that they were being negotiated at a premium and at five times the original value. It was further denied that no complaint was made between 1944 and 1949 about the value of the shares.

(7) Besides the two affidavits there is nothing on the record to show whether the complainant did any speculation in the Calcutta Share Market or had had any dealings with Bengal Share Dealers Syndicate Limited. In para 11 of the affidavit filed by Mohan Lal complainant it was alleged that he had reason to believe that Mr. S. Chatterji had got the entries made in the registers of the Bengal Share Dealers Syndicate about this transaction as he was connected with all the above companies and also with the Aryan Silk Company and this might have been done to take some commission out of it.

This paragraph indicates that there was some evidence about the Bengal Share Dealers Syndicate doing something with the transaction in question.

(8) As regards the allegation in para 7 of the affidavit it is an admitted fact that the circular was sent to the complainant Mohan Lal. In this paragraph it is clearly mentioned what were the contents of the circular and what information was conveyed by it. As the circular was already with the complainant it could not be said that the allegations which were made in this paragraph were deliberately false.

It was, however, a question of interpretation of the circular and according to the allegations of the deponent the interpretation put upon the circular by the Company and by Nikhil Ranjan Guha Thakurta was that one unit of shares of the said Premier Mica Company Limited was of 10 original shares of Rs. 500/- each. It cannot be said that this interpretation was put by the company for the first time. There is a letter dated 21-9-1944 which was sent by the company to the complainant about the purchase of the shares and this letter also shows that one unit of 10 shares was valued at Rs. 5,000/-. It was after the receipt of this letter that the complainant sent the balance of Rs. 2387/8/- to the Company. In any case, it cannot be said that the deponent knew that the contents of this circular were false. He merely alleged in the affidavit the information which had been given to him by the company and by his brother Nikhil Ranjan Guha Thakurta and he therefore cannot be held liable under S. 193, I. P. C. if the interpretation put by them on the circular was incorrect.

(9) As regards para 12 there is nothing on the record to indicate that any complaint regarding the value of the shares was made to Nikhil Ranjan Guha Thakurta personally. It appears from para 15 of the affidavit filed by Nihar Ranjan Guha Thakurta that his brother had severed his connection with the Mica Mining and Trading Company Limited and the Premier Mica Company Limited from 15-1-1947. It may be that some complaint might have been made by the complainant to the Mica Mining and Trading Company Limited about the value of the share which had been purchased for him, but it was not in the knowledge of the deponent nor had he been informed of it by his brother or by the company.

(10) The allegation in para 16 is that it was for the first time that Nikhil Ranjan Guha Thakurta received a letter of a lawyer on behalf of the complainant regarding the value of the shares and making certain inquiries from him. It has not been alleged on behalf of the complainant that before the letter of 14-7-1950 any other letter had been received by the opposite party Nikhil Ranjan Guha Thakurta from the complainant's lawyer. No copy of any such letter has been produced by the complainant.

(11) In view of the above facts I am of opinion that that it is not a fit case in which a complaint under S. 193, I. P. C. should be made against the deponent Nihar Ranjan Guha Thakurta. Whatever allegations he made he made on the information conveyed to him by the company and by his brother and even if the information which was given to him was wrong he cannot be held liable unless at the time he swore the affidavit he knew that it was wrong and in spite of that knowledge he swore the affidavit.

(12) The prayer for the prosecution of the opposite party Nihar Ranjan Guha Thakurta under S. 193, I. P. C. is therefore rejected and the notice issued to him is discharged.

(13) Leave to appeal to the Supreme Court is refused.

R.G.D. Application rejected.

(S) AIR 1955 ALLAHABAD 610 (V 42 C 175 Nov.)

AGARWALA J. (22-10-1954)

Balram Misir, Applicant v. Ram Ratan Misir and others, Opposite Parties.

Civil Revn. No. 111 of 1948, against decision of Dist. J., Ghazipur, D/- 18-12-1947.

(a) Transfer of Property Act (1882), S. 91 (1) (a) — Cultivatory lessee — Right to redeem — (Debt laws — U. P. Agriculturist Relief Act (2 of 1939), S. 12) — (Civil P. C. (1908), S. 115 — Error of law).

The words "property mortgaged" in S. 91 (1) have reference to the entirety of the rights which the mortgagor had in the property before it was mortgaged, while the 'right to redeem' the same has reference to those rights of the mortgagor which he retains after the execution of the mortgage. Even a cultivatory lessee who has been granted a lease when a usufructuary mortgage has already come into existence has "an interest in the property mortgaged" as also in the right to redeem within the meaning of S. 91. The word "interest" is not necessarily confined to proprietary interest but includes even the interest of a lessee.

Where the lower court held that the plaintiff, who was a cultivatory tenant, had no right to redeem.

Held that as by a wrong application of the law the court below had refused to exercise the jurisdiction vested in it to give relief to the applicant as provided for under S. 12 of U. P. Agriculturists' Relief Act. This was a case which fell under Cl. (b) of S. 115, Civil P. C. Case law, Rel. on. (Paras 2, 3, 4)

Anno: T. P. Act, S. 91 N. 12; C. P. C.; S. 115 N. 11, 13.

(b) Transfer of Property Act (1882), S. 105 — Cultivatory lease and proprietary lease — Distinction.

The main distinction between the cultivatory lease and proprietary lease consists in this that whereas in a cultivatory lease the lessee is entitled to cultivate himself or have the land cultivated by sub-tenants, in a proprietary lease the lessee is entitled to lease out the land to persons who become tenants of the original lessor or in other words, who would become tenants-in-chief and not sub-tenants merely and the lessee is given the power to collect rent from the tenants. In other words, in a proprietary lease the lessee is entitled to become an intermediary between the landlord and the tenants-in-chief.

The lease recited that it was perpetual, that the lessee would remain in cultivatory possession from generation to generation on payment of the fixed rent, that he may either himself cultivate the land or have it cultivated by sub-tenants, that he was entitled to sink wells or plant a grove and to transfer his rights, that he was not entitled to be ejected except for non-payment of the rent, that the landlord was not entitled to enhance the rent and that the lessee was not entitled to have the rent reduced. No power was given to the lessee to build on the land or to create tenancies or to let out lands to tenant, that is to say, to persons who would be tenants of the lessor:

Held that this was a perpetual, hereditary and transferable lease of cultivatory rights and it was not a lease of proprietary rights. The mere fact that the lease was permanent, hereditary and transferable was not enough to show that the lease was of proprietary rights. (Para 1)

Anno: T. P. Act, S. 105 N. 3.

CASES REFERRED: Paras

(A) (1888) 39 Ch D 456 : 57 LJ Ch 452 3
(B) ('96) 19 Mad 151 3
(C) (V27) AIR 1940 Bom 15 : ILR (1939) Bom 713 3
(D) (V13) AIR 1926 Nag 496 : 96 Ind Cas 973 3
(E) (V12) AIR 1925 Oudh 270: 78 Ind Cas 47 3
(F) ('07) 29 All 679: 4 All LJ 703 3
(G) (V16) AIR 1929 All 616: 121 Ind Cas 223 3
(H) (V24) AIR 1937 Oudh 146: 12 Luck 161 3
(I) (V5) AIR 1918 All 392: 47 Ind Cas 861 3

Kanhaiya Lal Misra, for Applicant; A. P. Pandey, for Opposite Party.

ORDER: This is a plaintiff's application in revision and arises in the following circumstances: The applicant applied under S. 12, Agriculturists' Relief Act for the redemption of a usufructuary mortgage executed by the original zamindars of the plots on 14-3-1920 in favour of the father of the defendant-respondent Ram Ratan Misir for a sum of Rs. 90/-. On 13-3-1928 the original zamindars executed a perpetual lease in favour of the plaintiff-applicant granting him the right to be in cultivatory possession of the plots in dispute generation after generation. He then applied under S. 12, Agriculturists' Relief Act for redemption of the usufructuary mortgage and alleged that the whole amount of the usufructuary mortgage had been paid up by the usufruct in excess of the legal rate of interest chargeable under the law.

The main defence of the defendants opposite parties was that the plaintiff being a mere cultivatory tenant of the plots had no interest in the mortgaged property or in the equity of redemption to sue for the redemption of the mortgage. The courts below have differed on this question, the lower appellate court holding that the plaintiff had no right to redeem. The only point, therefore, for decision in this revision is whether the court below was right in holding that the plaintiff had no 'locus standi' to sue for the redemption of the mortgage.

The lower appellate court held that the lease in favour of the plaintiff was a mere cultivatory lease and not a lease of proprietary interest, that therefore he had no right to sue for redemption. Learned counsel for the applicant has contended that the lease was a lease of proprietary rights and not of cultivatory rights merely.

The lease recites that it was perpetual, that the lessee would remain in cultivatory possession from generation to generation on payment of the fixed rent, that he may either himself cultivate the land or have it cultivated by sub-tenants, that he was entitled to sink wells or plant a grove and to transfer his rights, that he was not entitled to be ejected except for non-payment of the rent, that the landlord was not entitled to enhance the rent and that the leassee was not entitled to have the rent reduced.

No power was given to the lessee to build on the land or to create tenancies or to let out lands to tenants, that is to say, to persons who would be tenants of the lessor. This was in my opinion a perpetual, hereditary and transferable lease of cultivatory rights and it was not a lease of proprietary rights.

The main distinction between the two leases consists in this that whereas in a cultivatory lease, the lessee is entitled to cultivate himself or have the land cultivated by sub-tenants, in a proprietary lease the lessee is entitled to lease out the

land to persons who become tenants of the original lessor or, in other words, who would become tenants-in-chief or and not sub-tenants merely and the lessee is given the power to collect rent from the tenants. In other words, in a proprietary lease the lessee is entitled to become an intermediary between the landlord and the tenants-in-chief.

The mere fact that the lease was permanent, hereditary and transferable is not enough to show that the lease was of proprietary rights. I, therefore, agree with the view of the lower appellate court that the lease in the present case was a cultivatory lease and not a lease of proprietary rights.

(2) The question then is whether a lessee of the present type is entitled to redeem the usufructuary mortgage which had been created by the mortgagor after the execution of the mortgage. The answer to this question has to be obtained from the language of S. 91, Transfer of Property Act. That section reads:

"91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:

(1) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

. . . . . .

The rest of the clauses are immaterial for the present purpose. Any person having any interest in or charge upon either the property mortgaged or the right to its redemption has the right to redeem it. It is quite obvious from the context in which the words are used, that the words "property mortgaged" have reference to the entirety of the rights which the mortgagor had in the property before it was mortgaged, while the 'right to redeem' the same has reference to those rights of the mortgagor which he retains after the execution of the mortgage.

(3) By the lease an interest in the property mortgaged was created in favour of the applicant and since there was an outstanding mortgage he could not exercise the rights given to him by the mortgagor except on the condition that he should get the mortgage redeemed in the first instance. The applicant, therefore, had a vital interest in the mortgaged property and in the right to redeem because as already said without redemption he could not exercise the rights conferred on him by the lease. I have no doubt in my mind that even a cultivatory lessee who has been granted a lease when a usufructuary mortgage has already come into existence has "an interest in the property mortgaged" as also in the right to redeem within the meaning of S. 91, Transfer of Property Act.

Under the English law, the lessee from the mortgagor has been held to be entitled to redeem the mortgage. — 'Tarn v. Turner', (1888) 39 Ch. D. 456 at p. (462) (A). The word "interest" is not necessarily confined to proprietary interest but includes even the interest of a lessee, — 'Paya Matathil Appu v. Kovamel Amina', 19 Mad 151 (B). See aslo — 'Gafur Usman v. Sakharam', AIR 1940 Bom 15 (C); 'Panna Lal v. Rajaram', AIR 1926 Nag 496 (D); 'Kalu Singh v. Hansraj Upadhiya', AIR 1925 Oudh 270 (E); Raghunandan Prasad v. Ambika Singh', 29 All 679 (F); Sheo Saran Rai v. Jaimangal Misir', AIR 1929 All 616 (G); Tulshi Ram v. Mt. Muna Kuar', AIR 1937 Oudh 146 (H); 'Mahomed Husain Khan v. Hanuman', AIR 1918 All 392 (I).

The lessee in the present case had, therefore, sufficient interest in the property to entitle him to redeem the usufructuary mortgage.

(4) It was however urged by learned counsel for the opposite parties that even though the court below erred in holding that the applicant had no right to redeem the property this was merely an error of law which could not be corrected in the exercise of this Court's jurisdiction under S. 115, Civil P. C. This contention has no force. What has happened in the present case is that by a wrong application of the law the court below has refused to exercise the jurisdiction vested in it to give relief to the applicant as provided for under S. 12, Agriculturists' Relief Act. This was, therefore, a case which fell under cl. (b), S. 115, C. P. C.

(5) The application is therefore allowed. The decree of the court below is set aside and that of the Revenue Officer restored with costs to the applicant in all the courts.

D.H.Z. Revision allowed.

(S) AIR 1955 ALLAHABAD 611 (V 42 C 176 Nov.)

MUKERJI J. (9-2-1955)

Chandra Kishore and another, Applicants v. Smt. Hemlata Gupta, Opposite Party.

Civil Revn. No. 124 of 1954, against decision of Dist. J., Sahranpur, D/- 11-1-1954.

(a) Guardians and Wards Act (1890) S. 9 — 'Ordinarily resides' — Meaning of — Evidence of residence' — (Words and Phrases).

The words "ordinarily resides" obviously mean more than temporary residence, even though such residence is spread over a long period. In the case of people who are 'sui juris', the difficulty in applying these words is considerably minimised because the person in respect of whom the question of residence may arise can give evidence to say where he actually ordinarily resides.

There may be evidence of his doing work in a particular place; there may be evidence of his having an abode in a particular place, and there may be also evidence of his being employed or of his earning his livelihood in a particular place. When such evidence is available, the question becomes not difficult of decision, for the question as to what is the ordinary residence of a person is a question of fact. (Para 3)

Anno: G. and W. Act S. 9 N. 1.

(b) Guardians and Wards Act (1890) S. 9 — Hindu minor — Residence of — Contest between mother and father for guardianship — Jurisdiction of Court — (Hindu law —Guardianship — Minor).

Under S. 9 in order to give the Court jurisdiction to entertain an application, the minor must be "ordinarily residing within the local limits of that Court's jurisdiction. (Para 9)

Under the Hindu law, the father is the natural guardian and the preferential guardian of his minor children. Therefore, when there is a contest between the mother and the father in regard to what the residence of the minor children is going to be, then the mother's word cannot be accepted in preference to the word of the father. (Para 4)

Thus where the evidence shows that certain minors had an ancestral home in Meerut, that they had been there with their father and mother during the better part of their short life, & that they had been taken by their mother to Dehra Dun only a very brief span of a few hours.

Held that the ordinary residence of the minors was Meerut and that the Dehra Dun Court had no jurisdiction to entertain the application of the mother for the guardianship of her minor sons. AIR

1951 Nag 179, Rel. on; AIR 1952 All 79, Distinguished, case law referred. (Para 9)

Anno: G. W. Act S. 9 N 1.

CASES REFERRED: Paras

(A) (V39) AIR 1952 All 79 : 1952 All WR HC 124 4
(B) (V27) AIR 1940 All 329 : ILR (1940) All 269 5
(C) (V8) AIR 1921 Cal 309: 48 Cal 577 6
(D) (V24) AIR 1937 Lah 797 : ILR (1937) Lah 426 7
(E) (V38) AIR 1951 Nag 179 : ILR (1951) Nag 35 8

Brij Lal Gupta, for Applicant; D. D. Seth and B. D. Gupta, for Opposite Party.

ORDER: This is a revision which has been filed by Sri Chandra Kishore and Sri Sohan Lal against an order of the District Judge of Saharanpur, exercising jurisdicion over Dehra Dun Area, holding that an application made by Srimati Hemlata Gupta for her appointment as a guardian of her two minor children was maintainable in his Court.

(2) Srimati Hemlata, the opposite party, was married to Chandra Kishore some years ago. This marriage produced two children Rakhesh, aged about four and a half years, and Gambhir, aged about two years and a few months. Chandra Kishore belongs to Meerut and has his permanent residence at that place. After the marriage the young couple resided in Meerut, and the children, after their birth, also resided with their parents at Meerut.

Unfortunately, the husband and the wife started having differences, so much so that Hemlata, the wife, decided to leave her husband's residence to go and live with her parents who resided at Dehra Dun. On 1-10-1953, Hemlata, with her two little sons, left Meerut to arrive at Dehra Dun with the object of staying there with her parents.

The departure of Hemlata with her children caused some amount of consternation in the family, with the result that Hemlata's father-in-law came to Dehra Dun and some how was able to return to Meerut with his two grandsons. The father-in-law returned to Meerut with the children on the 2nd, namely the same day that he had gone to Dehra Dun.

On 3-10-1953, Hemlata made the application which has given rise to this revision, for being appointed guardian of the person of her two minor children, in the court of the District Judge of Saharanpur at Dehra Dun. Her allegation in the application was that she had been deprived of her children by her father-in-law by practising fraud on her.

The application was contested by the husband and the father-in-law. We are not here concerned with all the grounds on which contest was made but with only one such ground. The ground which which we are concerned in this revision is the plea of jurisdiction that was raised on behalf of the two applicants. It was contested that the Court in Dehra Dun had no jurisdiction to entertain the application. This plea was raised on the strength of S. 9, Guardians and Wards Act. The material portion of S. 9, sub-s. (1), is in these words:

"If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides."

It was contended on behalf of the applicants that the minor did not "ordinarily reside' 'within the jurisdiction of the Dehra Dun Court. The learned District Judge came to the conclusion that the Dehra Dun Court had jurisdiction. His view was that children of such tender age as the two minors in the present case must be taken to be living with their mother, and since the mother was residing, or had the intention of residing, permanently henceforward, at Dehra Dun, the minors would also be deemed to be having their ordinary residence at Dehra Dun.

The learned District Judge found support for his view from the observations made by this Court in the case of — 'Ram Sarup v. Chimman Lal', AIR 1952 All 79(A).

(3) In order to have jurisdiction the Court must find that the minor in respect of whom the application for guardianship is made "ordinarily resides" within the jurisdiction of the Court. The question, therefore, is what the words "ordinarily resides" signify. These words have been the subject-matter of judicial interpretation. The words "ordinarily resides" obviously mean more than temporary residence, even though such residence is spread over a long period.

In the case of people who are 'sui juris', the difficulty in applying these words is considerably minimised because the person in respect of whom the question of residence may arise can give evidence to say where he actually ordinarily resides. There may be evidence of his doing work in a particular place; there may be evidence of his having an abode in a particular place, and there may be also evidence of his being employed or of his earning his livelihood in a particular place.

Under such circumstances, namely when evidence of the character just indicated is available the question becomes not difficult of decision, for the question as to what is the ordinary residence of a person is a question of fact. The difficulty arises when this question is to be determined in relation to the residence of a minor for, a minor cannot, in law, express his mind in regard to any matter.

He can have no status attaching to him by reason of any contractual obligations like that of service etc., and, therefore, the question has to be determined, when it arises in relation to a minor by reference to some other kind of evidence. Counsel for the opposite-party attempted to argue this matter on the analogy of the law applicable to domicile. I am, however, of the opinion that the law applicable to cases of domicile is really of no help in determining the question that calls for decision in this case.

(4) AIR 1952 All 79 (A) was decided on a reference by the District Judge of Moradabad to this Court under S. 14, Guardians and Wards Act. Section 14 is in these words:

"1. If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself.

2. If the Courts are both or all subordinate to the same High Court they shall report the case to the High Court and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian of the minor shall be had.

3. In any other case in which proceedings are stayed under sub-s. (1) the Courts shall report the case to and be guided by such orders as may be received from their respective Provincial Government."

The position that obtained in the case of Ram Sarup (A) was that guardianship proceedings had been initiated in two Courts subordinate to the High Court of Allahabad one was initiated in the Court of the District Judge of Moradabad, and the other before the District Judge of Aligarh. The district Judge of Moradabad was apprised of the fact that there was an application pending in the same matter in the Court of the District Judge of Aligarh and, therefore, the District Judge of Moradabad made a reference to the High Court for its directions

under S. 14(2) of the Guardians & Wards Act. While deciding this reference, Sapru J. pointed out that

"the power of this Court to determine in which Court the guardianship proceedings shall be held is of a very wide nature."

He was obviously referring to the power conferred on this Court under S. 14(2). Under S. 14(2) the decision of the High Court was not necessarily to be given with reference to the ordinary residence of the minor. The High Court could under the circumstances of any particular case direct one of the Courts in which proceedings had been initiated to go on with the matter irrespective of the fact that the minor did not "ordinarily reside" within the jurisdiction of that Court.

Sapru J. however pointed out that while exercising its powers under S. 14(2) the High Court should attach due weight to what was stated in S. 9 of the Act in regard to the Court's right to entertain an application for appointment of a guardian of a minor; but he did point out that that was not the sole consideration which the Court was bound to take into account in deciding the forum where the proceedings are to take place.

Mootham, J. (as he then was) agreed with Sapru J. in these conclusions but, as he has said, with some hesitation. He was of the view that in determining the question which Court was to proceed with the guardianship of a minor; the High Court ought to be guided by the consideration of the question of jurisdiction primarily, for he did not consider that the intention of the legislature was to confer upon the High Court powers by which the High Court could invest a subordinate Court with a jurisdiction under the Act which ordinarily that Court did not possess.

The decision was ultimately given on a question of fact, namely on the fact that the minors were, actually, at the time residing with their mother within the jurisdiction of the District Judge of Aligarh. It appears from the judgment of Mootham J. that he took the view that the mother had taken the minors away from Chandausi and since she had taken them away with the intention that they were going to stay away from Chandausi, that circumstance was taken as strong enough circumstance for finding that the residence of the minors prior to their date of departure from Chandausi had terminated and that, thereafter, their ordinary residence became Hathras where the mother and the minors had come and were at the time of the application for guardianship "ordinarily" residing. Sapru J. took a similar view, which he expressed in these words:

"Admittedly, in this case the children are very young and they have been living with their mother. They were no doubt, until their mother left their father living in Chandausi which is in Moradabad district. It is not disputed that after her departure from Chandausi they have been living with her at Hathras. In these circumstances in this particular case an inevitable conclusion to which I am driven is that their ordinary place of residence is at the moment Hathras."

Sapru J. went on to say that when a person leaves his place where he has been residing as a permanent resident, for good that is, with no intention to come back to it and goes to some other place to live there, the former place where he used to live ceases to be his ordinary place of residence. This observation of Sapru J., I say with respect, was perfectly right in regard to the mother, but whether this statement could be right in the case of the minors who had no volition of their own is, in my view, not so convincing. If somebody else can speak the mind of the minors, then that somebody must have the legal right to so speak on behalf of the minors. Under certain circumstances the mother, as a natural guardian, may have that right, but not in all cases. Under the Hindu law, the father is the natural guardian and the preferential guardian of his minor children. Therefore, when there is a contest between the mother and the father in regard to what the residence of the minor children is going to be, then the mother's word cannot be accepted in preference to the word of the father.

The decision in 'Ram Sarup's case (A)' is, therefore, not binding authority for what I have to determine in this case. As I have pointed out earlier, the interpretation of S. 9, Guardians and Wards Act, did not specifically fall for determination in that case. Learned counsel for the opposite party, that is, the mother, laid great stress on this case, particularly because the facts of 'Ram Sarup's case (A)' were somewhat similar to the facts of the case before me. Learned counsel, however omitted to see the real basis of the decision, namely the fact that at the time the application for guardianship was made in the Court of the District of Aligarh, the minors were in fact within the jurisdiction of that Judge.

(5) Another case of this Court, — 'Mst. Lalita Tawaif v. Paramatma Prasad', AIR 1940 All 329 (B) needs be noticed at this stage. This decision arose out of a First Appeal filed against an order, made by the Court below, under S. 25, Guardians and Wards Act, for the custody of certain minor children. An application was made under S. 25 by one Paramatma Prasad for the custody of certain minor children who were at the time with their natural mother, residing in village Shadiabad, within the judgeship of the District Judge of Ghazipur, the application having been made to the District Judge of Banaras. Objection was taken to the jurisdiction of the Banaras Court on the grounds stated in S. 9(1) of the Act.

It was pointed out by Ganga Nath J. that

"the fact that a minor is found actually residing at a place at the time the application is made does not determine the jurisdiction."

In this case what had happened was that Mt. Lalita Tawaif who had been a mistress of Paramatma Prasad and had been residing with him at Banaras left him with her children to reside in Shadiabad in the district of Gazipur. After her departure with the children, Paramatma Prasad made an application for the custody of the minors, whom he claimed as his children, under S. 25 of the Act to the District Judge of Banaras.

Objection was made on behalf of the mother to the jurisdiction of the Banaras Court. The Judge at Banaras decided that he had jurisdiction, because according to his view of the facts, the minors' ordinary residence was Banaras. Ganga Nath J., while dealing with the appeal; pointed out that on the facts of that case it was clear that the mother of the minors had been residing at Banaras for the last six or seven years and that the minors had been living at Banaras for a major part of their lives.

The fact that the minors had been removed from Banaras only three or four months before the application was made, made no difference as to their place of ordinary residence, which according to both the District Judge and Ganga Nath J. was to be deemed to be Banaras. It was pointed out that the mere fact that the minors were taken by their mother to Shadiabad when she went to visit it would not make Shadiabad the place of ordinary residence of the minors. The ratio of this case, therefore is that in order to prescribe — if I may use that word — for ordinary residence, the residence has to be of some permanence, and that ordinary residence cannot be a synonym for "present residence".

(6) Certain observations in the case of — 'Anilabala Chowdhurani v. Dhirendra Nath Saha', AIR

1921 Cal 309 (C) were referred to during the course of the arguments at the Bar. It may be pointed out that this case could not be a direct authority for the question that I have to consider, inasmuch as, this case was under the Lunacy Act. The words which called for interpretation in that case were not the same as here before me.

The terms the import whereof was considered in that case, were "reside" and "residence". The Acting Chief Justice Sir Asutosh Mookerjee, pointed out, relying on certain decisions, that a man's residence is the place where his family dwells or which he makes the chief seat of "his affairs or 'interests". He further pointed out that whatever definition may be framed or adopted, there is one fundamental point of view which must not be overlooked, namely that the term "residence" may be used in two senses, the one denoting the "personal habitual habitation", and the other "the constructive technical and legal habitation". When a person has a fixed abode where he dwells with his family, there can be no doubt as to the place where he resides said the learned Judge the place of his personal and legal residence is the same; but he pointed out that when, on the other hand, a person has no permanent habitation or family but dwells in different places as he happens to find employment, there can equally be no doubt as to the place where he resides: he may be considered as residing where he actually or personally resides.

It was pointed out, and very rightly, that some individuals have permanent habitations where their families constantly dwell and they have other habitations where they pass a great portion of their time for purposes of services etc., so in such cases, according to this learned Judge, there are two residences, legal residence as he calls it and the personal residence. In the case before me the minors had an ancestral home at Meerut, and they were taken from that place to Dehra Dun which was not their ancestral home.

To the question whether the mother's intention to leave the ancestral home of the minors & to take them and live with them at Dehra Dun could lawfully change the legal residence, to quote the words of Asutosh Mookerjee J. of the minors, there can be but one answer in my judgment namely an answer in the negative.

As I have already pointed out, a mother is not the legal guardian of Hindu minors, and, therefore, she cannot, in law, do anything, lawfully which may affect the rights and privileges conferred on the minors. The question is likely to be asked whether being subject to one territorial jurisdiction or another is a privilege or legal status? Being subject to one jurisdiction or another may not be, strictly speaking, either of the two aforementioned things, but nonetheless, in my view, it is an important thing, almost akin to a legal status.

The framers of the law relating to guardians and minors laid some emphasis on the question of jurisdiction, and the wisdom of it is not far to seek, when we remember that it is the Court within whose jurisdiction the minor resides that has the primary responsibility imposed on it by law to safeguard the interest of a minor and to see to its welfare. A Court within whose jurisdiction a minor has been ordinarily residing, undoubtedly has, or is supposed to have, better knowledge about the affairs of the minor and have better ideas about its well being than a Court within whose jurisdiction the minor is taken temporarily, so to speak, or the minor is moved for a brief stay.

(7) In the case of — 'Nazir Begam v. Ghulam Qadir Khan', AIR 1937 Lah 797 (D), Skemp J. held that a minor who lived during the major part of her life in the Multan district and had been moved from that district a few weeks before the application was made for her guardianship would be deemed to be residing ordinarily within the jurisdiction of the Multan Court.

(8) In the case of — 'Sm. Vimlabai v. Baburao Shamrao', AIR 1951 Nag 179 (E) it was held that where a Hindu minor had been living in Amraoti continuously for over a year with her father, she must be deemed to reside ordinarily in Amraoti even though before going to Amraoti the minor lived at Nagpur with her mother and even though the stay at Nagpur was longer than the stay at Amraoti. It was pointed out in this case that under the Hindu law the father is the natural guardian of his children and his children must be deemed to reside where he resides. It was further pointed out that while the minor stayed at Nagpur with the mother her stay there would be deemed to be in charge of the mother on behalf of the father who was her natural guardian.

(9) In order to give the Court jurisdiction to entertain an application the minor must be "ordinarily residing" within the local limits of that Court's jurisdiction, that is so provided by S. 9 of the Act. The fact of this case indicate, as I have already pointed out, that the minors had an ancestral home in Meerut, that they had been there during the better part of their short life, and that they had been at Dehra Dun only for a very brief span of a few hours.

Under these circumstances, on the facts, there could be no difficulty in holding that the minors' "ordinary residence" was Meerut. The legal discussion that was entered into by learned counsel appearing on behalf of the mother could not as I have already pointed out, alter that position. So that I must hold, as I do, that the minors were not ordinarily residing within the territorial jurisdiction of the Court at Dehra Dun and that the learned Judge's order holding that he had jurisdiction was erroneous.

(10) Learned counsel for the opposite party, as a last resort, argued that I should refrain from interfering with the order of the Court below inasmuch as no injustice was likely to accrue if the case was tried at Dehra Dun instead of at Meerut. It was further argued by learned counsel that in this case the applicants had removed the minors from the jurisdiction of the Dehra Dun Court to Meerut by practising fraud on the mother of the minors who was the applicant before the District Judge of Sahranpur.

I regret I cannot give effect to this contention of learned counsel, for I am reminded of the following words of that great Chief Justice of America, Marshall:

"..... Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, & can will nothing. When they are said to exercise a discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."

(11) For the reasons given above, I allow this aplication in revision, set aside the order of the Court below and direct that the application for guardianship be returned to Srimati Hemlata Gupta for presentation to the proper Court. Under the circumstances of this case I make no order as to the costs of this petition, and I direct the parties to bear their own costs of this petition and the costs incurred in the Court below.

D.R.R. Revision allowed.

(S) AIR 1955 ALLAHABAD 615 (V 42 C 177 Nov.)

LALL J. (17-2-1955)

Anand Narain, Applicant v. District Judge, Faizabad and others, Opposite Party.

Misc. Writ No. 993 of 1953.

Satmp Act (1899), S. 33 — Inspector of Stamps reporting about unstamped documents in record room of District Judge — Power of District Judge to impound such documents.

Where the Inspector of Stamps, while inspecting the records in the record room of the District, notices an award and a decree passed in terms of the award, which documents, in his opinion, should have been stamped, and sends a report to that effect to the Chief Inspector of Stamps and a copy thereof to the District Judge, if the District Judge is, on perusal of the report of the Inspector of Stamps, of the opinion that the decree and the award had not been duly stamped, he has power under S. 33 to impound the same. (Para 4)

The record room of the District Judge is a public office and the District Judge is in charge of the said office. It is true that in some judgeships a subordinate judicial officer, e.g. a Small Cause Court or a Civil Judge, is generally placed in immediate charge of the record room but he exercises supervision thereof under the control and guidance of the District Judge. Under such arrangement also, the District Judge does not cease to be in charge of the record room. (Para 3)

As the Stamp Inspector had sent the report to the District Judge as a person in charge of the record room under R. 330 of the U. P. Stamp Rules, 1942, the documents came before the District Judge "in the performance of his functions". Case Law Referred. (Para 5)

Anno: AIR Com. Stamp Act S. 33 N. 3; 1950 Mulla and Pratt, S. 33 P. 98 N "Any....office" (6 Pts extra in AIR Com.)

AIR Com. Stamp Act S. 33 N. 4; 1950 Mulla and Pratt S. 33 P. 98 N "In.....functions and P. 99 N "Causes" (7 Pts. extra in AIR Com.)

CASES REFERRED: Paras

(A) (V32) AIR 1945 Pat 96 : 23 Pat 351 (SB) 5
(B) (V5) AIR 1918 Cal 1023 : 46 Ind Cas 555 5
(C) (V30) AIR 1943 Nag 97: ILR (1943) Nag 520 5
(D) (V19) AIR 1932 Lah 495 : 13 Lah 745 (SB) 5
(E) (V23) AIR 1936 Lah 985: 163 Ind Cas 560 5

G. P. Bhargava, for Applicant.

ORDER: The petitioner instituted a suit (No. 39 of 1947) in the court of the Civil Judge at Faizabad. The suit was referred to arbitration. The arbitrators delivered an award and the Court passed a decree in terms of the award on 30-4-1948.

(2) The record was consigned to the record room of the District Judge in due course and remained there for about five years. It was in 1953 that the Inspector of Stamps while inspecting the records in the record room of the District Judge noticed the award and the decree. He was of the opinion that these documents should have been stamped. He made a report to that effect to the Chief Inspector of Stamps and sent a copy thereof to the District Judge.

The Junior Secretary to the Board of Revenue as the Chief Controlling Revenue authority also drew the attention of the District Judge to the Stamp Reporter's report. Some notes passed between the District Judge and the Civil Judge and also between the District Judge and the Junior Secretary, Board of Revenue.

Thereafter the District Judge impounded the documents on 7-7-1953. Three days later i.e. on 10-7-1953 he forwarded the award and the decree to the Collector of Faizabad under S. 38(2) Indian Stamp Act (2 of 1899). The Stamp Officer of Faizabad exercising the powers of the Collector under S. 40, Stamp Act issued notice to the petitioner on 27-8-1953 which was received by him on 26-9-1953.

The petitioner has come to this Court and prays that the District Judge's order dated 7-7-1953 impounding the documents and the Stamp Officer's order dated 27-8-1953, calling upon the petitioner to show cause, may be cancelled.

(3) The question that arises for decision is whether the District Judge had power to pass the order impounding the documents or not. The learned State counsel contends that the power of impounding the documents was exercised under S. 33, Stamp Act. This section so far as is material for purposes of this petition runs as follows:

"Every person in charge of a public office except an officer of police before whom any instrument, chargeable in his opinion, with duty is produced or comes in the performance of his functions shall, if it appears to him that such instrument is not duly stamped impound the same."

The record room of the District Judge is a public office and the District Judge is in charge of the said office. It is true that in some judgeships a subordinate judicial officer e.g. a Small Cause Court or a Civil Judge is generally placed in immediate charge of the record room but he exercises supervision thereof under the control and guidance of the District Judge.

It is not known whether any such arrangement exists at Faizabad. But assuming that such arrangement does exist the District Judge does not cease to be in charge of the record room.

(4) If the District Judge was, on perusal of the report of the Inspector of Stamps, of the opinion that the decree and the award had not been duly stamped he had power under S. 33 to impound the same.

(5) The learned counsel for the petitioner has cited several cases, e.g. — 'In re Payanda Khan, AIR 1945 Pat 96 (A); — 'Mohd. Asharaf v. Umed Ali' AIR 1918 Cal 1023 (B); — 'In re Narayan Das Nathurama', AIR 1943 Nag 97 (C); — 'Thakur Das v. Emperor', AIR 1932 Lah 495 (D) & — 'Ujjal Singh Sunder Singh v. Ahmad Yar Khan', AIR 1936 Lah 985 (E).

All these authorities lay down that the mere fact that a document is physically placed before a court or an officer in charge of a public office does not mean that the said document comes before that Court or officer "in the performance of his functions". This contention is perfectly correct and I have no hesitation in agreeing with the learned counsel that the mere circumstance that a document is present before a Court or an officer does not give jurisdiction to it or to him to exercise power of impounding it under S. 33.

What is needed is that it should have come to the Court or the officer "in the performance of his functions." In the present case, however, there is no gainsaying the fact that the Stamp Inspector had sent the report to the District Judge as a person in charge of the record room under R. 330 of the U. P. Stamps Rules 1942. This rule is to be found on page 438 of the U. P. Stamp Manual 1945 edition.

These are statutory rules and have the force of law. Rule 330 makes it obligatory on the Stamp Inspector to send such reports to the Court or the head of the office and imposes on the latter a duty to "examine the report soonafter he receives it".

In order to examine the report it was necessary to have a look on the documents which in the Inspector's opinion, were not duly stamped. Thus

the documents came before the learned District Judge" in the performance of his functions. It is not for me to express any opinion as to whether or not the documents were duly stamped and whether or not the learned District Judge's view was correct. But the learned Judge did find that they were not duly stamped and as such he had jurisdiction to impound the same and to forward them to the Collector.

(6) The learned counsel for the petitioner contended that the District Judge should have given an opportunity to his client to be heard before impounding the documents. In this connection it may be pointed out that S. 33 does not make it obligatory on the person impounding the documents to issue notice to any party affected thereby to show cause why the documents concerned should not be impounded. Rule 330 gives an option to the Court or the head of office to hear the party where 'he considers it necessary". No absolute right is given to any party to be heard. It purely rests with the discretion of the Court or the head of office to hear the party or not.

(7) Moreover the decision of the District Judge is not final. The mere fact that the District Judge has impounded the documents and was of the opinion that they were not duly stamped, does not in any way saddle the petitioner with the responsibility to pay any duty or penalty. The matter is yet to be heard and decided by the Collector or by the Stamp Officer exercising his powers under S. 40.

It is open to the petitioner to plead before him that neither the award nor the decree was a document executed by him. He may also contend, if he is so advised, that the documents were not required to be stamped or that in any case it is not he who is liable to pay the stamp duty or penalty. These and all other pleas that may be raised by him shall be considered on the merits by the Stamp Officer. It is he who will give the final decision. No decision has yet been given. All that the appellant has been called upon to do is to appear before the Stamp Officer and to state his point of view.

(8) In my opinion no good ground exists for interfering in this matter. In the circumstances the petition fails and it is hereby dismissed.

V.B.B. Petition dismissed.

(S) AIR 1955 ALLAHABAD 616 (V 42 C 178 Nov.)

LUCKNOW BENCH — MULLA J. (11-2-1955)

Ram Das and others, Applicants v. State and another, complainant, Opposite Parties.

Criminal Revn. No. 299 of 1954, against order of Temporary Civil and S. J., Sitapur, D/- 26-8-1954.

Criminal P. C. (1898), Ss. 208, 209, 210, 215, 287 and 342 — Scope — Examination of accused by committing Magistrate — Omission — Prejudice to accused — Quashing of commitment — AIR 1935 Cal 605, Not foll.

Whenever an accused pleads for a discharge and his statement is not taken by the committing Magistrate, it is sufficient to prove that he has been prejudiced. If the accused is prejudiced the commitment will be quashed. (Paras 8, 10)

Section 342, Criminal P. C., cannot be interpreted without keeping in mnd the provisions of S. 209 Cr. P. C. Under Chapter 18, Criminal P. C., a valuable right has been conferred on an accused person to prepare a ground for claiming a discharge and after doing so to plead for it. In other words a definite right to defend himself has been given to an accused person. The option lies with him and it is open to him to defend himself in the Magistrate's Court or to waive this right.

If he elects to defend himself, the Court cannot stop him from doing so. The right to claim a discharge given to an accused person under Chapter 18 is far wider than given to him under Chapter 21 in a warrant trial. (Distinction between the two pointed out). (Para 5)

Under S. 209, Criminal P. C., the Magistrate can omit to examine an accused person only if he feels that there are no circumstances for the accused to explain and he can be discharged without recording such a statement, but where a commitment has to be made, an accused person must be examined. The words "if any" used in S. 210, Criminal P. C., do not confer any discretion to the Magistrate.

The words 'if any' are only used to cover those cases where the accused refuses to make a statement and does not reply to the questions put by the Court or where he is physically incapable to make a statement, for example if he is deaf and dumb. It is, therefore, incorrect to interpret the words 'if any' used in S. 210, Cr. P. C., to mean that the Magistrate has an option to examine the accused person. (Para 6)

Section 287 also makes it clear that an accused person must be examined by the committing Court. 23 Mad 636 Foll, AIR 1935 Cal 605, Not foll. (Para 7)

Anno: AIR Com. Cr. P. C. S. 208 N. 8; 1953 Mitra, S. 208 P. 884 N. "Evidence for the accused" (1 Pt. extra in AIR Com. — 1 Pt. extra in Mitra.)

AIR Com., Cr. P. C., S. 208 N. 10; 1953 Mitra, S. 208, P. 885, N. 698 "Sub-section (2)..... cross examination".

AIR Com. Cr. P. C. S. 209 N. 2; 1953 Mitra, S. 209 (AIR Com. topic extra).

AIR Com. Cr. P. C. S. 215 N. 8; 1953 Mitra, S. 215 P. 905 N. 718 "Point of law" and "Absence of evidence" (AIR Com. note exhaustive and illustrative).

AIR Com. Cr. P. C. S. 287 N. 1; 1954 Mitra, S. 287, P. 1189 N. 895 "The.....accused", P. 1190 N. "Read as evidence" (AIR 1949 Nag 163 (166) not noticed in Mitra).

AIR Com. Cr. P. C., S. 342 N. 3; 1949 Mitra, S. 342, P. 1037, N. 973 "Scope", para 2 (Reasons for Rangoon view not indicated in Mitra).

AIR Com. Cr. P. C. S. 342 N. 19; 1954 Mitra, S. 342 (Topic scattered in Mitra).

AIR Com. Cr. P. C. S. 342 N. 35; 1949 Mitra, S. 342, P. 1044, N. 975 "Examination imperative" (7 Pts. extra in AIR Com. — 51 Cal 945 not noticed in AIR Com.)

CASES REFERRED : Paras

(A) (V22) AIR 1935 Cal 605: 36 Cri LJ 1340 3
(B) (1900) 23 Mad 636: 2 Weir 253 4
(C) (V40) AIR 1953 SC 468: 1953 Cri LJ 1933 (SC) 9

Shafiq-ul-Rahman, for Applicants; Shanker Sahai Addl. Asst. Govt. Advocate, for the State; Saraswati Prasad, for Opposite Party.

ORDER : Ram Das and two others have filed an application under S. 215, Criminal P. C., read with S. 561A, Criminal P. C., praying that the order of committal passed by the Special Magistrates, Sitapur, dated 20-5-1954 be set aside and the proceedings be quashed. The applicants were committed under S. 307 read with S. 34, Penal Code to stand their trial in the Court of the Sessions Judge, Sitapur.

(2) Several grounds were taken in this application, but the main contention of the counsel for the applicants is that the committing Magistrates did not examine the accused persons under S. 342, Criminal P. C., and this has vitiated the entire proceedings.

(3) On behalf of the opposite parties it was contested that no illegality has been committed, if S. 342, Criminal P. C., is correctly interpreted. It was argued that S. 342, Criminal P. C., contemplates two stages when a Court can examine the accused persons. The first stage extends upto the time when the accused is called upon his defence and it is discretionary with the Magistrate to examine him during this stage or not. The second stage, which is the mandatory part of this section, is reached when the accused is called upon to enter upon his defence.

As in an inquiry under Chapter 18, Criminal P. C., the accused is not called upon to enter into his defence, it cannot be said that the Magistrate, if he omitted to examine the accused persons, committed any illegality. It is contested that the accused is called upon to enter into his defence only when after committal the proceedings start in the Court of Session and he is asked to register his plea. In support of this contention an authority was cited.

This decision is reported in — 'Emperor v. Ajahar Mandal', AIR 1935 Cal p. 605 (A). It was held in this case that in a case which is triable by a Sessions Court, it is the latter Court which tries the accused and calls upon him to enter on his defence and, therefore, it is to that Court that the mandatory provisions of S. 342, Criminal P. C., are applicable. That being so it cannot be said that the omission to examine the accused in the committing Court is a disregard of an express provision of law and, therefore, illegal.

(4) I have carefully considered the decision given by the Calcutta High Court, but with respect to the Judges who gave that decision, I am unable to accept their point of view. I find myself in agreement with the contrary view expressed in — 'Queen-Empress v. Pandara Tevan', 23 Mad 636 (B). In this decision the Judges held:

"It was the duty of the Magistrate, before committing the accused persons for trial to have examined them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of S. 209, Criminal P. C., is that it is not left to the discretion of a Magistrate, who intends to commit to examine the accused person. He is bound to examine him, and if he makes an order of commitment without examining him the order is irregular.

Before, however, we can quash the order of commitment, we have to be satisfied that the irregularity has occasioned a failure of justice."

(5) In my opinion the Madras view is a correct interpretation of the law. Section 342, Criminal P. C., cannot be interpreted without keeping in mind the provisions of S. 209, Criminal P. C. Under Chapter 18, Criminal P. C., a valuable right has been conferred on an accused person to prepare a ground for claiming a discharge and after doing so to plead for it. In other words a definite right to defend himself has been given to an accused person.

The option lies with him and it is open to him to defend himself in the Magistrate's Court or to waive this right. If he elects to defend himself, the Court cannot stop him from doing so. The right to claim a discharge given to an accused person under Chapter 18 is far wider than given to him under Chapter 21 in a warrant trial. A specific right to cross-examine the witnesses has been given to him under S. 208, Criminal P. C. A similar right has not been given to an accused person under Chapter 21.

Again the right to examine witnesses in defence, even before he makes his statement has been conferred on him under the same section; while in a warrant trial the accused has no right to examine any defence before the charge is framed. The only limitations imposed upon his defending himself are, firstly, that the Magistrate can refuse to examine those defence witnesses whom, for reasons which he records, he deems unnecessary and, secondly, he cannot discharge him by assessing the evidence in the same manner as a trial Court does.

In other words in a case triable by the Court of Session an accused person is given two rights to defend himself. If he so desires he can defend himself in the Court of the Magistrate and the Magistrate cannot adopt any such procedure which would deny him this right. Where the accused person wants to defend himself, it is obvious that he would be highly prejudiced, if the committing Magistrate does not examine him. It indicates that the committing Magistrate is not willing to consider the question of a discharge at all.

The argument that the accused have not been prejudiced, if the Magistrate has committed them to the Court of Session, since they have a right to defend themselves before the trial court, is fallacious. If a person has two opportunities of defending himself and one is taken away from him, it is obvious that he would be prejudiced. A trial Court on the same reasoning might say that no prejudice has been caused to an accused person by an order of conviction, because the accused has still a right to appeal against that order.

(6) The question whether an accused person is prejudiced or not can always be determined by the fact whether he had been given a full opportunity to defend himself or not. If the accused does not elect to defend himself in the committing Magistrate's Court, it is obvious that he would not feel aggrieved if he is committed to the Court of Session. The very fact he files an application under S. 215, Criminal P. C., shows that he feels aggrieved by the procedure adopted by the committing Magistrate.

On a careful reading of S. 209, Criminal P. C., it is clear that the Magistrate can omit to examine an accused person only if he feels that there are no circumstances for the accused to explain and he can be discharged without recording such a statement, but where a commitment has to be made, an accused person must be examined. The words "if any" used in S. 210, Criminal P. C., do not confer any discretion to the Magistrate. The words 'if any' are also used in S. 253, Criminal P. C., under which the Magistrate examines an accused person in a warrant trial.

It cannot for a moment be maintained that it is open to the Magistrate to frame a charge against an accused person in a warrant trial without examining the accused person. The words 'if any' are only used to cover those cases where the accused refuses to make a statement and does not reply to the questions put by the Court or where he is physically incapable to make a statement, for example if he is deaf and dumb. It is, therefore, incorrect to interpret the words 'if any' used in S. 210, Criminal P. C., to mean that the Magistrate has an option to examine the accused person.

(7) A Sessions trial is held under Chapter 23, Criminal P. C. Section 287, Criminal P. C., runs as follows :

"The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence."

This section makes it clear that an accused person must be examined by the committing Court. The words 'if any' do not find a place in this section. If the option had been given to the Magistrate to examine the accused or not, these words would have been mentioned in this section.

(8) I am, therefore of the opinion that whenever an accused pleads for a discharge and his statement is not taken by the committing Magistrate, it is sufficient to prove that he has been prejudiced.

(9) That the statement of an accused person before the committing Magistrate is a valuable piece of evidence in his favour can be gathered from the observations of the Supreme Court in — 'Hate Singh v. State of Madhya Bharat', AIR 1953 SC 468 (C). The learned Judges observed:

"The statements of an accused person recorded under Ss. 208, 209 and 342 are among the most important matters to be considered at a trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man.

The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial.

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable & accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false."

(10) In the circumstances of this case I am satisfied that prejudice was caused to the applicants by the procedure adopted by the committing Court. I, therefore, set aside the order of committal passed in this case and direct that the case be sent back to the committing Magistrate to record the statements of the accused persons. I further direct that they should be given an opportunity to examine their witnesses in defence, if they so desire, and the Committing Magistrate, after considering these statements and evidence, should pass proper orders. I see no occasion to quash the entire proceedings, as prayed by the applicants.

K.S.B. Case remanded.

°AIR 1955 ALLAHABAD 618 (V. 42, C. 179 Nov.)

LUCKNOW BENCH — KIDWAI AND H. S. CHATURVEDI JJ. (13-4-1955)

R. B. Lal, Applicant v. The State.

Criminal Revn. No. 198 of 1954, against order of Civil and S. J., Lucknow, D/- 5-6-1954.

(a) Motor Vehicles Act (1939), Ss. 123 and 42 — Scope — Vehicle registered in name of Divisional Superintendent Northern Railway — Use without permit and fitness certificate — Responsibility.

Section 123 is wider in scope than S. 42(1). The latter is limited to the owner while the former is applicable not only to the owner but to any person who is in charge of the vehicle and allows it to be used in contravention of the terms of a permit. The use of the motor vehicle without a permit is also an infringement of S. 42(1) since that section forbids the use of the vehicle by the owner save in accordance with the conditions of a permit authorising the use of the vehicle in that place in the manner in which the vehicle is being used.

If a vehicle is being plied without a permit, it is not being plied in accordance with the conditions of a permit authorising its use in that place and that manner. Therefore it is not only the owner who is guilty under S. 123(1) but whoever causes or allows the vehicle to be used without any permit or in breach of any conditions of the permit. The words are wide enough to cover the case of a person who is in charge of the vehicle.

Where therefore the vehicle was registered in the name of the Divisional Superintendent of the Northern Railway and he was in general charge of it, and the vehicle was plying on a public road without a permit and without a fitness certificate although he may not have caused the vehicle to be used without a permit, he must be held to have allowed the vehicle to be used and therefore he is responsible for allowing the vehicle to be plied without permit. AIR 1950 All 234. Ref. (Paras 10, 11)

Anno: AIR Man., Motor Vehicles Act, S. 42 N. 1; S. 123 N. 1.

(b) Motor Vehicles Act (1939), S. 42(1) and 42(3) (a) — Purpose ancillary to business — S. 42 (1) will not apply.

The conveying of money to the Bank from the station or other place where it is collected, and from the Bank to the place where it is to be paid, is ancillary to the business of the Railway and the Vehicle used as a conveyance for these purposes, is used, if not for the business of a Railway, at least in connection with the business of a Railway. The exemption from the necessity of taking a permit contained in S. 42(1) is, therefore, not applicable to the vehicle used for the purpose. (Para 12)

Anno. AIR Man.: Motor Vehicles Act, S. 42 N. 1.

(c) Motor Vehicles Act (1939), Ss. 42, 123 — Charge under — Sentence.

Where the correspondence on the record establishes that the Railway Authorities were labouring under a bona fide mistake as to the need of a permit — a mistake which was at one time shared even by the Transport Authorities,

Held that the lower court acted rightly in giving only a warning. (Para 19)

Anno: AIR Man., Motor Vehicles Act, S. 42 N. 1; S. 123 N. 1.

CASE REFERRED: Para

(A) (V37) AIR 1950 All 234 : 51 Cri LJ 734 10

B. N. Mulla, for Applicant; Addl. Govt. Advocate, for the State.

KIDWAI J.:

The applicant Sri R. B. Lal, is the Divisional Superintendent, posted at Lucknow, of the Northern Railway. Truck registered as U. S. J. 3125 was found being used, on 14-7-1952, without a permit and without a fitness certificate. Hazari Lal was driving the truck and since it was registered in the name of the Divisional Superintendent, who happened at the time to be Sri R. B. Lal he and

the chauffeur were prosecuted under Ss. 38/112 and 42/123 of the Motor Vehicles Act.

(2) The defence of Hazari Lal was that he acted under the orders of his superiors and carried nothing but cash. Sri R. B. Lal pleaded that the vehicle did not require a permit and in any case that was the impression both of the Railway and of the Transport Authorities.

(3) Evidence was led to prove the fact that the vehicle was plying on a public road without a permit and without a fitness certificate. The defence produced a witness Ram Sunder Pandey to prove that he had gone to the Regional Transport Office on 12-7-1952, the day after that on which the fitness certificate expired, for its renewal. The witness was told by the office people to come some other day.

The next day was a Sunday and he went again on 14-7-1952, but he was again told to come some other time and the office people were busy. On that very day the truck was stopped by Sub-Inspector Quraishi.

(4) The trying Magistrate in an elaborate judgment discussed the whole matter and held:

"1. That though the vehicle belonged to the Central Government, Sri R. B. Lal "can rightly be held to be the person in whose possession and control the vehicle in question runs and as such he can rightly be called the owner of the vehicle."

2. That the vehicle in question is used for carrying Railway earnings from the station to the Imperial Bank and also for collecting other income earned by the railway and for carrying money from the Bank for the payment of salaries of the Railway staff:

3. That the vehicle in question "was a subsidiary instrument engaged for the purpose of the business of the Railway:"

4. That the Divisional Superintendent, who, on the relevant date was Sri R. B. Lal, is responsible for an infringement of the law since to him was assigned the duty of controlling the vehicle which stood registered in his name:

5. That the delay in obtaining a certificate of fitness was not due to any action of the registering authority but owing to the fact that the person in whose name the vehicle was registered did not comply with Rule 28(d) of the U. P. Motor Vehicles Rules.

(5) As a result the learned Magistrate found Sri R. B. Lal guilty under Ss. 38(1)/112 and 42/123 of the U. P. Motor Vehicles Act and sentenced him to pay fines of Rs. 15/- and Rs. 230/- in respect of the two offences.

(6) Sri R. B. Lal appealed and the learned Additional Sessions Judge considered the matter equally carefully in view of its importance and being more or less in the nature of a test case. He held:

1. That the truck in question, being used for the carriage of money from and to the station and the Bank, was used in connection with the business of the Railway; and

2. That those responsible for the truck were grossly negligent in not getting the fitness certificate renewed within time.

(7) He accordingly upheld the conviction but he held that the appellant before him was labouring under a bona fide mistake about the need for taking out a permit. He accordingly reduced the sentence under S. 42/123 of the Motor Vehicles Act to a mere warning but maintained the sentence under S. 38/112 of the Act.

(8) Sri R. B. Lal has applied to this Court in revision and since an authoritative decision was required the application was referred to a Bench. Before us the learned Advocate for the applicant contended:

1. That it is only the owner that is required to take out a permit and the applicant is not the owner of the vehicle and cannot be punished under S 123 of the Act.

2. That the provision of S. 42(3) exempt the vehicle in question from the requirements of S. 42 (1) and

3. That the vehicle in question is not a transport vehicle and that consequently no permit is required.

(9) It is no doubt true that though the vehicle is registered in the name of the Divisional Superintendent it is not his property but the property of the Central Government. Sri R. B. Lal cannot, therefore, be punished for not obtaining a permit. Section 123, however, does not unlike S. 42(1), limit the responsibility to the owner: it says:

"(1) Whoever drives a motor vehicle or causes or 'allows' a motor vehicle to be used or lets out a motor vehicle for use in contravention of sub-s. (1) of S. 42....."

(10) Thus S. 123 is wider in scope than S. 42 (1) since the latter is limited to the owner while the former is applicable not only to the owner but to any person who is in charge of the vehicle and allows it to be used in contravention of the terms of a permit.

The use of the motor vehicle without a permit is also an infringement of S. 42(1) since that section forbids the use of the vehicle by the owner" save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority authorising the use of the vehicle in that place in the manner in which the vehicle is being used."

If a vehicle is being plied without a permit, it is not being plied in accordance with the conditions of a permit authorising its use in that place and that manner —Vide — 'Uma Shanker Tewary v. Rex', AIR 1950 All 234 (A).

(11) In the case to which reference has just been made our learned brother Agarwala J. held that it is the owner alone that can be punished since it is he alone who is required to take out a permit. We respectfully differ from this view. Our learned brother pointed out what he considered to be a lacuna in the law: we find, however that there is no lacuna. It is not only the owner who is guilty under this section but whoever causes or allows the vehicle to be used without any permit or in breach of any conditions of the permit.

These words are wide enough to cover the case of a person who is in charge of the vehicle. It is not disputed that the vehicle is registered in the name of the Divisional Superintendent and that he was in general charge of it. Although he may not have caused the vehicle to be used without a permit, he must be held to have allowed the vehicle to be used. Indeed he never disputed the responsibility for such an action: he only disputed the fact of ownership of the vehicle.

(12) The next point for consideration is whether the vehicle was being used in connection with the business of the Railway. It was contended that it could only be said to be so used if it was used for the transport of passengers or goods. The business of a Railway is to carry goods and passengers. For the performance of that business it must employ a staff and it is entitled to realise charges. Money realised from passengers or the consignors of goods must be kept in a place of security and money must be conveyed to places where payment has to be made to the servants of the Railway.

The conveying of money to the Bank from the station or other place where it is collected and from the Bank to the place where it is to be paid is ancillary to the business of the Railway and the vehicle used as a conveyance for these purposes is used, if not for the business of a Railway, at least "'in connection' with the business of a Railway". The exemption from the necessity of taking a permit contained in S. 42(1) is therefore, not applicable to the vehicle in dispute.

(13) The last contention is that the vehicle in question is not a "transport vehicle" and that consequently there was no necessity for anyone to take out a permit. In this connection reliance was first of all placed upon sub-s. (2) of S. 42. That sub-section does not assist us in determining what a transport vehicle is; it only lays rules down for determining whether a vehicle which is a transport vehicle is used for the carriage of goods for hire or reward.

Sub-section (1) of S. 42 requires a permit to be taken for every transport vehicle and not only for those which are used for the carriage of goods for hire or reward. Sub-section (2) is, therefore, not relevant to the determination of the question which we are called upon to determine.

(14) Transport vehicle is defined in S. 2 (33) as follows:

" 'Transport vehicle' means a public service vehicle, a goods vehicle, a locomotive or a tractor other than a locomotive or tractor used solely for agricultural purposes."

(15) Admittedly the motor vehicle in question is not a locomotive or tractor or a public service vehicle as defined in S. 2 (14), 2 (30) and 2 (25) of the Act. Is it then a goods vehicle? A goods vehicle is defined in S. 2(8) as follows:

" 'Goods Vehicle' means any motor vehicle constructed or adapted for use for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers."

(16) It has, therefore, to be seen whether as a fact the vehicle is "constructed or adapted for use for the carriage of goods;" it is not necessary that it should actually be used for that purpose. The first point to notice is that this question of fact was not raised in any of the Courts below and it is taken for the first time in the revision before us. It has, therefore, to be ascertained whether there is any evidence upon which a finding can be based.

(17) P. W. 1 Sub-Inspector Quraishi, P. W. 2 Head Constable Akbar Ali and D. W. 1 Ram Sundar all call the vehicle a truck. In Ex. D-3, a letter from the office of the Divisional Superintendent to the Regional Transport Officer, Lucknow thus describes the "truck":

"U. S. J. 3125 (Cash lorry). Carries Railway earnings from Railway Station to Imperial Bank and vice versa....."

(18) This description is inconclusive because a truck may or may not "be constructed or adapted for the carriage of goods." What is, however, of great significance is the admission of the Railway Authorities and the statement of D. W. 1 Ram Sundar Pandey, a motor mechanic of the Road Transport of the Northern Railway that a fitness certificate used to be taken out for this vehicle.

Section 38 of the Motor Vehicles Act provides for the necessity of taking out a fitness certificate for "Transport Vehicles" only. From this evidence and on these facts the case of the Railway Authorities was that although the truck in question was a transport vehicle requiring a fitness certificate, it was exempt from the requirements of S. 42 (1) of the Act because it was a vehicle belonging to the Central Government not used in connection with the business of a Railway. There is thus sufficient material to establish that the truck in question is a "Transport Vehicle". It, therefore, required both a permit and the fitness certificate.

(19) The correspondence on the record establishes that the Railway Authorities were labouring under a bona fide mistake as to the need of a permit — a mistake which was at one time shared even by the Transport Authorities. The learned Additional Sessions Judge, therefore, acted rightly in giving only a warning.

(20) The conviction and the sentence in respect of the charge under S. 38/112 of the Motor Vehicles Act must be upheld. The evidence of D. W. 1 Ram Sundar Pandey shows that the Railway Authorities applied at the last minute for a renewal of the certificate. Under Rule 28 (d) of the Motor Vehicles Act Rules, they ought to have applied one month earlier. D. W. 1 admits that it takes about an hour to test the vehicle before a certificate is issued. He also states that on each occasion when he went to obtain a certificate there were other vehicles there being tested.

It is in order to obviate difficulties of this kind that a salutary rule is laid down that an application for the renewal of fitness certificate must be made a month in advance and then the vehicle must be produced at the date and time fixed for its inspection. The Railway Authorities chose to ignore this rule. The conviction was accordingly correct and must be upheld. In the circumstances we see no reason to reduce the fine.

(21) This application is accordingly dismissed.

(22) Leave to appeal is refused.

H.G.P. Application dismissed.

***AIR 1955 ALL 620 (V 42 C 180 Nov.)**

LUCKNOW BENCH — KIDWAI AND A. N. MULLA JJ. (24-3-1955)

The State, Complainant -Appellant v. Rasool and others, Accused-Respondents.

Criminal Appeal No. 576 of 1953, against order of 1st Addl. S. J., Unnao, D/- 8-4-1953.

(a) Criminal P. C. (1898), Ss. 236 and 237 — Appplicability.

Sections 236 and 237, Criminal P. C., are really meant to apply to that type of cases where there is no doubt about the facts alleged but there is a doubt as to the applicability of any particular law against the proved set of facts; in other words they can be acted upon only where the same facts raise a doubt in the mind of a Court whether they constitute one offence or some other offence. They obviously do not apply to those cases where a different set of facts are to be given prominence for coming to a conclusion that a particular offence was committed.

Sections 236 and 237, Criminal P. C., can only be used where it can be held that the accused was not prejudiced by his conviction under a section for which he was not charged. Where the accused has been prejudiced or can be prejudiced, a conviction with the help of Ss. 236 and 237, Criminal P. C., cannot be maintained or upheld: AIR 1945 All 81, Approved; AIR 1952 SC 105, and AIR 1952 All 878, Distinguished.

(Paras 5 and 6)

Anno: AIR Com., Cr. P. C., S. 236 N. 1.

(b) Criminal P. C. (1898), S. 222 — Contents of charge.

A charge must contain those particulars which give the accused an idea of the case which he has

to meet. It may not contain elaborate details but there should be no doubt left in the mind of an accused person as to what is the case against him and what allegations he has to meet. (Para 6)

Anno: AIR Com., Cr. P. C., S. 222, N. 1.

CASES REFERRED: Paras

(A) (V32) AIR 1945 All 81: 46 Cri LJ 750 7
(B) (V39) AIR 1952 SC 105 : 1952 All LJ 268: 1952 Cri LJ 644 (SC) 7
(C) (V39) AIR 1952 All 878: 1952 All LJ 685: 1952 Cri LJ 1551 7

Asst. Addl. Govt. Advocate, for the State; Manik Chand Jain, for Respondents.

MULLA J.:

One Mohammad Urooj, a resident of Kanpur, owned and managed a tenanery on Kundan Road which was on the road between Unnao and Kanpur. He purchased a large number of goat hides from Gul Mohammad and Brothers of Kanpur. These hides were known by the name of "Patna Tayari" hides. About 8 or 9 days after these hides came to his tannery theft was committed in the tannery buildings between the night of 13 and 14-12-1951 and 389 hides were stolen. Mohammed Urooj made a report about this theft on the 15-12-1951.

No names were given in this report. The police registered a case under S. 380, I. P. C., but did not succeed in tracing the culprits. Sub-Inspector Shaukat Husain was in charge of the investigation. He was about to file a final report when Mohammad Urooj approached one Noor Mohammad, P. W. 3, and tried to trace the stolen hides through him. Before the final report could be accepted, the investigation was taken away from Sub-Inspector Shaukat Husain by the Station Officer Sri Salik Ram, and on 8-1-1952 he recovered 388 hides from shop No. 97/9 on Kayasthana Road, Kanpur which belonged to one Abdul Rahman.

This recovery took place at about 10 P. M. When this recovery was made, Rasul, Abdul Rahman, Ali Husain, Phuddi and Abdul Razzaq were present in the shop of Abdul Rahman. These hides were subsequently put up for identification, and Mohammad Urooj and other employees of his tannery identified these hides as the hides which were stolen on the night between the 13 and 14-12-1951. It was urged that two other persons were also present in the shop of Abdul Rahman when these hides were recovered but they ran away before they could be arrested.

These two persons were, however, recognised, and they were Ghafoor and Salar, the brothers of Rasul. They were also subsequently arrested, and the police prosecuted all the seven persons under S. 380, I. P. C.

(2) This case was heard by a Magistrate of Unnao but when the time came for framing the charge, he thought that instead of S. 380, I. P. C., the case proved against the accused person fell under S. 411, I. .P C. He, therefore, framed a charge against all the seven accused persons under S. 411, I. P. C. When the case became ripe for decision, the trial court again changed its opinion and came to the conclusion that S. 411, I. P. C., applied only to the case of Abdul Rahman but the cases of the other accused persons fell under S. 414, I. P. C.

He thereupon convicted Abdul Rahman under S. 411, I. P. C., and Rasul, Abdul Razzaq and Phuddi under S. 414, I. P. C. The other three accused persons were acquitted. The Court purported to act under the provisions of Ss. 236 and 237, Criminal P. C.

(3) All the convicted persons went up in appeal, and the Sessions Judge of Unnao rejected the appeal of Abdul Rahman but accepted the apeals of Abdul Razzaq, Phuddi and Rasul. The appellate Court found that the facts of the case believed by the trial Court did not constitute an offence under S. 414, I. P. C., and therefore acquitted these appellants. Aggrieved by this order the State has filed the appeal against the three persons, namely Rasul, Phuddi and Razzaq.

(4) The main point that was raised before us in this appeal was that the evidence on the record clearly established a case under S. 414, I. P. C., against Rasul, and the trial Court was fully justified in convicting him under that section by using the provision of Ss. 236 and 237, Criminal P. C. The appeal against the other two appellants, namely Razzaq and Phuddi was not pressed, and in our opinion rightly not pressed. The evidence against these two appellants did not constitute an offence at all and this was conceded by the Counsel for the State.

(5) Sections 236 and 237, Criminal P. C., are really meant to apply to that type of cases where there is no doubt about the facts alleged but there is a doubt as to the applicability of any particular law against the proved set of facts: in other words they can be acted upon only where the same facts raise a doubt in the mind of a court whether they constitute one offence or some other offence.

They obviously do not apply to those cases where a different set of facts are to be given prominence for coming to a conclusion that a particular offence was committed. Apart from this a conviction arrived at under S. 237, Criminal P. C., can only be maintained and upheld if the Court is satisfied that no prejudice was caused to an accused person and he had a full opportunity of meeting the allegations against him.

In our opinion the facts of this case do not disclose that a proper discretion was exercised by the trial Court when it convicted the accused persons of an offence under S. 414, I. P. C., although they were charged only for an offence under S. 411, I. P. C. The three links as brought out from evidence and on the basis of which a charge under S. 414, I. P. C., is made out against Rasul are the following:

(1) Noor Mohammad deposed that Rasul along with another person came to him with five hides and tried to persuade Noor Mohammad to purchase these hides at a reduced price.

(2) Noor Mohammad was taken to the shop of Abdul Rahman by Rasul and several others; and

(3) When the hides were recovered from the shop of Abdul Rahman, Rasul was counting these hides and putting them in bags.

(6) From a recital of the case given above it is clear that the accused should have been given an opportunity to meet this case. Rasul was examined by the trial Court but we find that no question was put to him about his counting the hides and putting them in the bags. The decision of the trial Court, however, clearly shows that he has used this circumstance to come to the conclusion that Rasul was guilty under S. 414, I. P. C. We, therefore, find that Rasul was not given an opportunity to meet the case against him. No doubt questions relating to the other two links were put to him but the main question put to Rasul was:

"Is it correct that on 8-1-1952 at about 10-30 P. M. you and other persons took Noor Mohammad to the shop of Abdul Rahman which is on Kayasthana Road in Kanpur and out of his shop from your possession were recovered 388 hides

which were all stolen from Mohammad Urooj's Tannery?"

From a reading of this question it is clear that the charge against Rasul was that he was in possession of these stolen hides and not that he assisted the disposal of these stolen hides. The charge framed by the trial Court also shows the same thing. It runs as follows:

"That you on or about 8-1-1952 at about 10-30 P. M. in Mohalla Kaisthana Road, police station Colonelganj, Kanpur in the shop of Abdul Rahman dishonestly retained stolen 388 hides belonging to Mohammad Urooj knowing or having reason to believe the same to be stolen property and thereby committed an offence punishable under S. 411, I. P. C."

It is clear from this charge also that no inkling was given to Rasul that he was going to be convicted for assisting the disposal of these hides. The Counsel for the State contested that it is not necessary to give the details of the facts constituting an offence in the charge sheet framed by a Magistrate. In our opinion this contention is not sound at least so far as the circumstances of this case are concerned.

A charge must contain those particulars which give the accused an idea of the case which he has to meet. It may not contain elaborate details but there should be no doubt left in the mind of an accused person as to what is the case against him and what allegations he has to meet. The charge framed in this case did not fulfil these conditions and is, therefore, not a proper charge within the meaning of S. 222, Cr. P. C.

It does not contain such particulars which would give notice to the accused that he has to meet the accusation of assisting the disposal of these stolen hides. In our opinion Ss. 236 and 237, Cr. P. C. can only be used where it can be held that the accused was not prejudiced by his conviction under a section for which he was not charged.

Where the accused has been prejudiced or can be prejudiced, a conviction with the help of Ss. 236 and 237, Cr. P. C. cannot be maintained or upheld. Under such circumstances the proper course for the trial Court is to amend the charge under S. 227, Cr. P. C. and then explain it to the accused so that he may be in position to defend himself.

(7) There is a decision of the Allahabad High Court reported in — 'Makkhan v. Emperor,' AIR 1945 All 81 (A), in which the learned Judge observed:

"The whole object of framing a charge is to enable the defence to concentrate its attention on the case that it has to meet, and if the charge is framed in such a vague manner that the necessary ingredients of the offence with which the accused is convicted are not brought out in the charge, then the charge is defective."

We agree with the view expressed above, and in our opinion the charge framed in this case cannot by any means be said to cover the offence for which the accused was ultimately convicted. The Counsel for the State has referred two decisions to us. The first is reported in — 'Bejoy Chand v. State of West Bengal.' AIR 1952 SC 105 (B). This is a Supreme Court decision in which it was held that:

"If an accused was charged under S. 307, I.P. C.; he can be convicted under S. 326, I. P. C. even though no charge was framed against the accused under latter section."

In our opinion this decision is not applicable to the circumstances of this case. No one disputes the proposition that a person can be convicted of an offence although not charged with it under the provisions of Ss. 236 and 237, Cr. P. C. What is disputed is whether a person can be convicted without being given a proper opportunity of defending himself; in other words Ss. 236 and 237, Cr. P. C. are not applicable to those cases where a different set of facts is to be alleged against an accused person for securing his conviction.

They are applicable only to those cases where one set of facts is presented before a Court and the only question in doubt is as to which offence is applicable to that set of facts.

The second decision cited by the Counsel for the State is also reported in — 'Ram Prasad v. State' AIR 1952 All 878 (C).

This is a single Judge decision of the Allahabad High Court in which it was held that the omission to charge an accused person for an unlawful assembly will not vitiate the charge as a clear indication was given by mentioning S. 149 in the charge. In our opinion this case also has no application to the circumstances of this case.

It was clearly held in that case that the accused was not prejudiced by this omission while we have observed above that the accused was clearly prejudiced in this case. We, therefore, find that this case is not covered by the provisions of Ss. 236 and 237, Cr. P. C. and the conviction of Rasul cannot be maintained. If the trial Court felt that there was evidence to convict Rasul under S. 414, I. P. C. it should have amended the charge under S. 227, Cr. P. C. at that stage before pronouncing the judgment. At this stage it is not desirable to reopen the whole case again when the evidence against Rasul is also not free from doubt. We, therefore, dismiss this appeal. The opposite-parties are on bail. Their bail bonds are cancelled and they need not surrender.

D.S.P. Appeal dismissed.

°AIR 1955 ALL 622 (V 42 C 181 Nov.)

AGARWALA AND OAK JJ. (15-4-1955)

Gaya Singh and another, Defendants-Applicants v. Mst. Ram Piari and another, Opposite Parties.

Civil Revn. No. 1314 of 1951, from decision of Civil J., Gyanpur, D/- 2-6-1951.

Civil P. C. (1908), S. 152 — Mistake in decree passed by Court in former Benaras State — Decree merged in final decree restored by Judicial Committee of that State — Merger of State in Uttar Pradesh — No successor Court existing — No power to High Court to entertain any proceeding arising from decision of Judicial Committee — Application to amend the decree in such circumstances will lie to Court which has power to execute the decree — AIR 1951 All 234 (FB), Ref. — 32 All 295 (PC), Disting. (Paras 7, 8)

Anno: AIR Com., C. P. C., S. 152, N. 9 Pts. 10 to 12.

CASES REFERRED: Paras

(A) (V38) AIR 1951 All 234: 1951 All LJ 303 (FB) 3

(B) ('10) 7 All LJ 507 : 32 All 295 (PC) 9

P. M. Varma, for Applicants; N. P. Asthana, for Opposite Parties.

AGARWALA J.:

This is an application in revision against an order amending a decree passed by the Judicial Committee of the Banaras State.

2. The plaintiffs-opposite-parties sued for possession over plot No. 381 comprising 1 bigha 6 biswas in area, situated in village Sarai Jagdish, as well as over certain other plots situated in village

Birnai. The suit was decreed by an order dated 18-2-1946, by the Civil Judge of Gyanpur in the Banaras State.

By some error the decree did not mention plot No. 381 at all, and mentioned the other plots which were situated in Birnai as being situated in Sarai Jagdish. There was an appeal against the decree, and the Chief Judge of the Banaras State Chief Court allowed the appeal and set aside the decree; but this order of the Chief Judge of Banaras State Chief Court was upset by the Judicial Committee of the Benaras State and the trial court's decree was restored. Nobody noticed the error in the decree during all this time.

3. Then in 1949, the Benaras State was merged in the province of Uttar Pradesh and, under the Banaras State (Abolition of Privy Council and Chief Court) Order of 1949, the Judicial Committee of the Banaras State was abolished as also the Chief Court of Banaras, and certain provisions regarding cases pending in the Judicial Committee were made in the Order.

They were to stand removed to this Court. A Full Bench decision of this Court reported in Ram Sarup v. Mahadeo Pathak AIR 1951 All 234 (A) interpreted this Order and held that the High Court of Uttar Pradesh was not empowered to entertain fresh appeals and other proceedings arising out of the decision of the Chief Court or the Judicial Committee, and that the order related only to proceedings pending on 30-11-1949.

4. The plaintiffs discovered the mistake in the decree on 12-3-1950. They made an application to the Court of Civil Judge, Gyanpur for an amendment of the decree. That court amended the decree on the ground that it was a mere clerical error apparent on the face of the record, and against that order the defendants have come up in revision to this Court, and their main plea is that the court below had no jurisdiction whatsoever to amend the decree passed by the Judicial Committee of the former Banaras State.

5. As the final order passed in the case was of the Judicial Committee of the Banaras State, the trial court's decree merged in the decree of the Judicial Committee, and it would be that court which could have had jurisdiction to amend the decree if that court were in existence. That court has been abolished without a successor.

6. As we have already observed, under the Full Bench ruling quoted above, this Court has no jurisdiction to entertain any application for the amendment of the decree of the Judicial Committee. The question in these circumstances is; which court has jurisdiction to amend the decree?

7. The decree is executable. It is not alleged that it is not. But it contains an obvious clerical error. The Court which had passed the decree has been abolished and, in these circumstances, it appears to be in accordance with good conscience and natural justice that the court which will be called upon to execute the decree should be able to amend it and to execute it as it should be executed.

8. No doubt, ordinarily, an execution court has no jurisdiction to amend a decree; it must execute the decree as it finds it. This principle however, cannot be applied to the circumstances of the present case, because to do so will result in injustice. Courts of law exist for doing justice and not for perpetrating injustice. Assuming, however, that the lower court had no jurisdiction to amend the decree, we are of opinion that since substantial justice has been done, we are not bound to interfere with the order of the court below.

9. Learned counsel has, however, brought to our notice a decision of their Lordships of the Privy Council in the case of Brij Narain v. Tejbal Bikram Bahadur, 7 All LJ 507 (B) in which the Privy Council laid down firstly, that the lower court had no jurisdiction to amend the decree of a higher court and, secondly, that where this has been done by the lower court without jurisdiction, the High Court should not allow the order which was passed without jurisdiction to stand, and interference in revision was called for.

In that case it was obvious that there was in existence another court which could have amended the decree, and it was in those circumstances that the Privy Council held that the order of the court below which was without jurisdiction should not be allowed to stand. In the present case, however, the court which could have amended the decree has been abolished, and there does not appear to be any court, other than the execution court, which can amend the decree. We are of opinion that the Privy Council ruling cited above is not applicable to the circumstances of the present case.

10. We, therefore, dismiss this application but in the circumstances of the case we make no order as to costs.

V.S.B. Revision dismissed.

AIR 1955 ALL 623 (V 42 C 182 Nov.)

M. L. CHATURVEDI J. (22-11-1954)

Shital Prasad and others, Applicants v. Deputy Accountant General (S. R.) Accountant General Office, Allahabad and others, Opposite Parteis.

Misc. Writs Nos. 472 and 703 of 1952.

Government Servants Conduct Rules, R. 23 — Infringement.

The mere formation of a Union with outsider as some of its office bearers cannot be said to be an activity tending to excite disaffection against the Government or to embarrass it or to produce feelings of enmity or disturbance of public peace. Even if these outsiders belong to a particular political party, it does not necessarily follow that the Union will indulge in some such subversive activities or that the Union or its members will assist any political party. (Para 3)

If the employees or the Union do indulge in some such activity a charge may be framed showing actually what that activity is, and the Government can then proceed against the employees in the manner provided by the rules. (Para 3)

CASE REFERRED: Para

(A) (V39) AIR 1952 Mad 253 : ILR (1953) Mad 57 3

S. N. Misra, for Applicant; Standing Counsel, for Opposite Parties.

ORDER: These are two connected petitions filed under Art. 226 of the Constitution. The petitioners are employed as class IV employees in the office of the Accountant General, Uttar Pradesh, Allahabad. They formed a Union known as the "Fourth Class Employees Union" and they selected as their office bearers some persons who were not employed in the office of the Accountant-General. The Deputy Accountant General took exception to the formation of this Union and on 16-9-1952 he issued notices to some of the employees in class IV including the petitioners. The notices run as follows:

"It has been explained to you that you cannot be a member of a Trade Union. You are hereby directed to resign from such a union and inform the undersigned of your having done it within a couple of days."

The petitioners did not inform the Deputy Accountant General that they had resigned from the Union, and on 19-9-1952 he issued further notices calling upon the petitioners to answer the charges mentioned in the document on or before 29-9-1952. They were also asked to show cause why severe disciplinary action should not be taken against them. The charge against the petitioners is:

"Under R. 23, Government Servants Conduct Rules, 'no Government Servant shall take part in, subscribe in aid of, assist in any way, any political movement in India or relating to Indian affairs.' The expression 'Political movement includes any movement or activities tending directly, or indirectly, to excite disaffection against or to embarrass, the Government as by law established. A movement sponsored by 'Outsiders' to organise Government Servants into a Union for any purpose is a movement tending directly or indirectly to excite disaffection against or embarrass Government. You have joined one such, which has been called a Union of Class IV Government Servants, of which the President and the Secretary are outsiders. You have, therefore, infringed an important Government Servants' Conduct Rule." The petition No. 472 of 1952 was filed on 24-9-1952 and petition No. 703 of 1952 was filed on 22-12-1952.

(2) In the affidavit filed along with petition No. 472 of 1952 it has been stated that on account of need for mutual help and social, economic and cultural uplift to 4th Class Employees' a Union was resolved to be formed. Paragraph 5 gives the aims and objects of this Union and the prayer that is contained in the petition is that a writ of mandamus be issued against the respondents directing them to withdraw the charge sheet and the notices issued against the petitioners and other members of the Union, and to further direct the respondents not to interfere with the petitioners' right to form, organise and join their Union.

It is also prayed that the charge sheet framed against the petitioners be quashed. In the counter affidavit filed on behalf of the respondents 1 and 2 it has been stated in para. 3 that there was no objection by the respondents to the petitioners' formation of a Union and the objection was only to the effect that the Union was sponsored by outsiders and persons not in the employment of the Government in the Accountant General's office.

It is admitted that warning was given to the petitioners that they would be infringing the Government Servants Conduct Rules if they did anything in contravention of R. 23, and they were further told that a movement sponsored by outsiders with outsiders at its office bearers was considered a movement tending or likely to embarrass the Government and the working of the department. A large number of employees assured the respondents that they were not connected with the Union. It is stated in para 12 that no office bearer of the Union was terrorised, but a charge-sheet was issued on the ground that a number of class IV Government Servants had been guilty of infringing the Government Servants Conduct Rules and they were required to furnish an explanation to the charges mentioned in the document.

There is no assertion anywhere that this Union has been guilty of conducting any movement or activity tending directly or indirectly to excite disaffection against, or to embarrass the Government as by law established, or to promote feelings of hatred or enmity between different classes of His Majesty's subjects, or to disturb the peace.

The position taken up by the respondents as shown by the charge-sheet is that the very act of joining a union or a movement sponsored by outsiders is a movement tending directly or indirectly to excite disaffection against or to embarrass the Government. The charge framed against the petitioners was that they had infringed R. 23(i), Government Servants Conduct Rules and the relevant portion of that rule is quoted in the notice which I have mentioned above.

(3) The rule really is to the effect that a Government servant shall not take part in, subscribe to or assist in any way any political movement in India or a movement which relates to Indian affairs. An explanation is added saying that the expression "political movement" includes any movement or activities tending directly or indirectly to excite disaffection against, or to embarrass the Government as by law established, or to promote feeling of hatred or enmity between different classes of His Majesty's subjects, or to disturb the peace.

The rule nowhere says that no Union of Government Servants as such should have outsiders as its office bearers and the mere fact that the Union has some outsiders as its office bearers cannot possibly be said to infringe R. 23 mentioned above. The infringement of the rule can only come in if the Union resorts to the activities which are prohibited in the rule read with the explanation.

There is no allegation in the counter affidavit anywhere that this Union indulged in any such activity. The charge, on the other hand, says that a movement sponsored by outsiders to organise Government Servants into a Union for any purpose, is a movement tending directly or indirectly to excite disaffection against or to embarrass the Government. This assertion is not justified by anything contained in the rule or the explanation to the rule.

If this were the intention, the rule could have easily contained a prohibition against the Government servants joining Unions of which the office bearers were outsiders. In my opinion, the charge framed does not make out any case against the petitioners of having infringed R. 23, Government Servants Conduct Rules.

The mere formation of a Union with outsider as some of its office bearers cannot be said to be an activity tending to excite disaffection against the Government or to embarrass it or to produce feelings of enmity or disturbances of public peace. Even if these outsiders belong to a particular political party, it does not necessarily follow that the Union will indulge in some such subversive activities or that the Union or its members will assist any political party.

If the employees or the Union do indulge in some such activity a charge may be framed showing actually what that activity is, and the respondents can then proceed against the employees in the manner provided by the rules. The charge as it has been framed does not make out a case against the petitioners of any infringement of R. 23. The only fact it asserts is that the petitioners have joined the Union sponsored by outsiders, but that by itself, in my opinion, cannot be said to be infringement of the rule and I am, therefore, constrained to quash these charges.

The learned counsel for the petitioner referred to a case reported in — 'Ramakrishnaiah v. President District Board Nellore', AIR 1952 Mad 253 (A), but the point that arose in that case does not arise in the instant case. Nor is it necessary to consider the point that R. 23(1). Government Servant Conduct Rules is inconsistent with the provisions of Art. 19(1)(c) of the Constitution.

(4) I consequently allow these petitions and quash the charges framed against the petitioners. But in view of all the circumstances of the case, I direct the parties to bear their own costs.

D.H.Z. Petitions allowed.

°AIR 1955 ALL 625 (V 42 C 183 Nov.)

AGARWALA AND SAHAI JJ. (7-3-1955)

Sahu Jagdish Prasad, Appellant v. Pandit Shreedharpant and others, Respondents.

First Appeal No. 347 of 1946, against decree of Civil Judge, Bareilly, D/- 30-4-1946.

Hindu Law — Widow — Alienation — Benefit of estate — Acquisition of property in lieu of debts and resale.

A Hindu widow is not a mere agent or trustee of the estate which she is bound to preserve for the benefit of the reversioners. She has wide powers because her status is that of an owner of the property inherited by her subject to certain restrictions on alienation and subject to its devolving upon he next heir upon her death. The extent of the power of alienation which she possesses is also well defined. This power is analogous to that of a manager of an estate.

This power can be exercised in case of need or for the benefit of the estate. She is the best person to decide as to how she will manage the property as a prudent owner. If she decides that the debts due to the estate may be realised in a particular fashion which is not detrimental to the estate she is at perfect liberty to do so. If she finds that a debtor to the estate cannot pay the debt in cash she is at liberty to recover it in kind or in property with liberty to convert the goods or property thus acquired into cash. This acquisition of property in lieu of debts and its conversion into cash in a manner that no loss is incurred by the estate must be deemed to be within the powers of the widow and the re-sale of the property in this manner must, in these circumstances, be held to be a transaction for the benefit of the estate. AIR 1916 PC 117 and 6 Moo Ind App 393 (PC), Ref. (Para 8)

CASES REFERRED: Paras

(A) (V3) AIR 1916 PC 117 : 43 Ind App 207 (PC) 8

(B) (1854-57) 6 Moo Ind App 393 : 18 Suth WR 81 FN (PC) 8

V. D. Bhargava, for Appellant; N. D. Pant and G. S. Pathak, for Respondents.

AGARWALA J.:

This is a defendant's appeal arising out of a suit for possession of certain property. The plaintiffs in the action which has given rise to this appeal claim to be the reversioners of one Ganga Prasad who died as long ago as the year 1875 as a minor without any issue. His successor was his mother, Shrimati Hardei. Hardei died in 1933. The reversioners brought the suit within twelve years of her death for the recovery of the estate of Ganga Prasad.

They impleaded the transferees of the estate also in the suit. In this appeal we are concerned with one of the transferees namely, Sahu Jagdish Prasad, arrayed as defendant 14.

(2) Sahu Jagdish Prasad is in possession of the property of village Bhagwantpur. This property was not the property of Ganga Prasad. It had been acquired by Shrimati Hardei from certain debtors of Ganga Prasad, partly in lieu of Ganga Prasad's debts and partly in lieu of some money which was the 'Stridhan' property of Shrimati Hardei. According to the plaintiff-respondents the property was acquired by Smt. Hardei as an accretion to the estate of Ganga Prasad and she could not transfer it without legal necessity, which according to them, did not exist.

The defence of the suit, so far as Sahu Jagdish Prasad is concerned, was, firstly, that the property in its entirety was the self-acquired property of Smt. Hardei and she could, therefore, transfer it as she liked; and, in the second place, that the transfer in favour of the appellant was justified on the ground of legal necessity. The Court below has held that part of the consideration belonged to the estate of Ganga Prasad and there was no necessity for transferring the property.

The sale deed with regard to that portion of the estate has been declared to be void, and a decree for possession with regard to that portion has been passed. With regard to the remaining portion it has been held that it was purchased by the 'Stridhan' money of Smt. Hardei and the suit of the plaintiff in respect of that portion has been dismissed. From this judgment the defendant has come up in appeal to this Court and the plaintiff has filed a cross-objection.

(3) In this appeal we have, therefore, to see whether the transfer in favour of the appellant's predecessor-in-interest could be justified on the ground of legal necessity or, as it has been argued as being for the benefit of the estate with regard to the whole of it or any part thereof; and whether, if that was not so, the whole or any part of it could be said to be an accretion to the estate of Ganga Prasad.

(4) The relevant facts relating to the property in dispute are these:

(5) Ganga Prasad's father Bhawani Datta had advanced certain mount to two persons, Devi Singh and Dal Singh, by way of 'zare peshgi' as consideration for a lease of certain property in village Bhagwantpur. Before the expiry of the term of the lease, however, the lessor entered on the property and dispossessed Bhawani Datta who, therefore, become entitled to a refund of the portion of the 'Theka' money outstanding at the time of his dispossession.

Another 'Zare Peshgi' lease was taken by Bhawani Datta in respect of certain property in village Manipur from the aforesaid lessors. He had been deprived of the possession of that property also by the lessors and so the lease money was also due from them. The money was not paid to Bhawani Datta or to Ganga Prasad, and after the death of Ganga Prasad Smt. Hardei filed a suit against Devi Singh and Dal Singh in respect of the Theka money due to the estate in respect of the lease of Bhagwantpur property, and obtained a decree for a sum of Rs. 2757/7/-, that is, for Rs. 1266/- as principal and Rs. 1064/- as interest from 2-1-1871 to 27-1-1879 and Rs. 426/14/6 for costs and interest 'pendente lite' and future.

The decree is dated 27-3-1879. She did not file a suit in respect of the lease money due for the lease of village Manipur.

(6) It appears that Devi Singh and Dal Singh could not pay in cash the decretal amount and the amount due on the Theka of Manipur. They entered into a transaction of sale of their property of village Bhagwantpur with Smt. Hardei. This sale was made on 19-3-1880 in lieu of Rs. 4,000/-. Rs. 2757/7/- were set off as due under the decree, Rs. 442/9/- were set off as due in respect of the Theka of Manipur and Rs. 800/- were paid in cash to the vendors.

Some time later, namely, on 19-7-1881, Smt. Hardei sold the property thus acquired from Devi Singh and Dal Singh to two persons, Tara Singh and Bhikam Singh, at a profit of Rs. 200/- i.e. for a sum of Rs. 4200/-. The appellant, Sahu Jagdish Prasad, is the successor-in-interest of Tara Singh and Bhikam Singh. The court below found that out of the sum of Rs. 4000/- a sum of Rs. 1768/3/- must be considered to be the 'Stridhan' property of Smt. Hardei and the balance of Rs. 2231/13/- as belonging to the estate of Ganga Prasad. In arriving at the figure of Rs. 1768/3/- the learned Judge held that Rs. 426/14/6 due for costs and interest

'pendente lite' and future and the interest from the date of the death of Ganga Prasad upto the date of the suit i.e., 27-1-1879, must be treated as Stridhan of Smt. Hardei. The rest he treated as belonging to the estate of Ganga Prasad.

He calculated the proportion between these two sums and held that 14/25ths of the share of the property in village Bhagwantpur must be held to be the estate of Ganga Prasad and 11/25ths share must be treated as the property of Hardei herself.

(7) It appears to us that the learned Judge failed to look at the matter from the correct perspective. The two transactions; that of the sale by Devi Singh and Dal Singh in favour of Smt. Hardei and of the sale by Smt. Hardei to Tara Singh and Bhikam Singh of the property which had been obtained by Smt. Hardei in lieu of the debts due partly from her husband's estate and partly to herself, appear to us to be part of a single scheme which Smt. Hardei laid out in order to realise the debt due from Devi Singh and Dal Singh who apparently could not pay in cash the amount payable by them.

Smt. Hardei seems to have cosidered it to be the best manner of realising the dues, to take a sale of their property and to re-sell it, and thus to recoup the debt due to the estate or to her in cash. In a transaction of this nature it is not proper to take the later transaction of sale by Smt. Hardei by itself apart from the previous transaction.

(8) A Hindu widow is not a mere agent or trustee of the estate which she is bound to preserve for the benefit of the reversioners. She has wide powers because her status is that of an owner of the property inherited by her subject to certain restrictions on alienation and subject to its devolving upon the next heir upon her death. As the Privy Council observed in Janki Ammal v. Narayanasami Aiyer, AIR 1916 PC 117 (A):

"Her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; so long as she is alive no one has any vested interest in the succession".

The extent of the power of alienation which she possesses is also well defined. This power is analogous to that of a manager of an estate as defined by the Judicial Committee in Hunooman Pershad Pandey v. Musammat Babooee Mundraj Koonwaree, 6 Moo Ind App 393 (PC) (B). This power can be exercised in case of need or for the benefit of the estate. She is the best person to decide as to how she will manage the property as a prudent owner.

If she decides that the debts due to the estate may be realised in a particular fashion which is not detrimental to the estate she is at perfect liberty to do so. If she finds that a debtor to the estate cannot pay the debt in cash she is at liberty to recover it in kind or in property with liberty to convert the goods or property thus acquired into cash. This acquisition of property in lieu of debts and its conversion into cash in a manner that no loss is incurred by the estate must be deemed to be within the powers of the widow and the re-sale of the property in this manner must, in these circumstances, be held to be a transaction for the benefit of the estate. In the present case, she has re-sold the property acquired by her at a profit so that the estate of Ganga Prasad has benefited to the extent of Rs. 200/-. The reversioners have no occasion to complain of the sale made by her of property which she had herself acquired in lieu of debts due to the estate or to her. We have, therefore come to the conclusion that the sale made by Smt. Hardei must be held in its entirety to be for the benefit of the estate, even assuming that the entire money which went to form the consideration of the sale deed was a part of the estate of Ganga Prasad and even if the whole property be treated in the first instance, to be an accretion to the estate of Ganga Prasad.

(9) Mr. N. D. Pant, learned counsel for the respondent, strenuously urged that there was no pressure on the estate which would justify the transfer made by Smt. Hardei in favour of Tara Singh and Bhikam Singh and that it could not be said that this transaction was for the benefit of the estate. He has further contended that the whole of the property must be treated as an accretion to the estate of Ganga Prasad because Smt. Hardei did not make a distinction between her own money and the money belonging to the estate of Ganga Prasad which together formed the consideration for the sale deed executed by Devi Singh and Dal Singh.

We do not think that the transaction in the present case can be looked at from this narrow angle and we find that upon the facts of the present case the transfer in favour of Tara Singh and Bhikam Singh must be held to be an act of prudent management which was for the benefit of the estate.

(10) The appeal, therefore, succeeds and we allow it. The cross-objection fails.

(11) We modify the order of the court below so far as it affects the appellant Sahu Jagdish Prasad and set aside that portion of the decree by which the suit of the reversioners plaintiff-respondents was decreed in respect of 14/25 ths share of the property of village Bhagwantpur and direct that the suit be dismissed in toto with regard to the property.

(12) The cross-objection is dismissed.

(13) The appellant will have his costs of both the appeal and the cross-objection from the respondents.

D.S.P. Appeal allowed.

°AIR 1955 ALL 626 (V 42 C 184 Nov.)

ASTHANA AND ROY JJ. (1-3-1955)

Ballan, Appellant v. The State, Respondent.

Criminal Appeal No. 1520 of 1954, against order and judgment of S. J., Bijnor, D/- 12-11-1954.

(a) Penal Code (1860), S. 304A — Scope and applicability — Acts which are in themselves criminal will not be acts which may be termed as negligent.

Section 304A does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed still, the willful offence does not take the character of rashness, because its consequences have been unfortunate.

Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge of the offender, and placed in their appropriate place in the class of offences of the same character. Where the act is in its nature criminal, S. 304A has no application. (Para 8)

Anno: AIR Man.: Penal Code, S. 304A N. 2.

(b) Penal Code (1860), S. 299 — Scope — Intention of causing death.

Intention of causing death is not the intention of causing the death of any particular person. The first illustration to S. 299 shows that a person can be guilty of culpable homicide of a person whose

death he did not intend. The same may be gathered from illustration (d) to cl. (4) of S. 300. (Para 9)

Anno: AIR Man.: Penal Code, S. 299 N. 3.

(c) Penal Code (1860), S. 301 — Section 301 contains rule deducible from Ss. 299 and 300.

Section 301 declares a rule deducible from Ss. 299 and 300. It states that the quality of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured and not with reference to his intention or knowledge with reference to the person actually killed.

Thus S. 301 clearly makes the culpable homicide murder notwithstanding the fact that there was no intention actually to commit the murder of the deceased particularly. In such a case the accused can be rightly convicted under S. 302. 13 Cr LJ 145 (Mad) and AIR 1917 All 455, Foll. (Para 9)

Anno: AIR Man.: Penal Code, S. 301 N. 1.

CASES REFERRED: Paras

(A) ('12) 13 Cri LJ 145: 13 Ind Cas 833 (Mad) 9
(B) (V4) AIR 1917 All 455: 39 All 161: 17 Cr LJ 505 9

S. C. Khare and Sri Ram Singh Yadav, for Appellant; Sri Ram, Dy. Govt. Advocate, for Respondent.

ROY J.:

This is an appeal by Ballan son of Hashmat Ali aged 27 years, resident of town Nehtore in the district of Bijnor, who has been convicted by the learned Sessions Judge of Bijnor under S. 302, I. P. C. and S. 19(f), Arms Act. He has been sentenced to death under the former section and to one year's rigorous imprisonment under the latter section. Along with the appeal there is the usual reference by the learned Sessions Judge for the confirmation of the sentence of death.

(2) Briefly stated the case for the prosecution was as follows. The appellant was wanted in connection with three dacoities alleged to have been committed by him in village Moosepur, Mangal Khera and Sahanpur Navada. He had been absconding and he could not be arrested by the police in spite of several raids at his house and in spite of proceedings having been taken against him under the provisions of Ss. 87 and 88, Criminal P. C.

On 15-6-1954 subinspector Ram Murti Singh, station officer of police station Nehtore received information that the appellant was present at his house. The sub-inspector arranged a raid consisting of Radhey Shiam head constable, Rajendra Prasad constable and several other constables, and he took along with himself five other persons from the public inclusive of Nanhey and Abdul Salam who were residents of that locality. The house of the appellant was besieged.

Sub-inspector Ram Murti Singh along with head constable Radhey Shiam, constable Rajendra Prasad, and Nanhey Abdul Salam and several others entered the house of the appellant. The appellant was lying on a cot inside the 'kothri' facing west, the 'kothri' having been situate by the side of his inner courtyard. On seeing the raiding party inside the kothri the appellant slipped into a grain-bin which was just near the cot. Sub-inspector Ram Murti Singh asked the appellant to come out of the grain-bin. The accused did not come out: instead he fired a shot with a country-made pistol (Ex. 1) at the police party. Ram Murti Singh, who was standing in the forefront, seeing that he was firing towards the police party ducked and luckily saved himself.

The discharge from that pistol hit constable Rajendra Prasad who was at a short distance from the sub-inspector. He was hit on the upper part of the chest. In agony Rajendra Prasad came out of the 'kothri' and fell down dead in the 'sehan' at a distance of about six feet from the door of the 'kothri'. Ram Murti Singh then fired two shots with his service revolver towards the grain-bin. The appeliant, it is alleged, came out of the grain-bin at that juncture with the country-made pistol in his hand.

Sub-inspector Ram Murti Singh at great risk to himself held the appellant by his hand and grappled with him in order to snatch away the pistol from him. The other members of the raiding party also came to his aid in overpowering the appellant. The appellant and the sub-inspector received certain injuries in that scuffle; the pistol was taken away from the hand of the appellant and he was secured. Sub-inspector Ram Murti Singh at once made a search of the grain-bin and found five .12 bore live cartridges inside it. He prepared recovery list.

A fired cartridge was found in the barrel of the pistol. Sub-inspector Ram Murti Singh noticed marks of blood inside the kothri where constable Rajendra Singh was shot at. He also found a cardboard disk inside the 'kothri' and blood in the 'sehan' where Rajendra Prasad had ultimately fallen down. He sent the accused to the police station together with a written report where a first information report was prepared on its basis.

This report was lodged on the same day at 6.45 p. m. within 45 minutes of the occurrence, the police station having been at a distance of two and a half furlongs from the place of occurrence.

On receiving the register of inquest reports the sub-inspector prepared an inquest report; and the dead body was then sent to the mortuary at Bijnor. The injuries of Ram Murti Singh were examined by Dr. R. P. Gupta, Medical Officer in charge of the dispensary at Nehtore on 15-6-1954 at 9 in the night. He had a contusion on the left ring finger, two abrasions on the back of right middle and a swelling on the whole right thumb. Injury No. 1 was caused by pressure between some hard substances.

Injury No. 4 was caused by striking against some hard substance and injuries Nos. 2 and 3 were caused by tooth-bite. The medical evidence further disclosed that these injuries were caused to Ram Murti Singh exactly at the time when the prosecution alleged that they had been caused.

(3) The post-mortem examination over the dead body of Rajendra Prasad constable was performed by Dr. V. N. Srivastava on 16-6-1954 at 12 in the day. The deceased was a young man of 28 years. The probable time since death at the time of examination was about eighteen hours. He had a contusion 3/4" x 1/4" on the right side of the face one inch above the angle of mandible. He had another contusion 1/2" x 1/4" on the right cheek one inch above injury No. 1.

He had gunshot wounds, nine in number, each measuring 1/3" x 1/4" at the back of neck and right side of upper chest in an area of 5" x 4". The first, third and fifth ribs in the posterior side were fractured. The right lung showed four holes covered with blood clots. In the opinion of the doctor death followed shock and haemorrhage due to gunshot injuries.

(4) On receiving the special report of the case Circle Inspector Hari Singh (P. W. 11) at once proceeded to Nehtore and reached there the same night at about 12 and he took over the investigation of the matter. He inspected the locality, prepared the site-plan and looked into the grain-bin and found a bullet of the service revolver of .38 bore embedded in one side of the grain-bin and

noticed another hole of the same size close to it.

This hole appeared to have been made by the bullet which had passed through and through. He took down the statements of the witnesses on that very night and the matter was ultimately placed in Court after completing the necessary investigation which resulted in a conviction of the appellant in the manner stated above.

(5) The appellant pleaded not guiity to the charge. He denied that he fired any shot at the police party or he was in possession of the country made pistol and the live cartridges. In the Court of the committing Magistrate he refused to make any statement and reserved his plea for the court of Session. In the Court of Session he contended that he did not know whether he was wanted by police in any dacoity case or whether the police had made any raid at his house in his absence.

He pleaded that he had gone away to Pakistan in 1951 and he returned home only two days prior to this occurrence; that on the evening of 15-6-1954 a police raiding party reached his house when he was sitting on a cot in the 'sehan' of his house; that in that party sub-inspector Ram Murti Singh had a double-barrelled gun; that seeing the police party the appellant ran inside his 'kotha' but sub-inspector Ram Murti Singh fired at him with the gun; that the appellant stood by the side of the wall near the door of the 'kotha' and the sub-inspector entered the 'kotha' and peeped behind the grain-bin; that as soon as the sub-inspector looked at the appellant the appellant ran out; that the sub-inspector fired another shot at him with the same gun but he again missed the aim and that shot struck constable Rajendra Prasad who was standing in the 'sehan' near the door of the 'kotha'; that Rajendra Prasad constable died as a result of that shot; that sub-inspector Ram Murti Singh grappled with the appellant with the help of other persons and overpowered the appellant and gave him a beating and that the case had been falsely laid against the appellant with the aid of the prosecution witnesses who belonged to the party of one Abdul Rahim who was antagonistic to the appellant.

(6) In support of the prosecution case twelve witnesses were examined of whom eight were more or less formal in nature and four were eye-witnesses of the occurrence. The eye-witnesses were sub-inspector Ram Murti Singh, head constable Radhey Shiam, Nanhey and Abdul Salam. The appellant produced in his defence his younger brother Ahmad Husain in order to prove the copy of a complaint made by Ahmad Husain against Abdul Rahim and four others regarding a certain robbery.

(7) The fact that constable Rajendra Prasad received gunshot wound and died instantaneously at the spot admits of no doubt whatsoever. This is proved by the evidence of the four eye witnesses; supported by the medical evidence. It is admitted by the appellant himself. The question which we have got to determine is whether Rajendra Prasad was shot at by the appellant, or whether he was hit by the discharge of any gunshot made by sub-inspector Ram Murti Singh.

Before coming to that question it may be stated that the prosecution case was that the appellant was wanted in three dacoity cases and he was a fugitive from law. The police at Nehtore had not been able to arrest him in spite of several raids and in spite of attachment of his property under Ss. 87 and 88, Criminal P. C. The appellant pretended ignorance of these facts in the Court of Session by stating that he had no knowledge of the same. His younger brother Ahmad Husain D. W. 1 clearly admitted that the police raided his house several times to arrest the appellant who had run away and that the police had even made attachment of his property.

Sub-inspector Ali Jan (P. W. 12) who was the station officer of police station Nehtore when those raids and attachment had been made, deposed on oath that Ballan appellant was wanted in three dacoity cases relating to villages Moosepur, Mangal Khera and Sahanpur-Navada and that he had been absconding and he could not be arrested. This witness produced copies of general diary regarding the various attempts which had been made to trace him out during the period from November 1953 to January 1954.

The statement of this witness stood unchallenged and he was not at all cross-examined on the points stated by him. The prosecution case that the appellant was wanted in several dacoity cases and he was absconding and could not be arrested for more than a year was therefore proved beyond the pale of all controversy. It was in the evidence of sub-inspector Ram Murti Singh that on 15-6-1954 he received information regarding the presence of the appellant at his house. He, therefore arranged a raid and with a police party and certain respectable persons of that locality he surrounded the house.

The fact that a raid was made at the appellant's house by the police was admitted even by the appellant himself. The case that was set out in Court found expression in the first information report Ex. P. 6 that had been made by the Sub-Inspector Ram Murti Singh at the police station at the earliest opportunity when he had had no occasion to give it a shape which was something other than reality. In the first information report he stated how the raid had been arranged.

He stated how the party entered inside the house of the appellant. He further stated therein in what position the appellant had been found inside the 'kothri'. He described in detail the manner in which the appellant entered into the grain-bin and from there he shot at the raiding party when the Sub-Inspector had demanded of him to come out and to surrender. The first information report further indicated that at that moment the Sub-Inspector fired from his service revolver hitting the grain-bin at two places.

It indicated further that when the appellant came out from the grain-bin there was a scuffle and in that scuffle the appellant bit the hand of the Sub-Inspector causing him certain injuries. It further stated that the appellant was ultimately secured and that constable Rajendra Prasad met with an instantaneous death and he fell down into the sehan' after he was hit inside the 'kothri'. That story was clearly and consistently supported in evidence by Sub-Inspector Ram Murti Singh, head constable Radhey Shiam and the two witnesses Nanhey and Abdul Salam who were not at all shaken in any manner in their cross-examination.

In fact, there was practically no cross-examination of these witnesses; and the only cross-examination that we find was the suggestion put to them that the Sub-Inspector fired with a 12 bore gun and not with his service revolver and that the appellant was not the first to shoot at the raiding party. These suggestions were emphatically denied by all these four witnesses.

We have examined the evidence of these witnesses with care and caution and we see no reason to disbelieve their testimony. The learned Sessions Judge who had had the advantage of marking the demeanour of the witnesses when they were in the witness-box was completely impressed with the truth of their statements. We see no reason to differ from the view taken by the learned Sessions Judge with regard to these witnesses. The line of

defence taken by the appellant was not supported by any evidence whatsoever. And that line, according to us, was improbable in the extreme. The appellant had admitted that the Sub-Inspector grappled with him and overpowered him with the help of other persons.

If the Sub-Inspector was standing inside the 'kotha' and the accused had run out of the 'kotha', as was contended by him, there could have been no question of the Sub-Inspector's grappling with the accused; for in that event the appellant would have eluded the grasp of the Sub-Inspector and would have been caught by other persons standing outside the 'kotha' and not by the Sub-Inspector himself. The accused's version was, therefore, totally false when he said that the Sub-Inspector at first fired with his gun when the appellant was inside the 'kotha' and there was another shot with the same gun when he ran out of the 'kotha'.

If the Sub-Inspector had resorted to firing with a 12 bore gun at such close range the appellant would not have escaped being hit with the gun. Furthermore, as we have already pointed out, if the version of the appellant were correct, namely, that he eluded the Sub-Inspector and ran out of the 'kotha when the second shot was fired at him, the appellant could not have been caught by the Sub-Inspector and there would not have been a grappling between the Sub-Inspector and the appellant. On the contrary this would have led to his having been caught by others of the raiding party.

We are, therefore, satisfied from the evidence of Sub-Inspector Ram Murti Singh, head constable Radhey Shiam and prosecution witnesses Nanhey and Abdul Salam that the incident took place in the manner and in the sequence alleged by the prosecution.

(8) It has been contended on behalf of the appellant that on the facts found by the learned Sessions Judge a case under S. 302, I. P. C. is not made out and that if the appellant is at all guilty he is guilty under S. 304A, I. P. C. We are not able to agree to this contention of the learned counsel for the appellant. Section 304A does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result. If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge of the offender, and placed in their appropriate place in the class of offences of the same character.

Where the act is in its nature criminal, S. 304A has no application. In order to attract the operation of S. 304A, I. P. C. the argument of learned counsel for the appellant is founded on the basis that the appellant rushed into the grain-bin and when the raiding party came inside the 'kothri' the appellant was not in a position to see where the respective members of the raiding party had taken their stand and from inside the grain-bin he shot at random and, therefore, his act was more in the nature of a negligent act than in the nature of a criminal act.

We have already indicated that acts which are in themselves criminal, as in the present case they were, would not be acts which may be termed as negligent within the four corners of S. 304A, I. P. C. A rash act or a negligent act is primarily an over hasty act and thus opposed to a deliberate act. In the present case the act of the accused was a deliberate act and by no stretch of reasoning can it be said to have been only a negligent or a rash act so as to attract the operation of S. 304-A, I. P. C. alone.

(9) It has next been contended that since the aim taken by the appellant was against the Sub-Inspector when he shot with the pistol and since the Sub-Inspector was not hit but the constable who was standing behind the Sub-Inspector was hit, the act would not be covered by S. 302, I. P. C. and it would be a case where the provisions of S. 301, I. P. C would apply. Before we proceed to examine the provisions of S. 301 we would like to lay down what S. 299, I. P. C., says. That section defines the offence of culpable homicide in the following terms:

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

It may be pointed out that the intention of causing death is not the intention of causing the death of any particular person. The first illustration to S. 299 shows that a person can be guilty of culpable homicide of a person whose death he did not intend. The same may be gathered from illustration (d) to Cl. (4) of S. 300, I. P. C. That illustration says that where A without any excuse fires a loaded cannon into a crowd of persons and kills one of them, A is guilty of murder although he may not have had a premeditated design to kill any particular individual. Section 301, I. P. C. is as follows.

'If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

The scope of this section is clear enough; and that scope was laid down by the Madras High Court in — 'Public Prosecutor v. Suryanarayana Moorty', 13 Cr LJ 145 (Mad) (A). There the accused, with the intention of killing A (on whose life he had effected large insurances, and in order to obtain the sums for which he was insured) gave him some sweet-meat in which a poison containing arsenic and mercury in soluble form had been mixed.

A ate a portion of the sweetmeat and threw the rest away. One R the daughter of the accused's brother-in-law, aged 8 or 9 years, picked up the sweetmeat without the knowledge of the accused and até it and gave some to another little child who also ate it. The two children died from the effect of the poison. But A though the poison severely affected him eventually recovered. The accused was sentenced to transportation for life by the Sessions Judge for having attempted to murder A, but he was acquitted on the count of murdering the two children.

On appeal against the acquittal, Benson and Abdur Rahim JJ. held that the accused was guilty of murder. Benson J. observed that:

"The section does not enact any rule not deducible from the two preceding sections, (namely, Ss. 299 and 300, I. P. C.), but it declares in plain language an important rule deducible, as we have seen, from those sections, just as an explanation to a section does. The rule could not well be stated as an explanation to either S. 299 or S. 300 as it

relates to both. It was, therefore, most convenient to state the rule by means of a fresh section.

The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill, a rule which though it does not lie on the surface of S. 299 yet is, as we have seen, deducible from the generality of the words "causes death" and from the illustration to the section; and the rule then goes on to state that the quality of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of Ss. 299 and 300 though not, perhaps, lying on their very surface."

The same view found favour with Abdur Rahim J. Abdur Rahim J. further observed:

"Obviously, it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result, as it often happens, is due to a series of causes. We have to consider in each case the relative value and efficiency of the different causes in producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause.

But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intention of the act of a voluntary agent must necessarily absolve the person between whose act and result it intervenes."

This majority view of the Madras case was approved of by a Division Bench of this Court in — 'Mt. Jeoni v. Emperor', AIR 1917 All 455 (B). Taking the facts of the present case we have no doubt in our minds that the accused was guilty of culpable homicide of constable Rajendra Prasad having regard to the definition of that offence in S. 299, and we think that S. 301 clearly makes the culpable homicide murder notwithstanding the fact that there was no intention actually to commit the murder of Rajendra Prasad particularly. The appellant in our opinion was rightly convicted under S. 302, I. P. C.

(10) With regard to the sentence which should be passed upon the accused we can see no extenuating circumstance in the case to merit the lesser penalty provided by S. 302, I. P. C. The appellant was a fugitive from law. He had successfully evaded arrest by the police when he was wanted in three dacoity cases that were hanging against him. He escaped to Pakistan. He returned back to his home.

When the police got information of his presence and raided his house with a view to arrest him he was armed with a country made pistol for which he held no licence. He tried to evade arrest even at this stage and he did not agree to the suggestion set forth by the Sub-Inspector to surrender himself. He shot at the raiding party and hit constable Rajendra Prasad dead. There was no justification for him for that course of conduct. In fact Sub-Inspector Ram Murti Singh exhibited commendable courage and high sense of duty when he at risk to his own life caught hold of him and snatched away the pistol from him. In circumstances such as these death penalty is the only penalty that should be imposed upon the appellant.

(11) We, therefore, dismiss the appeal, confirm the conviction and sentence accept the reference and direct that the sentence of death be carried into execution according to law.

(12) We do not certify it to be a fit case for appeal to the Supreme Court.

V.S.B. Appeal dismissed.

***AIR 1955 ALLAHABAD 630 (V 42 C 185 Nov.)**

AGARWALA AND OAK JJ. (4-4-1955)

Gaya Deen, Appellant v. Mst. Amrauti, Respondent.

Second Appeal No. 672 of 1947, against order of Sm. C. C. J., Allahabad, D/- 21-12-1946.

(a) Hindu Law — Widow — Adverse possession by — Onus — (Evidence Act (1872), Ss. 101 to 103) — (Limitation Act (1908), Arts. 142 and 144).

Where a Hindu widow in a joint Hindu family takes possession over a family property, it is for those who want to assert that her possession was not adverse but in lieu of an arrangement or for consolation, to establish the truth of their assertion. 22 Cal 445 (PC) and 29 Cal 664 (PC), Ref. (Para 10)

Anno: AIR Man., Evi. Act, Ss. 101 to 103 N. 14; AIR Com., Lim. Act, Arts. 142 and 144 N. 19 Pts. 6, 7.

(b) Hindu Law — Widow — Alienation — Nature of estate prescribed — Presumption.

The nature of an estate prescribed by a Hindu widow depends upon the intention with which she takes possession of the property adversely to the true owner. If her intention is that she has an absolute interest in the property, she is prescribing for an absolute estate, which, on her death, would be inherited by her own Stridhan heirs. If, on the other hand, her intention is to take possession of the property as an heir of her husband, she prescribes for a widow's estate and she is making good the property to the estate of her husband which on her death, would go to the heirs of her husband. (Para 12).

The intention must be exhibited by overt acts which may consist of the conduct of the widow as shown in her dealing with the property. Her statements asserting either an absolute estate or widow's estate may be produced in a case, but the court must be satisfied that the widow did in fact make those statements after understanding their nature. (Para 12)

In the absence of any evidence of intention, the question has to be decided on presumption. Where a Hindu widow enters into possession, on the death of her husband, over the property which stood in his name, then, whether the husband was the absolute owner of the property in his own right or was a coparcener in a joint Hindu family, the presumption is that the widow entering into possession enters as the widow of her husband and claims the property as such.

No distinction exists between a case in which the Hindu widow enters into possession of a property absolutely owned by her husband as a separated member of the family or as his self-acquired property, and where she enters on that property when her husband was a member of a joint Hindu family with his coparceners. Case Law reviewed. 1944 All LJ 344, Foll. AIR 1952 All 190, Doubted. (Para 14)

CASES REFERRED: Paras

(A) ('95) 22 Ind App 25: 22 Cal 445 (PC) 10, 15, 16

(B) ('02) 29 Ind App 132: 29 Cal 664 (PC) 10, 12, 15, 18
(C) (V34) AIR 1947 PC 19: 1946 All LJ 441 (PC) 12
(D) (V35) AIR 1948 All 31: 1947 All LJ 228 12
(E) (V11) AIR 1924 All 740 (2): 46 All 769 12, 15, 20
(F) (V33) AIR 1946 Oudh 38: 21 Luck 143 12, 15, 21
(G) (V6) AIR 1919 PC 60: 42 All 152 (PC) 15, 19
(H) (V11) AIR 1924 All 88: 45 All 729 15
(I) (V15) AIR 1928 Pat 220: 7 Pat 163 15, 22
(J) (V36) AIR 1949 All 458: 15, 23
(K) ('44) 1944 All LJ 344 25
(L) (V39) AIR 1952 All 190: 1951 All WR HC 53 26

A. P. Pandey, B. P. Pandey and Baleshwari Pd., for Appellant; Jwala Prasad Bhargava, for Respondent.

AGARWALA J.:

This is a plaintiff's appeal arising out of a suit for possession of a property which was in possession of one Mst. Newasi while she was alive and which she had, during her life-time, transferred by means of a sale deed to the respondent. The facts briefly stated are as follows:

There were three brothers, Debi Prasad, Shiva Prasad and Mahabir, who formed a joint Hindu family. Shiva Prasad died in 1906 leaving Smt. Sambodha as his widow; Mahabir died in 1916 leaving Smt. Newasi as his widow; and Debi Prasad died in 1925 leaving Smt. Tulsa as his widow. As the brothers were all members of a joint Hindu family, on the death of Shiva Prasad the estate passed to Debi Prasad and Mahabir; and on the death of Mahabir, Debi Prasad was the sole surviving coparcener of the property, and in law became the exclusive owner of the property, and the widows had only a claim for maintenance.

The plaintiff-appellant is a collateral of Debi Prasad. On the deaths of Shiva Prasad and Mahabir, however, the names of their widows were entered. Smt. Sambodha's name was entered over one-third of the property and so was the name of Newasi entered over another one-third of the property. Apparently the names of Shiva Prasad, Mahabir and Debi Prasad were entered on the record as owners of the property in equal shares, though no village record has been filed in the case showing the nature of the entry.

(2) After the death of Shiva Prasad and Mahabir, Smt. Sambodha, jointly with Debi Prasad, executed a simply mortgage in favour of Gaya Deen plaintiff-appellant on 24-6-1922. In this deed of mortgage it was stated that they were mortgaging their one-third shares over which they were in possession . On 31-12-1943, after the death of Debi Prasad, Smt. Sambodha transferred her one-third share in the property to the wife of the plaintiff-appellant on the allegation that she was transferring her share which was in her possession.

The necessity recited in the deed of mortgage was the payment of debts and family expenses; while in the deed of sale it was shown as Kharch Khangi, payment of Malguzari and payment of debts.

(3) On 18-1-1944, Newasi made a sale deed of her entire one-third share in favour of the defendant-respondent. In this deed she stated that she was transferring the share in her possession and that the transferee would become absolute owner of the property. It would be observed that neither Smt. Sambodha nor Smt. Newasi claimed absolute title in themselves in respect of the properties which they were transferring.

(4) Smt. Newasi died in 1944,: and soon after her death the appellant filed the present suit for possession over her share of the property on the ground that he was the next reversioner of Mahabir, that the sale deed executed by Smt. Newasi in favour of defendant-respondent was without any legal necessity and, as such, he was entitled to the possession of the property.

(5) The defence of the defendant-respondent was that since Mahabir and his brothers were members of a joint Hindu family, on the death of Mahabir the sole surviving owner was Debi Prasad, and that Smt. Newasi's possession was adverse and was in the nature of a full absolute ownership and that, therefore, she had every right to transfer her property to the defendant. In the alternative it was claimed that even if Smt. Newasi was in possession as a Hindu widow, the sale deed was made by her for legal necessity.

(6) The trial court held that the sale deed was not for legal necessity and that Smt. Newasi's possession was in the capacity of a Hindu widow and that therefore, the transfer was invalid. In the result the suit was decreed.

(7) This decree was reversed by the lower appellate court holding on the above circumstances that Smt. Newasi's possession was in the capacity of an absolute owner of the property and not as a Hindu widow, and that therefore, her transfer could not be questioned by the reversioner of her husband.

(8) In this appeal by the plaintiff it has been strongly urged that the view of law taken by the lower appellate court as to the nature of the estate prescribed by Smt. Newasi was erroneous.

(9) After hearing learned counsel for the parties we have come to the conclusion that the contention of learned counsel for the appellant is correct.

(10) It will be observed that Smt. Newasi took possession of the share which stood in the name of her husband and her possession took effect on the death of her husband. It is true that she had no title to the property because her husband was a member of a joint Hindu family with Devi Prasad on whose death Debi Prasad succeeded to his property as the sole surviving coparcener. Smt. Newasi's possession of the property would, therefore, be adverse unless it was shown that she held it under some mutual arrangement with Debi Prasad.

The trial court held in this case that there was a mutual arrangement, but this was a mere surmise because there was no evidence on record in support of this finding and the lower appellate court did not uphold it. It is well settled that where a Hindu widow in a joint Hindu family takes possession over a family property, it is for those who want to assert that her possession was not adverse but in lieu of an arrangement or for consolation, to establish the truth of their assertion, vide — 'Mt. Lachhan Kunwar v. Anant Singh', 22 Ind App 25 (A); and — 'Sham Koer v. Dah Koer', 29 Ind App 132 (B).

(11) The possession of Mst. Newasi was therefore certainly adverse, but the question, however, is whether she prescribed for a widow's estate merely or for a full absolute ownership.

(12) The nature of an estate prescribed by a Hindu widow depends upon the intention with which she takes possession of the property adversely to the true owner. If her intention is that she has an absolute interest in the property, she is prescribing for an absolute estate, which, on her death, would be inherited by her own Stridhan heirs. If, on the other hand, her intention is to take possession of the property as an heir of her husband, she prescribes

for a widow's estate and she is making good the property to the estate of her husband which, on her death would go to the heirs of her husband.

(See Bhawal Sanyasi's case reported in — 'Bibhabati Devi v. Ramendra Narain', AIR 1947 PC 19 (C), and the case of — 'Budhram Rai v. Banarsi Rai', AIR 1948 All 31 (D). The intention must be exhibited by overt acts which may consist of the conduct of the widow as shown in her dealings with the property. If in dealing with the property she asserts that she is the absolute owner of the property, it will be assumed that she was prescribing for an absolute estate. If, on the other hand, she asserts that she was in possession of the property as an heir of her husband or that she had only a limited estate as a Hindu widow, in that case she would be prescribing only for a widow's estate.

It may be that her statements to any of the above effects may be produced in a case, but the court must be satisfied that the widow did in fact make those statements after understanding their nature. For instance, in the case of '29 Ind App 132 (B)', the Privy Council had occasion to refer to such statements and, on the facts of that case, came to the conclusion that it was not true that the widows knew of those statements or had made them after fully comprehending their effect.

There are cases in which the observations made by the Privy Council in the above case have been relied upon explain away similar statements. For instance, in the case of — 'Kali Charan v. Piari', AIR 1924 All 740 (2) (E); and — 'Udai Pratap Singh v. Narotam Singh', AIR 1946 Oudh 38 (F), such statements were disregarded presumably on the very same grounds on which the Privy Council disregarded them.

(13) In the present case it was urged on behalf of learned counsel for the respondent that the mortgage deed of 1922 and the sale deed of 1943, to which Smt. Sambodha was a party, showed that she was claiming an absolute estate. This is not correct. We have already pointed out that in these two documents the lady did not say that she was claiming an absolute estate. She merely referred to the share in her possession. This is quite consistent with a widow's estate. Further, any statement made by Smt. Sambodha would have no relevancy in determining the nature of the estate prescribed by Smt. Newasi.

Even Newasi did not make any assertion in her life-time excepting in the deed, the validity of which is challenged in this case. Even there she did not assert that she claimed an absolute estate. She no doubt stated that the vendee would acquire an absolute title, but this was quite consistent with a sale for legal necessity by a widow holding a widow's estate. It must, therefore, be held that in the present case there is no evidence of the intention of Smt. Newasi to hold the estate as an absolute owner.

(14) In the absence of any evidence of intention, the question has to be decided on presumption. In our opinion where a Hindu widow enters into possession, on the death of her husband, over the property which stood in his name, then, whether the husband was the absolute owner of the property in his own right or was a coparcener in a joint Hindu family, the presumption is that the widow entering into possession enters as the widow of her husband and claims the property as such.

No distinction to our mind exists between a case in which the Hindu widow enters into possession of a property absolutely owned by her husband as a separated member of the family or as his self-acquired property, and where she enters on that property when her husband was a member of a joint Hindu family with his coparceners. It may be stated here that it is our experience that in this State in the preparation of the record of rights even the member of a joint Hindu family owning a certain property are recorded as owning the property in defined shares.

In these circumstances we are of opinion that the presumption in the present case would be that Smt. Newasi entered into possession over the property which was entered in the name of her husband as the widow of her husband and would, therefore, prescribe only a widow's estate.

(15) Learned counsel has referred to several cases in support of his contention that where the widow enters into possession over a property which was joint family estate, there would be no such presumption. He has referred to the following cases:

"22 Ind App 25 (PC) (A)'; '29 Ind App 132 (PC) (B)'; — 'Satgur Prasad v. Raj Kishore', AIR 1919 PC 60 (G); — 'Uma Shankar v. Aisha Khatun', AIR 1924 All 88 (H); 'AIR 1924 All 740 (2) (E)'; 'AIR 1946 Oudh 38 (F)'; — 'Suraj Bali Singh v. Tilakdhari Singh', AIR 1928 Pat 220 (I); — 'Ulfat Rai v. Sm. Kamla Devi', AIR 1949 All 458 (J).

We have examined all these cases and we do not think that they support the contention put forward by learned counsel. In almost all these cases the widow had entered into possession of a property either on the death of the last male owner who was not her husband.

(16) In '22 Ind App 25 (PC) (A)', the property was at one time held by one Mangal Singh. He died leaving a widow Jit Kunwar and a son Pahlad Singh. Palhad Singh died in 1861 leaving a widow Lachhan Kunwar. Instead of Lachhan Kunwar, Jit Kunwar entered into possession of the property on the death of her son, and the finding of the Judicial Commissioner was that Mst. Jit Kunwar treated the estate always as being her own absolute property and that the estate she held was that of an absolute full proprietor, and not the limited estate of a Hindu widow.

On these facts it was held that Jit Kunwar's estate was that of a full proprietor and not the limited estate of a Hindu widow. Learned counsel relied on the following observations in that case:

"The son having the title, she could not take possession excluding him unless she intended to take an adverse possession — a possession to which she was not in any way entitled."

From this observation it is argued that wherever a widow takes possession of the property without title, she takes it as a full and absolute owner. This inference is not warranted. The Privy Council did not say in the above quotation that whenever a widow takes a property by adverse possession she would take it as an absolute owner.

(17) Again, reliance was placed on another observation:

"The contention that although it might be barred as against the son and all persons claiming under him, the effect was only to extinguish those rights, and to let in the rights of any persons who would claim as reversionary heirs of Mangal, does not appear to their Lordships to be supported by authority nor is it tenable unless it were clearly shown that when Jit Kunwar took possession she professed to do it as claiming only the limited estate of a widow."

It is argued that unless the burden of showing that a widow took possession professedly as a limited owner is discharged, the presumption must always be that she was taking as a full owner. This is not what the Privy Council has laid down. They were referring to the particular case that was before them and in that particular case Jit Kunwar had taken possession of the estate not on the death of her husband but after the death of her son who was the last male owner.

It was in those circumstances that it was held that those who wanted to assert that she took a limited estate of a Hindu widow must prove their assertion. In the present case Smt. Newasi took what was entered in her husband's name, on his death.

(18) In the case of 29 Ind App 132 (PC) (B), possession was taken by the widow and the daughter-in-law (the latter being the widow of a predeceased son) of a member of a joint Hindu family. The widow had died and the question was what the nature of the estate prescribed by the daughter-in-law was, and their Lordships held that unless it was shown that she was taking a limited estate, her estate would be an absolute one.

(19) In the case of AIR 1919 PC 60 (G), the widows of one of the brothers took possession of an estate which was owned, as the sole surviving member, by their husband's brother. It was held that they held adversely to the reversioners of that brother. It may be noted that in that case there was no question whether the nature of the estate prescribed by the widows by adverse possession was that of a Hindu widow's estate or of a full owner.

That question would have arisen if the reversioners of their husband had claimed title to the property. But as it was, the case was between one of the widows and the reversioners of the husband's brother.

(20) In the case of 46 All 769 (E), two widows of two brothers took possession over the property (that would have come to their husband's share if there had been a partition) after the death of their father-in-law, their husbands having died during the life-time of their father. The head-note of the case is erroneous. It was not a case in which a widow of a member of a joint Hindu family took possession, on the death of her husband, of the property which was in his possession during his life-time, as is stated in the head-note.

(21) In the case of AIR 1946 Oudh 38 (F), a widow had taken possession of the property of her husband on the husband's death who was joint with his brother, and then after the death of that brother she had also taken possession of his share of the property. The question in the suit was with regard to the brother's share of the property which had been transferred by the widow, and it was held that she acquired absolute interest over that portion of the property.

She had made transfers of the property describing herself as 'owner', and in certain documents she had described herself as being in 'absolute proprietary possession' since the death of her husband and that of his brother. In these circumstances it was held that the acts, conduct and the assertions of the widow during the entire period of possession clearly disclosed that she prescribed as a full owner. But the learned Judges went on to observe as follows:

"The law is clear that where a Hindu female who has no right to the property obtains and retains possession for the requisite period, she will normally prescribe for an absolute title, unless it is shown that she was in possession under some arrangement with the persons best entitled to the property or that she was prescribing only for a limited estate."

To this proposition we would only add that—

"where a Hindu widow takes possession of a property over which her husband's name is recorded or which was in her husband's possession on her husband's death, the presumption is that she is taking the property in the capacity of her husband's widow and, as such, prescribing only for a limited estate."

(22) In the case of AIR 1928 Pat 220 (I), the widow of a person took possession over that property on the death of her husband's brother both of whom were members of a joint Hindu family.

(23) In the case of AIR 1949 All 458 (J), a learned single Judge of this Court, after reviewing the case law, laid down the following propositions as well-established:

"(1) That, where on the death of a member of an undivided Hindu family, his widow assumes possession of the family property or a portion thereof there is no presumption that she has been allowed this for her mere consolation or in lieu of maintenance — unless the surviving member proves an arrangement making her possession permissive, it would be deemed to be adverse.

(2) That, where on the death of an absolute Hindu proprietor, his widow, on assuming possession of his property, renounces her character as a limited owner by asserting an absolute title and remains in possession of the property for over 12 years, she prescribes a full estate for herself to the exclusion of her husband's heirs.

(3) That, where the widow in the last case, making no such renunciation or assertion, acquires adverse possession over a certain property and retains it for the full statutory period, she prescribes only a limited estate in respect of that property which, on her death, would revert to her husband's heirs.

(4) That the question of the widow's possession as a limited owner can arise only if she claims through the last male owner, that is to say, if she is his heir and not otherwise, and

(5) That a fortiori, if she is not the heir of the last male owner, her possession is adverse to the latter's heirs, and after the lapse of 12 years the property becomes her stridhan, descendible on her own heirs."

(24) To the first three propositions laid down by the learned Judge no exception can be taken. But the last two propositions need modifications. In proposition No. 4, the question of the widow's possession as a limited owner can arise, not only when she claims through the last male owner as his heir, but also when not claiming through the last male owner she claims the property as an heir of her husband in the capacity of her husband's widow although her husband was not the last male owner.

And, as regards proposition No. 5, it may be stated that if the widow is not the heir of the last male owner, her possession is adverse to the latter's heirs and after the lapse of 12 years the property becomes either her stridhan descendible on her own heirs, or the property is made good to the estate of her husband if she claimed to be prescribing only for a limited estate as a Hindu widow.

(25) We think the law was correctly laid down in the case of — 'Chandra Bali Pathak v. Bhagwan Prasad Pande', 1944 All LJ 344 (K), when their Lordships observed:

"It is true that possession, unless it is based upon title, must be deemed to be adverse, but the possession of a Hindu widow must be treated on a different basis. The true test has always been furnished by the character in which she steps into possession. If she has entered possession not as a widow of the last male owner or as a widow of the family, the possession will be deemed to be adverse, but if she has entered in possession as a widow of the last male owner or as a widow of the family, her possession cannot be treated as adverse.

If there are no indications to the contrary a woman claiming an estate expressly by inheritance must be deemed to be claiming a limited estate."

(26) The statement of the law, so far as it goes, is correctly made in Mulla's Hindu Law, 11th Edn., para 211 at pp. 235 to 237. On p. 237 it is stated—

"The possession of a portion of the joint family estate by the widow of a member of a joint Hindu family governed by the Mitakshara Law, as of right, for twelve years or upwards, as for instance, where mutation has been effected in her name and she remains in continuous possession, bars the claims of the other members of the family."

In this passage the learned author has not stated what the nature of adverse title for which she prescribes, would be, because he had already done so earlier on p. 236. The statement of law would become clear if the following words are added at the end of the passage:

"on the basis of their being surviving members of a joint Hindu family."

(27) Our attention has also been drawn to a single Judge decision of the Lucknow Bench of this Court, — 'Pirthi Pal Pandey v. Mst. Kalpoo', AIR 1951 All 190 (L). In that case a widow had taken possession of the property entered in the name of her husband on her husband's death, and it was found that her husband was joint at the time of his death with his brother. It was held that there was no presumption that the widow's name was recorded by way of consolation and that her possession was unlawful at its inception.

It was nowhere stated that she prescribed for an absolute estate. But since the suit of the reversionary heir to her husband was dismissed, it appears that the learned Judge considered that even her husband's reversioners were barred. If that is so, we respectfully differ from the decision of the learned Judge. It does not seem that it was brought to the notice of the learned Judge that although the widow's possession would be adverse because it was unlawful, she would be prescribing only for a widow's estate inasmuch as she took possession over her husband's share on her husband's death, the presumption being that in such a case she would be taking the property as a widow of the husband unless the contrary was established.

(28) In our opinion the nature of the estate prescribed for by Smt. Newasi was a widow's estate.

(29) The next question that fell for determination before the courts below was whether the transfer in the present case by Smt. Newasi was for legal necessity or not. The trial court held that it was not for legal necessity, but the lower appellate court has not decided this issue. The case will, therefore, go back to the lower appellate court for a decision on that issue.

(30) We, therefore, direct that the court below shall proceed to record its finding on the following issue:

"Was the sale deed dated 18-1-1944 by Smt. Newasi in favour of the defendant-respondent for legal necessity?"

The finding shall be sent to this Court within two months. On receipt of the finding, parties shall be allowed ten days' time to file objections. The case will thereafter be listed for final disposal.

H.G.P. Case remanded.

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*AIR 1955 ALLAHABAD 634 (V. 42, C. 186 Nov.)

AGARWALA AND SAHAI JJ. (3-3-1955)

Narayan Singh, Applicant v. Smt. Bahadur Kunwar, Opposite Party.

Misc. Case No. 84 of 1949.

Stamp Act (1899), S. 13—Some sheets used up in writing contents of document & remaining sheets utilised by defacing stamp with cross and bearing signatures of parties — This is proper compliance — (Stamp Rules (1925), R. 7).

A composite document consisting of a sale deed and a deed of release was executed by one K. The stamp required on the sale deed and the deed of release was of the value of Rs. 403/2/-. The Treasury supplied the stamp in ten sheets. Seven sheets were used up in writing out the contents of the documents. Three sheets remained. They were utilised by defacing the stamp with a cross and by the parties to the transaction putting their signatures on them.

On the seventh sheet on which the body of the document ended, was mentioned the fact that ten sheets formed part of the document. Each of the three remaining sheets on which there was the cross and the signatures of the parties also showed that they were part of the sale deed executed by K. They also bore the same number '15' as was given to the rest of the seven sheets.

Held that the three sheets could be considered to have been used as directed by S. 13, Stamp Act and R. 7 of the Stamp Manual. Civil Misc. Case No. 293 of 1945, D/- 23-9-1946 (All), Disting. (Para 2)

Anno: AIR Com.: Stamp Act, S. 13 N. 4.

CASE REFERRED: Para

(A) ('46) Civil Misc. Case No. 293 of 1945, D/- 23-9-1946 (All) 4

Standing Counsel, for Applicant; B. L. Dixit, for Opposite Party.

AGARWALA J.:

This is a reference by the Junior Secretary and Chief Inspector of Stamps, Board of Revenue, Allahabad, under S. 61, Stamp Act.

(2) The Inspector of Stamps and Registration, Kanpur Circle, in the course of inspection of the records of the Civil Judge's Court, Etawah, detected a document (Paper No. 20 attached to List S2/2C filed in Suit No. 18 of 1947) and was of opinion that it was written in contravention of S. 13, Stamp Act and R. 7 of the Stamp Manual. The document was a composite document consisting of a sale deed and a deed of release, executed by one Kr. Narayan Singh, son of Kr. Sati Singh, resident of village Asjana, Pargana Bidhuna, district Etawah.

The stamp required on the sale deed and the deed of release was of the value of Rs. 403/2/-. The Treasury supplied the stamp in ten sheets. Seven sheets were used up in writing out the contents of the documents. Three sheets remained. They were utilised by defacing the stamp with a cross and by the parties to the transaction putting their signatures on them.

On the seventh sheet on which the body of the document ended was mentioned the fact that ten sheets formed part of the document. Each of the three remaining sheets on which there was the cross and the signatures of the parties also showed that they were part of the sale deed executed by Kr. Narayan Singh, son of Kr. Sati Singh, by caste Thakur, resident of village Asjana, Pargana Bidhuna, district Etawah.

They also bore the same number '15' as was given to the rest of the seven sheets. The question was whether on these facts the three sheets could be considered to have been used as directed by S. 13, Stamp Act and R. 7 of the Stamp Manual. In our opinion they were used as directed by law. Section 13 says:

"13. Every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument."

This section, therefore, requires two things, firstly, that the document should be written in such a manner that the stamp may appear on the face of

the instrument (this was complied with) and, secondly, that it cannot be used or applied for the purposes of scribing another instrument.

(3) Rule 7 of the Stamp Rules is as follows:

"7(1) Where two or more sheets of paper on which stamps are engraved or embossed are used to make up the amount of duty chargeable in respect of any instrument, a portion of such instrument shall be written on each sheet so used."

This rule, therefore, only requires that a portion of the instrument should be written on each sheet used for the purposes of the instrument. Now signatures of the parties to an instrument are a portion of the instrument. As these three sheets bear the signatures of the executants, R. 7 was duly complied with.

And since they were crossed and defaced and there was an endorsement on the seventh sheet that ten sheets were used for the instrument, and further as the three sheets in question bore a note that they were used for the purpose of the sale deed executed by Kr. Narayan Singh whose address was given, and they also bore the same number as the previous seven sheets, these three sheets could not be used for or applied to any other instrument. The provisions of S. 13, Stamp Act were also, therefore fully complied with.

(4) The Chief Inspector of Stamps has referred to a ruling of a Division Bench of this Court of 'Civil Misc. Case No. 293 of 1945, D/- 23-9-1946 (All) (A)'. In that case the blank sheets bore the signatures of the executants and also the cross mark but there was nothing else to show that they formed part of the same instrument which was scribed on the other sheets, and further, it did not appear that they could not be used for or applied to any other instrument.

In those circumstances it was held that the blank stamp sheets were not properly used up as required by S. 13, Stamp Act, and the document was, therefore, held to be insufficiently stamped. That case is clearly distinguishable from the facts of the present case.

(5) We, therefore, hold that the document is duly stamped and answer the reference accordingly.

D.S.P. Answer accordingly.

°**AIR 1955 ALLAHABAD 635 (V. 42, C. 187 Nov.)**

RAGHUBAR DAYAL AND SAHAI JJ. (16-3-1955)

B. Lachhmi Das and others, Applicants v. Panchmurti Shivalinga, Opposite Party.

Civil Revn. No. 285 of 1954, against order of Civil J., Banaras, D/- 14-12-1953.

(a) Civil P. C. (1908), O. 33, R. 15 — "Order refusing to allow applicant to sue as pauper." Bar of second application.

If an order amounts to an order refusing to allow the opposite party to sue as a pauper, the facts that the applicant paid the necessary Court-fee and that the application was treated as 'plaint' will not change the nature of that order. That order will continue to be a good order. The mere fact that the provisions of the latter part of O. 33, R. 15 did not come into play would not make the provisions of the earlier part, which created a bar to the presentation of a subsequent application to sue as a pauper, of no effect. (Para 6)

Anno: AIR Com. C. P. C., O. 33, R. 15, N. 2.

(b) Civil P. C. (1908), O. 33, R. 15 — "Order refusing to allow the applicant to sue as pauper."

A composite order by which a Court expresses its view that the applicant should not be allowed to sue as a pauper and grants time to pay the deficient Court-fees is not an order refusing to allow the applicant to sue as a pauper within the meaning of that expression in Rr. 7(3) and 15 of O. 33, C. P. C. (Para 17)

Anno: AIR Com. C. P. C., O. 33 R. 15 N. 2.

CASES REFERRED: Paras

(A) (V23) AIR 1936 All 584: 1936 All LJ 760 (FB) 8, 11, 12, 13, 14, 16

(B) (V 42) (S) AIR 1955 All 154: 1954 All LJ 752 (FB) 11, 12, 13, 16, 17, 18

(C) (V42) (S) AIR 1955 All 159: 1954 All LJ 749 (FB) 17, 18

S. N. Kacker, for Applicants; Ambika Prasad, for Opposite Party.

RAGHUBAR DAYAL J.:

Panchmurti Shivaling alias Pancho Pandwa filed a petition to institute a suit in 'forma pauperis' against a number of opposite parties. The application to sue as a pauper was rejected on 25-8-1945, it being held, after notice had been issued to the Collector and the opposite parties, that it had not been made out that the plaintiff deity was a pauper. The plaintiff-applicant then filed another application for the review of this order. This application was allowed on 17-11-1945.

By this order, the previous order of 25-8-1945 was cancelled and the Collector was required to report about the financial position of the plaintiff deity. The opposite parties were allowed an opportunity to oppose the application. Finally on 16-3-1946 the Court ordered:

"I accept the Collector's report that the plaintiff is not a pauper. The application is, therefore, rejected with costs to the opposite parties concerned.

The plaintiff will pay court-fee necessary for the suit within 30 days from the date of this order".

The plaintiff then paid the requisite court-fee and the suit proceeded.

(2) The defendants questioned the correctness of the valuation of the suit and the Court decided that the suit had been undervalued and that, on proper valuation, the amount of court-fee necessary should be Rs. 1,200/- and odd instead of Rs. 500/- and odd which had been paid in the first instance. The plaintiff was unable to pay the excess court-fee demanded and again applied to be permitted to sue as a pauper. This application was rejected summarily on 17-7-1948 by a brief order:

"The plaintiff has already paid court-fee. He cannot be declared a pauper now. Rejected."

The plaint was ultimately rejected for want of sufficient court-fee on 26-7-1948.

(3) The plaintiff took other steps for the restoration of the suit but he ultimately failed in getting the suit restored. Thereafter he presented another application to be permitted to sue as a pauper with respect to the same subject-matter. This applicaton was opposed by the defendant opposite parties on the ground that a second application to sue as a pauper was not maintainable in view of R. 15, O. 33, Civil P. C. This objection did not appeal to the learned Civil Judge. He considered the prayer for permission to sue in 'forma pauperis' on merits and allowed the plaintiff to sue as a pauper. It is against this order that the defendant opposite parties have filed this application in revision.

(4) The order dated 17-7-1948 rejecting the plaintiff's prayer for permission to sue as a pauper need not detain us as nothing turns on it. The applicants base their contention on the first order dated 16-3-1946 by which the plaintiff's application to sue in forma pauperis was rejected and he was

required to pay the necessary court-fee within a specified period.

If that order amounts to an order refusing to allow the plaintiff to sue as a pauper, the present application to sue as a pauper with respect to the same subject-matter and on the same right to sue will be barred on account of R. 15, O. 33, Civil P. C. which is to the effect that:

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the State Government and by the opposite party in opposing his application for leave to sue as a pauper."

(5) It is contended for the opposite party that the fact that the plaintiff paid the court-fee demanded on 16-3-1946, and the suit proceeded as a regular suit made the aforesaid order ineffective as an order refusing to sue as a pauper. It is also contended that the order, dated 16-3-1946, is not an order refusing to allow the opposite party to sue as a pauper and, therefore, cannot be a bar to the present application for permission to sue as a pauper under R. 15 of O. 33, Civil P. C.

(6) We do not consider the first contention for the opposite party to be sound. If that order of 16-3-1946 amounts to an order refusing to allow the opposite party to sue as a pauper, the facts that the opposite party paid the necessary court-fee and that the application was treated as 'plaint' will not change the nature of that order. That order will continue to be a good order. The opposite party got over the effect of that order by paying the necessary court-fee.

It is true that the provisions of the latter part of the aforesaid R. 15 did not come into play at the time of treating the application to sue as a pauper as a 'plaint' possibly for the reason that the plaint was not presented subsequently to the refusal to allow the opposite party to sue as a pauper. The mere fact that the provisions of the latter part of the aforesaid rule did not come into play would not make the provisions of the earlier part, which created a bar to the presentation of a subsequent application to sue as a pauper, of no effect.

(7) On the second contention, we are inclined to agree and hold that the order, dated 16-3-1946, does not amount to an order refusing to allow the opposite party to sue as a pauper and, therefore, the present application for permission to sue as a pauper is not barred by the provisions of R. 15, O. 23, Civil P. C.

(8) In the Full Bench case of Chunna Mal v. Bhagwant Kishore, AIR 1936 All 584 (FB) (A) the following two questions were referred to the Full Bench:

"(1) Whether while rejecting the application for permission to sue as a pauper the Court can under S. 149, Civil P. C. allow the applicant to pay the requisite court-fee and treat the application as a plaint?

(2) Whether after rejecting the application for permission to sue as a pauper, can the Court by a separate and subsequent order allow the applicant to pay the requisite court-fee under S. 149, Civil P. C. and treat the application as a plaint?"

(9) The Full Bench held that the application for permission to sue as a pauper was a single document having the nature of a mere petition in spite of the fact that it contained the particulars necessary to be mentioned in a plaint and that this document, originally of the nature of a petition, becomes a 'plaint' if the Court allows the applicant to sue as a pauper or, before the Court had refused to allow the applicant to sue as a pauper, the applicant pays the necessary court-fees or asks for time to pay the necessary court-fees and the Court orders the petition to be treated as a 'plaint'.

(10) The answer to the first question was that if the Court has passed an order rejecting the application under R. 5, there will be no bar of R. 15 which applies only when an order refusing to allow the applicant to sue as a pauper is passed after receiving evidence under R. 7 (3) and that if a question arose that while refusing to allow the applicant to sue as a pauper under O. 33 R. 7, the Court also allowed him to pay the requisite court-fee, then the answer must be in the negative. It was observed:

'The Court having refused to allow him to sue as a pauper must follow the provision of R. 15 which should not be evaded."

The second question was answered in the negative.

(11) In the Full Bench case of Devendar Kumar v. Raghuraj Bharti', (S) AIR 1955 All 154 (B), it is held where a Court has finally disposed of an application for leave to sue in forma pauperis so that it has ceased to have seizin of the case, it cannot by a subsequent order grant time to pay the court-fees as there was no proceeding pending before the Court to which S. 149, Civil P. C. could apply. This was also the view of the Full Bench in Chunna Mal v. Bhagwant Kishore(A).

(12) It was also held in Devendar Kumar v. Raghuraj Bharti (B) that where the application for leave to sue in forma pauperis was still pending or at the time of refusing to grant leave, the Court could grant time under S. 149 of the Code to pay the court-fees and if the court-fees were paid within the time allowed by the Court, the plaint could be deemed to have been filed on the date on which the application for leave to sue in forma pauperis was made. This is against the view expressed in Chunna Mal's case (A).

(13) These two contradictory views on this question exist, both the views being expressed by Full Benches of three Judges. Malik C. J. said at p. 155 in Devendar Kumar Bharti's case (B).

"It has been suggested that since Chunna Mal's case (A) was decided by a Bench of three Judges this case should go before a larger Bench. The facts that gave rise to the decision in Chunna Mal's case (A) are in certain material particulars different from the facts of this case and we do not, therefore, consider it necessary to refer it to a larger Bench."

After referring to the facts in both the cases and to the answer of the Full Bench to the second question in Chunna Mal's case (A) he observed with respect to the second point referred in that case:

"The other point, on which there was difference of opinion, did not arise in that case and was as follows:

"Whether while rejecting the application for permission to sue as a pauper the Court can under S. 149, Civil P. C., allow the applicant to pay the requisite court-fee and treat the application as a plaint".

It is true that that question did not arise on the facts of Chunna Mal's case (A) but that question was referred to the Full Bench and answered by it in a particular manner. Its decision on this question, therefore, does not appear to be obiter.

(14) The question before us is different. It is not whether the Court can or cannot grant time under S. 149, Civil P. C., to pay the court-fees at the time of refusing to grant leave to sue as a pauper. It is whether an order by which the Court

rejects an application for permission to sue as a pauper and grants time to pay court-fees is an order refusing to allow the applicant to sue as a pauper as contemplated by R. 7(3) or R. 15 of O. 33, Civil P. C. In 'Chunna Mal's case (A)', Allsop J., who dealt with this question at some length, observed at P. 591.

"As I have already said, I think that the application for leave to sue as a pauper must be regarded as one application which does not require more than one order of the Court and it follows from this that the proceeding based on the application must come to an end as soon as the Court passes an unconditional order refusing to allow the applicant to sue as a pauper."

This means that the order we are considering is not an unconditional order refusing to allow the applicant to sue as a pauper and therefore the proceedings based on the application for permission to sue as a pauper do not come to an end on the making of such an order.

(15) In considering the question whether at the time of rejecting an application to sue as a pauper the Court can allow the applicant to pay the requisite court-fee and treating the application as a plaint, Allsop J. observed on pp. 591-592:

"The question assumes an order which contains two parts, namely, a refusal to allow the applicant to sue as a pauper and a permission under the provisions of S. 149, Civil P. C. granted to the applicant to stamp his application so as to convert it into a plaint.

I think that there can be no doubt that the Court at the time when it passes such an order would have jurisdiction under S. 149 to allow the application to be stamped as a plaint and I do not think that that discretion should be taken away because as a matter of form that permission is accorded at the same time and on the same document as an order refusing to allow the applicant to sue as a pauper.....I am of opinion that too much importance should not be attached to the fact that the Court intends to refuse to allow the applicant to sue as a pauper and writes an order to that effect.....

The point is that we should look to the substantial intention of the Court at the time when it still has jurisdiction under S. 149, Civil P. C. and if it means to exercise that jurisdiction before the proceedings came to an end we would not say that it is incompetent to do so merely because it expresses its intention at the same time not to allow the applicant to sue as a pauper."

The judgment of Allsop J., was a minority judgment in the case, but his view is approved by the later Full Bench in 1954 and therefore reference has been made to his views to find out the nature of such an order. These observations of Allsop, J. indicate that he did not consider such an order to be really a final order refusing to allow the applicant to sue as a pauper and thus disposing of the application for permission to sue as a pauper.

He considered it to be an order allowing the applicant to pay the court-fees after the Court had expressed its intention not to allow the applicant to sue as a pauper. More expression of intention would not amount to an order and would not therefore make such an order an order refusing to allow the applicant to sue as a pauper within the meaning of that expression in R. 7(3) or R. 15, O. 33, C. P. C.

(16) The observations of Malik C. J., in 'Devendar Kumar Bhartis case (B)', also point to the same conclusion. At p. 155 he said:

"But where an application is still pending and at that stage the Court grants time under S. 149 of the Code, R. 15 cannot be made applicable."

He formulated the question for consideration thus at the same page:

"The question, therefore, that arises for consideration is whether the application for leave to sue in 'forma pauperis' can be considered to be a document which can be converted into a plaint on payment of court-fees before orders have been passed rejecting it and whether the Court can grant time to pay the requisite court-fees on it as a plaint before or at the time of passing such an order."

It would appear that the question formulated contemplated the conversion of the application into a plaint before orders are passed rejecting the application, and the second part of the question related to the power of the Court to grant time to pay the requisite court-fees at the time of passing such an order, which, in view of the terms of the first part, must be before orders had been passed rejecting the application. Again at pp. 156-157 Malik C. J. observed:

"Then arises the question and that is the point for decision in the case whether the Court can grant time when refusing to grant permission to sue in 'forma pauperis.' Once the Court has dismissed the application, there is nothing more pending before it and two separate orders do not seem to be needed before the Court ceases to have seizin of the application for leave to sue in 'forma pauperis'. Before the Court has finally rejected the application, the Court has before it a document in which the petitioner has claimed various reliefs but has prayed that he be allowed to claim them without payment of court-fee. While the Court is still seized of the case it might say you shall not be exempted from payment of the court-fee, but you can claim the other reliefs if you pay the court-fee within the time allowed to you under S. 149 of the Code."

Again, at the same page he observes when considering an alternative view about the nature of the document containing the prayer for permission to sue as a pauper and the particulars required in a plaint:

"The Court, however, may instead of rejecting the application and putting an end to the proceedings before it, refuse to allow the prayer for exemption from payment of court-fee, but at the same time grant time under S. 149, Civil P. C. to pay the court-fee."

He again observes at p. 157:

"The petition cannot be treated as two documents, an unstamped plaint and an application praying to be excused from payment of the court-fees. It is one document in which the prayer is that the petitioner be allowed to claim the reliefs mentioned in it, without payment of court-fees. The other reliefs are, therefore, subordinate and do not arise unless the main prayer relating to court-fee is either granted or become unnecessary by payment or by time being granted for payment."

Here no reference is made to the arising of the other reliefs for consideration on the refusal to allow the applicant to sue as a pauper.

Lastly he observes on the same page:

"The view that by reason of the plaintiff withdrawing the prayer to file the suit in 'forma pauperis' the document becomes an unstamped plaint to which S. 149 applies, but if the Court considers that the plaintiff should not be allowed to file the suit in 'forma pauperis' but grants time to pay the court-fees the same result would not follow, is, to our minds, not based on any sound reason."

This language is similar to that used by Allsop J. in 'Chunna Mal's case (A)' and lays emphasis on the Court's view that the applicant should not be allowed to file the suit in 'forma pauperis' as distinct from the Court's order refusing the applicant to sue

as a pauper. It should follow, therefore, that what the Full Bench meant was that before the tentative order of the Court indicating its views to refuse to allow the applicant to sue as a pauper becomes a final operative order, which it would be only after it is signed by the Court, the Court can pass an order allowing the applicant to pay the necessary court-fees within a certain time.

Once an order for paying the necessary court-fees is passed, there cannot be any possible occasion still to consider whether the prayer for allowing the applicant to sue as a pauper should be granted or not. The request of the applicant to pay court-fees, and thus to get the petition converted into a plaint, amounts to a request for permission to withdraw his prayer for permission to sue as a pauper. The fact that the Court has, in its order, incorporated its views on the question of the applicant's claim to be adjudged a pauper will not make the order a final order refusing to allow the applicant to sue as a pauper.

We cannot, therefore, interpret the order of the Full Bench to mean that the order, whose validity the learned Judges were determining, amounted to two orders, one refusing to allow the applicant to sue as a pauper and the other allowing the applicant to pay the court-fees and get his petition converted into a plaint when it clearly expressed the opinion that the latter order could be passed only so long as the order refusing the applicant to sue as a pauper had not been passed.

(17) We are, therefore, of opinion that the expression 'or at the time of refusing to grant leave" in the final opinion expressed at p. 155 by Malik C. J. delivering the majority judgment does not actually mean at the time of passing of the order refusing the applicant to sue as a pauper but should be taken to mean at the time of the Court expressing its intention not to allow the applicant to sue as a pauper. It would follow that such a composite order by which a Court expresses its view that the applicant should not be allowed to sue as a pauper and grants time to pay the deficient court-fees is not an order refusing to allow the applicant to sue as a pauper within the meaning of that expression in Rr. 7(3) and 15 of O. 33, C. P. C.

We feel confirmed in our view by the observations of Malik C. J. delivering the judgment for the Full Bench of five Judges in — 'Kalap Nath Singh v. Shyama Nand', (S) AIR 1955 All 159 (C). The observations he made at the conclusion of the judgment were not necessary for that case but seem to repeat what had been held earlier in 'Devendar Kumar Bharti's case (B)' and which would give relief to such applicants for leave to sue in 'forma pauperis', who on account of the rejection of their application may file a fresh suit barred by limitation. He observed at p. 161:

"When, therefore, a Court is not satisfied that the petitioner is a pauper but has no reason to think that the application was not a 'bona fide' one, it should, before it has signed the order disallowing the prayer to be allowed to sue in 'forma pauperis', grant time for payment of court-fees. If, before signing the order disallowing the prayer to sue in 'forma pauperis' an application, oral or written, has been made to the Court praying that time for payment of court-fees be granted, it is the duy of the Court to pass a suitable order on that application as part of the order disallowing the prayer to sue in 'forma pauperis'.

If by mistake or oversight this has not been done, the Court has jurisdiction to correct its own error by reviewing its previous order rejecting the application and by adding thereto a suitable order dealing with the prayer contained in the application for time."

Emphasis is laid that the order to grant time should be given before the order disallowing the prayer to sue in 'forma pauperis' is signed. An order of a Court becomes effective after it is signed and so long as the order is not signed it retains the character of a tentative opinion. It should follow, therefore, that when the Court passes a final order granting time to pay the deficient court-fees, its previous expression of opinion in the same order that the applicant should not be allowed to sue in 'forma pauperis' did not attain the final character of an effective order refusing to allow the applicant to sue as a pauper.

(18) It has been contended that the view we are taking of the decision in '(S) AIR 1955 All 154 (B)' amounts to a view contrary to that expressed by the said Full Bench and that it would be desirable that a reference be made to a larger Bench. We are of opinion that we are not laying down any view contrary to that expressed by the Full Bench a view which is also practically confirmed by a larger Full Bench of five Judges in the case of '(S) AIR 1955 All 159 (C)'. What we are doing is simply to interpret what the learned Judges mean when they say that where the application for leave to sue in 'forma pauperis' was still pending or at the time of refusing to grant leave, the Court could grant time under S. 149 of the code to pay the court-fees.

(19) We are, therefore, of opinion that the order of 16-3-1946 does not amount to an order refusing to allow the applicant to sue as a pauper but is an order allowing the applicant to pay the necessary court-fees and get his petition converted into a plaint on such payment. The order, therefore, implies that either the plaintiff has withdrawn his prayer for permission to sue as a pauper or the Court did not desire to pass a formal order refusing such a prayer and allowed an opportunity to the plaintiff to pay the necessary court-fees even if he himself did not request for it.

The plaintiff subsequently availed of that concession, paid the necessary court-fees and proceeded with the suit. The result is that the present application to sue as a pauper was not barred on account of the earlier order of 16-3-1946.

(20) It was also contended for the applicants in this revision that the order of 16-3-1946, was not a correct order and that, therefore, the original order of 25-8-1945 was still an effective order and barred the present application to sue as a pauper. We do not see that this contention has any force when the order, dated 16-3-1946, said that the earlier order was being set aside due to a certain mistake having been committed. The present applicants submitted to that order. We cannot, therefore, treat now the order of 25-8-1945 to be a good order.

(21) In view of the above, we dismiss this revision with costs. Let the record of the case be returned to the Court below at an early date.

D.S.P. Application dismissed.

°(S) **AIR 1955 Allahabad 638 (V. 42, C. 188 Nov.)**

DESAI AND CHOWDHRY JJ. (1-6-1955)

Sheoraj, Applicant v. A. P. Batra and another, Opposite Party.

Criminal Misc. No. 17 of 1954.

(a) Evidence Act (1872), S. 3 — Direct and circumstantial evidence — Probative value.

Rule that facts are provable by circumstances as well as by direct testimony has a considerable effect in preventing guilty or dishonest parties from

tampering or making away with witnesses, and other instruments of evidence, which they would be more likely to do, if they knew that the only evidence which the law would receive against them was contained in a few easily ascertained depositories. (Para 25)

Anno: AIR Man. Evi. Act, S. 3 N. 3, 6.

(b) Evidence Act (1872), S. 1—Affidavits—Contempt proceedings—Use as mode of proof—(Constitution of India, Arts. 21, 215) — (High Court Rules & Orders—Rules of Court (U.P.). 1952, Chap. 9 R 12) —(Contempt of Courts Act (1952) S. 3).

Contempt proceedings are governed neither by the Code of Criminal Procedure nor by the Code of Civil Procedure. (Para 3)

The power of a High Court to institute proceedings for contempt and punish where necessary is a special jurisdiction which is inherent in all Courts of Record. The Code of Criminal Procedure does not apply in matters of contempt triable by a High Court. It can deal with contempt summarily and adopt its own procedure, and all that is required is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself. AIR 1954 SC 186 Foll. (Para 3)

Law of evidence is a part of the law of procedure; if the contempt proceedings are not governed by any particular procedure, it follows that they are not governed by any particular law of evidence. Even if contempt proceedings are judicial proceedings within the meaning of S. 1, Evidence Act, they are outside the scope of S. 1 and have always been treated as such. Contempt proceedings are usually decided on the basis of affidavits and it is not illegal to find a person guilty on the strength of affidavits alone. AIR 1954 All 523 Rel. on. (Para 3)

It is therefore not true to say that contempt must be proved in the manner laid down in the Evidence Act; the Court undoubtedly has to be satisfied that contempt has been committed, but is competent to adopt its own procedure for deriving satisfaction. It stands to reason that when the law does not prescribe manner in which contempt should be brought to the notice of the Court, and when it has not even defined what contempt is, there cannot be any law as to the onus of proof, or the method of proof, in contempt proceedings. (Para 3)

In cases of criminal contempt, the facts can be proved by affidavit. (Para 3)

Since the Evidence Act expressly does not apply to affidavits, proving a fact by an affidavit is not barred; if a fact is allowed to be proved by an affidavit, it can be proved by an affidavit notwithstanding the provisions of the Evidence Act. (Paras 3, 26)

Rule 12 of Chapter 9 of the Rules of Court, 1952, allows contempt to be proved through an affidavit. Since the practice in this country, in England and in America has always been that contempt can be proved through an affidavit, that is the procedure established by law and holding a person guilty of contempt on the basis of an affidavit only does not infringe his constitutional right under Art 21 of the Constitution. (Para 3)

Per Chowdhry J. : Affidavits are certainly used as a mode of proof though only at the initial stage of an interlocutory matter. The opposite party may file a counter-affidavit or it may demand attendance of the deponent of an affidavit for cross-examination. If he does neither, the affidavit, used initially to start proceedings, will become evidence in the fullest sense against him. If, on the other hand, the deponent of an affidavit does not produce himself for cross-examination in response to the demand of the opposite party, it will be denuded of all probative value. (Para 27)

Anno: AIR Man., Evi. Act, S. 1 N. 6; AIR Man., Contempt of Courts Act., S. 2 N. 2; AIR Com., Const. of India Art. 21 N. 8; Art. 215 N. 3.

(c) Contempt of Courts Act (1952), S. 3 — Contempt of Court — Interference with course of justice—Stifling of prosecution by D. S. P. — (Constitution of India Art. 215).

Obstructing justice amounts to contempt of Court and is to be understood in a wide sense. (Para 8)

Where there is no doubt that the D. S. P. did prevent the police investigation into an applicant's report about an offence and the magisterial inquiry into the same applicant's complaint about the same offence by sending a forged application for its withdrawal to the Magistrate taking their normal course and stifled both, this conduct of the D. S. P. amounts to an interference with the course of justice and is punishable as contempt of Court irrespective of what the ultimate result of the inquiry might have been. Such conduct would be reprehensible in any man, but it would be much more so in the case of one holding the responsible office of a D. S. P. (1903) 2 KB 432 and (1905) 1 KB 32, Rel. on. (Paras 8, 11, 37)

Anno: AIR Man., Cont. of Courts Act, S. 1 N. 3; AIR Com., Const. of India, Art. 215 N. 3.

(d) Contempt of Courts Act (1952), S. 3 — Winning over complainant — Effect.

A person who commits contempt of Court by obstructing the course of justice cannot escape punishment by interfering with the contempt proceedings by winning over the complainant. (Para 10)

Anno: AIR Man., Cont. of Courts Act, S. 2 N. 1, 2.

(e) Contempt of Courts Act (1952), S. 3 — Benefit of doubt.

Contempt proceedings being quasi-criminal, the benefit of reasonable doubt should be given to the alleged contemner. 52 CLR 248 — AIR 1951 Pat 443 and (1924) 266 US 42, Rel. on. (Para 12)

Anno: AIR Man., Cont. of Courts Act, S. 2 N. 2.

CASES REFERRED : Paras

(A) (V41) AIR 1954 SC 186: 1954 SCJ 67: 1954 Cri LJ 460 (SC) 3
(B) (V41) AIR 1954 All 523: 1954 All LJ 378: 1954 Cri LJ 1141 (FB) 3
(C) (1888) 128 US 289: 32 Law Ed 405 3
(D) (1889) 131 US 267: 33 Law Ed 150 3
(E) (1925) 267 UC 517: 69 Law Ed 767 3
(F) (1948) 333 US 257: 92 Law Ed 682 3
(G) 52 CLR 248 12
(H) (V38) AIR 1951 Pat 443: 52 Cri LJ 558 12
(I) (1924) 266 US 42: 69 Law Ed 162 12
(J) (1951) 1951 WN 208 12
(K) (1878) 9 Ch D 259: 39 LT 404 27
(L) (1903) 1903-2 KB 432: 72 LJ KB 839 30
(M) (1906) 1906-1 KB 32: 75 LJ KB 104 30

P. C. Chaturvedi, for Petitioner; S. S. Dhavan, for Opposite Party.

DESAI J. :

I agree with my brother Chowdhry that the Deputy Superintendent of Police is guilty of contempt of the Courts of the Judicial Magistrate and the District Magistrate, Fatehpur. Since it is a serious matter to find a Deputy Superintendent of Police guilty of contempt of Court, I would like to give my reasons for doing so. It is not necessary to repeat

the facts which have been stated by my learned brother in his judgment.

(2) The case against the opposite party (I am for the present dealing with the case against the Deputy Superintendent alone) is contained in the affidavit filed by Sheoraj in this Court on the basis of which these proceedings have been initiated. When the opposite party appeared in Court in response to the notice, it was brought to our notice by Sri P. C. Chaturvedi, who had filed the application for contempt proceedings, that Sheoraj had been won over by the opposite party and did not appear to give him further instructions.

We summoned Sheoraj to appear personally and recorded his statement on oath. He disowned the application for contempt proceedings and the affidavit said to have been sworn by him in support of it. He also denied that the opposite party or anyone else ever threatened him or forced him to withdraw the complaint filed by him, or that he ever kept him in wrongful confinement.

If his statement made in Court is believed, it would mean that the opposite party has not committed any contempt. Since all the evidence against the opposite party is contained in the affidavit sworn by Sheoraj and Sheoraj's own deposition in Court is a complete retraction, it was contended, and contended most vehemently, by Shri S. S. Dhawan that there is no evidence on the basis of which the opposite party can be adjudged guilty of contempt of Court.

He made it clear that he did not contend that the affidavit should be disbelieved because it is counter-balanced by the counter-affidavit filed by the opposite party; his contention is that while the affidavit was sufficient for the initiation of proceedings against the opposite party, it is not sufficient for finding him guilty of contempt.

He treats the affidavit as if it were a plaint verified on oath; unless a plaint verified on oath is filed in Court, no summons would issue to the defendant; but once a summons is issued and the defendant appears in Court and files a written statement, verified on oath, denying the allegations in the plaint, the plaint cannot be treated as evidence and the suit cannot be decreed merely on its basis.

If the suit is to be decreed, there must be evidence produced in Court in accordance with the provisions of the Evidence Act. So it was argued that the affidavit in support of the application cannot take the place of evidence. If the allegations made in the affidavit were not denied by the opposite party in his counter-affidavit, he might have been liable to be found guilty of contempt on the basis of the affidavit.

But here the allegations have been denied in the counter-affidavit and, therefore, it was argued, there must be evidence produced under the Evidence Act before the opposite party can be held guilty. Reference was made to S. 1, Evidence Act, laying down that the Act

"applies to all judicial proceedings in or before any Court, including Courts martial.....but not to affidavits presented to any Court or officer, nor to proceedings before an arbitrator."

It was contended that the present proceedings are judicial proceedings governed by the Evidence Act, and that under the Evidence Act there must be evidence to justify a finding of guilt. The Evidence Act does not make affidavits evidence. It was also contended that nobody can be convicted on the basis of an affidavit which is nothing but an ex parte evidence, and that to convict a person on the basis of an affidavit would be against the procedure established by law and infringement of Art. 21 of the Constitution. I have no hesitation in repelling the contentions of Sri S. S. Dhawan.

(3) Contempt proceedings are governed neither by the Code of Criminal Procedure nor by the Code of Civil Procedure. In — 'Sukhdev Singh v. Judges of the Pepsu High Court', AIR 1954 SC 186 (A), it was pointed out by the Supreme Court that the power of a High Court to institute proceedings for contempt and punish where necessary is a special jurisdiction which is inherent in all Courts of record, that the Code of Criminal Procedure does not apply in matters of contempt triable by a High Court, that it can deal with contempt summarily and adopt its own procedure, and that all that is required is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself.

Reference may also be made to — 'State v. Padma Kant Malviya', AIR 1954 All 523 (FB) (B), to which I was a party. Law of evidence is a part of the law of procedure; if the contempt proceedings are not governed by any particular procedure, it follows that they are not governed by any particular law of evidence. Even if contempt proceedings are judicial proceedings within the meaning of S. 1, Evidence Act, they are outside the scope of S. 1 and have always been treated as such.

Contempt proceedings are usually decided on the basis of affidavits and not a single authority was brought to our notice in which it was held that this cannot be done legally or that contempt must be proved against the alleged contemner in accordance with the provisions of the Evidence Act. Were it illegal to find a person guilty of contempt on the strength of affidavits alone, there must necessarily have been judicial pronouncement to that effect, and the absence of any such judicial pronouncement shows that it is not illegal.

The Evidence Act does not permit a person to be convicted without any evidence even if he has committed the offence in the presence of the Court trying him; but it is well-known that a person guilty of direct contempt, that is contempt in the presence of the Court, can be punished instantly without any evidence being recorded; if any authorities are needed reference may be made to — 'In the matter of Terry', (1888) 128 US 289 (C); — 'In the matter of Savin', (1889) 131 US 267 (D); — 'Cooke v. United States', (1925) 267 US 517 (E) and — 'Re William Oliver', (1948) 333 US 257 (F). In the case of S. Terry (A), Harlan J. observed that:

"For a direct contempt committed in the face of the Court, at least one of a superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred."

See also Halsbury's Laws of England, Vol. VIII, paragraph 67. It is therefore not true to say that contempt must be proved in the manner laid down in the Evidence Act; the Court undoubtedly has to be satisfied that contempt has been committed, but is competent to adopt its own procedure for deriving satisfaction.

It stands to reason that when the law does not prescribe the manner in which contempt should be brought to the notice of the Court, and when it has not even defined what contempt is, there cannot be any law as to the onus of proof, or the method of proof, in contempt proceedings. It is stated in — Oswald's Contempt of Court, 3rd edition, page 212 that:

"In cases of criminal contempt the facts are proved by affidavit." This statement is approved of in Halsbury's Laws of England, Volume 8, "Contempt of Court", paragraph 63, where it is said that to found an application for criminal contempt the facts constituting the alleged contempt must be proved by affidavit. The word "proved" is signifi-

cant; it shows that the affidavit is meant to supply the proof for final orders being passed on the application for contempt.

The contempt said to have been committed by the opposite party is criminal contempt and it can be proved by affidavit. It is stated in 17 Corpus Juris Secundum "Contempt", para 84, that it has been held that a conviction for contempt based on affidavit is not a deprivation of the accused person's constitutional privilege to meet his witnesses face to face, and that affidavits on which a warrant is issued in contempt proceedings are admissible in evidence on the bearing.

Since the Evidence Act expressly does not apply to affidavits, proving a fact by an affidavit is not barred; if a fact is allowed to be proved by an affidavit, it can be proved by an affidavit notwithstanding the provisions of the Evidence Act. It is laid down in R. 12(1) of Chapter IX of the Rules of Court, 1952, that an application praying that a person be punished for contempt

"shall set out in the form of a narrative the material facts and circumstances and shall be supported by an affidavit."

I do not think this rule merely prescribes the form or contents of an application and that an affidavit is required to accompany an application simply to make it in order so that a notice may be issued. Since no procedure is prescribed even in the Rules of Court for contempt proceedings, there is no justification for saying that the affidavit is required simply to enable a notice of the application to be issued; really there is no warrant for dividing the proceedings into two parts, (1) relating to issue of notice, and (2) relating to the final hearing.

There is no reason for saying that the affidavit is not meant to be used for passing final orders on the application for contempt proceedings. Under R. 12(2) the Court is empowered to call for an affidavit in any other matter coming up before it; there is no reason to think that this power is to be exercised by the Court only for the purpose of taking a preliminary step and not for the purpose of passing final orders in the matter.

If the affidavit required under R. 12(2) can be used to support the final orders passed in a case, the affidavit required under R. 12(1) also can be used to support the final orders in contempt proceedings, because the affidavits mentioned in the two provisions are intended to be used for identical purposes.

Under R. 13 any person opposing the grant of an application or showing cause against a rule may file a counter-affidavit. There may arise a question of issue of a notice or taking any other preliminary step on an application, but there cannot arise any question of issue of a notice or of taking a preliminary step when the opposite party appears in Court and denies the allegations of the applicant.

Therefore the argument that any affidavit is required under the Rules simply to enable the Court to issue a notice or take any other preliminary step, is not available in respect of a counter-affidavit; the counter-affidavit must necessarily be for the purpose of supplying evidence in proof of the facts formed in it. As regards the use that can be made, there is no distinction between an affidavit and a counter-affidavit; if one can be used for a particular purpose, the other also can be used for the same purpose.

If an affidavit were not to be treated as evidence, there would have been no necessity of a counter-affidavit. I am of the opinion that the purpose for which an affidavit is required under R. 12(1) is the same as that for which an affidavit is required under Halsbury's Laws of England, Vol. 8. "Contempt of Court", para 63; the words "shall be supported" are used in the same sense in which the words "to found an application for contempt" are used.

The rule thus allows contempt to be proved through an affidavit. Since the practice in this country, in England and in America has always been that contempt can be proved through an affidavit, that is the procedure established by law and holding a person guilty of contempt on the basis of an affidavit only does not infringe his constitutional right under Article 21.

(4) The statements made by Sheoraj, Matauwa, Ram Das, Ram Dhani and Gahroo before us are all unconvincing, self-conflicting and full of inherent improbabilities. Sheoraj and Ram Das told palpable lies when they denied having made any statement before the Magistrate on 29-6-54. Sheoraj went to the length of denying that even his and Ram Das's thumb-impressions were taken on any paper.

In the next breath he had to admit that they were taken and that they were taken inside the Court room. Sheoraj was medically examined on 28-6-54 at 11-15 A.M. at his own request. But he had the audacity to state in Court that he was not injured at all, that he showed to the doctor a tumour that he had from before on the left side of back, and that he feigned to feel pain whenever the doctor touched his body.

Then the statement made by him about sending an application through an unknown constable to the Court on 5-7-54 is a fantastic story. That he paid Rs. 6/- to the constable is a lie, because there is no explanation for the amount of Rs. 6/-; no court-fee is required on an application to a Superintendent of Police, and an application to a Magistrate requires a court-fee stamp of only one rupee. No attempt was made to trace out the constable; if there were any truth in the story of Sheoraj, the constable could have been traced out and produced in Court to support it.

The application that was actually taken by the constable to the Magistrate did not bear any court-fee label. Two of the applications have been traced but not the third that was given to the constable. The statement of Sheoraj that he made the applications of his own accord and that he did not meet the opposite party and that no advice was given to him in the matter of making the applications by him or the Superintendent of Police is falsified by the counter-affidavits of both the opposite parties (vide para 2(xx)).

Evidently Sheoraj in his over-zeal to avoid an admission of any contact between him and the opposite parties, denied even that contact which was admitted by them. His demeanour in the witness-box did not create any favourable impression in our minds; he seemed to have been tutored so much that he did not even pause to hear the questions put to him in cross-examination in full and answered them even before they were completed.

He did not give a satisfactory reason for his approaching the opposite party with his so-called grievance on July 4 or 5, 1954. If the case of the opposite parties is true, he must have known the opposite party because he had gone to his village on 26-6-54 and interrogated him. He would not have had any need of asking Chedu Thakur about the address of the Deputy Superintendent of Police.

He falsely denied knowing Ram Nath of Mohammadpur, who had made the application to the District Magistrate on 3-7-54. Once he said that he does not know even Mohammadpur, but had to admit in the next breath that he knows one Mohammadpur. Though there was nothing to suggest that there were two Mohammadpurs, he tried to make out that Ram Nath belongs to another Mohammadpur.

His statement that he complained to the opposite party on July 3, that police constables used to harass him, would not let him sleep in peace and used to take him to the police station either is a lie or goes against the opposite party himself. S. I. Baqar Husain had been relieved of the investigation on June 28 and was transferred from the police station on June 29; therefore no constable would have harassed Sheoraj on behalf of the sub-inspector and if he was still harassed it only means that he was harassed by police constables working on behalf of the opposite party.

Of course he would not go and complain against them to the opposite party. But really he did not go to him at all to complain against the police. Since he was bent upon telling lies, he could not tell a consistent story. He forgot while giving evidence in Court that he could not have been harassed by the sub-inspector or any constable working on his behalf after June 28, and in any case after June 29.

He had no satisfactory explanation for voluntarily going to the opposite party on July 3 and invented on the spur of the moment the explanation which does not make any sense. Finally, the whole story told by him about what happened at Allahabad and his disowning the present application for contempt is a tissue of lies. I am not prepared to believe for a moment that Sri P. C. Chaturvedi, an Advocate of this Court, got filed this application without even meeting Sheoraj and was a party to a fraudulent application being presented in Court.

I have not the slightest doubt that the statement made by Sheoraj before us is false; on the other hand, there is nothing to suggest that the affidavit made by him is false. I cannot believe that at the instance of a pleader, a clerk of the Magistrate took down an absolutely false statement of Ram Das even in the presence of the Magistrate. Ram Das admitted that when the statement was being written down, he knew that it was about a robbery committed upon Sheoraj, but he did not tell the clerk or the Magistrate that it was not his statement. He did not offer a satisfactory explanation for remaining quiet for a month.

(5) I am not prepared to accept the evidence of the opposite parties and Sheoraj, etc. that no robbery was committed by Ram Manohar Girdhari, and Bhura on 25-7-54, that Ram Manohar was not arrested with Bhura, that Ram Manohar was arrested by Matauwa, Ram Dhani, Budhi, Jagrup, Surajpal and Inderpal on 24-6-1954 and taken to the police station on 25-6-1954 at 9 A.M. and that no confessions were made by Ram Manohar and Bhura at the police station. There was nothing improbable in the report taken down at the police station on 25-6-1954 at sunset. S. I. Baqar Husain had taken charge of the police station on 8-6-1954 on his transfer from Allahabad to Fatehpur district. He did not know Ram Manohar and Girdhari. He had, therefore, no reason whatsoever to get them falsely implicated by Sheoraj in his report. Ram Manohar was an absconder; there were several cases pending against him including one under S. 457, I. P. C., in which he had been released on bail.

The Station Officer had no interest in any of these cases. Two warrants of arrest were issued for his arrest and they were received back at the police station on 25-6-1954 at 4 P.M. with a report that they could not be executed. An entry about the same was made in the general diary. I am totally at a loss to know why the Station Officer should have wrongfully confined Ram Manohar in the lock-up from the morning and made a false report at 4 P.M. that the warrants could not be executed.

No explanation whatsoever has been offered for this conduct of the Station Officer. He could not know that some report of a serious offence such as a robbery, would be made in the near future in which Ram Manohar could be falsely implicated. Ram Manohar could not be falsely implicated in every report of a serious offence. Further, when there were several cases pending against him and when the sub-inspector did not even know him, there was no reason for him to implicate him in a false case and to keep him in illegal detention with that object.

On the other hand he would have tried to take credit for arresting him himself. The story told by Matauwa and Ram Dhani in Court is full of improbabilities and does not sound convincing at all. Ram Dhani claimed to be interested in getting Ram Manohar arrested because some relations of his had stood surety for his attendance in Court. He said that he was told by his relation to catch Ram Manohar wherever he got him.

Ram Dhani sought the assistance of Matauwa. Both Ram Dhani and Matauwa were co-accused with Ram Manohar in the case under S. 457, I. P. C. It is strange that Ram Dhani does not even know the name of his relation who had stood surety for Ram Manohar and that Ram Manohar was arrested by the very persons who were being prosecuted with him in the case. I am not at all satisfied that Matauwa and Ram Dhani had any interest in arresting him.

Then though he is said to have been arrested at noon at a place only nine miles from the police station, he was not taken at once to the police station, but was detained in the village for no good reason and taken to the police station next day by 9 A.M. Even the Chowkidar is said to have kept watch over him at night. Matauwa made a mess of his statement when he was cross-examined about the circumstances in which Ram Manohar was arrested; he was unable to give a coherent account of the circumstances.

Ram Manohar had injuries when he was taken to the police station; so had Bhura. It was natural for their being beaten by Sheoraj, etc. on their being caught while committing the robbery. The fact that Ram Manohar had injuries is highly significant; it supports the report made against him by Sheoraj. Matauwa and Ram Dhani had to admit that Ram Manohar had injuries when he was taken to the police station and said that they had beaten him after arresting him.

There was no occasion for them to beat him; they had absolutely no enmity against him and, on the other hand, were being tried along with him in the case under S. 457, I. P. C. Ram Dhani's statement about the circumstances in which Ram Manohar was arrested conflicts with that of Matauwa. The story told by Matauwa, etc. about the circumstances attending the arrest of Ram Manohar must be rejected as false.

There being nothing against the story told in the report of Sheoraj about the same matter, it must be accepted as true. Whatever may be said about the Station Officer's having a reason to get Ram Manohar implicated in a false report, nothing can be said about his having a motive for getting Girdhari implicated in a false report. There is absolutely nothing to explain why he should get Girdhari falsely involved.

He did not know him also. The story that Sheoraj told now in Court about the occurrence of 25-6-54 receives some corroboration from Gahroo, who is related to him, and Ram Das. According to them only a theft of some chattel of Sheoraj was committed by Bhura in the afternoon and he was taken to the police station at 3 P.M. and a report of simple theft was dictated by Sheoraj against Bhura.

The report was actually taken down at 9 P.M.; there was no reason for the Station Officer to write

out the report at 9 P.M. if it was dictated at 3 P.M. It has not been explained why he should not have taken down the report for six hours. Gahroo stated that he, Sheoraj, etc. remained at the police station from 3 P.M. to midnight or 1 A.M.; there is no explanation for this long stay at the police station, particularly when Gahroo denied that the Station Officer recorded his statement at the police station.

The Station Officer's case is that the report was made at 9 P. M. and that he at once took down the statements of Sheoraj, Gahroo, Sukhdeo and Madho Chowkider, and the two arrested persons, Ram Manohar and Bhura. That would explain why Sheoraj, Gahroo, etc., were detained at the police station up to midnight or 1 A. M. The statement of the Station Officer that Ram Manohar and Bhura both confessed having committed the robbery, that Ram Manohar confessed to dacoities, some of which were not even registered at the police station, and that in one dacoity he implicated Ram Dhani, Matauwa and others, seems to be correct.

He made a report for the confession of Ram Manohar being recorded by a Magistrate; he would not have made it if actually Ram Manohar had made no confession and was not expected to make any before a Magistrate. I do not understand how the Station Officer who had been at the police station for only eighteen days could have thought out a false confession in respect of dacoities which were not even registered at the police station; there was absolutely nothing to be gained by him by that act.

I, therefore, accept his statement that Ram Manohar did confess and Ram Manohar's confession supports the report taken down at the police station.

(6) Nothing that the opposite party did between 25-6-54 and 29-6-54 amounts to contempt of Court; the simple reason is that so far there were no proceedings in Court, the report of Sheoraj being under investigation, and there is no allegation that he did anything amounting to interference with the natural course of justice.

But it has great significance as showing what the opposite party intended to do and was capable of doing and has great value in persuading the Court to believe the allegations of Sheoraj in his affidavit as to what was done to him on and after 2-7-54.

(7) The complaint was filed by Sheoraj on 29-6-1954 through Sri Faiyaz Husain Rizvi Vakil in the Court of the Judicial Officer Sri Babu Ram Dube, who immediately recorded the statement of Sheoraj under S. 200 and the statement of his witness Ramdas under S. 202, Criminal P. C., and issued processes against the three accused for 12-7-1954.

The opposite party seems to have got himself interested in the complaint of Sheoraj through Sri Babu Lal Vakil of Fatehpur, who is admittedly related to Ramdhani. In a report made by the opposite party to the Superintendent of Police about the conduct of S. I. Baqar Husain in the matter of taking down the report of Sheoraj the opposite party admitted having met Sri Babu Lal.

The report made by the opposite party is not before us, but S. I. Baqar Husain has deposed that the report contains this admission of the opposite party. S. I. Baqar Husain has proved the admission of the opposite party and not merely given hearsay evidence, which would not be admissible if the strict provisions of the Evidence Act applied.

What the opposite party stated in the report is his admission and this is what is proved by S. I. Baqar Husain whose statement has not been challenged by the opposite party. Since Ramdhani and his relations were implicated in the confession by Ram Manohar, Sri Babu Lal met the opposite party and presumably induced him to take action to have Ram Manohar dissociated from the report of Sheoraj and to prevent his confession being recorded by any Magistrate.

Sheo Raj in his affidavit only alleged that the opposite party for reasons known to himself adopted a strange attitude from the very beginning. He did not explain specifically why he did so. The name of Sri Babulal is not mentioned anywhere in the affidavit. But these facts are certainly no reason for our disbelieving the statement of S. I. Baqar Husain that it was Sri Babu Lal who was instrumental in persuading the opposite party to adopt a strange attitude towards the investigation into the report of Sheoraj from the very next day.

I do not see any substance in the contention of Sri S. S. Dhawan that this Court cannot take cognizance of the allegation made against Sri Babu Lal without his being a party to these proceedings, or being examined as a witness. The Court is not proceeding at all against Sri Babu Lal and if there are two persons who are parties to a wrong, it is not the law that no enquiry can be made into the wrong committed by one person unless the other person also is a party or has been examined as a witness.

The Court is obligated to refer to the part played by Sri Babu Lal because without doing it it cannot refer to the corresponding part played by the opposite party. It is true that the Court is not in possession of any facts explaining what hold Sri Babu Lal or has over the opposite party. But it can still believe that the opposite party acted as he did because of some inducement by Sri Babu Lal.

The most important reason is that there was no other reason for his acting as he did. It was the most unusual thing for a Dy. Superintendent of Police to interfere with the investigation by a Station Officer into a report of only a petty robbery on the very next day of the report.

It was very easy for the opposite party and also the superintendent of Police to plead before us that it is a part of their routine duty to supervise investigations in reports of grave offences like murder, dacoity, robbery etc., and that it is the practice for gazetted officers to interrogate persons immediately on their arrest because it has been found that without such supervision there would be a risk of a defective investigation, or victimization of innocent persons.

It is certainly the duty of superior officers like a Dy. Superintendent of Police or a Superintendent of Police to supervise investigations by Station Officers into reports of murder and dacoity, but the report of Sheoraj which was of a very petty robbery was not such a report as would call for supervision of its investigation. Further the supervision of every investigation starts when a special report of the crime is received by the superior police officer; it is not known on what date the special report, if any was sent, was received by the opposite party.

I should mention here that neither of the two opposite parties had the courage to come into the witness-box and to face cross-examination. If their conduct were innocent which could bear scrutiny, they had nothing to be afraid of and would have offered themselves for any searching enquiry into their conduct. The opposite party has not explained at all how on 26-6-1954 he knew that a report of robbery had been made against Ram Manohar etc.

The first purcha of the case diary was received in the office of the Superintendent of Police several days later and the only order passed on it was "File". It is certainly strange that the opposite party simply on account of statements supposed to have been made to him by the two under-trials concluded that the report made by Sheoraj was wrongly taken down by the Station Officer; he had not met or talked to any one else such as Sheoraj etc.

That a Police Officer should, without any scrutiny, accept the bare statement of a person accused of a crime, is certainly unusual and I am not prepared to say that the opposite party formed the opinion that he did simply on the basis of the statements made by the under-trials; his ears must have been poisoned earlier.

There is no record kept by the opposite party of the statements supposed to have been made by the under-trials. When they alleged that the station officer took down an incorrect report he should have taken down their statements. He says that he brought the matter to the notice of the other opposite party and that the latter directed him to make further enquiries; there is however nothing in writing about these matters.

I do not know why the opposite party volunteered to make the enquiry himself unless he wanted it to result in a particular way. The matter was not so important and normally the Circle Inspector would have been asked to enquire into the conduct of the station officer. The under-trials had been already remanded to jail custody by the Magistrate for 14 days; still the opposite party took the unusual step of getting them remanded to police custody for 48 hours.

The Magistrate had also warned the under-trials that they were not bound to make a confession and ordered them to be put before him on 28-6-1954 for recording confessions. These facts were concealed by the Public Prosecutor who, admittedly at the instance of the opposite party, applied not to the judicial magistrate but to another magistrate that the under-trials were required by the police for further investigation and therefore should be remanded to police custody.

It is unfortunate that this magistrate, who was no less than the Additional District Magistrate, failed to perform the duty of satisfying himself that the detention of the under-trials in the police custody was necessary. Actually it was not necessary at all; they were not required to be taken to any place; they had already been interrogated by the opposite party and if any further interrogation was necessary it could be done inside the jail.

The remand to police custody was obtained obviously for an oblique motive. That is why the material facts that the judicial Magistrate had already granted remand for 14 days and had already ordered the under-trials to be put up before him on 28-6-1954 were concealed. It was the opposite party who on the Additional District Magistrate's sanctioning the remand to police custody, ordered the under-trials to be kept in the lock up of Kotwali Police station.

The allegation of the opposite party that S. I. Baqar Husain confessed to him on 27-6-1954 that the report was wrongly taken down and that the under-trials had not made any confession is denied by S. I. Baqar Hasain and I am not prepared to accept the allegation of the opposite party. I do not know why S. I. Baqar Husain so readily confessed having fabricated a false report and a false case diary.

Had he really confessed, it was the duty of both the opposite parties to take severe action against him. Had they been so mindful of their duties, as they pose to be, they would not have failed to take immediate action against him for concocting a false case and preparing false records which was certainly not a matter to be condoned.

I think the Sub-Inspector would have justifiably been dismissed for what he had done according to his alleged confession. The opposite party did not have in his possession clinching evidence with which he could confront the Sub-Inspector. The Sub- Inspector was not taken unawares when he was told that his investigation was not honest. He had been called by the opposite party for the express purpose of explaining his conduct and so he must have gone prepared to maintain his position.

The opposite party claims to have taken only Bhura to the spot on 27-6-1954 and to have interrogated Sheoraj and others about the robbery. Neither was the presence of Bhura necessary on the spot nor was anything lawful done as regards the other under-trials which could not have been done inside the jail. It is clear that there was really no reason for the opposite party's getting the under-trials remanded to police custody even for 48 hours and still when he did it, he must have done it with an evil design.

There is no record maintained by him of the statements supposed to have been made by Sheoraj etc., on 27-6-1954; I do not understand what kind of supervision over the investigation he was exercising when he was not reducing to writing anything. I seriously doubt if he even went to the spot on 27-6-1954.

The investigation into the report of Sheoraj was taken away from S. I. Baqar Husain and entrusted to the second officer on 28-6-1954. The Superintendent of police further transferred S. I. Baqar Husain from Police Station Khaga to the Police Lines, Fatehpur. The under-trials were not put up before the Judicial Magistrate on 28-6-1954; his order of 26-6-1954 was flouted by the opposite party.

On 28-6-1954, the second officer wrote to the opposite party that the under-trials should be remanded for three days more to police custody because the investigation was incomplete. The opposite party ordered the Public Prosecutor to manage to get the remand to police custody for three days. The use of the word "Manage" is indicative of the manner in which the opposite party's mind worked.

The Public Prosecutor reported to the Additional District Magistrate that under special circumstances the under-trials be remanded to police custody for three days more and the Additional District Magistrate readily obliged without considering at all whether remand to police custody was required.

There is no doubt that the Additional District Magistrate abused his power of granting remand to police custody. I should point out here that the opposite party kept him completely in the dark about the whole matter and also about the report of S. I. Baqar Husain that the under-trials were prepared to confess before a magistrate. Really very little investigation was being done against the under-trials.

Moreover all the material witnesses, namely, Sheoraj, Ramdas, Gahroo, Mahadeo and Sahdeo had been examined. What was being done now was an enquiry against S. I. Baqar Husain and for this purpose the under-trials could not possibly be remanded to police custody. Ultimately the under-trials reached jail on 30-6-1954 or 1-7-1954.

They were produced before the Judicial Magistrate on 2-7-1954 for their confessions being recorded but they refused. On 14-7-1954 the Second Officer obtained remand against Ram Manohar though there was said to be no case against him and on 27-7-1954 he and Bhura were both released under S. 169 even though there was a clear case of theft against Bhura.

It was the opposite party who approved of the final report against both the under-trials. It seems that while they were in police custody they were tutored to make certain statements and that Bhura was rewarded for his yielding to the pressure of the opposite party by being released under S. 169, Criminal P. C., though on his own confession he was guilty of theft.

The submission of the report under S. 169 to the Judicial Magistrate who had already taken cogniz-

ance of the complaint of Sheoraj on 29-6-1954 was itself a contempt of his court because it undoubtedly interfered with the natural course of justice in the complaint case.

While the Judicial Magistrate was trying the complaint case the police could not without committing contempt of his court tell him that the complaint case was false. They were bound to let the complaint case take its natural course and nothing what is contained in S. 173 of the Code could justify their interfering with it.

When the Magistrate had already taken cognizance there could not arise any question of a report being made to him under S. 173 of the Code. He could not take cognizance of the offence again and he could not throw out the complaint on the basis of the police report. That contempt is, however, not the subject matter of enquiry in these proceedings.

But I have dealt with the matter in some detail in order to show that the opposite party had no regard for the law.

(8) It is stated by Sheoraj in his affidavit that he was unlawfully arrested on 2-7-1954 and that undue pressure was exerted upon him in order to make him withdraw the complaint case. Naturally the opposite parties denied the allegation; they could not be expected to admit it.

But the circumstances, both antecedent and subsequent, show that there is considerable truth in the allegation of Sheoraj, notwithstanding his retraction in court. The exertion of undue pressure was quite consistent with the opposite party's design. His effort to spoil the investigation would have been rendered futile if Sheoraj was left free to prosecute his complaint case.

Not only that but his dishonest activities would have been exposed in court. So Sheoraj was kept in unlawful confinment on July 2 and 3 and was released after his thumb-impressions were taken on some blank papers and he was warned not to proceed with his complaint. On 3-7-1954 Ram Nath, a relation of Sheoraj made a complaint of the wrongful confinement.

It was mentioned in it that he was wrongfully detained in the office of the opposite party and that he was being forced to withdraw the complaint. There is no reason to disbelieve the complaint of Ram Nath. It was repeatedly argued by Shri S. S. Dhawan that it was S. I. Baqar Husain who was at the back of the complaint of Sheoraj of 29-6-1954, of the complaint of Ram Nath of 3-7-1954, and also of the present application of Sheoraj for contempt.

It may be conceded that some of the allegations made in the complaints of Sheoraj and Ram Nath are based on information received from the Sub-Inspector. But the Sub-Inspector did nothing wrong, at least nothing illegal, in giving information to Sheoraj and Ram Nath. Merely because he passed on information to them or even induced them to make the complaints it cannot be said that the complaints are false. He had no control over Sheoraj and Ram Nath and I do not think they would have gone out of their way to make false allegations and false allegations of a very serious nature against the opposite parties if there were no basis for them.

After all it is not an easy matter for any one to make a false complaint that the Superintendent of Police and Dy. Superintendent of Police have committed contempt of court by unlawfully detaining him, by taking thumb-impressions on blank papers, by forcing and threatening him to withdraw the case and by getting the case withdrawn through an application forged on blank paper. Sheoraj would not have made himself a pawn in the hands of S. I. Baqar Husain who might be bearing a grudge against the opposite parties.

The application that the Judicial Magistrate received on 5-7-1954 was undoubtedly a forgery and was sent to the Judicial Magistrate through a constable by the opposite party. I accept the statement contained in the affidavit that the thumb-impressions were taken on some blank sheets of paper. There is the endorsement of the Judicial Magistrate himself that the application was received in his court in a closed 'Kaidak' and through a police constable.

I accept Sheoraj's statement contained in the affidavit that the application was written out on the blank papers on which his thumb-impressions were taken by the opposite party and was sent by him with a constable to the Court. His subsequent statement in court is not at all convincing. I do not believe that there was any occasion for his sending the application through a constable whose name even he did not know. He could not have got hold of a Kaidak in which the application could have been sent.

The very fact that the application did not bear a court-fee stamp, as it should have, shows that it was sent not by Sheoraj but by the opposite party who seems to have been under the impression that any application sent by him does not require to bear a court-fee stamp. The application purports to have been scribed by "R. Sahai." It is not known if there is a man named R. Sahai and if he scribed the application; the prosecution could not examine evidence to prove that it was not scribed by R. Sahai but the opposite party could prove that it was scribed by R. Sahai at the instance of Sheoraj.

However no R. Sahai has been produced in Court. The opposite parties did not ask Sheoraj in cross-examination who R. Sahai is, who had scribed his application. The constable who took it could have been traced out by the opposite party and examined to prove that he had been entrusted by Sheoraj with the application; but it was not done. In the application of 3-7-1954 Sheoraj did not say a word about his and Ram Das's statements recorded under Ss. 200 and 202, Criminal P. C. Had he got the application written out he must have explained how his and Ram Das's statements came to be recorded in court.

The opposite party not being well versed in law might not have known anything about the statements and therefore in the forged application did not offer any explanation for them. The statement in the application that Sheoraj and Ram Das were taken by a constable to village Budhwan to see Girdhari is obviously a false statement. The Station Officer had no reason whatsover to get Girdhari implicated in a false report. Girdhari's name must have been given by Sheoraj when dictating the report. If he gave his name, there was no need of his being taken to village Budhwan to see him.

There is nothing to support the statement in the application that Sri Faiyaz Husain Vakil himself got the complaint written out and obtained the thumb-impression of Sheoraj on it. I do not think the pleader would have taken so much risk even at the instance of the Station Officer. I cannot believe that the statements recorded by the Magistrate under Ss. 200 and 202 were not recorded by him and were not made by Sheoraj and Ram Das.

If they made the statements the complaint also must have been dictated by Sheoraj and he must have known what it contained; otherwise his statement under S. 200 would not have tallied with it. There is no doubt that the application of 5-7-1954 contains falsehood. There was no reason for Sheoraj himself to withdraw the complaint case; even if he wanted to withdraw it, he need not have told so many lies and falsely accused the Station Officer and Sri Faiyaz Husain Vakil.

I am, therefore, convinced that the application was not made by Sheoraj, that it was forged by the

opposite party on blank papers on which his thumb impresssions were taken on 3-7-1954 and was sent by him through a constable to the court to make sure that it reached the Court. Evidently the opposite party knew that Sheoraj himself would not take it to court. This is the grossest form of contempt committed by the opposite party.

Whatever may be the truth about the complaint of 29-6-1954 whether it be true or false, once a magistrate had taken cognizance of it the opposite party had no right whatsoever to interfere with the natural course of justice by sending a forged application for its withdrawal. The complaint was filed by Sheoraj himself, I have no doubt about it, but even if it had not been filed by him the opposite party committed contempt by sending to the court a forged application for its withdrawal.

The complaint purported to be in the name of Sheoraj and had to take its natural course; any unauthorised interference with it would be contempt. Obstructing justice amounts to contempt of court and is to be understood in a wide sense. Sri S. S. Dhawan takes his stand upon the statement made by Sheoraj in court that he had filed no complaint on 29-6-1954. He argues that if Sheoraj filed no complaint it was impossible for the opposite party to commit contempt in respect of it.

What Sheoraj deposed is neither necessarily true nor conclusive; and if one were to be concluded by his statement, his other statement that the oposite parties did not threaten or force him itself would have been enough to exonerate them and there would have been no necessity of any inquiry into, or discussion of, facts.

(9) When the application of 3-7-1954 reached the Judicial Magistrate he ordered Sheoraj to be present. Sheoraj did not appear in court on two dates but his counsel Sri Faiyaz Husain was present. On 30-7-1954 Ram Das made an application dated 29-7-1954 giving the other version of the occurrence of 25-6-1954 and exculpating Ram Manohar and the Magistrate kept the application in the record. Sri Faiyaz Husain challenged the genuineness of the application and asked the Magistrate to send his orderly to see the place where Ram Das got it scribed.

It seems that the Magistrate sent his orderly, who returned and informed him that Ram Das had taken him to the office of the Superintendent of Police's reader. This means that the application was scribed in the office of the Superintendent of Police. On 31-7-1954 Sri Faiyaz Husain requested the Magistrate in writing to make a note of the fact but the Magistrate ordered that no note would be made.

It is enough that he did not say that the contents of Sri Faiyaz Husain's application were wrong. There is no doubt that somebody in the office of the opposite parties committed contempt of Court again by persuading, if not compelling, Ram Das to write out a false application and take it to court. Ram Das was no party to the complaint; he was only a witness and had no locus standi to make any application. All that he had to do was to refrain from giving evidence at all, or to state the truth, when summoned as a prosecution witness.

Still when he made the application, he must have been prevailed upon by the opposite party to make the application. Sheoraj was again absent on 13-8-1954. On 24-8-1954 Ram Manohar and Bhura got the case transferred from the Court of the Judicial Magistrate to that of the District Magistrate. Really there was no reason for transfer and I am surprised that the District Magistrate thought fit to transfer the case to his own file at the instance of the accused. On 31-8-1954 he discharged the accused on the basis of an application (supported by an affidavit) by Sheoraj of 25-8-1954.

(10) The purpose behind the application of 25-8-1954 was to throw overboard the contempt proceedings started on Sheoraj's application of 15-7-1954. Just as for throwing overboard the proceedings started on his complaint of 29-6-1954 the application of 3-7-1954 was forged, so also this application was brought into existence to throw overboard the contempt proceedings; from the similarity of the means adopted it can reasonably be inferred that both the applications are the work of the same person.

It seems that the opposite party was anxious to see that Sheoraj adhered to the application and, therefore, got an affidavit from him in support of the application. Affidavits are usually not filed in support of applications presented in Courts of Magistrates. It is difficult to believe all the allegations made in the application. There is no allegation of Sheoraj's being kept in wrongful confinement or under duress, and if he remained away from the police, he did it voluntarily though under the advice of Sital.

There is nothing to suggest that he was prevented earlier from going away to his house. The statement that he was kept in village Sankha for one month and ten days is falsified by the fact that he was served with the notice of the transfer of his complaint case on some date between 12-8-1954 and 24-8-54. The opposite party seems to be under the blithe but dangerous belief that he can frustrate legal proceedings by destroying evidence and that he can wipe out one contempt by committing another contempt.

Certainly a person who commits contempt of Court by obstructing the course of justice cannot escape punishment by interfering with the contempt proceedings by winning over the complainant. There was absolutely no occasion for the application being made in the Court of the District Magistrate where the complaint case was pending; the District Magistrate had nothing to do with the contempt proceedings pending in this Court.

The proper court in which the application should have been presented is this Court, but it seems that Sheoraj. the opposite party and others dared not come to this Court with such an application as that dated 25-8-54. There is, therefore, no doubt that it is a false application. There is no charge against the opposite party for contempt of this Court by interfering in an unlawful manner with the contempt proceedings by tampering with the evidence of Sheoraj and inducing or forcing him to file the application containing falsehood in the District Magistrate's court but the facts supply strong circumstantial evidence in support of the charges made against the opposite party.

(11) It is fully established that the opposite party committed contempt of the courts of the Judicial Magistrate and the District Magistrate by unlawfully interfering with the proceedings pending before them and exerting undue pressure upon Sheoraj, Ram Das, etc. who were to be material witnesses in them.

(12) As regards the Superintendent of Police, there is only the allegation in the affidavit of Sheoraj, but there are no circumstances to corroborate it. The affidavit actually makes no distinction between one opposite party and the other and it is by no means certain that both of them are meant to have done every act which is said in the affidavit to have been done by the opposite parties.

The Deputy Superintendent was the person mostly concerned with the complaint of Sheoraj and its withdrawal. There is no doubt that he has done the acts mentioned in the affidavit of Sheoraj. As regards the Superintendent of Police all that can be

said is that he must have been aware of what the Deputy Superintendent was doing.

If he remained ignorant it only means that he himself is inefficient in the performance of his duties. The counter-affidavit filed by him is on the same lines as that filed by the Deputy Superintendent and he has espoused his cause whole-heartedly. He has not pleaded that he was not aware of the misdeeds of the Deputy Superintendent and therefore did not take steps to check him; on the other hand he has supported him in everything that he did.

There is also the fact that the Deputy Superintendent could not have dared do any of the mischievous acts that he has done unless he was certain of receiving the support of the Superintendent and he would have been certain of it if the Superintendent was no respecter of the law. There may thus be good material for departmental action against the Superintendent of Police, but I am not satisfied that he can be said to have been guilty of the contempt of court.

Contempt proceedings being quasi-criminal, the benefit of reasonable doubt should be given to the alleged contemner, vide — 'The King v. Fletcher', 52 CLR 248 (G); — 'The State v. Dasrath Jha', AIR 1951 Pat 443 (H) and — 'Michaelson v. U. S. Ex Rel C. St. P. M. and O. R. Co.', (1924) 266 US 42 (I). In — 'Perera v. The King', 1951 WN 208 (J) the Judicial Committee accepted the defence of good faith on the part of a person who was charged with contempt of court.

The Superintendent of Police also might have acted in good faith believing all that was told to him by the Deputy Superintendent of Police and he might not have known the truth. I, therefore, agree that the notice issued to him should be discharged.

(13) The offence committed by the Deputy Superintendent deserves serious notice. He has committed repeated contempts of court and seems to be labouring under the impression that being a Deputy Superintendent of Police he can with impunity do anything he likes in relation to proceedings pending in court. He has committed serious offences as of wrongful confinement, criminal intimidation, forgery etc.

He therefore fully deserves to be sent to prison for the contempt committed by him. But we take into account that the offences committed by him will be taken due notice of by the State and the State may pass an order of removal from service which is fully justified. Generally the Court leans to the side of mercy and having regard to the punishment that may be inflicted upon him by the State we think that he need not be sent to jail and that infliction of fine would be sufficient vindication of the law.

CHOWDHRY J.:

(14) This is an application under Ss. 3 and 4, Contempt of Courts Act (XXXII of 1952) by one Sheoraj, a 'dhobi' of village Teni, police station Khaga, district Fatehpur, against the Superintendent of Police A. P. Batra and Deputy Superintendent of Police Hari Singh of Fatehpur, hereinafter referred to as the S. P. and the D. S. P. respectively.

(15) The applicant's case, as contained in the affidavit filed in support of the present application, is that while returning to his village with one Ramdas at about sunset on 25-6-1954 from a fair in village Thariayon, he and his companion were waylaid on the outskirts of village Teni and robbed at the point of Karauli and lathis by Sheoshankar alias Bhura, Ram Manohar and Girdhari; that in response to the alarm raised by them Mahadeo Pasi, Mahadeo Chaukidar and Sukhdeo Chaukidar reached the spot; that with their help two of the culprits, Sheoshankar and Ram Manohar, were secured but the third one escaped; and that they took Sheoshankar and Ram Manohar along with the stolen articles to the police station at Khaga and the applicant lodged there the first information report of the occurrence at 9 p.m.

Ram Manohar was an absconder in connection with a case against him under S. 19(f), Indian Arms Act, and made confessions to the Station Officer Khaga about a number of offences. He was presented before the court, where proceedings in the Arms Act case had been stayed by reason of his having absconded, and sentenced to two years' R. I. It is the applicant's allegation that the S. P. and the D. S. P. under the directions and control of the S. P. took a very strange attitude from the very beginning for reasons best known to them.

As soon as the S. P. came to know that the said case under S. 392, I. P. C., had been registered and the confession of Ram Manohar had been recorded in the case diary, he got enraged with the Station Officer and scolded him for registering the case. Having come to know of these developments, the applicant filed a complaint against the said accused for the offence in question on 29-6-1954 in the court of the Judicial Magistrate, Khaga.

The Judicial Magistrate recorded the statement of the applicant under S. 200 and of the witness, Ram Das, under S. 202, Criminal P. C., and issued processes to the accused to answer the charge under S. 392, I. P. C., on 12-7-1954. The applicant avers that when the opposite parties came to know of the filing of the complaint they decided to harass the applicant and thereby stifle the prosecution.

(16) As proof of the said allegation that the opposite parties had decided to harass the applicant in order to stifle the prosecution, the applicant cites the following acts alleged to have been committed by them. They had the applicant arrested and brought to Fatehpur, put pressure on him to withdraw the complaint, and on his refusal to do so forced him to affix his thumb impression on four papers without disclosing to him what was written in those papers.

The applicant alleges that he was detained in police custody from July 2 and released on the morning of July 4, 1954, under threat of being ruined if he prosecuted his complaint. While he was in police custody a relation of the applicant, one Ramnath of Mohammadpur, police station, Thariayon, filed an application before the Judicial Magistrate on 3-7-1954 to the following effect:

"It is respectfully submitted that Sheoraj, who is my relation and Biradari, has filed a complaint against Sheo Shankar alias Bhura and others on 29-6-1954 under S. 392, I. P. C. The statement of the complainant and evidence under S. 202, Cr. P. C., having been recorded the Magistrate proceeded to order for the issue of process against the accused and 12-7-1954, was fixed for the attendance of the accused persons.

For reasons best known to it, the police does not want that the case be proceeded with and with that end in view they are taking all sorts of illegal steps and one of the links of this chain is that the complainant had been brought to Fatehpur since yesterday morning and is being kept in the police control since then. Yesterday during day time he was kept at the residence and in the office of the Deputy Superintendent of Police and was kept at the Police station Kotwali during night.

All these things having probably not come in record anywhere and this detention amounts to an offence under S. 342 I. P. C. During all this time constant efforts are being made to have the statement of the complainant spoiled or to have the complaint withdrawn. This is against law and justice. The applicant is bringing these things to the notice of the court because apart from its being offence under

various sections, it amounts to contempt of court. It may be noted and necessary action be taken."

(17) The applicant goes on to aver that he came to know, on being released from police custody, that one of the four papers on which the applicant had been coerced into affixing his thumb-impression had been forwarded to the Judicial Magistrate on 5-7-1954. It ran as follows.

"To,
The Judicial Officer, Khaga,
District Fatehpur.

Sir,

It is submitted that the applicant is resident of village Teni, police station Khaga district Fatehpur. On 25-6-1954, which was Friday, the applicant lodged a report at the police station Khaga. On 3rd day thereafter i. e. on Sunday, two police constables brought the applicant and the witnesses to the Hospital at Khaga and got them medically examined. Rs. 25/- were paid as fee by the Station Officer.

After medical examination I and my Samdhi Gahru came back to our house. On 29-6-1954 two constables brought me and Ram Das from my house and took us to the Station Officer. The Station Officer thereafter brought us to Fatehpur to the house of Vakil Sahib. Vakil Sahib thereafter took me and Ram Das on an ekka to the courts and made me sit outside the court room and wrote out whatever he wanted.

Thereafter my thumb impression was obtained on the complaint I do not know what is written in the complaint. Thereafter the Vakil Sahib sent me and Ram Das to his house along with his men. There the Station Officer, Khaga, came & took us to Khaga by the evening bus. Next morning a constable took me and Ram Das to village Budhwan for recognising Girdhari Lohar.

Thereafter I and Ram Das went back to our house. I do not know what was recorded as my statement on which my thumb impression was obtained. I have not filed any complaint against any person of my circle. I therefore pray that this Hon'ble Court be pleased to dismiss my complaint against Ram Manohar and others under S. 392 I. P. C.

Petitioner, Sheoraj Son of Bhuiyan Din, Dhobi, resident of village Teni, police station Khaga, district Fatehpur."

(18) The Magistrate passed the following order on receipt of that application on 5-7-1954:

"Today this application was received in a close wrapper through a constable. The application was taken up. The applicant was called but he is absent. Ordered that it be put up for verification on the date fixed."

(19) The applicant avers that on account of the threats of the opposite parties he could not attend the court on 12-7-1954 but came to Allahabad on 10-7-1954 and filed the present application on 15-7-1954. He contends that the aforesaid conduct of the opposite parties amounts to gross contempt of court and prays that they be punished for the same according to law.

(20) The opposite parties have filed separate but identical replies by counter-affidavits. The gist of their case is that the report lodged by the applicant on 25-6-1954 was really a report only against one man, Sheo Shankar, of his having committed theft in the applicant's house in Teni; that the Station Officer Baqar Husain converted it into one under S. 342, I. P. C. as alleged by the applicant, in order to implicate Ram Manohar falsely because Ram Manohar had absconded and jumped bail in the 19 (f) Arms Act case; and that the applicant had been set up by others, meaning Station Officer Baqar Husain by implication, in order to frustrate the departmental inquiry instituted against the Station Officer for his attempt to implicate Ram Manohar falsely. The details of their counter affidavits are the following.

(21) The report was lodged on 25-6-1954 and the accused Ram Manohar and Sheo Shankar were produced before the Magistrate on 26-6-1954. Before they were sent to jail, they were separately interrogated by the D. S. P. as the Circle Officer concerned. It is alleged that this was done as a part of the routine duty of a Circle Officer to supervise the investigations in cases of all grave offences, such as dacoity, robbery and murder with a view to obviating the risk of innocent persons being victimised as a result of improper or insufficient investigation.

Ram Manohar is said to have told the D. S. P. that he had jumped bail in the 19 (f), Arms Act case and brought to the police station, Khaga by his surety on the morning of 25-6-1954. If so, it is averred, Ram Manohar could not have committed the alleged robbery on the evening of that date. Sheo Shankar is alleged to have confessed to the D. S. P. that he had committed theft of a lota and Rs. 1/14/- in the house of Sheoraj on 25-6-1954 but was caught, the stolen things were recovered from him and he was taken to the police station by Sheoraj, the said two chaukidars and one Gahru, and that Sheoraj related these facts to the Station Officer but the latter got the first information report recorded as he liked.

The D. S. P. brought these facts to the notice of the S. P., and the latter directed the former to make further inquiries into the matter and obtained a remand for 48 hours for the purpose. The remand was obtained, Station Officer Baqar Husain was sent for and he appeared before the D. S. P. on the morning of 27-6-1954. On being interrogated by the D. S. P., the Station Officer is said to have confessed that Ram Manohar had been brought to the police station by his surety, and that he was locked up with Sheo Shanker as he was a criminal.

Not satisfied with this explanation of the Station Officer, the D. S. P. went to Teni, the scene of the occurrence, taking Sheo Shankar with him. He interrogated there the two Chaukidars, Ram Das, Gahru and Sheoraj, and they supported the aforesaid statement of Sheo Shankar. On 28-6-1954 the D. S. P. informed the S. P. of the result of his inquiry. On the same day the S. P. ordered transfer of S. I. Baqar Husain to the police station at Fatehpur in order that the inquiry initiated by the D. S. P. might proceed without any risk of interference and manipulation by the Sub-Inspector.

(22) The opposite parties aver in the counter-affidavits that they were informed on 29-6-1954 that a complaint had been filed by the applicant before the Judicial Magistrate, Khaga, that the latter summoned the accused to appear before him on 12-7-1954 and that on 2-7-1954 the applicant approached the D. S. P. and, as a part of the departmental enquiry held by the D. S. P., disclosed to him the circumstances in which he had been made to file the complaint.

These circumstances are the same as contained in the aforesaid application filed before the Judicial Magistrate on 5-7-1954. Thereupon, the D. S. P. professes to have advised the applicant to place the facts, if he so desired, before the Judicial Magistrate. On 6-7-1954 the D. S. P. is said to have submitted a report to the S. P., on the conduct of S. I. Baqar Husain, and the latter was suspended on 24-7-1954.

After the filing of the present application the applicant filed an application supported by an affidavit on 25-8-1954, and made a statement on 31-8-1954, before the District Magistrate, Fatehpur (to whose court the applicant's complaint had in the meanwhile been transferred). The opposite parties have filed copies of the affidavit and the statement.

The former is a lengthy document but the gist of it is that during the preceding 1½ months the applicant had been kept in duress by one Shital Dhobi, and that during this period he was taken to various places, including the houses of lawyers at Fatehpur and Allahabad and also the High Court, that the Fatehpur lawyers tried to persuade him to make a statement in Court supporting the robbery case as set forth in the first information report but the applicant refused to agree to that and told him that he had already disclosed facts correctly to the D. S. P. at his (applicant's) house, and that at the High Court his thumb-impression was obtained on two written documents although he did state before the Allahabad lawyer and the latter's clerk that he (the applicant) did not understand what it was all about and what the contents of those documents were.

The concluding portion of the affidavit is to the effect that, on an opportune moment presenting itself, the applicant made good his escape from the house of the Fatehpur lawyer, reached his village, sent his son Girwar to the S. P. to inform him how the applicant had been kept in confinement by Shital Dhobi for two months and attempts had been made during that period by the police to persuade him under threats to make a false statement.

The applicant's statement, dated 31-8-1954, before the District Magistrate was that the complaint which he had filed was false, that he had in fact filed no complaint and the lawyer had obtained his thumb-impression on the petition of complaint, that he was not administered oath in court nor was his statement recorded on the back of the complaint that he did not even come to court, and that he had already filed an applicaion on 25-8-1954.

On this statement, the District Magistrate passed an order on the same date (31-8-1954) discharging all the accused. Evidence was allowed to be produced by the parties in the present proceedings and, to complete the picture, it may be added that the applicant deposed here that he made no application (meaning the present contempt application) in this Court but some clerk took his thumb-impression on a paper in the High Court, and that he had neither engaged nor even seen any lawyer in Allahabad.

Referring to his own learned counsel, Sri P. C. Chaturvedi, who was examining him in-chief, he professed never to have seen him. He further stated that he had filed no complaint but the Station Officer had taken him to a lawyer at Fatehpur who was not paid anything by him, that neither he nor Ramdas made any statement in court but their thumb-impressions were taken by a clerk while the Magistrate was busy with his work. He also supported the opposite parties' case that the real occurrence about which he had lodged the report on 25-6-1954 was that of theft at his house by Sheo Shankar, and that in respect of that occurrence he was interrogated by the D. S. P. at his house on the third day.

In connection with the aforesaid application dated 3-7-1954, purporting to have been filed before the Magistrate by one Ram Nath, the applicant stated that he did not know any Ram Nath, while he took full responsibility for the other application received by the Magistrate on 5-7-1954. He stated that he sent this latter application of his own accord through a constable and emphatically denied having done it at the instance of the opposite parties.

(23) A few other facts, which are not in dispute, may be stated in their chronological order. The D. S. P. sent to S. I. Baqar Husain a written order dated 26-6-1954 informing him that he was not satisfied with his investigation and asking him to see him on 27-6-1954. The S. I. saw the D. S. P. on 27-6-1954. There is a difference between the statement of the S. I. and the affidavit of the D. S. P. as to what happened in this interview on 27-6-1954.

As pointed out above, according to the D. S. P.'s affidavit the S. I. confessed to him that Ram Manohar had been brought to the police station by his surety and that he had been locked up because he was a criminal; but the S. I. deposed that on being told by the D. S. P. that he had taken down the report incorrectly he (the S. I.) produced the two accused before him (the D. S. P.) and the accused adhered to the confessions which they had already made before him (the S. I.) of their guilt. On 28-6-1954, the S. P. ordered transfer of S. I. Baqar Husain to the police lines at Fatehpur, and the S. I. reached the police lines on 29-6-1954.

The investigation was made over to Second Officer S. P. Singh. S. I. Baqar Husain remained in the police lines till 3-7-1954 on which date at about 2 P.M. he left for police station Chandpur under an order of the S. P., that he should remain within the limits of that police station. He was suspended by an order dated 24-7-1954 but reinstated by an order dated 29-11-1954. When he appeared here on 24-1-1955 he came from Kanpur district where he had been transferred.

There is one other set of facts which are material. On 26-6-1954 S. I. Baqar Husain despatched the two accused Sheo Shankar and Ram Manohar to the district jail and they were produced before a Magistrate with two communications from the S. I. one for recording their confessions and the other for 14 days' remand.

The Magistrate granted the remand till 10-7-1954 and, after administering the usual warning, directed that they be produced for the recording of their confessions on 28-6-1954. Before the accused could be sent to the Jail after the passing of these orders, and without making any reference to the orders, another Public Prosecutor obtained on the same date (26-6-1954) from another Magistrate 48 hours remand to police custody for further investigation.

Thereupon the D. S. P. directed the S. O. Kotwali to keep the accused in the police lock up. On the expiry of the 48 hours remand, Second Officer S. P. Singh, who had in the meanwhile been entrusted with the investigation of the S. 392, I. P. C. case, applied for further remand. There is a note of the D. S. P. to the Public Prosecutor that a 3 days' remand was necessary which ends with the following request: "Please manage to take it."

The Additional District Magistrate sanctioned the remand. Further remands were obtained until a final report was submitted by the Second Officer under S. 169, Criminal P. C., and the accused were released on 27-7-1954.

(24) It is in this setting of facts and circumstances that the present application has to be disposed of, and the broad questions that arise for determination are whether the applicant's allegations as to the conduct of the opposite parties in regard to his report and his complaint are correct and, if so, whether such conduct amounts to contempt of court.

(25) Before entering into the merits of the applicant's allegations a legal issue, raised and strenuously urged by the learned counsel for the opposite parties, must needs be disposed of. The issue raised was: Whether the applicant's affidavit is not legal evidence and should not therefore be looked into for the disposal of the present application?

The argument of the learned counsel was that if his contention as to the inadmissibility of the affidavit be accepted, there would be nothing left on the records in support of the allegations contained in

the present application. Neither of these contentions is well-founded. In the first instance, the affidavit is admissible in evidence, and, in the next, even if it were not, there exist circumstances in this case which speak more eloquently against the opposite parties, specially the D. S. P., than any direct evidence could.

And in this context the following quotation from Best's Principles of the Law of Evidence, Eleventh (1911) Edition, at page 309, where the learned author deals with the comparative probative values of direct and circumstantial evidence, is most apposite:

"Besides, the rule that facts are provable by circumstances as well as by direct testimony, has a considerable effect in preventing guilty or dishonest parties from tampering, or making away with witnesses, and other instruments of evidence, which they would be more likely to do, if they knew that the only evidence which the law would receive against them was contained in a few easily-ascertained depositories."

It may be that the rule extolled by the learned author has failed to serve its preventive purpose in the present case, but that does not take away from its efficacy as a mode of proof.

(26) The learned counsel for the opposite parties took his stand on the preamble (S. 1?) to the Evidence Act, 1872, where it is laid down that the Act does not apply to affidavits presented to any court. He sought to conclude therefrom that affidavits are not a mode of proof. He further argued that under the Rules of the Court an affidavit serves only to initiate proceedings, and that material facts contested between the parties can be proved during the proceedings only by viva voce evidence and not by affidavits.

Now, to say that the Indian Evidence Act does not apply to affidavits is not the same thing as to say that affidavits are not evidence. The same preamble which lays down that the Act does not apply to affidavits contains, in my opinion, also the reason for its saying so; for, it also provides that the Act applies to all judicial proceedings in or before any court. Evidence viva voce is no doubt taken in judicial proceedings in or before a court, so that it is possible for the Judge presiding over the Court to control that evidence.

For instance, the Judge will disallow inadmissible evidence or leading questions in examination-in-chief. But affidavits, while there appears to be no bar against it, are generally not sworn before the Court in which they are used, but before some other Court or person empowered to administer oath. See S. 139, C. P. Code and S. 539, Criminal P. C.

The aforesaid control of the Court over the deponent according to the rules of the Evidence Act is therefore not possible in the case of an affidavit. That appears to be the reason why the preamble to the Act lays down that it does not apply to affidavits.

(27) At the same time, although the Evidence Act does not apply to affidavits, there is no doubt that affidavits are used as a mode of proof. See, for instance, S. 51, Divorce Act, 1869, which permits a party to verify his case by affidavit, except that the opposite party has a right to cross-examine him whereafter he may also be re-examined.

Likewise, S. 30(c) of the C. P. Code empowers a Court to order any fact to be proved by affidavit, and under O. 19, R. 2, of the Code the deponent may be ordered to attend for cross-examination. Affidavits are mainly used on interlocutory motions, that is, "on any application to a court which if granted would not finally decide the rights of the parties'. And the obvious reason why the Court acts on affidavits on interlocutory applications is that no other evidence is obtainable at so short a notice.

-- 'Gilbert v. Endean', (1878) 9 Ch D 259 (K). Rule 12 of Chapter IX of Vol. I of the Rules of Court, 1952, enumerates such applications, including one praying that a person be punished for contempt of court which must be supported by affidavits. It would thus appear that affidavits are certainly used as a mode of proof though only at the initial stage of an interlocutory matter. The opposite party may file a counter-affidavit or it may demand attendance of the deponent of an affidavit for cross-examination.

If he does neither, the affidavit, used initially to start proceedings, will become evidence in the fullest sense against him. If, on the other hand, the deponent of an affidavit does not produce himself for cross-examination in response to the demand of the opposite party, it will be denuded of all probative value. Judged in the light of these elementary principles of the law of evidence, it cannot be said that the present applicant's affidavit was reduced to a mere brutum fulmen after initiation of the present proceedings on its basis, for the applicant did produce himself as a witness and was subjected to cross-examination. As to what weight may be attached to the affidavit is quite another matter.

(28) Reverting now to the applicant's allegations against the opposite parties, they relate obviously to two stages, the stage after the lodging of the report dated 25-6-1954 but before the complaint was filed on 29-6-1954, and the stage after the filing of the complaint. His allegations relating to the first stage are that both the S. P. and D. S. P. took a strange attitude from the very beginning, and that as soon as the former came to know that the case under S. 392, I. P. C., had been registered and the confession of Ram Manohar had been recorded in the case diary, he got enraged with the Station Officer and scolded him for registering the case.

The applicant's allegations relating to the second stage are that as soon as the opposite parties came to know of the filing of the complaint, they decided to stiffle the prosecution, & that in order to achieve this object they had him arrested and brought to Fatehpur, put pressure on him to withdraw the complaint and, on his refusing to yield, forcibly took his thumb-impression on blank papers and sent one of them to the trying Magistrate.

The document has been reproduced above and was found on the record of the case. Its purport was that the applicant had filed no complaint against anybody but the Station Officer had forcibly obtained his thumb-impression on it and it ended with the prayer that it be dismissed. The reply of the opposite parties is that as a result of the routine inquiry made by the D. S. P. from various persons, including the applicant himself, it was found that only a theft had been committed at the applicant's house by Sheo Shankar but in order to implicate Ram Manohar falsely S. I. Baqar Husain had engineered a report of an offence under S. 392, I. P. C., and that thereupon the D. S. P. had advised the applicant to bring the facts to the notice of the trying Magistrate. The implication is that the applicant himself was the author of the said communication.

(29) In the present proceedings the applicant and S. I. Baqar Husain were produced as witnesses in support of the application, while four witnesses were produced by the opposite parties. Of these two (Ramdas and Gahru) were produced in support of the version that it was only a case of theft by Sheo Shankar, and the other two (Matauwa and Ramdhani) to prove that Ram Manohar had been arrested and taken to the police station at the instance of his surety.

(30) Now, so far as the present proceedings are concerned, it is quite unnecessary to decide whe-

ther only a theft was committed, as the D. S. P. purports to have found on inquiry, or whether the report as taken down by S. I. Baqar Husain was the correct version of the occurrence. The proper forum to decide that question was the Magistrate who had seisin of the complaint filed by the applicant on 29-6-1954.

It is therefore unnecessary to examine the oral evidence produced in the present proceedings from that point of view. The said complaint did not however take the normal course complaints do of being adjudicated upon on merits after the summoning of the accused and the recording of evidence pro and contra. Two applications of diametrically opposite natures were filed before the trying Magistrate before the date for which the accused had been summoned, one purporting to be by one Ram Nath complaining that the police at the headquarters were trying to stifle the prosecution, and the other purporting to be by the applicant himself asking the Magistrate to dismiss the complaint because it had been engineered by S. I. Baqar Husain.

This latter prayer was reiterated before the District Magistrate in the applicant's application and affidavit dated 25-8-1954 and in his statement dated 31-8-1954 so that the District Magistrate thought that no useful purpose was likely to be served by proceeding further with the case and discharged the accused. The question for consideration in these proceedings is whether the situation which led to the passing of his order by the District Magistrate was a culmination of events taking their normal and natural course, or it had been artificially brought about by the opposite parties or any one of them.

If the latter, the acts of the opposite parties, or the opposite party concerned, as the case may be, amounted to an interference with the course of justice in connection with an inquiry into a criminal offence pending before a Magistrate, and will therefore be punishable as contempt, irrespective of what the result of the inquiry might have ben. — 'R. v. Parke', (1903) 2 KB 432 at p. 442 (L); and — 'R. v. Davis', (1906) 1 KB 32 at p. 42 (M)'.

(31) The situation which led to the passing of the District Magistrate's order dated 31-8-1954 could have been the culmination of events taking their normal and natural course if the application and affidavit dated 25-8-1954 and the statement dated 31-8-1954 could possibly be ascribed to the applicant's own volition. A careful scrutiny of the contradictory parts played at various stages by the applicant however makes it impossible to come to any such conclusion.

His lodging of the report on 25-6-1954, filing of the complaint on 29-6-1954 and presentation of the present application on 15-7-1954 betray one state of mind, but diametrically opposed to that is the state of mind betrayed by the application received by the trying Magistrate on 5-7-1954, his application and affidavit dated 25-8-1954, his statement before the District Magistrate on 31-8-1954 and his statement dated 24-1-1955 in the present proceedings.

Police investigation had hardly had time to complete itself on the report of 25-6-1954 when a complaint was hurriedly filed on 29-6-1954. It is interesting to note the reason given in the present application for filing the complaint the reason, that is, that the opposite parties adopted a strange attitude from the very beginning and the S. P. scolded the Station Officer for having registered the case under S. 392, I. P. C.

How, in the words of the present application, did the applicant, a 'dhobi' of village Teni, come to know 'of these developments' between the said police officers passes one's comprehension. Thereafter, it is alleged in the present application, the applicant could not attend the Magistrate's court on 12-7-1954 due to the threats of the opposite parties, but he had courage enough to come to Allahabad and file the present application on 15-7-1954 and then go back to his village.

Within a month and a half of the presentation of this application the applicant filed an application in the Court of the District Magistrate, supported by an affidavit, on 25-8-1954, and made a statement in that court within a week of that, all of which set at naught the complaint dated 29-6-1954 and the present contempt application. On 24-1-1955 the applicant presented the strange spectacle of making a statement in this Court which falsified his own case and supported that of the opposite parties.

He did not even recognise his own counsel. He emphatically denied having filed at the instance of the opposite parties the application received by the Magistrate on 5-7-1954. Asked in cross-examination whether the opposite parties had threatened him, or whether anybody had beaten him at the police station Fatehpur, he answered both the questions in the negative even before the questions had been completed.

(32) Thus, there can be no manner of doubt but that the applicant has been alternately playing into the hands of two contending parties. There can also be no doubt that these contending parties were S. I. Baqar Husain on the one hand and the opposite parties, or at least the D. S. P., on the other. As soon as S. I. Baqar Husain found that the investigation was going out of his hands, he got the complaint filed by the applicant on 29-6-1954.

It was he who was obviously the source of aforesaid reasons contained in the present application for filing the complaint. After the S. I. had been ordered to the police lines the applicant admittedly came into contact with the D. S. P., and that contact admittedly resulted in the filing of the said application before the Magistrate on 5-7-1954. What hand, if any, had the opposite parties, or any of them, in the filing of that application, will be dealt with presently.

The S. I. left for Chandpur on 3-7-1954, but somehow he succeeded in getting the present application filed by the applicant on 15-7-1954. After that control of affairs passed exclusively into the hands of the opposite parties, and that control has exhibited itself in the attitude taken by the applicant first in the court of the District Magistrate and then in this Court.

The attitude adopted by the applicant in the District Magistrate's court resulted in the dismissal of his complaint, and those interested in such a result must have counted a lot on his attitude in this Court for the dismissal of the present complaint. But evidently they reckoned without the said golden rule of circumstantial evidence enunciated by Best in his treatise on evidence.

(33) The persons interested in the dismissal of the present application are naturally the opposite parties. They, or at least one of them, must therefore obviously be the force behind the suicidal statement made by the applicant in the present proceedings. The opposite parties were, or at least one of them was, also vitally interested in the dismissal of the aforesaid complaint. This is evidenced by the part played by the D. S. P. from the very beginning.

He professes to have done it as part of the routine duty of a Circle Officer to supervise the investigations in cases of all grave offences. That is indeed a claim of perfection, but even supposing that this D. S. P. was such an ideal officer, this petty case of a robbery unattended with violence could hardly be described as a grave offence. And all that has come to light in the present case would show

that it was something else than the gravity of the offence which attracted his attention.

The report was lodged at Khaga on 25-6-1954, and Ram Manohar and Sheo shankar were produced before a Magistrate at Fatehpur on 26-6-1954 with two applications of S. I. Baqar Husain, one for 14 days remand and the other for recording the confessions of the accused. The Magistrate administered the usual warning to the accused and directed them to be taken to jail and to be produced before him for the recording to confessions on 28-6-1954.

The D. S. P. all of a sudden interposed himself at this stage. He sent an order to S. I. Baqar Husain on 26-6-1954 to see him on the following day because, he said, he was not satisfied with his investigation. This step the D. S. P. professes to have taken because, before the accused could be taken to jail in compliance with the aforesaid order of the Magistrate, he had interrogated the accused and found that facts were different from what appeared in the report.

This was an interesting situation indeed. According to S. I. Baqar Husain the accused were going to make confessions, but according to the D. S. P. the accused complained to him that they were being falsely implicated. It does not appear how within less than 24 hours of the lodging of the report the D. S. P. had come to know what its contents were. He had not gone to Khaga. The accused would not know that the S. I. had manufactured a false report against them.

In this connection it is pertinent to refer to the statement of S. I. Baqar Husain. He deposed that Ram Manohar had confessed to a number of dacoities, that in this confession he had implicated certain relations of a lawyer of Fatehpur (who need not be named), including Ram Dhani, and that this Vakil saw the D. S. P. on 26-6-1954. Ram Dhani has stated that it was not true that Ram Manohar had made a confession implicating him.

This statement is unworthy of credence on the face of it since Ramdhani would not know that Ram Manohar had made any confession before the police. Ramdhani has however admitted being a relation of the said lawyer. S. I. Baqar Husain stated further that the D. S. P. made a mention of the said lawyer having seen him on 26-6-1954 in his report of inquiry against him (the S. I.). A report of this inquiry was admittedly made, but it was not filed to contradict the said statement of the S. I.

In fact, the S. I. was not even cross-examined with regard to his statements that Ram Manohar had implicated the lawyer's relations and that the lawyer saw the D. S. P. on 26-6-1954. In the circumstances, the only source of D. S. P.'s information as to the report that had been lodged on 25-6-1954 appears to have been the lawyer, and this lawyer would be naturally interested in preventing Ram Manohar from implicating his relations.

(34) It would thus appear that it was this interview of the said lawyer with the D. S. P. on 26-6-1954 that was behind the sudden interest which the D. S. P. started taking in the case since that date. And this is confirmed by the subsequent activities of the D. S. P. which were all directed towards preventing Ram Manohar from making a confession. A police officer in the D. S. P.'s situation should have allowed the accused to be taken to Jail on 26-6-1954 and then, in compliance with the Magistrate's order, to be produced for their confessions on 28-6-1954 in order to see which of the conflicting versions was the true one.

That way, however, lay the danger of Ram Manohar implicating the said lawyer's relations. In the teeth of the aforesaid order of the Magistrate, the D. S. P. secured an order of remand of the accused to police custody from another Magistrate. That it should have been possible for the D. S. P. to do so is an extremely sad commentary on the then administrative machinery of the magistracy of the district of Fatehpur, besides its showing to what extent this officer could go.

The anxiety he betrayed in this connection is worthy of note. When 48 hours remand to police custody was sanctioned by the other Magistrate on 26-6-1954, the accused would naturally have been kept in police custody for that period. But conscious presumably of the fact that magisterial orders were capable of being thwarted, the D. S. P. passed an order directing the S. O. Kotwali to keep the accused in lock up.

When the 48 hours remand period expired, it would have sufficed for the D. S. P. to ask the Public Prosecutor to apply for further remand. "Please manage to take it" is, however, what the D. S. P. wrote to the Public Prosecutor. Several further remands were taken. Incidentally, in none of the orders authorising detention of the accused in police custody did the Magistrate record his reasons for doing so, as was imperative under S. 167 (3), Criminal P. C.

The upshot of it all was that the second officer, to whom the socalled investigation had been made over by the D. S. P., eventually submitted a final report under S. 169, Criminal P. C., and both the accused were released on 27-7-1954. Surprisingly enough, this final report was submitted in respect of Sheo Shankar also in respect of whom it is even here the case of the opposite parties that he was guilty of an offence punishable under S. 380, I. P. C.

And be it noted that a judicial inquiry against the accused had already started on 29-6-1954 and had not yet come to an end. The D. S. P. however had apparently no faith in a judicial inquiry and decision and thought that a parallel police investigation and final report were the proper substitutes for the same. This conduct of the D. S. P. by itself amounted to gross contempt of court.

(35) It is said in the D. S. P.'s counter-affidavit that on 27-6-1954, S. I. Baqar Husain confessed to him that Ram Manohar had really been brought to the police station by his surety and that he (the S. I.) locked him up with Sheo Shankar as he was a criminal. The S. I. however denied it in his statement in this Court and deposed that on being accused of having recorded the report incorrectly he produced the accused before the D. S. P. and the accused adhered to their confessions.

It is incredible that the S. I. should have made the confession attributed to him in the D. S. P.'s affidavit. If any such confession had been made, the so-called inquiry into the conduct of the S. I. should have come to an end then and there and the D. S. P. should have made a report to the S. P. on the basis of that confession. But the D. S. P.'s affidavit is that even after that confession he went to village Teni and interrogated witnesses. It may be mentioned here in passing that no written record of the inquiry was maintained by the D. S. P.

(36) In the light of the facts and circumstances mentioned above, there could be no doubt but that it was the D. S. P., and not the automaton, the present applicant, who was behind the application received by the Magistrate on 5-7-1954. Many were the somersaults taken by the applicant, and since sometime before presentation of the application before the District Magistrate he has been under the undoubted sway of the D. S. P.

It is no wonder therefore that in his statement before this Court the applicant said that he himself was responsible for that application. Similar applications were sent to the S. P. and the District Magistrate also. The applicant's statement in this connection is however most unconvincing. He says that as

it was evening time and the following day was a Sunday and he was returning home, he handed over the applications to a police constable with Rs. 6/-.

What this sum of money was meant for does not appear. None of the applications, at any rate, bore any court-fee labels. Asked as to what the name of the constable was, the applicant stated that he did not know it but that he was related to one Ramanand Sunar of his village, who was employed in the police department at Lucknow, and used to come to his village. Obviously, this was an attempt to explain away the unfortunate note appearing in the order sheet of the Magistrate that the application had been received in a close wrapper through a constable.

The actual words used, of which "close wrapper" is a translation, were "bund kaidak". A "bund kaidak" is used for transmission of official correspondence and would not be available to a private person like the applicant. There is no reason why the applicant himself should not have presented the application before the Magistrate. Indeed, it would have been the most natural thing for him to do.

He made over the applications instead to a constable although he did not even know his name. The constable was named because otherwise the falsity of his statement would have been proved. The D. S. P. admits that on 2-7-1954 he had come to know of the facts which form the contents of the said application, although he adds that he advised the applicant to place those facts before the Magistrate.

The tell-tale note in the order sheet of the Magistrate, the unsatisfactory statement of the applicant and the other surrounding circumstances referred to above, however, clearly show that it was the D. S. P. who was behind the application sent to the Magistrate. Had the D. S. P. stated that his only part in the affair was that he had the application presented before the Magistrate the situation might have been different, for if the contents of the application reflected what was in the mind of the applicant it mattered not that the D. S. P. or his man acted as the messenger.

But, apart from the other reasons mentioned above, the fact that he completely washes his hands of the whole affair goes to prove his full complicity in it. It was suggested that S. I. Baqar Husain may have sent the application through a constable. That suggestion would not however stand a moment's scrutiny for the S. I. could not possibly be a party to an application which would cut at the very root of his case.

(37) In the result, therefore, I am satisfied that the eventual dismissal of the applicant's complaint was not the result of the events taking their normal & natural course but had been artificially brought about by the D. S. P. There are strong reasons to hold that the D. S.P. wanted to screen the relations of a certain lawyer, that there was a danger of those relations getting involved if Ram Manohar made a confession or a statement in court, and that therefore he hit upon the course of getting a final report made in the police investigation into the report lodged by the applicant and of getting the applicant's complaint dismissed.

But whatever may have been the D. S. P.'s motive, there is no doubt that he did prevent the police investigation into the applicant's report and the magisterial inquiry into the applicant's complaint taking their normal course and stifled both. He even tried to stifle the present application. This conduct of the D. S. P. amounted, as adverted to above, to an interference with the course of justice and is punishable as contempt of court irrespective of what the ultimate result of the inquiry might have been.

Such conduct would be reprehensible in any man, but it would be much more so in the case of one holding the responsible office of a D. S. P. I am of the opinion that D. S. P. Hari Singh is guilty of contempt of courts subordinate to this Court, viz., the court of the Judicial Magistrate Fatehpur, where the applicant's complaint dated 29-6-1954 was filed and remained pending until transferred, and of the court of the District Magistrate Fatehpur where the said complaint was transferred and eventually dismissed, the contempt in question not being an offence punishable under the Indian Penal Code.

It is not possible to attribute the said interference with the course of justice to any act of the S. P. There can, however, be no gainsaying the fact that at no stage did he try to sift matters and exercise his independent judgment but allowed himself throughout to be led away by the ipse dixit of the D. S. P. He was either too supine or no judge of men and affairs.

Had the S. P. exercised vigilance expected of the head of the police force of a district, not of course the kind of vigilance displayed by the D. S. P., interference with the course of justice might have been avoided.

BY THE COURT

(38) In the result, the application is allowed in respect of the Deputy Superintendent of Police Hari Singh but dismissed in respect of the Superintendent of Police A. P. Batra. The Deputy Superintendent of Police Hari Singh is fined Rs. 500/-. In default of payment of fine, he will suffer simple imprisonment for 1½ months. He will also pay Rs. 500/- as costs to the Government Advocate. The applicant Sheoraj and the Superintendent of Police A. P. Batra will bear their own costs.

DESAI J.:

(39) There is no justification for certifying this as a fit case for appeal to the Supreme Court. I am authorised by my brother Chowdhry to say that he concurs in this. The application for certification is refused.

V.B.B. Order accordingly.

°(S) AIR 1955 Allahabad 653 (V. 42 C. 189 Nov.)

CHOWDHRY J. (29-7-1955)

Firm Raghubar Dayal Kallu Mal, Petitioner v. State of U. P., Lucknow and others, Opposite Parties.

Civil Misc. Writs Nos. 1300 to 1306 of 1954.

(a) Constitution of India, Art. 226 — Other remedy open — Infringement of fundamental rights.

The principle that a court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party comes to the court with an allegation that his fundamental right has been infringed and seeks relief under Art. 226. AIR 1953 SC 252 and AIR 1954 SC 403, Foll. (Para 9)

Anno: AIR Com., Const. of India, Art. 226 N. 19(g).

(b) Sales Tax — U. P. Sales Tax Rules (1948), R. 2(d-1) (b) — "As a direct result of sale".

The Act and the Rules are concerned only with sales, and all that R. 2(d-1) (b) therefore requires is that the motive force behind the import should be none other than sale the stage at which the sale takes place being immaterial. True, the clause speaks of the import being "as a direct result of sale" but that would still be so if the outside dealer despatches the goods in the expectation of being able to sell them and that expectation is eventually realised. Where therefore railway receipts are sent directly by a dealer outside U. P. endorsed in favour of a dealer in U. P. and where they are first endorsed by the outside dealer in favour of his bank in U. P. and subsequently by the bank in favour

of the dealer in U. P., the import of the goods into U. P. is as a direct result of sale, and the case is in consequence governed by Cl. (b) of the definition of import. (Paras 13, 14)

(c) **Sales Tax — U. P. Sales Tax Rules (1948), R. 2(d) (1) — Re-sale.**

The use of the word 're-sale' denotes that a sale had already taken place, and since the re-sale has to be by the person who imported the goods, that sale should necessarily have been in favour of the importer. The person in whose favour the sale has been made and who makes the re-sale is therefore one and the same person, and he is the person who imported the goods. (Para 15)

(d) **Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 2(c) — Explanation — Agent of dealer outside state — Bank, if such agent.**

Carrying on the business of buying or selling in U. P. on behalf of the person resident outside U. P. is an essential condition of the particular kind of agent who is to be treated as a dealer under the Act. That being so, if the person carries on some business other than that of buying or selling on behalf of the person resident outside U. P. he will not be this particular kind of agent and will not therefore be a dealer who could be taxed under the provisions of the Act. The dealer who is therefore liable to be taxed as importer is not the bank, as an agent of the dealer outside U. P. in whose favour the railway receipt is first endorsed and then again by the bank in favour of the dealer in U. P. (Para 16)

(e) **Sales Tax — U. P. Sales Tax Rules (1948), S. 2 (d-1) — Definition of importer if ultra vires — (Constitution of India, Art. 245).**

Due both to the complexity and immensity of the present day legislative function subordinate legislation has become inevitable. Such delegation is permissible so long as the Legislature does not efface itself by setting up a parallel legislative authority and transferring to it the essential legislative function of determining what the law shall be, but confines the delegation to entrustment of the duty of filling in matters of detail. (Para 18)

The definition of importer in the U. P. Sales Tax Rules is not illegal or inoperative by reason either of its being ultra vires the rule-making power of the State Legislature or of its amounting to delegation of legislative power outside permissible limits. AIR 1954 SC 465, Applied. (Para 20)

(f) **Constitution of India, Art. 286(1), Explanation — Sale within State.**

A sale cannot be clearly in a State unless it be a sale of the description contemplated by the Explanation to Cl. (1) of Art. 286. If it is not a sale of that description, it cannot be deemed, for purposes of that Article, to be a sale within the State, irrespective of where actually under the general law relating to sale of goods property in the goods may have passed. (Para 24)

(g) **Constitution of India, Art. 286(1), Explanation and (2) — Sale becoming intra-State under Explanation — Inquiry whether sale had taken place in course of inter-State trade or commerce, if necessary.**

As soon as a State finds that a sale involving inter-State elements becomes intra-State under the Explanation to Cl. (1) of Art. 286, it has the fullest authority to tax it as a sale which has taken place within that State and it need not embark on a roving inquiry whether it was a sale which had taken place in the course of inter-State trade or commerce, as contemplated by Cl. (2) of the said Article. (Para 27)

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 252: 1953 SCR 1069 (SC) 9, 21, 24, 27
(B) (V41) AIR 1954 SC 403: 1954 SCR 1122 (SC) 9
(C) (1951) 236 US 230: 59 Law Ed 552 18
(D) (V41) AIR 1954 SC 465: 1954 SCA 824: 1954 Cri LJ 1322 (SC) 19
(E) (V38) AIR 1951 SC 332: 1951 SCR 747 (SC) 19
(F) (V40) AIR 1953 Orissa 334: ILR (1953) Cut 553 23, 25

O. N. Mehrotra, for Petitioner.

ORDER: These are seven petitions under Art. 226 of the Constitution by as many firms carrying on business as wholesale dealers in cloth in Bareilly in the State of Uttar Pradesh against the State, the Sales Tax Commissioner U. P. and the Sales Tax Officer Bareilly, impugning orders of assessment of sales tax passed against them respectively by the Sales Tax Officer Bareilly.

(2) This judgment will govern all the seven writ petitions as the grounds on which the orders in question were passed, and those on which those orders are being challenged by the petitioners, are identical.

(3) The relevant provisions of the U. P. Sales Tax Act (15 of 1948) hereinafter referred to as the Act, which came into force on 1-4-1948 and was passed by the Provincial Legislature by virtue of the power vested in it under S. 100(3), read with Entry 48 in List II, Sch. 7, Government of India Act, 1935, may be set forth to begin with. The corresponding power is now conferred on the State Legislature by Art. 246(3), read with Entry 54 of List II, Sch. 7 of the Constitution.

In accord with S. 99(1), Government of India Act, corresponding with Art. 245(1) of the Constitution, the Preamble of the Act shows that it provides for the levy of tax on the sale of goods in the U. P. Section 2(h) defines 'sale' as transfer of property in goods for valuable consideration and Explanations II and IV lay down what sales may be deemed to have taken place in the State of U. P., the former acting on the pre-constitution principle of territorial nexus and the latter (added by Act 18 of 1953) incorporating the legal fiction contained in the Explanation to Cl. (1) of Art. 286 of the Constitution.

Incidentally, S. 27, which incorporates the provisions of Cls. (1) and (2) of Art. 286 as to restrictions on the taxing power of a State in relation to Sales involving inter-state elements, was added to the Act by the Adaptation of Laws Order, 1950, as amended by the Adaptation of Laws (Third Amendment) Order, 1951, published at p. 129 of Part II of the U. P. Gazette of 5-5-1951. Goods may be divided into three categories as those exempt from taxation (S. 4 and the first proviso to the definition of turnover), those liable to multiple point taxation (S. 3) and those liable to taxation at a single point in the series of sales by successive dealers (S. 3A).

The charging Ss. 3 and 3A fix, subject to variation, the taxable turnover on the aggregate of the proceeds of sale of a dealer (S. 21) and the rate of tax and make the dealer, defined in S. 2(c) as a person or association of persons carrying on personally or through an agent, the business of buying or selling goods in U. P., liable for the same. The dealer has to submit returns in Form IV quarterly or yearly according as he elects the assessment year (Rules 39 and 41(1)) or the previous year (R. 40 and S. 7(1)) as the basis of assessment.

In the former case there is a single and final assessment and in the latter a provisional, or to-

the-best-of-his-judgment, assessment by the Sales Tax Officer, followed by a final assessment, in case the dealer fails to submit the return or submits it without depositing the tax payable on the turnover shown in his return (R. 41(3)). If a dealer wishes to recover from his customers the sales tax realised from him, he has to get himself registered under S. 8A of the Act.

The petitioners are such registered dealers. The assessment is subject to appeal (S. 9) and revision (S. 10). Under S. 24 the State Government has the power to make rules to carry out the purposes of the Act.

(4) In exercise of the powers conferred by S. 3-A of the Act the State Government declared by Notification No. ST-117/X-923, dated 8-6-1948, that with effect from 9-6-1948, proceeds of sale of goods entered in column 2 of the Schedule appended to the notification shall not be included in the turnover of any dealer except at the point in the series of sales by successive dealers mentioned in column 4 under the circumstances shown in column 3 of the Schedule, and that the rate of tax in respect of the turnover of the aforesaid goods shall be as entered in column 5.

Turnover in respect of mill-made cloth imported from outside U. P., with which the present cases are concerned, is liable to tax at six pies per rupee at the point of sale by the importer. The U. P. Sales Tax Rules, framed by the State Government under S. 24 of the Act, define importer, as respects goods imported into Uttar Pradesh from any other State of India, as meaning

"(a) in a case where the goods are not imported for the purpose of re-sale in the same condition as they were imported by the person who imported them, the dealer in such other State, who made the sale as a direct result of which the goods are imported into Uttar Pradesh :

(b) in a case where the goods are imported for the purpose of re-sale in the same condition as they were imported by the person who imported them, the dealer who makes the first sale after the sale as a direct result of which the goods were imported into Uttar Pradesh; and

(c) in a case where the goods are imported into Uttar Pradesh otherwise than as a direct result of a sale, the dealer who makes the first sale after such import."

(5) The Constitution guarantees freedom of trade, commerce and intercourse throughout the territory of India (Art. 301), but that is subject to the power of a State Legislature to tax goods imported from other States or impose such reasonable restrictions on the said freedom as may be required in the public interest (Art. 304). This taxing power of a State is in its turn subject to the restrictions (1) that it shall be non-discriminatory (Art. 304(a)) (2) that it shall not exceed the territorial jurisdiction conferred on it by Art. 245(1) by imposing, or authorising the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State (Art. 286(1)(a)), and (3) that it shall not exceed the subject-matter jurisdiction prescribed by Art. 246 by taxing sales that take place in the course either of import and export of goods or of inter-State commerce or trade (Art. 286(1)(b) and (2)), both of these being Union subjects (Entries 83 and 42 of List I of Sch. 7 of the Constitution).

Any tax on sale or purchase of goods which fails to steer clear of these restrictions will therefore be ultra vires the State Legislature.

(6) Coming now to the facts of the present cases, the affidavits and rejoinder-affidavits filed by the petitioners and the counter-affidavit filed by the Sales Tax Officer, Bareilly show that it is common ground between the parties that the petitioners are dealers as defined in the Act; that the cloth the sale of which was the subject of the impugned taxation was mill-made cloth purchased by the petitioners from outside U. P., the modus operandi being that the sellers outside U. P. were both the consignors and the consignees in the railway receipts under which the goods were imported within the State of U. P. by rail, deliveries from the railway were taken by the petitioners on the railway receipts being endorsed in their favour by the said sellers or by their banks in Bareilly, and prices were paid by the petitioners to the sellers in the former case directly and in the latter through the banks; and that the cloth thus purchased by the petitioners was then sold by them in the same condition to other dealers in U. P., but not to consumers.

(7) Cause of action arose to the petitioners in the following circumstances. Being of the view that turnover in respect of mill-made cloth imported from outside U. P. was not liable to assessment to sales tax, the petitioners thought that they were under no obligation to realise, and they did not in fact realise, any sales tax, and they submitted, on being required to do so, their returns in Form IV under protest to the Sales Tax Officer, Bareilly, for the two quarters ending June 30 and September 30, 1954, declaring their turnovers for the said quarters but without making in either case deposits in the treasury of the amounts of tax due on the said turnovers.

Overruling the objections of the petitioners, the Sales Tax Officer held them by orders dated 8-11-1954, liable to pay the tax as 'importers' and, determining their turnover for the said quarters to the best of his judgment at certain enhanced figures, he provisionally assessed them to various amounts of tax on those figures and served them with notices of demand and with notices calling upon them to appear for final assessment.

The petitioners waited on 18-11-1954, in deputation on the Sales Tax Officer for a clarification of the situation arising out of what they describe as an unwarranted and illegal assessment, but without avail. They then petitioned the Commissioner of Sales Tax U. P. for setting aside the provisional assessments and for stay of realisation of the tax. By an order dated 22-11-1954, the Commissioner informed the petitioners that if they filed affidavits declaring the sales of ex-U. P. cloth for the quarters in question and deposited the tax due in full on or before 21-12-1954, realisation of the excess tax if any, assessed for the said periods would be stayed pending final assessment.

(8) On 15-12-1954, the present petitions were filed impugning the impost on a number of grounds, complaining that the fundamental right of carrying on trade or business guaranteed to the petitioners by Art. 19(1)(g) of the Constitution had in consequence been infringed, and praying that it be declared that the U. P. Sales Tax Act is ultra vires the State Legislature, that a writ of certiorari be issued quashing the order dated 8-11-1954, passed by the Sales Tax Officer, Bareilly, that a writ of prohibition be issued ordering the Sales Tax Officer not to tax the petitioners with sales tax on cloth obtained by them from states outside U. P., that a writ of mandamus be issued ordering the Sales Tax Officer or any other officer of the State of U. P. not to realise the tax imposed on the petitioners, and that an ad interim order be passed staying realisation of the tax.

On the same date ad interim orders were issued staying realisation of the tax imposed on the peti-

tioners and the taking of any further proceedings of assessment against them.

(9) In the Sales Tax Officer's counter-affidavit the assessment orders have been justified as legal and valid, and it has been objected that the petitioners had not adopted the normal course of obtaining relief by filing appeals under S. 9 of the Act. This objection was not pressed in the form in which it has been pleaded, and rightly, in view of its being well-established that the principle that a Court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party came to the Court, as in the present case, with an allegation that his fundamental right had been infringed and sought relief under Art. 226. — 'State of Bombay v. United Motors (India) Ltd.', AIR 1953 SC 252 (A) and — 'Himmat Lal v. State of M. P.', AIR 1954 SC 403 (B).

It may be added that infringement of fundamental rights has not been alleged by the petitioners in these cases merely to get their petitions under Art. 226 admitted. There is no doubt that the various pleas on which the validity of assessment orders has been challenged have been found to be untenable, but the tenability or untenability of those pleas was a matter of considerable controversy, as will presently appear, and so could not have been foreseen.

These are not, therefore, cases of the petitioners having merely come to the court with allegations of their fundamental right having been infringed but of their having done so in the bona fide belief of their allegations being well-founded. The aforesaid objection, as pleaded, has therefore no force.

(10) The form in which the said objection was argued on behalf of the opposite parties was that if the decision of the writ petitions depended on any question of fact, as, for example, whether the cloth in question was delivered in this State or sold by the petitioners for consumption, and that question of fact was not capable of being determined on mere affidavits, the writ petition should be dismissed on that ground alone.

Any such controversial question of fact either does not arise in these cases, or it need not be decided by this Court for the disposal of these petitions, as will be shown at its proper place.

(11) There are quite a number of grounds on which the petitioners pray for the aforesaid reliefs, but the only ones pressed in argument were (1) that the petitioners are not importers as defined in the U. P. Sales Tax Rules; (2) that even if they be importers the definition of that term is illegal and inoperative (a) as it is ultra vires the rule-making power of the State Government and (b) as it amounts to delegation of legislation outside permissible limits; and (3) that the Act or the Rules, in so far as they permitted assessment of the sales in question, are ultra vires the State Legislature since the assessment is in conflict with the provisions of Art. 286 of the Constitution. None of these grounds, however, has any force.

(12) Taking the first ground, the question is whether the petitioners are importers within the definition of that term in R. 2(d-1), U. P. Sales Tax Rules. The definition has already been reproduced, and it shows that the term importer has been defined in three senses in cls. (a), (b) and (c) of the Rule. It being common ground that the goods in question were imported for the purpose of re-sale in the same condition in which they were imported, Cl. (a) has no application since it applies to the case where the goods are not imported for the purpose of re-sale in the same condition as they were imported.

Clauses (b) and (c) both apply to cases where goods are imported in Uttar Pradesh, but whereas the former applies to the case where the import takes place as a direct result of sale, the latter applies to the case where the import is otherwise than as a direct result of a sale. It was pleaded in the counter-affidavit of the Sales Tax Officer, filed on behalf of the opposite parties, that the cloth in question was imported in U. P. as a direct result of sale.

This was traversed in the rejoinder affidavit of the petitioners, and their learned counsel sought to find support for the contention that the cloth was imported into U. P. otherwise than as a direct result of sale from the fact that in the railway receipts the consignor and consignee of the cloth was the dealer residing outside U. P. Now it has been seen that admittedly the railway receipts were either sent by the outside dealer endorsed in favour of the petitioners, in which case the petitioners remitted the price direct to the outside dealer, or they were endorsed in favour of a Bareilly bank and the latter re-endorsed them in favour of the petitioners, in which case the price was paid by the petitioners to the bank.

The two procedures are indicative of the two ways which the outside dealer adopted for realising the price of cloth sold by him to the petitioners, one directly and the other through his bank. But in either case the cloth was imported into U. P. as a direct result of sale.

This was patently so in the cases where the outside dealer sent the railway receipts already endorsed in favour of the petitioners, for in these cases, irrespective of the fact that the price was payable in future, the despatch of cloth was attributable to one and only one fact, namely, that the status of the outside dealer as seller and that of the petitioners as purchasers had already been determined. In other words, the goods in question were being imported into U. P. as a direct result of sale and clause (b) is clearly applicable in respect of these goods. Import of cloth into U. P. in the other case in which the railway receipt was first endorsed by the outside dealer in favour of a Bareilly bank and again by the bank in favour of the petitioners, is attributable to no different cause.

The petitioners have not cleared it in their affidavits as to why such a procedure was adopted in some cases. It has not been clarified, that is to say, whether in these cases the status of the petitioners as purchasers of those goods had not been determined before their depatch, or at any rate by the time of the entry of the goods into U. P. If it has been, import of these goods would also be as a direct result of sale. If not, it was for the petitioners to have said so, and the fact cannot be presumed in their favour. That being so, the petitioners are not entitled to take their stand on Cl. (c), which applies to cases of import of goods otherwise than as a direct result of sale.

(13) On the other hand, there are good reasons for holding that Cl. (b) applies even in those cases where railway receipts were first endorsed to the bank and then by the bank to the petitioners. Even in these cases property in the goods admittedly passed as a result of sale and not of any contract of a different nature, e.g., gift. It may be that the sale took place after the goods had been imported into U. P., but that would be immaterial.

What Cl. (b) requires is that goods are imported as a direct result of sale. It does not say anything as to when or where the sale should take place. Nor indeed would that be material provided only it could be said that import was occa-

sioned by sale, irrespective of whether the sale was an already completed, or an expected, transaction.

The Act and the Rules are concerned only with sales, and all that the clause therefore requires is that the motive force behind the import should be none other than sale, the stage at which the sale takes place being immaterial. True, the clause speaks of the import being "as a direct result of sale", but that would still be so if the outside dealer despatches the goods in the expectation of being able to sell them and that expectation is eventually realised. In the present cases, there is no room for the supposition that cloth was sent into U. P. for any other purpose than sale.

If this be not the interpretation put upon the said words in Cl. (b), it would be possible to circumvent the provisions of the Explanation to Art. 286(1)(9) of the Constitution (to be referred to presently) where also the same words have been used.

(14) The question would naturally arise as to what would be an import as an indirect, or non-indirect, result of sale. The answer should obviously be an import between which and the sale there has intervened some other motive force as the cause for the import. Suppose A in U. P. purchases goods from B in Bombay and the goods are as a result imported into U. P. That would be a case of import into U. P. as a direct result of sale.

But suppose A in U. P. purchases goods from B in Bombay for C in some place outside U. P., but before A is able to present the goods to C the goods are attached in execution of a decree against A and brought into U. P. In this case import of the goods into U. P. is as a direct result of attachment and only as an indirect result of sale. It should therefore be held that both where railway receipts were sent directly by the dealer outside U. P. endorsed in favour of the petitioners and where they were first endorsed by the outside dealer in favour of his bank in Bareilly and subsequently by the bank in favour of the petitioners, the import of cloth into U. P. was as a direct result of sale, and that the present cases are in consequence governed by Cl. (b) of the definition of 'importer'.

(15) Having found that the present cases are governed by Cl. (b) the essential ingredients of that clause may now be examined in order to find whether the petitioners are importers. The essential ingredients of the clauses are :

1. that the goods are imported into U. P. as a direct result of sale,

2. that the goods are imported for the purpose of re-sale,

3. that the re-sale is to be

(a) in the same condition in which they were imported, and

(b) by the person who imported them, and

4. that, if these conditions are satisfied, the importer would be the dealer who makes the first sale after the sale, referred to in No. (1) above, as a direct result of which the goods were imported into U. P.

That the first condition is satisfied has already been found. It is admitted, as adverted to above, when stating facts that are common ground between the parties, that the mill-made cloth in question was re-sold in the same condition in which it was imported. The second condition and part (a) of the third condition also therefore stand satisfied. As regards part (b) of the third condition, it is necessary that the resale must be by the person who imported the goods.

The use of the word 're-sale' denotes that a sale had already taken place, and since the re-sale has to be by the person who imported the goods, that sale should necessarily have been in favour of the importer. The person in whose favour the sale has been made and who makes the re-sale is therefore one and the same person, and he is the person who imported the goods.

It has been seen, when discussing the question of whether the cloth in question was imported into U. P. as a direct result of sale, that the seller of the cloth was the dealer outside U. P. and the purchasers the petitioners. It follows therefore that the petitioners are the persons in whose favour the sale was made. They are also the persons who made the re-sales, and they would be the persons who imported the cloth.

The first three conditions therefore stand satisfied. That being so, the dealers who made the first sales after the sales as a direct result of which the cloth was imported into U. P. would, under the fourth condition above, be the petitioners. It has also been seen that the petitioners are dealers as defined in the Act. They are therefore importers within the definition of that term in Cl. (b) of R. 2(d-1), U. P. Sales Tax Rules.

(16) Before coming to the next point there is a piece of argument put forward on behalf of the petitioners which has to be dealt with. The argument was that the railway receipt being first endorsed in favour of the bank and then again by the bank in favour of the petitioners, it is the bank as agent of dealer outside U. P. which is liable to be taxed under the third proviso to the definition of turnover.

Now, under the Explanation to the definition of dealer in S. 2(c) of the Act, the agent of a person resident outside U. P. is the person who carries on the business of buying and selling goods in U. P. on behalf of such a person, and he shall in respect of such business, be deemed to be a dealer for the purposes of the Act. Carrying on the business of buying or selling in U. P. on behalf of the person resident outside U. P. is therefore an essential condition of the particular kind of agent who is to be treated as a dealer under the Act.

That being so, if the person carries on some business other than that of buying or selling on behalf of the person resident outside U. P., he will not be this particular kind of agent and will not therefore be a dealer who could be taxed under the provisions of the Act. Now, it is not contended on behalf of the petitioners that the Bareilly bank carries on the business of buying or selling on behalf of the dealer outside U. P. All that the bank does is to perform its business as such, namely, the business of collecting the price of the goods.

Moreover, the two endorsements do not amount to sale and re-sale within the intendment of clause (b) of the definition of importer, but only a procedure for taking delivery of the goods from the railway. The dealer who is therefore liable to be taxed as importer, as defined in the Act, is not the bank in question but each of the present petitioners. The first point is accordingly decided against the petitioners.

(17) The next question is whether the definition of importer is ultra vires the rule-making power of the State Legislature. In other words, has that definition been framed by assumption of powers in excess of those conferred by the Act? Now, the definition, along with the other rules, has been framed by the State Government in exercise of the rule-making authority conferred on it by S. 24 of the Act, which runs as follows :

"POWER TO MAKE RULES : 1. The Provincial Government may make rules to carry out the purposes of this Act.

2. In particular and without prejudice to the generality of the foregoing power, such rules may provide for

(a) all matters expressly required or allowed by this Act to be prescribed;

(b) the licensing of persons engaged in the sale of goods and the imposing of conditions in respect of the same for the purpose of enforcing the provisions of this Act and fees for licenses;

(c) the determination of turnover for the purpose of assessment of tax under this Act;

(d) compelling the submission of returns and the production of documents and enforcing the attendance of persons and examining them on oath or affirmation;

(e) the appointment, duties and powers of officers appointed for the purpose of enforcing the provisions of this Act; and

(f) generally regulating the procedure to be followed and the forms to be adopted in proceedings under this Act.

3. The power to make rules conferred by this section shall be subject to the condition of the rules being made after previous publication for a period of not less than four weeks.

4. All rules made under this section shall be published in the Gazette, and upon such publication shall have effect immediately as if enacted in this Act.

5. All rules made under this Act shall be laid for not less than seven days before the Legislature as soon as possible after they are made and shall be subject to such modifications as the Legislature may make during the session in which they were so laid."

Now S. 3-A empowers the State Government to select the goods which shall be subject to single point taxation and to fix the single point in the series of sales by successive dealers at which the turnover in respect of those goods is to be liable to tax. The State Government has carried out that purpose by promulgating the aforesaid notification dated 8-6-1948, and framing the definition of importer.

The particular purpose served by the definition of importer is to fix the particular point in the series of sales by successive dealers at which the turnover is to be taxed. That definition therefore not only "carries out the purpose of the Act" under the general power contemplated by cl. (1) of S. 24, but under the specific provisions of cl. (2)(a) of that section it provides for a matter expressly required or allowed by the Act to be prescribed, viz., the matter referred to in S. 3-A. The definition is therefore intra vires the rule-making power of the State Government.

(18) Nor is there any force in the next contention of the petitioners, namely, that the defining of importer by the State Government amounts to delegated legislation. Now there is no doubt that by reason of the State Legislature not having itself the single point of taxation under S. 3-A but left it to be done by the State Government under its rule-making power, there has been delegation of powers by what is called subordinate legislation.

But due both to the complexity and immensity of the present day legislative function subordinate legislation has become inevitable. Such delegation is permissible so long as the Legislature does not efface itself by setting up a parallel legislative authority and transferring to it the essential legislative function of determining what the law shall be, but confines the delegation to entrustment of the duty of filling in matters of detail.

Both the principles underlying delegation and the necessity for the same have been enunciated as follows in the American case of — 'Mutual Film Corporation v. Industrial Commission', (1915) 236 US 230 (at p. 245) (C).

"Undoubtedly the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases: but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done, there would be infinite confusion in the laws, and in an effort to detail and to particularise, they would miss sufficiency both in provision and execution."

(19) Their Lordships of our Supreme Court are of the same opinion as regards the limits within which legislative power may legitimately be delegated. It is laid down in — 'Hari Shankar Bagla v. State of M. P.', AIR 1954 SC 465 at p. 468 (D), as follows :

"It was settled by the majority judgment in Art. 143, Constitution of India and Delhi Laws Act (1912) etc., In re, AIR 1951 SC 332 (E), that essential powers of legislation cannot be delegated. In other words, the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law.

The essential legislative function consists in determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."

(20) Applying the above principles to the present cases, the Legislature has fixed the legal principle and laid down the policy under S. 3-A that certain goods may be subjected to only single point taxation in the series of successive sales by dealers in U. P. That principle is clear and is a sufficient enunciation of the legislative policy. In requiring the State Government to fix the particular point in the series of successive sales where the tax is to be imposed the State Legislature has only delegated the working out of a mere matter of detail of the said policy.

It must, in the result, be held that the definition of importer in the U. P. Sales Tax Rules is not illegal or inoperative by reason either of its being ultra vires the rule-making power of the State Legislature or of its amounting to delegation of legislative power outside permissible limits.

(21) It now remains to see whether the assessment is in contravention of the provisions of Art. 286 of the Constitution. Now, where sale or purchase of goods is purely local in the sense of being intra-State, e.g., where they are sold and consumed in the very State where they are manufactured, no difficulty arises. In such a case if that State makes laws for taxing the sale it acts within the bounds of the Constitutional limitations imposed by Art. 245 of the Constitution.

The difficulty only arises where commerce becomes inter-State, viz., when it involves more States than one. The goods may be manufactured in one State but sold from State to State. Which State is in such a case to impose, or authorise the imposition of, a tax on sale or purchase without infringing the constitutional limitations? The answer to this question, so far as our Constitution is concerned, is supplied by Art. 286.

It prohibits taxation on sale or purchase of goods by a State where such sale or purchase takes place (1) outside the State, or (2) in the course of the import or export of goods, or (3) in the

course of inter-State trade or commerce (except in so far as Parliament may by law otherwise provide). Should the State act otherwise, Art. 245 would be contravened in the first case and Art. 246 in the other two cases.

The only way for a State to steer clear of these prohibitions would therefore be to tax only those sales or purchases of goods which take place inside that State. Now in order to denote what a sale or purchase outside the State would be within the prohibition contained in Art. 286(1)(a), the Explanation appended to clause (1) of that Article lays down when a sale or purchase should be deemed to have taken place inside a State. As laid down in 'AIR 1953 SC 252 at p. 257 (A)'.

"It (the Explanation) provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State.... The test of sufficient territorial nexus was thus replaced by a simpler and more workable test: Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein? Then, such sale or purchase shall be deemed to have taken place in that State and outside all other States. The latter States are prohibited from taxing the sale or purchase: the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided."

(22) It has therefore to be seen whether the sales in question which have been taxed could be deemed to be sales which had taken place in the State of U. P. within the four corners of the aforesaid Explanation. That will depend upon the answer to the question: Were the goods actually delivered in U. P. as a direct result of sale or purchase for the purpose of consumption therein? Now in dealing with the question of whether the petitioners were importers within the definition of that term in the U. P. Sales Tax Rules it has been seen that the cloth in question was actually delivered in the State of U. P. as a direct result of sale to, or purchase by, the petitioners.

The only question that remains is whether delivery of cloth in U. P. was made for the purpose of its consumption therein. The argument advanced by the learned counsel for the petitioners in this connection was a two-fold one, namely, firstly, that the Sales Tax Officer had imposed the tax without deciding this point and, secondly, that so far as the present petitions are concerned, the petitioners have proved it unrebuttedly that the delivery of the cloth in question in this State was not for the purpose of consumption therein.

(23) So far as the first of these two contentions goes, the argument was that R. 41 (3) of the U. P. Sales Tax Rules imposes upon the Sales Tax Officer the duty of determining the turnover to the best of his judgment after making such inquiry as he considers necessary; that the orders dated 8-11-1954 passed by the Sales Tax Officer, Bareilly, showed that the only point decided by him was that the petitioners were importers; and that therefore he had not decided the question of delivery of cloth in this State for the purpose of consumption therein.

And in this connection it was pleaded, on the authority of — 'Sakhigopal Cocoanut Growers Co-operative Society v. State of Orissa', AIR 1953 Orissa 334 (F), that it was for the State to show that the deliver took place in U. P. for the purpose of consumption therein. So far as the second contention goes, it was contended that although this plea was specifically taken as ground No. 12, and although it was specifically averred in para 7 of the petitioners' affidavits that the petitioners never sell any cloth to consumers, there was no attempt at a rebuttal of this averment in the counter-affidavits filed on behalf of the respondents.

(24) The learned counsel appearing for the State met the above contentions by arguing that the matter was irrelevant, and that, if it was relevant, it should be presumed that the delivery was for consumption in U. P. Before taking up the contentions put forward on behalf of the petitioners, it may be said at once that the arguments advanced by the learned counsel for the State are not tenable.

So far as the first point is concerned, his argument was that the question of delivery of goods for consumption in a State may be relevant for purposes of Art. 286(1)(a), but it is quite irrelevant in a case, like the present, where the sale is clearly in U. P. That is, however, only begging the question. The sale cannot be clearly in U. P. unless, as adverted to above, it be a sale of the description contemplated by the Explanation to cl. (1) of Art. 286.

If it is not a sale of that description, it cannot be deemed, for purposes of that Article, to be a sale within the State, irrespective of where actually under the general law relating to sale of goods property in the goods may have passed. A similar argument was advanced before their Lordships of the Supreme Court in the above cited case of AIR 1953 SC 252 (A). The argument was repelled as follows at p. 257, para 13:

"On the other hand, the non-obstante clause in the Explanation is said to indicate that apart from cases covered by the legal fiction, the passing of property in the goods is to determine the place of sale. Thus, both the State of delivery and the State in which the property in the goods sold passes are, it is claimed, empowered to tax. We are unable to accept this view.

It is really not necessary in the context to use the word "only" in the way suggested, for when the Explanation says that a sale or purchase shall be deemed to have taken place in a particular State, it follows that it shall be deemed also to have taken place outside the other State. Nor can the non-obstante clause be understood as implying that, under the general law relating to the sale of goods, the passing of the property in the goods is the determining factor in locating a sale or purchase.

Neither the sale of goods Act nor the common law relating to the sale of goods has anything to say as to what the situs of a sale is, though certain rules have been laid down for ascertaining the intention of the contracting parties as to when or under what conditions the property in the goods is to pass to the buyer. That question often raises ticklish problems for lawyers and Courts, and to make the passing of title the determining factor in the location of a case or purchase would be to replace old uncertainties and difficulties connected with the nexus basis with new ones.

Nor would the hardship of multiple taxation be obviated if two States were still free to impose tax on the same transaction. In our opinion, the non-obstante clause was inserted in the Explanation simply with a view to make it clear beyond all possible doubt that it was immaterial where the property in the goods passed, as it might otherwise be regarded as indicative of the place of sale."

So far as the other argument of the learned counsel for the State based on presumption is concerned, it appeared to be based on the circumstance that the sales in question were made by dealers

as defined in the Act, viz., by persons carrying on the business of buying and selling of goods in U. P., after the cloth had been imported into U. P. as a direct result of sale. The implication, in other words, was that the sale in favour of the petitioners by the dealers outside the State acted, so to say, as a buffer which deadened the inter-State character of the transaction, so that whatever sales took place thereafter should be deemed to be sales within the State.

Now, this argument overlooks the fact that the re-sales by the aforesaid U. P. dealers might possibly not have been made for the purpose of consumption in this but in some other State. In the latter case, it will, as adverted to above, be that other State, and not the State of U. P., which will be entitled under the provisions of Art. 286 to treat the sales as sales taking place within its territorial ambit and to tax them as such.

(25) Reverting to the arguments of the learned counsel for the petitioners, there is no doubt that the orders of the Sales Tax Officer, Bareilly, do not mention whether the cloth in question had been delivered in U. P. for the purpose of its consumption therein. The only ground on which the order proceeded was that the petitioners were importers, and for the disposal of the cases on that ground it was not necessary to go into the aforesaid question since delivery of goods in U. P. for the purpose of its consumption therein is not one of the ingredients of the definition of imported.

It would appear therefore that the only point in issue before the Sales Tax Officer was whether the petitioners were or were not importers. Quite a number of questions could conceivably have arisen before the Sales Tax Officer, but he need have decided only those which actually did arise. The inquiry referred to in Rule 41(3) of the Rules, and also in S. 7 of the Act, implies the giving of an opportunity to the dealer concerned to put forward his own contentions with regard to the case.

It is nowhere alleged by the petitioners that such an opportunity was not given to them. On the contrary, the averments in paras 8, 10 and 11 of the petitioners' affidavits show that they were given such an opportunity, and that the only way in which they availed themselves of that opportunity was by pleading that the cloth which came into their hands manufactured outside U. P. was not liable to be taxed by any law made by the State Legislature. This contention does not cover the point of consumption under consideration.

In these circumstances, it might well be said that the plea in question relating to consumption was not taken by the petitioners before the Sales Tax Officer because it was a matter of admission that the cloth was delivered in U. P. for the purpose of consumption therein. It might equally be that the question did not arise because it was overlooked both by the Sales Tax Officer and the petitioners.

In any case, the petitioners are not entitled to any benefit on the mere ground that the impugned orders of the Sales Tax Officer make no mention of the point. It may be stated here in passing that the 'AIR 1953 Orissa case (F)', has no bearing on the facts of the present case since the matter of consumption was specifically in issue in that case both before the Sales Tax Officer and the appellate authority.

(26) The other argument advanced on behalf of the petitioners has also no force — the argument, that is, that on the pleadings in the affidavits of the parties it should be taken as having been established that the delivery of the cloth in question was not for consumption in this State. The plea in question has no doubt been specifically taken as ground No. 12 of the grounds, but the averment in para. 7 of the affidavit in support of the plea does not have the effect of establishing the plea.

The averment is that the petitioners never sell any cloth to consumers. The question under the Explanation to Art. 286, however, is not whether the petitioners do or do not sell cloth to consumers, but whether the cloth was delivered in U. P. for the purpose of consumption therein. That purpose might be subserved even though the sales in question by the petitioners were not to consumers, for those who purchased the cloth from them may have sold it to consumers.

The position therefore is that the petitioners have neither proved that the cloth in question was not delivered in U. P. for consumption therein nor are they entitled to any benefit by reason of impugned orders not having dealt with the question of delivery of that cloth for consumption in U. P. That should not however result, by reason of all the points raised by them having been decided against them, in an outright dismissal of their petitions, for the omission in the orders may have been due, as remarked already, to both the Sales-tax Officer and the petitioners having overlooked the point.

Due to that being a possibility, it appears to be just and proper to order the Sales Tax Officer concerned to make the final assessment after going into that question. That, of course, means going into the question after giving the petitioners proper opportunity to lay their respective cases before him relating to that question.

(27) There is a small point which remains to be disposed of. It was contended on behalf of the petitioners that it may be that the sales in question were sales within the State of U. P. within the purview of the Explanation to clause (1) of Article 286, but it should still have to be seen whether they were sales of the nature contemplated by Cl. (2) of the Article. If they were sales of that nature, the State would be debarred from taxing them. The contention is wholly without force.

As soon as a State finds that a sale involving inter-State elements becomes intra-State under the Explanation to cl. (1) of Art. 286, it has the fullest authority to tax it as a sale which has taken place within that State and it need not embark on a roving inquiry whether it was a sale which had taken place in the course of inter-state trade or commerce, as contemplated by cl. (2) of the said Article. The simple reason for this view is that it would be a contradiction in terms to speak of an intra-State sale having the characteristics of a sale which takes place in the course of inter-state trade or commerce. The aforesaid contention has been negatived in 'AIR 1953 SC 252 at p. 259 (A)', as follows:

"We are of the opinion that the operation of cl. (2) stands excluded as a result of the legal fiction enacted in the Explanation, and the State in which the goods are actually delivered for consumption can impose tax on inter-State sales or purchases. The effect of the Explanation in regard to inter-State dealings is, in our view, to invest what, in truth, is an inter-State transaction with an intra-State character in relation to the State of delivery, and cl. (2) can, therefore, have no application.

It is true that the legal fiction is to operate "for the purposes of sub-cl. (d) of Cl. (1)", but that means merely that the Explanation is designed to explain the meaning of the expression "outside the State" in cl. (1)(a). When once, however, it is determined with the aid of the fictional test that

a particular sale or purchase has taken place within the taxing State, it follows as a corollary, that the transaction looses its inter-State character and "falls outside the purview of cl. (2), not because the definition in the Explanation is used for the purpose of Cl. (2), but because such sale or purchase becomes in the eye of the law a purely local transaction.

It is said that even though all the essential ingredients of a sale took place within one State and the sale was, in that sense, a purely intra-State transaction, it might involve, transport of the goods across the State boundary, and that would be sufficient to bring it within the scope of cl. (2). We find it difficult to appreciate this argument. As already stated, the Explanation envisages sales or purchases under which out-of-State goods are imported into the State.

That is the essential element which makes such a transaction inter-State in character, and if it is turned into an inter-State transaction by the operation of the legal fiction which blots out from view the inter-State element, it is not logical to say that the transaction, though now become local and domestic in the eye of the law, still retains its inter-State character. The statutory fiction completely masks the inter-State character of he sale or purchase which, as a collateral result of such masking, falls outside the scope of Cl. (2)".

(28) In the result, all the grounds urged in this Court have been found to be untenable except that a doubt exists as to whether the delivery of the cloth in quesiton in U. P. was for the purpose of consumption therein. The petitions are accordingly dismissed except that a writ of mandamus shall issue directing the Sales Tax Officer, Bareilly, to make a final assessment as regards the sales in question after due inquiry into the question whether delivery of the cloth in question in U. P. was for purpose of consumption therein, and prohibiting all the three respondents from realising tax from the petitioners unless and until it has been determined as a result of the aforesaid inquiry. In view of this result, there is no orders as to costs.

V.R.B. Petitions dismissed.

(S) AIR 1955 Allahabad 661 (V. 42, C. 190 Nov.)

MOOTHAM C. J. AND AGARWALA J.

(22-7-1955)

Jokhi Ram and another, Defendants-Appellants v. Sardar Singh and others, Plaintiffs-Respondents.

Letters Patent Appeal No. 36 of 1946., against decree of Malik J. in S. A. No. 878 of 1945, D/-8-5-1946.

Civil P. C. (1908), O. 2, R. 2 — 'Same cause of action' — Requisites — Rule does not apply to different causes of action.

In order that the cause of action for two suits may be the same for the application of O. 2, R. 2, it is necessary that not only the facts which would entitle the plaintiff to establish his title to the property claimed in the two suits be the same but also that the attack on the title or the infringment of the plaintiff's right at the hands of the defendant must have arisen, in substance, out of the same transaction. (Para 13)

S had made a gift of his zamindari and Sir lands to three branches of his sons. One of the branches sold part of their zamindari share to X. In a suit for profits against other co-sharers X got a decree and in execution of it he purchased all the remaining zamindari lands in the hands of all the co-sharers. That however did not satisfy the decree in full and therefore the judgment-debtors executed a deed of relinguishment of their exproprietory rights in their Sir lands.

Subsequently, the minor members of two branches brought a suit against X for possession of Zamindari lands on ground that the property being ancestral S had no right to gift it and that in the suit brought by X they were not properly represented and defended by their guardians and therefore the auction was void and not binding upon them. The suit was decreed. Later on, the minors brought another suit for possession of land covered by the deed of relinquishment on the grounds same as in the previous suit and also on ground that the relinquishment was without consideration.

The date of the deed of relinquishment was mentioned as one of the dates of accrual of cause of action:

Held that the deed of relinquishment was a voluntary act quite separate from the execution sale which was the subject-matter of the previous suit. Though the facts which would entitle the plaintiffs to establish their title to the property were the same in both the cases, the infringements of the plamtiff's right having been occasioned as a result of two separate transactions covering different kinds of rights in property, it could not be said that the cause of action was substantially the same in both the cases. Case law considered. (Para 14)

Anno: AIR Com. C. P. C. O. 2, R. 2 N. 7, 23.

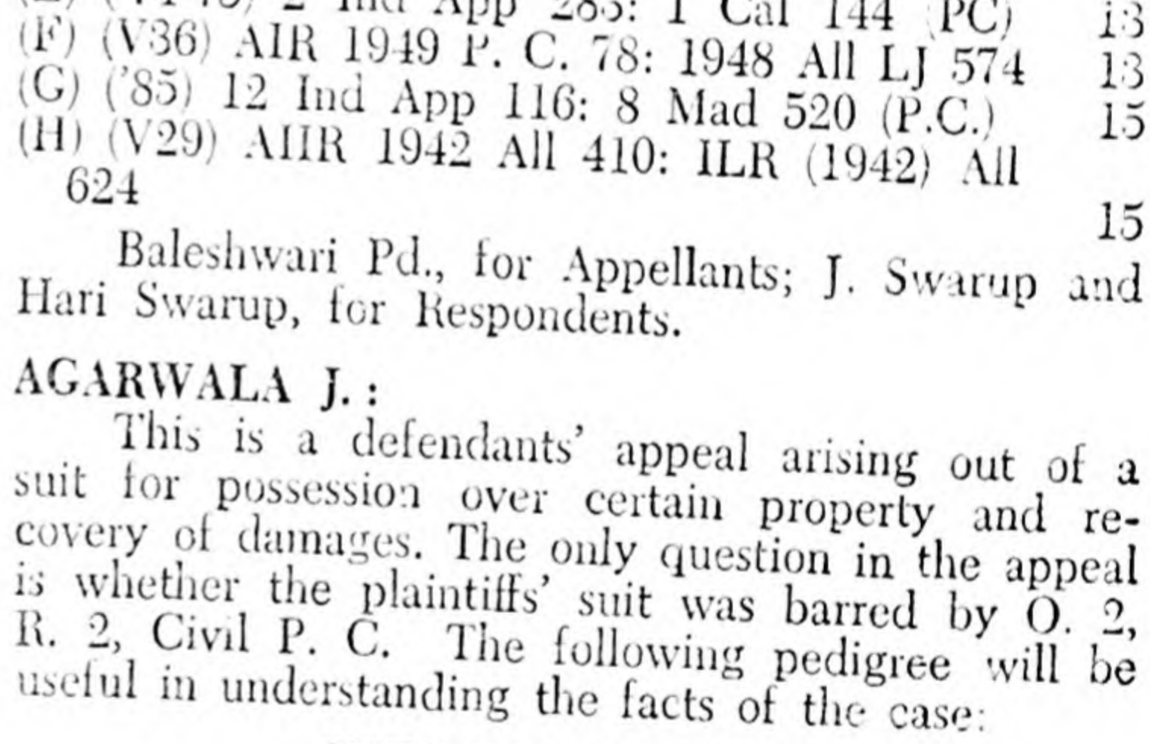
CASES REFERRED: Paras

(A) (1889) 22 QBD 120: 58 LJ QB 120 13
(B) (1873) 8 CP 107: 42 LJ CP 98 13
(C) ('89) 15 Ind App 156: 16 Cal 98 (P.C.) 13
(D) ('74) 12 Beng LR 304: IA Sup Vol 212 (P.C.) 13
(E) ('74-75) 2 Ind App 283: 1 Cal 144 (PC) 13
(F) (V36) AIR 1949 P. C. 78: 1948 All LJ 574 13
(G) ('85) 12 Ind App 116: 8 Mad 520 (P.C.) 15
(H) (V29) AIR 1942 All 410: ILR (1942) All 624 15

Baleshwari Pd., for Appellants; J. Swarup and Hari Swarup, for Respondents.

AGARWALA J.:

This is a defendants' appeal arising out of a suit for possession over certain property and recovery of damages. The only question in the appeal is whether the plaintiffs' suit was barred by O. 2, R. 2, Civil P. C. The following pedigree will be useful in understanding the facts of the case:



(2) Sheo Baran Singh was the owner of 2½ biswa share in Patti Sheo Baran Singh. Appertaining to this share he had some Sir land. On 23-11-1921 he made a gift of his zamindari share and the Sir land to the three branches of his sons but in unequal shares. To Lakhan Singh and Sardar Singh plaintiffs 1 and 2 and their mother Srimati

Chameli he gave 15 biswansis share, to Budha Singh and Tikam Singh, defendants 5 and 6 and Nabbo Singh deceased their father he gave 15 biswansis share, and to Shrimati Larehti, wife of Lochan Singh and mother of Hakim Singh and Hukam Singh, plaintiffs 3 and 4, he gave one Biswa share.

(3) On 2-7-1924, Nabbo Singh and his sons, Budha Singh and Tikam Singh sold 8 Biswansis zamindari share out of the 15 biswansis which they obtained under the aforesaid deed of gift to the appellants Jokhi Ram and Munna Lal.

(4) In 1925 the appellants who had thus become co-sharers in Patti Sheo Baran Singh brought a suit for profits against the members of the family of Sheo Baran Singh, who were co-sharers in the Patti. Lakhan Singh and Sardar Singh, plaintiffs 1 and 2, Hakim Singh and Hukam Singh, plaintiffs 3 and 4, were impleaded as minors represented by their respective guardians. The suit was decreed on 4-12-1925. Execution proceedings were taken out and the entire zamindari share remaining in the hands of the judgment-debtors was sold in auction and purchased by the appellants on 22-1-1929.

(5) The auction sale did not satisfy the decree in full and there was a balance of about Rs. 400/- still due to the decree-holders, the appellants. As a result of the sale, the Sir land in possession of the judgment-debtors became their exproprietary tenancy holding.

(6) In order to satisfy the balance of the decree, on 20-4-1931 Budha Singh and Tikam Singh, sons of Nabbo Singh, and Lochan Singh for himself and as guardian of his sons Hakim Singh and Hukam Singh, plaintiffs 3 and 4, and Srimati Chameli for herself and as guardian of Lakhan Singh and Sardar Singh, plaintiffs 1 and 2 executed a deed of relinquishment of their exproprietary rights in five plots measuring 8 bighas and 5 biswas in favour of the decree-holders appellants.

In this way the appellants acquired possession over the entire 2½ biswas zamindari share and also actual cultivatory possession over 5 plots measuring 8 bighas, and 5 biswas. The branch of Nabboo Singh submitted to all these proceedings, but the branches of the other two sons of Sheo Baran Singh did not.

(7) In 1938, Lakhan Singh and Sardar Singh, sons of Kedar Singh & Hukam Singh & Hakim Singh, sons of Lochan Singh brought a suit, suit No. 26, of 1938, against the appellants for possession over their 2/3rds share out of 2½ biswas zamindari share which was the subject-matter of the gift of 23-11-1921 on the grounds that the property was ancestral, that Sheo Baran Singh had no right to make a gift of it to different persons as he purported to do by means of the deed of gift dated 23-11-1921, that in the suit for profits brought by the appellants in the year, 1925, the plaintiffs were not properly represented and the guardians were negligent in defending the suit and for these reasons the decree in that suit was not binding upon them, that the sale in execution thereof was consequently of no legal validity and that they were entitled to obtain possession over their share of the property.

That suit was decreed. It was held that the property was joint, that Sheo Baran Singh was not entitled to make a gift of it, that the guardians appointed in the suit of 1925 were negligent and that the decree and sale in the execution proceedings of that decree were not binding on the plaintiffs.

(8) Later on, in the year 1942, the suit which has given rise to this appeal was instituted by Lakhan Singh, Sardar Singh, Hakim Singh and Hukam Singh for recovery of possession over 2/3rds share of the land covered by the deed of relinquishment of 20-4-1931.

(9) The main defence with which we are concerned was that the suit was barred by O. 2, R. 2, Civil P. C., in asmuch as the cause of action for the suit was the same as for suit No. 26 of 1938 and the relief for possession over the area sought for in the present suit should have been included in the previous one.

(10) The trial Court rejected the defence and decreed the suit. The lower appellate court on appeal set aside the decree of the trial court and dismissed the suit. There was an appeal to this Court which came up before a learned Single Judge who allowed the appeal and decreed the suit of the plaintiffs, holding that it was not barred by O. 2, R. 2. Against this judgment, the present special appeal has been brought by the defendants.

(11) The recitals in the plaints of the two suits so far as they related to the foundation of the plaintiff's claim were exactly the same, namely, that the property was ancestral that Sheo Baran Singh had no right to make a gift of it to different persons, that the decree passed in the appellant's suit for profits in which the plaintiffs were arrayed as minor defendants under their guardians were not binding upon them as their guardians were negligent in defending the suit and that the sale in execution of the decree was consequently void and not binding on them.

The only additional facts narrated in the present suit which were not narrated in the previous one were that as the decree for profits obtained by the appellants was not binding against the appellants, there was no real consideration for the deed of relinquishment, and that as such it was not binding on the plaintiffs to the extent of their share. 20th of April, 1931, the date of the deed of relinquishment, was mentioned as one of the dates of the accrual of the cause of action in the present suit and this date was not mentioned in the previous suit No. 26 of 1938.

(12) It is conceded that the plaintiffs could have included in the previous suit the claim made in the present suit if they were so disposed. On these facts the question is whether the cause of action for the previous suit is the same as the cause of action for the present suit or the two causes of action are different.

(13) Order 2, R. 2, lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of a particular cause of action and that if he omits to sue in respect of any portion of his claim he shall not afterwards sue in respect of the same. The objection of the rule is clearly to avoid splitting up of claims and to prevent multiplicity of suits. The phrase 'cause of action' has not been defined in any enactment, but the meaning of it has been judicially considered in various decisions. In — 'Read v. Brown', 1889-22 QBD 128 (A), Lord Esher, accepted the definition given in — 'Cook v. Gill', (1873) 8 C. P. 107 that it meant:

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

In — 'Sm. Chand Koer v. Pratab Singh', 15 Ind App 156 (PC) (C), Lord Watson delivering the judgment of the Board observed as follows:

"Now the cause of action has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or in other words to the 'media'

upon which the plaintiff asks the court to arrive at a conclusion in his favour."

In — Soorjomonee Dayee v. Suddanund', 12 Beng LR 304 (D), it was observed that the term "cause of action" is to be construed with reference rather to the substance than to the form of action. "To the same effect are the observations in — 'Krishna Behari Roy v. Brojeswari Chowdranee', 2 Ind App 283 at p. 285 (P.C.) (E). In — 'Mohammad Khalil Khan v. Mahbub Ali', AIR 1949 PC 78 at p. 87 (F), Sir Madhavan Nair, after a review of the relevant cases, summarised the law as follows:

"(1) The correct test in cases falling under Order 2, Rule 2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the Judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

If the 'cause of action' means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the court, it must obviously include not only the facts which would entitle the plaintiff to establish the right which he seeks to establish, but also its infringement because without the infringement of the right it can hardly be said that the cause of action has arisen for the suit. In every suit the plaintiff has to mention the date when the cause of action arose for the suit.

The date is the date of the infringement of the right of which the plaintiff complains. The right (including the facts constituting its foundation) and its infringement must, therefore, both constitute the cause of action for a suit. In 'Mohammad Khalil Khan's case (F)', (Ubi supra), the Judicial Committee clearly accepted this view. An observation of their Lordships at the bottom of page 86, of the report in the Allahabad Law Journal to the effect that:

"The plaintiff's cause of action to recover the properties consists of those facts which would entitle them to establish their title to the properties", should not be understood as laying down the proposition that the facts necessary to establish the title or the right of the plaintiff alone were sufficient to constitute the cause of action for the suit, and that the facts relating to its infringement were immaterial; because later on their Lordships do consider the infringement of the title or the right in the two suits which were under consideration before their Lordships and they approve of the observation of the High Court to the effect that the infringements in the two suits in substance arose out of the same transaction or formed part of the same transaction.

Thus it is clear that in order that the cause of action for two suits may be the same, it is necessary that not only the facts which would entitle the plaintiff to establish his title to the property claimed in the two suits be the same but also that the attack on the title of the infringement of the plaintiff's right at the hands of the detendant must have arisen, in substance out of the same transaction.

(14) In the present case the transaction which gave rise to the cause of action for the present suit was the deed of relinquishment executed on 20-4-1931. This was entirely a different transaction from the execution sale which took place in the execution proceedings of the appellants' decree for profits.

It is true that the consideration for the deed of relinquishment was the balance of the amount due under that decree, but the consideration for a transaction is not the same thing as the transaction itself. The deed of relinquishment was a voluntary act quite separate from the execution sale which was the subject-matter of the previous suit.

Though the facts which would entitle the plaintiff to establish his title to the property were the same in both the cases the infringements of the plaintiff's right having been occasioned as a result of two separate transactions covering different kinds of rights in property, it cannot be said that the cause of action was substantially the same in both the cases.

(15) This view finds support from the decision of the Judicial Committee in — 'Rajah of Pittapur v. Venkata Mahipati Suriya', 12 Ind App 116 (PC) (G). In that case the plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession and afterwards sued to recover from the same defendant moveable property in consequence of its wrongful detention.

The plaintiffs' title to the said estate as well as to the half share of the personalty arose under a will of one Bharayamma. It was held by their Lordships that:

"The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of the zamindari property. It was a distinct cause of action altogether and did not arise at all out of the other."

In — 'Har Sarup v. Anand Sarup', AIR 1942 410 (H), a Bench of this Court held that:

"The question whether a subsequent suit is founded upon the same cause of action on which a previous suit was based is essentially one of fact and must be determined upon the facts of each case. The right of an owner to maintain his possession over a particular item of property is quite distinct and apart from his right to recover possession of another item of property from which he has been ousted by a trespasser.

Where there is an infringement of two separate rights by two separate acts of trespass which cannot be said to have formed part of the same transaction committed by the same trespasser there must be two separate causes of action, and a suit in respect of the one will not be barred by a prior suit in respect of the other by O. 2 R. 2 because O. 2 R. 2 does not make it incumbent upon the plaintiff to combine separate causes of action in the same suit.

All that it lays down is that the plaintiff must include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action."

With respect, we agree with these observations.

(16) We, therefore, hold that the present suit was not barred by the provisions of O. 2, R. 2, of the Code.

(17) There is no force in this appeal and it is dismissed with costs.

H.G.P. Appeal dismissed

°AIR 1955 Allahabad 664 (V. 42, C. 191 Nov.)
LUCKNOW BENCH — RANDHIR SINGH AND MULLA JJ. (15-7-1955)

Gauri Shanker and another, Plaintiffs, Appellants v. Jamilluddin and others, Defendants, Respondents.

Second Appeal No. 559 of 1947, against decree of Dist. J., Rae Bareli, D/- 2-5-1947.

(a) Civil P. C. (1908), O. 34, R. 5 — Application for final decree when necessary. AIR 1917 Mad 669, Dissent. from.

Under the present law, an application for sale of the mortgaged property cannot be treated as an application for the passing of a final decree. AIR 1947 All 83, Rel. on. (Para 6)

Anno: AIR Com., Civil P. C., O. 34 R. 5 N. 10.

(b) Limitation Act (1908), Art. 181 — Application for final decree in mortgage suit.

Where on an application by the mortgage decree-holder for the making of the final decree the Court ordered: "Consigned to record. Let the decree-holder file fresh application", the order cannot be treated as an interlocutory order but one dismissing the application. (Para 7)

Anno: AIR Com., Lim. Act, Art. 181 N. 4.

CASES REFERRED: Paras
(A) (V4) AIR 1917 Mad 669 : 34 Ind Cas 756 6
(B) (V34) AIR 1947 All 83 : ILR (1947) All 40 6

B. P. Misra, for Appellant (No. 1); Baldeo Sahai Srivastava, for Respondent (No. 1).

RANDHIR SINGH J.:

This is a second appeal arising out of an application made for the passing of a final decree under O. 34, R. 5, Civil P. C.

(2) It appears that a preliminary decree under O. 34, R. 1, Civil P. C. was obtained jointly by Gauri Shankar and Maharaj Din on the basis of a mortgage deed, in 1934. Usual six months time for payment was granted. This decree was subsequently amended under the Agriculturists' Relief Act and intsalments were granted. In 1942 the plaintiffs-decree-holders applied for the passing of a final decree and when this application was pending an application for amendment of the decree under the U. P. Debt Redemption Act was made by the judgment-debtors.

The decree was once again ordered to be amended under the Debt Redemption Act and an order was passed on the application of the decree-holders for a final decree in the following words:

"Decree has been amended. Consigned to records. Let the decree-holder file fresh application."

(3) This order was passed on 11-7-1942. An application was made on 21-5-1945 for the sale of the mortgage property. This application was resisted by the judgment-debtors on the ground that the decree-holders could not ask for the sale of the property without first obtaining a final decree for sale under O. 34, R. 5, Civil P. C. An application for the passing of a final decree was then made on 24-9-1945.

The judgment-debtors contested that application and pleaded that the application was barred by time inasmuch as the decree amended on 11-7-1942, i.e., more than three years before the date of the application for the framing of the final decree. This contention of the judgment-debtors found favour with the trial Court and the application was dismissed.

The decree-holders then went up in appeal and the learned District Judge of Rae Bareli agreeing with the view taken by the trial Court dismissed the appeal. The decree-holders have now come up in second appeal.

(4) One of the decree-holders, namely, Maharaj Din died during the pendency of the appeal and his heirs not having been brought on the record, the appeal so far as Maharaj Din was concerned has abated.

(5) A preliminary objection has been taken on behalf of the respondents that the appeal has abated as a whole. This point is not altogether free from difficulty; but it may not be necessary to decide this point in the view which we propose to take on the merits of the appeal.

(6) It has been contended on behalf of the appellant that the application made on 21-5-1945, for the sale of the property may be deemed to be an application for the passing of a final decree. Reliance has been placed on a ruling of the Madras High Court, — 'Natesa Udayan v. Annasami Udayan', AIR 1917 Mad 669 (A).

Unfortunately the grounds on which the learned Judges held that an application for sale implies a prayer for making the decree absolute are not given in the brief judgment and it is difficult to find out on what basis the view was taken. The learned Judges have referred to other cases in their judgment. A perusal of the reports of some of those cases shows that those cases related to applications made when Ss. 88 and 89, Transfer of Property Act were in force.

Before the coming into force or the Code of Civil Procedure, 1908, applications for making a decree absolute were treated as applications for execution and if an application for sale of the property was treated under these circumstances by the Court as an application for the passing of a final decree it cannot be so treated under the present law inasmuch as an application for the passing of a final decree has to be made not to the execution court but to the Court in which the case is pending.

A suit does not come to an end after the passing of a preliminary decree but would be deemed to be pending till a final decree is passed. An application made to the execution court could not, therefore, be treated now as an application for the passing of a final decree. This view also finds support in — 'Ram Nath v. Deokinandan Krishna', AIR 1947 All 83 (B), to which reference has also been made by the lower appellate Court.

We are unable, therefore, to agree with the contention that the application of 21-5-1945, could be treated as an application for the passing of a final decree.

(7) Another point which has been pressed on behalf of the appellant is that the order dated 11-7-1942, should not be treated as one dismissing the earlier application for the making of the final decree but should be deemed to be an interlocutory order only. If the trial Court had only ordered the record to be consigned the interpretation sought to be put could perhaps have been accepted. There are, however, certain words in the order which are clearly indicative of the fact that the Court had dismissed the application.

The last sentence in the order was "let the decree-holder file a fresh application". These words clearly show that the Court dismissed the earlier application and gave to the decree-holders the right to make a fresh application. The last application which was made on 24-9-1945, was clearly barred by time.

(8) There is thus no force in any of the two contentions raised by the learned counsel for the appellant and the view taken by the lower appellate Court appears to be correct.

(9) In view of the fact that the appeal has no force it is not necessary to decide whether the whole of the appeal has or has not abated on account of the death of Maharaj Din. The appeal is dismissed. The parties shall bear their own costs.

Appeal dismissed.

V.B.B.

(S) AIR 1955 ALLAHABAD 665 (V. 42 C. 192 Dec.)

MOOTHAM C. J. AND AGARWALA J.

(21-7-1955)

Nagoo and another, Defendants-Appellants v. Pt. Shiv Dularey Dixit and others, Plaintiffs-Respondents.

Special Appeal No. 7 of 1950, against order of Mushtaq Ahmad J. in S A No. 2094 of 1946 D/- 8-4-1949.

Civil P. C. (1908), S. 11—Compromise decree —One of the parties breaking term of compromise —Effect on question of res judicata.

All the terms of a compromise decree are to be taken together and, unless the contrary is expressed in the compromise decree itself or necessarily implied in the circumstances of a particular case, an individual term of the compromise decree cannot be picked out by one party and the other party cannot be said to be bound by it in spite of the fact that the compromise decree as a whole, has fallen through by default of the very party who wishes to take advantage of its terms. AIR 1925 PC 63 — AIR 1929 All 409 and 63 Cal 550, Disting. (Para 7)

Anno: AIR Com., C. P. C., S. 11 N. 114.

CASES REFERRED : Paras

(A) (V12) AIR 1925 PC 63: 47 All 250 (PC) 6
(B) (V16) AIR 1929 All 409: 1929 All LJ 761 6
(C) ('36) 63 Cal 550 6

Gopal Behari, for Appellants; Krishna Shanker, for Respondents.

AGARWALA J. :

This is a defendants' appeal arising out of a suit for sale on a mortgage. The mortgage in question was executed by one Kalika for himself and as guardian of his two sons, Thakur and Kedar and also by his two other sons, Nagu and Bhola who were then major. Nagu and Bhola mortgagors filed a suit under S. 33, U. P. Agriculturists' Relief Act, for a declaration of the amount due to the mortgagee under the mortgage.

This was in 1942. The plaintiffs claimed that they were agriculturists and entitled to sue for accounts. The parties came to terms and entered into a compromise which may be quoted here in full:

"(a) The total balance due under the mortgage deed, the basis of the suit, has been settled at Rs. 700/- regarding mortgage deed and Rs. 25/- lawyer's fee of the defendant, total Rs. 725/-.

(b) The full amount settled viz. Rs. 725/- mentioned above between the plaintiffs and the defendants 2 and 3 will be paid to defendant No. 1 through his counsel by hand in 2 monthly instalments before court and the first instalment will become due on the 19th of September 1942 and the second instalment on 19th October, 1942.

(c) In case of default of payment of the instalments mentioned above the plaintiffs' suit shall be deemed to be dismissed.

(d) Parties will bear their own costs.

2. Parties therefore pray that the suit may be decided in terms of the compromise mentioned above.

Dated 19th August, 1942."

Therefore a decree in terms of the compromise was passed.

(2) The plaintiffs of that suit paid one instalment according to the terms of the compromise but failed to pay the second instalment in time. We are told that the amount of the second instalment was ultimately deposited in Court one month after the due date, but the creditor did not withdraw the amount. On 13-7-1944 he instituted a fresh suit which has given rise to the present appeal.

In this suit he gave credit to the amount of the first instalment which had been paid to him and sued for the balance of the amount that was due under the mortgage. He did not confine himself to the amount of Rs. 700/- as had been settled in the compromise in the previous suit. The suit was for recovery of Rs. 800/-.

(3) The defence of the mortgagors was that, in view of the compromise in the previous suit, even though there was default in making the payment of the second instalment, since one of the instalments had been paid, the default clause in the compromise did not come into operation and the previous suit did not stand dismissed in accordance with that clause, with the result that the present suit was not maintainable.

It was also urged that, in any case, the agreement in the previous suit that the amount of the mortgage was to be taken as Rs. 700/- bound the parties in the present litigation and lastly it was urged that since the defendants were agriculturists, they were entitled to the relief under the Agriculturists' Relief Act. It may be mentioned at this stage that in the plaint of the second suit the plaintiffs made a declaration under S. 4, U. P. Debt Redemption Act, but at the same time stated that this declaration was made by way of precaution in case the court should hold that the defendants were agriculturists.

(4) The suit was dismissed by the trial Court but was decreed by the lower appellate Court. A second appeal to this Court was dismissed by a learned single Judge of this Court.

(5) In this special appeal three points have been urged before us. It has been urged that the defendants, having paid one of the two instalments, it could not be said that the default clause of the compromise came into operation. In our opinion this contention has no force.

The clause in the compromise that

"in case of default of payment of the instalments mentioned above the plaintiffs' suit shall be deemed to be dismissed"

clearly meant that if the defendants failed to pay either of the instalments within the time stipulated the plaintiffs' suit shall be deemed to be dismissed. The word 'instalments' in the context meant either of the two instalments.

If the meaning were as alleged by the appellants it would lead to a very strange result. The defendants could claim not to pay the second instalment at all after paying the first and yet say that the suit could not be deemed to be dismissed. We do not think that this could have been the intention of the parties.

(6) The next point urged is that, even though the previous suit would be deemed to have been dismissed because of the non-payment of one of the instalments, nevertheless the amount due under the mortgage was settled between the parties to be a sum of Rs. 700 and that the plaintiff was bound by that settlement. Learned counsel has urged that the amount thus settled is 'res judicata' between the parties in the present case.

He has relied upon several decisions, viz. — 'Maina Bibi v. Vakil Ahmad', AIR 1925 PC 63 (A); — 'Raghunath Singh v. Sheo Pratapsingh', AIR 1929 All 409 (B); — 'Secretary of State v. Ateendranath', 63 Cal 550 (C) and has referred to Spencer Bower on 'res judicata' at pp. 23 and 24. In AIR 1925 PC 63 (A) and AIR 1929 All 409 (B) it was held that, even though a redemption suit was ultimately dismissed because the mortgage-money was

not paid by the mortgagor within the time allowed by the Court, yet the decisions on several issues decided by the Court in the suit were binding in a subsequent suit between the parties, where the same questions were agitated afresh. In 63 Cal 550 (C) it was held that

"a decree passed by consent is as effective a bar to a subsequent suit as one passed on contest, not only with reference to the conclusions arrived at in the previous suit, but also with regard to every step in the process of reasoning on which the said conclusions are founded."

There can be no doubt about these propositions. A judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is but fair that litigation should come to an end.

And, if they agree upon a result, or upon a verdict or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end. The same proposition has been laid down in Spencer Bower on 'res judicata' :

"Any judgment or order which in other respects answers to the description of 'res judicata' is nonetheless so because it was made in pursuance of the consent and agreement of the parties."

(7) The case of a compromise falling through, however, by reason of the default of one of the parties in not carrying out its terms, is quite a different matter. In the case of a compromise the presumption is that it is arrived at because there has been a give and take between the parties.

All the terms of a compromise are presumably to be taken together and unless the contrary is expressed in the compromise itself or necessarily implied in the circumstances of a particular case an individual term of the compromise cannot be picked out by one party and the other party cannot be said to be bound by it in spite of the fact that the compromise, as a whole, has fallen through by default of the very party who wishes to take advantage of its terms.

The amount of Rs. 700/- which was fixed by compromise to be due under the deed of mortgage was presumably settled because the defendant agreed to pay it quickly in two instalments. It may or may not have been agreed upon as the amount due under the mortgage if the plaintiff were told that the amount may not be paid within the time agreed.

As has been found in the present case, a sum much larger than the amount of Rs. 700/- was due under the mortgage-deed. We are, therefore, not prepared to bind the plaintiff with the settlement arrived at between the parties in the previous suit and the figure of Rs. 700/- as the amount due cannot be taken to be binding on the plaintiff on the ground of 'res judicata'.

(8) Lastly it was urged that the appellants were agriculturists and the lower appellate Court has recorded a finding that there is no evidence on the record to show that the defendants-appellants were agriculturists. It was, however, urged that since the plaintiff in the present suit gave a declaration under S. 4, U. P. Debt Redemption Act, it must be presumed that he accepted the position that the defendants were agriculturists.

This contention has no force. As already stated, the plaintiffs clearly alleged that the defendants were not agriculturists. They gave a declaration under S. 4, Debt Redemption Act, only to safeguard their interest in the event of the court finding the defendants to be agriculturists.

(9) There is no force in this appeal. It is dismissed with costs.

As the plaintiffs in the present case have not given credit for the amount of the second instalment which, we are told, the defendants paid in the previous suit and the amount is in deposit with the court, the defendants-appellants are entitled to withdraw that amount from the court, unless it has been attached in execution proceedings.

V.S.B. Appeal dismissed.

AIR 1955 Allahabad 666 (V. 42 C. 193 Dec.)

RAGHUBAR DAYAL AND V. BHARGAVA JJ.

(28-7-1955)

Teja Singh Soorma, Applicant v. Union of India and another, Opposite Parties.

Civil Revn. No. 765 of 1955, against Order of Civil Judge, Bareilly, D/-18-4-1955.

(a) Civil P. C. (1908), S. 115 — Exercise of jurisdiction illegally or with material irregularity — Wrong conclusion does not come under — (Arbitration Act (1940), S. 11).

To come to an erroneous conclusion does not amount to acting with material irregularity or illegality and a Court has as much jurisdiction to pass a correct order as a wrong one.

Thus, where it was not disputed that the Court had jurisdiction to deal with the application under S. 11, Arbitration Act but it was contended that he came to a wrong conclusion and did not pass the order which he would have passed, had he come to a correct conclusion:

Held, that the contention was not acceptable and the order was not open to revision. AIR 1953 SC 23, Relied on. (Para 2)

Anno: AIR Com., C. P. C., S. 115 N. 12 Pt. 7;

AIR Man., Arbi. Act, S. 11 N. 1.

(b) Arbitration Act (1940), S. 14 — Arbitrator's fees — Failure to pay — Arbitrator not proceeding further — No misconduct.

The law does not contemplate that an arbitrator must proceed with arbitration proceedings without payment of his fees in case he wanted them to be paid before acting in the arbitration proceedings.

Demand of fees from only one party to the arbitration and refusing to act further on failure to pay it, does not, therefore, amount to misconduct on the part of the arbitrator. AIR 1937 All 598 (FB) Disting. (Para 3)

Anno: AIR Man., Arbi. Act, S. 14 N. 1.

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 23: 1953 SCR 136 (SC) 2

(B) (V24) AIR 1937 All 598: 1937 All LJ 671 (FB) 3

D. Sanyal, for Applicant.

RAGHUBAR DAYAL J.:

A certain dispute between the applicant and the North-Eastern Railway was referred to an arbitrator in terms of the contract. The arbitrator asked the applicant to state his claim and the claim was stated and then the arbitrator called upon the applicant to deposit a certain amount as his fees.

The applicant did not deposit the amount and let the statutory period for the making of the award expire. The arbitrator then asked the parties to first get the order of the court for extending the time to make the award. He did not act further in the matter because his fees had not been paid.

The applicant thereupon put in an application under S. 11 of the Arbitration Act before the Civil Judge, praying for the removal of the arbitrator on account of his misconduct. The misconduct alleged was that the arbitrator demanded fees from one of the parties only, insisted on payment before acting further as an arbitrator and, in effect, neglected to deliver the award.

The opposite parties supported the arbitrator's conduct and the learned Civil Judge held that the arbitrator was justified in demanding his fees, that the amount of fees was not exorbitant but was reasonable and that the arbitrator could demand payment of his fees before proceeding further with the arbitration proceedings.

He considered Ss. 14 and 38 of the Arbitration Act and found that there was nothing in the Act which compelled an arbitrator to act without payment of fees in case he wanted fees. He, therefore, rejected the application, holding that the arbitrator had not misconducted himself. It is against this order that the applicant has come up in revision to this Court.

(2) We are of opinion that this order is not open to revision under S. 115 of the Civil P. C. The learned Civil Judge acted within his jurisdiction. It is not disputed that he had jurisdiction to deal with this application under S. 11 of the Arbitration Act.

What is contended is that he came to a wrong conclusion and did not pass the order which he would have passed, had he come to a correct conclusion, and that, therefore, he did not either exercise jurisdiction vested in him or acted with illegality or material irregularity in the exercise of his jurisdiction. We do not agree with this contention in view of a decision of the Supreme Court in — 'Keshardeo v. Radha Kissen and others', AIR 1953 SC 23 (A).

To come to an erroneous conclusion does not amount to acting with material irregularity or illegality and a court has as much jurisdiction to pass a correct order as a wrong one.

(3) It is lastly contended that the court below ignored the provisions of S. 14 of the Arbitration Act. This is not correct. The court referred to those provisions and S. 14 does not say that an arbitrator must proceed with the arbitration proceedings without payment of his fees. Sub-section (1) of S. 14 simply says that when the arbitrators have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and the award.

Of course, if fees have not been paid by that time, notice of such fees would be given at that stage; but if fees have been paid earlier, no such notice would be necessary. This sub-section does not say that fees cannot be demanded at an earlier stage or that the arbitrators must proceed to make the award whether fees have been paid to them or not.

There is no provision in the Arbitration Act which would enable an arbitrator to realise his fee in case none of the parties pays it and none of the parties desires the filing or the delivery of the award. The absence of any such provision by which the arbitrator can realise his fee once he has acted as an arbitrator indicates, to our minds, that the law did not contemplate that an arbitrator must proceed with arbitration proceedings without payment of his fees in case he wanted them to be paid before acting in the arbitration proceedings.

It cannot, therefore, be said that the court below ignored to consider the provisions of S. 14 of the Arbitration Act or of any other mandatory provision of the Act. The case of — 'Raghubirsingh alias Raghubir Singh v. Mulchand', AIR 1937 All 598 (FB) (B), does not apply to the facts of this case. In that case, the provisions of S. 30 of the U. P. Agriculturists' Relief Act had been ignored by the lower court.

(4) In view of the above, we reject this application.

H.G.P. Application rejected.

AIR 1955 Allahabad 667 (V. 42 C. 194 Dec.)

LUCKNOW BENCH — HARI SHANKAR AND RANDHIR SINGH JJ. (5-8-1955)

Udai Bhan Singh, Appellant v. Lachhman Das and another, Respondents.

F. A. F. O. No. 20 of 1952, against decree of Civil Judge, Rae Bareli, D/- 1-12-1951.

(a) **Court-fees Act (1870), S. 7 (IVA) (U. P. Amendment) — Applicability.**

The section refers to those decrees also to which a person was not a party. The mere fact that the plaintiff was not a party to the decree would not, therefore, affect the application of S. 7 (iv-A). The section would be applicable to all suits which involve cancellation or adjudging void or voidable a decree for money or other property.

Where the effect of a declaration in favour of the plaintiff would be that the decree being a charge against the property which is the subject-matter of the suit would no longer be a good decree and would be void so far as that property was concerned, the suit clearly involves adjudging void or voidable the decree. Where the plaintiff does not claim through the person against whom the decree is passed but independently of her sub-s. (2) will apply. (Paras 3, 4, 6)

Anno: AIR Com., Court-fees Act, S. 7 (IV) (C) N. 26.

(b) Court-fees Act (1870), S. 7 (IVA) and Sch. II Art. 17 (as amended in U. P.) — Applicability.

Article 17 of Sch. II would not, in its application to U. P. override the provisions of S. 7 (iv-A), Court-fees Act. (Para 5)

Anno: AIR Com., Court-fees Act, S. 7 (iv) (C) N. 26.

CASES REFERRED: Paras

(A) (V32) AIR 1945 All 111: 1945 All WR HC 32 5

(B) (V31) AIR 1944 All 208: ILR (1944) All 388 5

(C) (V31) AIR 1944 All 271: ILR (1944) All 336 5

S. P. Avasthi, for Appellant; R. K. Shrivastava, for Respondents.

RANDHIR SINGH, J.:

This is a miscellaneous appeal under S. 6-A(i), Court-fees Act arising out of a court-fee matter.

(2) A suit was instituted by the appellant for a declaration that the plaintiff was the owner in possession of the entire village Bansi Rehayak and

that the defendants had no right to put it to sale in execution of the decree dated 9/12th August, 1948.

The grounds on which the declaration was claimed were that this village belonged to one Thakur Sheo Narain Singh who was succeeded by his widow Thakurain Sujan Kunwar and that on the death of Thakurain Sujan Kunwar, who was only a life estate holder, the plaintiff became owner of the village.

A decree was passed against Thakurain Sujan Kunwar in her life time, and under the provisions of the Agriculturists' Relief Act a charge was created on village Bansi Rehayak. The decree was put into execution and as Thakurain Sujan Kunwar had died the plaintiff, who was her legal representative, also, raised an objection to the execution of the decree against this property.

It was alleged on his behalf that Thakurain Sujan Kunwar having died her interest in the property came to an end and the property could no longer be taken in execution of the decree. The defendants contested the suit and one of the objections raised by the defendants was that the court-fee paid by the appellant was insufficient inasmuch as the suit was governed for the purposes of payment of court-fee by S. 7 (iv-A) and not by Art. 17 of Sch. II, Court-fees Act.

The plaintiff had paid a court-fee of Rs. 18/12/- only. The lower Court found that the court-fee paid was insufficient and directed the plaintiff to pay ad valorem court-fee. The plaintiff has now come up in appeal.

(3) It has been argued on behalf of the appellant that the plaintiff did not either in words or in substance claim any declaration with regard to the decree which stood against Thakurain Sujan Kunwar and his suit was for a simple declaration of his own title to the property. Section 7 (iv-A) as amended in U. P. stands as follows :

"In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value,

(1) where the plaintiff or his predecessor-in-title was a party to the decree or instrument, according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument according to one-fifth of the value of the subject-matter, and such value shall be deemed to be—

If the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates."

A perusal of the words of the section clearly indicates that decrees to which a plaintiff or his predecessor-in-title was a party or was not a party are all within the purview of this section, and the difference lies only in that the court-fee will be payable on the value of the subject-matter if the plaintiff or his predecessor was a party to the decree, but court-fee only on one-fifth of the value shall be payable if he or his predecessor-in-title was not a party to the decree.

It would thus appear that the section refers to those decrees also to which a person was not a party. The mere fact that the plaintiff was not a party to the decree would not, therefore, affect the application of S. 7(iv-A), Court-fees Act.

The section would be applicable to all suits which involve cancellation or adjudging void or voidable a decree for money or other property.

(4) In the present case it cannot be disputed that the effect of a declaration in favour of the plaintiff would be that the decree being a charge against the property which is the subject-matter of the suit would no longer be a good decree and would be void so far as that property was concerned. The suit, therefore, clearly involves adjudging void or voidable the decree passed against Thakurain Sujan Kunwar.

(5) It has further been contended on behalf of the appellant that Art. 17 Sch. II overrides the provisions of S. 7 (iv-A) and reliance has been placed on a ruling reported in — 'Chief Inspector of Stamps v. Mst. Hulasiya', AIR 1945 All 111 (A). The Court-fees Act has been amended in U. P. and words have been added to Art. 17 which clearly show that Art. 17 would apply only if no provision had been made elsewhere in the Court-fees Act for a particular kind of suit.

This means that Art. 17 Sch. II, would not in its application to U. P. override the provisions of S. 7 (iv-A), Court-fees Act. Learned Counsel for the respondents has, on the other hand, relied on two reported cases of this Court — 'Madan Mohan v. Raghunandan Prasad', AIR 1944 All 208 (B), and — 'Kamta Nath v. Chironji Lal', AIR 1944 All 271 (C),.

In the case reported in — 'Madan Mohan v Raghunandan Prasad', (B), a similar question arose for determination and it was held that S. 7(iv-A) would be applicable to a case where, though a specific relief for avoidance of the decree is not claimed, but avoidance of the decree is contemplated or is involved.

The view taken by the learned Judge who decided that case appears to us, if we may say so with respect, to be the correct view. We are, therefore, clearly of opinion that S. 7 (iv-A) would be applicable to the facts of the present case and court-fee is payable under that section.

(6) It now remains to be seen whether sub-s. (1) or sub-s. (2) of S. 7(iv-A) would cover the present suit. Admittedly the plaintiff was not a party to the decree involved in the suit, but it is contended on behalf of the respondent that Thakurain Sujan Kunwar was a predecessor-in-title of the plaintiff and as such sub-s. (1) would apply.

The plaintiff does not claim through Thakurain Sujan Kunwar but independently of her. It would be difficult, therefore, to accept the contention that the plaintiff claims through Thakurain Sujan Kunwar or that she was his predecessor-in-title. We are, therefore, of opinion that sub-s. (2) should apply to the facts of the present case and that court-fee was payable according to one-fifth of the value of the subject-matter.

While, therefore partly agreeing with the view taken by the lower Court, we find that the court-fee would be payable on one-fifth of the valuation of the suit, that is, on one-fifth of Rs. 5808/4/3. The appeal is therefore, allowed as above and the plaintiff is directed to pay the deficit court-fee on or before 10-10-1955, in the Court below. Parties shall bear their own costs of this appeal.

Appeal allowed.

D.H.Z.

AIR 1955 Allahabad 669 (V 42 C 195 Dec.)

LUCKNOW BENCH — HARI SHANKAR AND RANDHIR SINGH JJ. (4-8-1955)

Sunder Lal and another, Plaintiffs-Appellants v. Jai Narain and others, Defendants-Respondents.

F. A. F. O. No. 12 of 1952, against decree of Civil Judge, Malihabad, Lucknow, D/- 31-3-1952.

Civil P. C. (1908), S. 20 and O. 7, R. 10 — Debtor to seek creditor — Applicability of rule — Suit by principal for accounts against agent — Place of suit — Return of plaint.

The principle that a debtor shall seek his creditor will apply only where the place of payment cannot be inferred or is not to be found in the contract but payment under the contract is contemplated. (Para 7)

The plaintiffs at X were to pay the price and the defendants at Y were to purchase goods for them. The goods had been purchased but were not delivered to the plaintiffs, who alleged that they had suffered damages on that account. The plaintiffs brought the suit in the Court at X. In the appeal from an order of return of plaint:

Held that the relationship between the plaintiffs and the defendants could not be said to be that of a creditor and a debtor. The suit was in substance a suit for accounting inasmuch as the plaintiffs wanted the defendants to account for the goods which they had purchased for the plaintiffs and which had not been disposed of according to the plaintiffs' direction. The suit could not, therefore, be maintained in the Court at X. AIR 1924 All 530, Rel. on.; AIR 1917 All 128; AIR 1926 All 477 and AIR 1927 PC 156, Disting. (Para 7)

Anno: AIR Com.: C. P. C., S. 20 N. 19 and 20; O. 7 R. 10 N. 7.

CASES REFERRED: Paras

(A) (V4) AIR 1917 All 128: 41 Ind Cas 890 6
(B) (V13) AIR 1926 All 477: 48 All 310 6
(C) (V14) AIR 1927 PC 156: 5 Rang 451 (PC) 6
(D) (V11) AIR 1924 All 530: 46 All 465 7

D. P. Khare, for Appellants; Nazeeruddin, for Respondents.

RANDHIR SINGH J.:

This is an appeal from a judgment of the Civil Judge of Malihabad at Lucknow ordering the return of a plaint for presentation to the proper Court.

(2) A suit was instituted by the plaintiffs-appellants against the respondents on the allegations that the defendants were asked by the plaintiffs to purchase some cloves for the plaintiffs and in this connection a sum of Rs. 3,000/- was sent to them from Lucknow but the cloves were not delivered to the plaintiffs. The plaintiffs, therefore, claimed Rs. 3,000/- which had been paid to the defendants as also a sum of Rs. 2675/- on account of damages.

(3) The defendants contested the suit and the first contention raised by them was that no part of the cause of the action arose within the limits of the jurisdiction of the lower Court and as such the suit was not within the cognizance of the Civil Judge at Lucknow.

(4) A preliminary issue on the plea of jurisdiction was then framed by the learned Civil Judge and the parties were allowed to adduce evidence. After recording the evidence the Court came to the conclusion that it had no jurisdiction to try the suit. It, therefore, ordered the return of the plaint for presentation to the proper Court. The plaintiffs have now come up in appeal.

(5) It was not disputed that the plaintiffs resided at Lucknow and the defendants were carrying on business of commission agents at Basti. The plaintiffs directed the defendants by means of a telegram sent on 9-2-1945, to purchase 35 maunds of cloves at a certain rate. The cloves were presumably purchased by the defendants and they asked the plaintiffs to pay the price. The plaintiffs remitted a sum of Rs. 3,000/- to the defendants.

According to the defendants' allegations the plaintiffs originally wanted the cloves to be sent to Gorakhpur for sale on behalf of the plaintiffs but subsequently altered their directions and asked the defendants to sell them at Basti which the defendants did. There was a loss in this transaction and the defendants contended that some money was due from the plaintiffs on this account.

(6) Sunder Lal plaintiff and Jai Narain defendant entered into the witness-box. The lower Court on hearing their evidence came to the conclusion that the goods were purchased at Basti at the plaintiffs' direction sent by the telegram and that the goods were to be sold at any other place where the plaintiffs wanted them to be sold.

In view of these circumstances evidently no part of the cause of action arose within the limits of the Lucknow Court and the plaintiffs were not entitled to maintain the suit in the Lucknow Court on this basis. It was, however, further contended on behalf of the plaintiffs that the defendants, even though they had purchased the goods at Basti, were bound to account for them to the plaintiffs at Lucknow and that the general 'maxim' that the debtor must find his creditor applied to the present case also.

It appears that on the date of issues the parties were examined under O. 10, Civil P. C. The learned Counsel for the plaintiffs there relied upon two facts only in order to bring the suit within the jurisdiction of the Lucknow Court. Firstly, it was stated that the goods were to be supplied by the defendants at Lucknow and as they were not so supplied, the plaintiffs could maintain a suit for damages in the Court at Lucknow.

Secondly it was stated that the sum of Rs. 3,000/- was paid as earnest money and a claim for the return of this earnest money could be maintained at Lucknow. None of these grounds was held to be tenable in the Court below, as it was found that there was no contract between the parties for the supply of goods at Lucknow, nor was there any payment of any earnest money.

It has, however, been argued in this court that even though the plaintiffs failed to establish the contract for the supply of goods at Lucknow, they could rely on the general 'maxim' mentioned above, namely that a "debtor must find his creditor". Reliance has been placed on some reported cases: — 'Sri Narain v. Jagannath', AIR 1917 All 128 (A); — 'Gokul Das v. Nathu', AIR 1926 All 477 (B); and — 'Soniram Jeetmull v. R. D. Tata and Co.', AIR 1927 PC 156 (C).

In almost all these reported cases there was a relationship of debtor and creditor and if there was no express contract to show that the payment was to be made to the creditor at a particular place, it was held that the maxim which is applicable to the Courts in India applied.

(7) In — 'Tika Ram v. Daulat Ram', AIR 1924 All 530 (D), a similar question arose for decision. In that case also there was a case of 'pucca arhatia' against whom a suit was instituted by the principal for rendition of accounts. In this case it was held by a Division Bench of this Court that a suit for accounting against a 'pucca arhatia' or 'del credere' agent could be maintained only at

the place of 'pucca arhatia' and not at the place where the principal resided.

The learned Counsel for the appellants has tried to draw a distinction between the facts of this reported case and the facts of the present case and it has been argued that in the present case the plaintiffs had a right to claim a repayment of the price paid by them as also damages incurred by the plaintiffs in this transaction on account of default of the defendants.

To our mind, it appears that the principle that a debtor should seek his creditor would apply only where the place of payment cannot be inferred or is not to be found in the contract but payment under the contract is contemplated. In the present case no payment to the plaintiffs was contemplated under the contract. The plaintiffs were in fact to pay the price and the defendants were to purchase goods for them.

The goods, had been purchased and the only complaint of the plaintiffs was that they had not been delivered to them and they had, therefore, suffered damages on that account. The relationship between the plaintiffs and the defendants could not, therefore, be said to be that of a creditor and a debtor and the maxim relied upon by the learned Counsel for the appellants would clearly not be applicable.

The suit was in substance a suit for accounting inasmuch as the plaintiffs wanted the defendants to account for the goods which they had purchased for the plaintiffs and which had not been disposed of according to the plaintiffs' direction. The suit could not, therefore, be maintained in the Court at Lucknow and the view taken by the lower Court appears to us to be correct.

(8) No other point arose for determination. As a result the appeal fails and is dismissed with costs.

V.S.B. Appeal dismissed.

°AIR 1955 Allahabad 670 (V 42 C 196 Dec.)

DESAI AND V. D. BHARGAVA JJ. (16-8-1955)

Debi Dayal, Applicant v. S. C. Roy, Opposite Party.

Misc. Appln. No. 8 of 1955.

Contempt of Courts Act (1952), S. 1 — No intention to commit contempt of Court.

While submitting his report to the District Magistrate the Public Analyst to the Govt. to whom phails of samples of ghee were sent for analysis, mentioned "These relevant facts of this case are brought to your notice for further necessary action as you may deem proper, because I strongly suspect that there has been a fraudulent substitution of the contents of the duplicate phial submitted by the accused at some stage or the other." Along with the report the District Magistrate forwarded this letter also to the trying Magistrate. Objection by the accused, who was being prosecuted for selling adulterated ghee, was taken to the use of the expression "fraudulent substitution by the accused at some stage or the other", and it was argued that this was used in order to influence the Court and, therefore, a contempt had been committed.

Held that as it was not the intention of the Analyst to influence the Court trying the case and as the letter was written to the District Magistrate to take such action as he deemed proper it could not be said that it would amount to contempt. (Para 6)

P. C. Chaturvedi, for Applicant; Praveen Chaturvedi, for Opposite Party.

V. D. BHARGAVA J.:

This is an application by one Debi Dayal who was being prosecuted under S. 4(1) read with S. 42, U. P. Pure Food Act for selling adulterated ghee in mohalla Katra Abdul Ghami in the city of Fatehpur on 2-8-1954, for taking proceedings under Contempt of Courts Act.

(2) The application has been filed against Sri S. C. Roy, Public Analyst to the Government of the Uttar Pradesh, Lucknow.

(3) The facts of the case are that the Food Inspector took samples of ghee and kept them in three phials one of which was given to the petitioner and the other two were taken by him. One of these two phials was sent to opposite party Sri S. C. Roy for analysis. A report was submitted by the opposite party that the sample of ghee sent to him was adulterated. Thereafter the petitioner applied for the analysis of the sample that had been left with him.

The remaining two bottles, i.e., one which was with the petitioner and the other which was with the Food Inspector, were sent to the opposite party with a forwarding letter from the District Magistrate in which he had mentioned that the prosecution suspected the genuineness of the seal on the phial of the accused and, therefore, the third phial retained by the Food Inspector was also sent for comparison.

A request was made to the opposite party to see the seals on both the phials and compare them with the specimen sent along with them.

(4) The opposite party found that the seals on both the phials sent to him were intact but on analysis he found that the phial which has been with the petitioner contained pure ghee while the third which had been retained by the Food Inspector contained adulterated ghee. While submitting his report to the District Magistrate he mentioned:

"It is also very interesting to note that the analytical characteristics of the triplicate portion of the sample have been found to be exactly the same as that of the original portion of the sample, indicating that the original and triplicate are of the same specimen of Ghee."

Further he said:

"These relevant facts of this case are, therefore, brought to your notice for further necessary action as you may deem proper, because I strongly suspect that there has been a fraudulent substitution of the contents of the duplicate phial submitted by the accused at some stage or the other."

(5) Objection has been taken to the use of the expression "fraudulent substitution by the accused at some stage or the other", and it was argued that this was used in order to influence the Court and, therefore, a contempt has been committed.

(6) This letter was addressed to the District Magistrate and was meant for his action that he might like to take in this matter. This letter should have been kept by the District Magistrate in his office and only the report should have been sent on to the trying Magistrate. But instead of that, this letter was also sent.

So far as the intention of the accused is concerned it appears that it was never to influence the trying Magistrate. No doubt, he had no business to suggest that the substitution had been made by the accused. For it was equally possible that the third phial may have been substituted with adulterated ghee.

However, as it was not his intention to influence the Court trying the case and the letter was written to the District Magistrate to take such action as he deemed proper it cannot be said that it would amount to contempt.

(7) Apart from the fact that this does not amount to contempt, the oppsite party has tendered an unqualified apology for the unhappy use of the words "fraudulent substitution" and we accept that apology.

(8) The application is accordingly dismissed. We make no order as to costs.

V.S.B. Application dismissed.

AIR 1955 Allahabad 671 (V. 42 C. 197 Dec.)

NASIR ULLAH BEG AND CHOWDHRY JJ.

(22-7-1955)

Lajja Ram, Appellant v. The State, Respondent.

Criminal Appeal No. 464 of 1955 and Refd. Appeal No. 49 of 1955, against order of Addl. S. J., Etawah, D/- 28-3-1955.

Evidence Act (1872), S. 9 — Identification parade — Application of accused to hold such parade not allowed by prosecution — Effect of such failure — Duty of Magistrate — (Criminal trial).

Although the accused has no right to claim identification if the prosecution turns down his request for identification it runs the risk of the veracity of the eye-witnesses being challenged on that ground. The prosecution will be exposing the claim of such witnesses to the criticism that the test of identification was shirked because the witnesses would not have been able to stand that test. Unless, therefore, the prosecution can nullify that criticism, there would be an element of doubt attaching to the testimony of those witnesses of which the benefit should go to the accused. AIR 1945 Lah 48 — 1955 All WR 55, Rel. on. AIR 1951 All 475, Expl. (Paras 8, 9)

Dictum: "If the prosecution failed in that duty (that is, to hold an identification parade), the Magistrate should have ordered the holding of identification proceedings when the appellant's application was put up before him. He however neither allowed nor rejected the application. The 'non possumus' attitude of the Magistrate laid him open to charge that he was acting in concert with the police in not giving the accused a fair deal. This joint and several remissness on the part of the prosecution and the Magistrate in the present case created a rock of disbelief and suspicion on which the entire case for the prosecution has foundered." (Para 13)

Anno: AIR Man., Evi. Act, S. 9 N. 5.

CASES REFERRED: Paras

(A) ('55) 1955 All WR 55 9
(B) (V32) AIR 1945 Lah 48: 46 Cri LJ 550 9
(C) (V38) AIR 1951 All 475: 1951 All LJ 437 9

P. C. Chaturvedi, for Appellant; M. H. Faruqi, for Respondent.

CHOWDHRY J.:

Lajjaram, aged 26, of village Jagannathpur, P. S. Ajitmal, District Etawah, has been convicted and sentenced to death under S. 302, I. P. C., for the murder of Pragu of village Kakraiya within the same police station by the learned Additional Sessions Judge of Etawah. Lajjaram has appealed against his conviction and sentence. The record is also before us for confirmation of the death sentence. Three men, Ramdas, Kanhai and Lakhan, who were charged with the abetment of the offence, have been acquitted.

(2) Kakraiya is about a mile from Jagannathpur, and the offence is said to have been committed after sunset on 8-3-1954. It is said that the deceased was sitting in front of his door when the aforesaid three persons who have been acquitted came up from the east and engaged him in talk in a low tone. Suddenly one of them addressed him in a loud tone. This is said to have served as a signal whereupon two other men, clad in Khaki and armed with guns, came up from the east.

One of them was the appellant and the other a person whose identity has remained untraced. From a distance of about 10 paces the latter flashed a torch at Pragu and the former shot at him hitting him in the knee. As Pragu rose to his feet, the appellant again shot at him, this time hitting him in the abdomen. Pressing his hand against his wound in the abdomen, Pragu ran inside his house followed by the appellant. Pragu crossed an outer room and a courtyard and fell down in a thatched verandah adjacent to another room.

The appellant, who had come up to the junction of the outer room and the courtyard, aimed his gun again at Pragu but the latter's wife Lareti, who happened to be in the room in front of which Pragu had fallen, pulled him in and bolted the door. The appellant knocked at the door and then came out and went back with his companions the way he had come.

(3) The occurrence was witnessed by Chiddu, a nephew of the deceased, who lived in an adjacent house and was at the time having a wash on a nearby Chabutra, by Chiddu's brother Moti Lal and sister Rati and Har Prasad and Ram Sanehi, who were warming themselves round a fire pit, and by Gajadhar who, along with others, was warming himself at another fire pit. Both these fire-pits were very close to the deceased's door. Chiddu, Gajadhar and Ram Sanehi from amongst these and one other, Ram Singh, went into Pragu's house and Pragu said in their presence that Ram Das, Kanhai and Lakhan had him shot at by Lajjaram to satisfy their grudge against him.

In about half an hour Pragu succumbed to his injuries. It is said that the appellant was wanted in several cases of dacoity, murder and attempt to commit murder and had been absconding since 1951, and that he committed the murder because Pragu had been acting as a police informer.

(4) The police station of Ajitmal is 5 miles from Kakraiya and report was lodged there at 9 p.m. by Chiddu. In this report the appellant and the co-accused who were acquitted were named. Second Officer Jamuna Nath reached the place of occurrence within an hour of the lodging of the report and found the dead body in the said room. He held an inquest, prepared a site plan, found blood where Pragu had fallen in the thatched verandah and recovered seven pellets and two card-board discs at the place where Pragu had been hit.

The post mortem, conducted by Dr. S. P. Saxena at noon on 10-3-1954, showed the aforesaid two gun-shot injuries, one in the right knee and the other in the abdomen. Death, in the opinion of the doctor, was syncopal due to shock and haemorrhage caused by the injuries of the abdominal organs as a result of discharge from fire-arm.

(5) The appellant was arrested on 30-4-1954. The investigation was completed on 3-7-1954, and the charge-sheet was submitted to the Magistrate concerned on 16-7-1954. The appellant applied from jail to the District Magistrate on 23-8-1954 for his being put up for identification. The District Magistrate sent the application to the Public Prosecutor for report on 26-8-1954

On 28-8-1954 a report appears to have been made in compliance with that order, but the report is not on the record. On 2-9-1954 the appellant was taken out of jail and produced before the Magistrate. While coming out of jail he protested that no action had been taken on his application for identification. There is nothing to show that any order was passed on the said application of the appellant dated 23-8-1954. No identification parade was held.

(6) The defence was a denial of the prosecution case. It was pleaded by the appellant in both the courts below that none of the alleged eye-witnesses knew him, and that none of them could have identified him if an identification parade had been held as desired by him.

(7) The learned Sessions Judge acquitted Ram Das, Kanhai and Lakhan because he was of the view that the mere fact that the attack was launched immediately after one of those three men had talked loudly to the deceased did not necessarily prove a conspiracy between them and the appellant. He thought that Lajja Ram and his companion may have appeared on the scene at that moment by sheer coincidence.

So far as the present appellant is concerned, the learned Sessions Judge discarded the circumstantial evidence of the appellant having been seen with a gun near the place of occurrence shortly after the murder and of his having absconded. He however convicted him on the findings that the motive alleged by the prosecution had been proved, and that there was direct evidence of eyewitnesses proving that the murder had been committed by the appellant. He also held that Pragu made the aforesaid dying declaration and that it incriminated the appellant.

(8) The prosecution produced six eye-witnesses: Chhiddu, Moti Lal, Har Prasad, Ram Sanehi, Mst. Rati and Gajadhar. Out of these the learned Sessions Judge discarded the testimony of all but three, i.e. Chhiddu, Moti Lal and Mst. Rati. The main contention put forward on behalf of the appellant before us, as it was also before the learned Sessions Judge, is that even these three witnesses were not worthy of belief inasmuch as their testimony was open to grave doubt by reason of the appellant not having been put up for identification inspite of his application.

Now there is no doubt that the holding of identification parade is a procedure not prescribed by any law but one which can be usefully adopted at the investigation stage, before the accused has become a cynosure of witnesses, to test the veracity of eye-witnesses who profess either to have known the accused or to have identified an accused not already known.

Though not bound by law therefore to do so, the prosecution usually adopts it for the latter purpose, initially for selecting witnesses who pass that test, and later at the trial stage as corroborative of identification by those witnesses in court and as a token of their reliability. On the other hand, if witnesses do not pass that test, or do so but poorly, and are yet produced, the accused can rely upon that circumstance as destructive of identification by those witnesses in court and as a mark of their unreliability.

Furthermore, provided it is not too late to do so, the accused can challenge the prosecution to an identification parade to falsify the claim of eye-witnesses who profess to have known him, and although there is no law which could be said either to confer any right upon the accused to throw such a challenge or to impose any duty upon the prosecution to take up the challenge, the prosecution which ignores that challenge without justification would be doing so at its peril.

It would be exposing the aforesaid claim of the witnesses to the criticism that the test of identification was shirked because the witnesses would not have been able to stand that test. Unless therefore the prosecution can nullify that criticism (e. g., by showing, that even though the witnesses were not put to the test of identification, there is evidence aliunde which establishes without doubt that the accused was known to them), there would be an element of doubt attaching to the testimony of those witnesses of which the benefit should go to the accused.

(9) In the present case, the appellant did challenge the prosecution to an identification parade to falsify the claim of eye-witnesses that they knew him. It cannot also be said that he was too late in doing so since, as adverted to above, he submitted the aforesaid application for identification from jail 10 days before he was produced before the Magistrate. There was therefore ample time for the prosecution to have put him up for identification in compliance with his request.

That request was however ignored. It was argued before the learned Sessions Judge, as it has been done before us also, that inaction on the part of the prosecution on the aforesaid application of the appellant was not deliberate but due to a misconception of the law, and that the latest decision of this Court came to the knowledge of the prosecution too late. The latest decision referred to was Shakoor v. State', 1955 All WR HC 55 (A), wherein the views of Asthana J., following — 'Sajjan Singh v. Emperor', AIR 1945 Lah 48 (B), were in effect the same as those expressed above.

The ruling of this Court which is said to have been misconceived by the prosecution is reported as — 'State v. Ghulam Mohiuddin', AIR 1951 All 475 (C). The learned Sessions Judge accepted this contention. We are of the view that he was not right in doing so. The 1951 ruling of this Court just referred to was given on a reference by a Sessions Judge recommending that the order of the trying Magistrate rejecting the accused's application for the holding of an identification parade be set aside as the accused had a right to claim such an identification.

Rejecting the reference, Bhargava J., held that the accused had no such right. At the same time, he held that the accused's right to cross-examine and challenge the veracity of witnesses in the manner provided by law, and further to contend that no reliance should be placed upon the witnesses who were not called upon to identify him at proper time, remained unaffected.

It would appear therefore that it was laid down in this ruling also that although the accused may have no right to claim identification, if the prosecution turns down his request for identification it runs the risk of the veracity of the eye-witnesses being challenged on that ground. This ruling, if it was at all consulted, should therefore have led the prosecution to comply with and not to reject the appellant's request. It appears however that the prosecution itself wanted to put up the appellant for identification. By two applications, dated 11-6-1954 and 31-7-1954, remand was taken for that specific purpose. Eventually, however, the Station Officer in charge of the police station reported on 24-8-1954 against putting up the accused for identification. Why this was done and where this report was made does not appear. If it was made at the head-quarters, it would appear that that was done in the teeth of the

aforesaid application of the appellant which had been made a day previously.

In these circumstances, the finding of the learned Sessions Judge that the omission was not deliberate is unsupportable. On the contrary, from what has been stated above it would rather appear that the omission was deliberate and anything but bona fide. That being so, it lay on the prosecution to justify the omission. That has been sought to be done by the alleged sterling worth of the witnesses themselves.

It is contended that even though the witnesses were not put to the test of identification, their evidence was intrinsically of such quality that it led one irresistibly to the conclusion that their assertion that the appellant was known to them was correct. The learned Sessions Judge accepted this contention in regard to the aforesaid three eye-witnesses, Chhiddu, Moti Lal and Mst. Rati on whose testimony he has convicted and sentenced the appellant.

(Their Lordships then reviewed the testimony of these witnesses and considered the probabilities arising from the prosecution version of the case and reached the conclusion):

(1) that it could not be said with respect to any of the three witnesses, Rati, Moti and Chhiddu, whose testimony the Sessions Judge relied for the conviction of the appellant, that they certainly knew the appellant from before;

(2) that the element of doubt attaching to the testimony of these witnesses by reason of the omission of identification test subsisted and the benefit of it went to the appellant.

(3) that there were certain circumstances which showed that the prosecution version of the case was inherently improbable and therefore unworthy of belief;

(4) that it was difficult to accept the prosecution case relating to the appellant having followed the deceased into his house and come back without being able to shoot at him again; and

(5) that it was difficult to believe that the deceased's wife Mst. Lareti should have been able to pull the deceased bodily into the room where she was and bolted the door and thereby prevented the appellant, who was said to have raised his gun again at the deceased, from shooting at the deceased.

(10) In view of the aforsaid circumstances, and in view of the testimony of the so-called eyewitnesses being open to grave doubt on account of the omission on the part of the prosecution to put the appellant up for identification inspite of his repeated requests, it cannot be said that the guilt has been brought home to the appellant.

(11) As regards motive, that is a piece of circumstantial evidence which cuts both ways. If the testimony of eye-witnesses were worthy of belief, that circumstance could have justifiably been used as establishing that the appellant committed the murder of the deceased because he was a police informer. In the absence of reliable eye-witnesses, however, the aforesaid evidence with regard to motive would rather go to show that the police had engineered a false case against the appellant because he was wanted in several cases.

(12) So far as the dying declaration in which the deceased is said to have named the appellant is concerned, the learned Sessions Judge has held it proved on the testimony of three witnesses, Chhiddu, Mst. Bilaso and Mst. Lareti. Of these three witnesses it has already been held that the testimony of Chhiddu as an eye-witness was open to grave doubt. So is also the testimony of Mst. Lareti in view of the fact that the story about her having pulled the deceased inside the room has been found to be improbable.

As adverted to above, the prosecution case in the sessions court was that the dying declaration was made not only in the presence of Msts. Lareti and Bilaso but also in the presence of a large number of persons who entered the house at the time. In the court of the committing Magistrate however Mst. Lareti clearly stated that when Pragu made the said statement only she and her daughter were present.

She further stated that after making that statement Pragu fell down and became unconscious. It is also noteworthy that according to the F. I. R. version of this matter the dying declaration was made only to the aunt of Chhiddu. It would appear therefore that there are material discrepancies in the aforesaid three versions, and that the prosecution developed the case in the sessions court in trying to show that witnesses besides Lareti were also present when dying declaration was made.

Moreover, in view of the fact that a torch is said to have been flashed at the deceased by the appellant's companion before the appellant shot at him, it is difficult to believe that the deceased should have been able to recognise who his assailant was. In view of these circumstances, the prosecution evidence with regard to the dying declaration is also unworthy of credence.

(13) Before we conclude it seems necessary to animadvert on the omission on the part of the prosecution in this case to hold an identification parade after an application to that effect had been made by the appellant. If the prosecution failed in that duty, the Magistrate should have ordered the holding of identification proceedings when the appellant's application was put up before him. He however neither allowed nor rejected the application. This 'non possumus' attitude of the Magistrate laid him open to charge that he was acting in concert with the police in not giving the accused a fair deal.

This joint and several remissness on the part of the prosecution and the Magistrate in the present case created a rock of disbelief and suspicion on which the entire case for the prosecution has foundered. If there exists any doubt in regard to the proper course to be adopted when an accused moves at the proper time for being put up for identification, it is to be hoped that it is dispelled by the observations made in this judgment.

(14) We would also like to express our appreciation of the closely reasoned and well expressed judgment which the learned Judge, Sri K. B. Srivastava, has written even though we have not agreed with his findings.

(15) The appeal is allowed, the reference is rejected and the conviction of the appellant under S. 302, I. P. C., and the sentence of death imposed upon him are set aside, and he is acquitted. He shall be released forthwith unless wanted in some other connection.

V.S.B. Accused acquitted.

AIR 1955 Allahabad 673 (V. 42 C. 198 Dec.)

LUCKNOW BENCH

MOOTHAM C. J. AND RANDHIR SINGH J.

State of Uttar Pradesh Defendant No. 1, Appellant v. Abdul Aziz, Plaintiff, and others, Defendants; 2 to 4, Respondents.

F. A. F. O. No. 31 of 1953, D/- 6-5-1955, against order of Civil Judge, Rae Bareli, D/- 15-4-1953.

(a) Arbitration Act (1940), S. 39 — Order holding Arbitration clause not applicable — Appeal.

Where the Court held that the arbitration clause did not apply to the dispute between the plaintiff and the defendants and directed that the suit should proceed:

Held that no appeal lay. (Paras 5, 6)

Anno: AIR Man. Arbitration Act, S. 39 N. 1.

(b) Civil P. C. (1908), S. 115 — Error of law.

Where the dicision of the Judge that the arbitration clause had no application to the subject matter of the dispute is wrong in law and that as a result of this erroneous decision the Judge will, unless the order be set aside, exercise a jurisdiction not vested in him by law the High Court can exercise its powers of revision under cl. (c) of S. 115 provided the decision is in a case which has been decided within the meaning of that sub-section. AIR 1949 PC 239 and AIR 1953 SC 23, Foll. (Para 7)

Anno: AIR Com C. P. C. S. 115 N. 12, 13.

(c) Civil P. C. (1908), S. 115 — Case decided.

A plea founded on S. 32 of the Arbitration Act is plea that the suit is not maintainable at all. Where the question of the applicability of the provisions of S. 32 was raised by the defendants in their application and the question whether the suit was maintainable had been raised it became an issue between the parties. As the decision of the Court on that issue had not resulted in the termination of the suit, its order could not be revised by the High Court under S. 115.

(Paras 11, 12)

Anno: AIR Com C. P. C. S. 115 N. 5

(d) Constitution of India, Art. 227 — Powers of superintendence.

The Court's powers of superintendence are exercised primarily through S. 115 of the Code of Civil Procedure and Art. 226 of the constitution, and Art. 227 confers upon it supplementary power not differing substantially in content but exercisable in cases to which those provisions are not appropriate.

It is not duty or the High Court in the exercise of its powers of superintendence to correct mere errors of fact or law unless the latter are apparent on the face of the record and there is no adequate alternative remedy Nor should it so exercise its power of superintendence as to effect an alteration in the judicial system the maintenance of which it should be its object to uphold.

(Paras 15, 16)

Anno: AIR Com Const. of India Art. 227 N. 3.

CASES REFERRED: Paras

(A) (V36) AIR 1949 PC 239:76 Ind App 131 (PC) 7
(B) (V40) AIR 1953 SC 23: 1953 SCR 136 (SC) 9
(C) (V42) (S) AIR 1955 All 309: 1955 All LJ 167 (FB) 9, 10
(D) (V42) AIR 1955 All 307: 1954 All LJ 718 9
(E) (V41) AIR 1954 SC 215: 1954 SCR 565 (SC) 13, 15
(F) ('67) 7 Suth WR 430 14
(G) (V3) AIR 1916 Pat 292: 1 Pat LJ 336: 17 Cri LJ 369 (FB) 14
(H) (V20) AIR 1933 Cal 132: 37 Cal WN 201: 34 Cri LJ 299 15
(I) (V38) AIR 1951 Cal 193 (SB) 15
(J) (V42) (S) AIR 1955 SC 233: 1955 SCR 1104 (SC) 15
(K) (1841) 1 QB 66: 10 LJM C 49 17

B. K. Dhaon and B. N. Roy, for Appellant; Mahabir Prasad Srivastava, G. H. Naqvi and Shafiqur Rahman, for Respondent No. 1

MOOTHAM C. J.:

This is in form an appeal from an order of the learned Civil Judge of Rae Bareli dated 15-4-1953.

(2) On 29-5-1952, the first respondent filed a suit against the State Government, the Assistant Engineer, Public Works Department, and two other persons. His principal claim in this suit was for the recovery of a substantial sum of money from the State Government as damages for the alleged breach of a contract entered into by him with the State Government on 25-2-1948, whereunder he was to supply 50,000 C. ft. of Kanpur lime to the Government at a certain price. The other reliefs sought by the plaintiff were not related to the claim founded on the alleged breach of the contract dated 25-2-1948, and with these reliefs we are not now directly concerned.

(3) On 6-10-1952, the first and second defendants filed what purported to be an application under Ss. 32 and 34 of the Arbitration Act. They contended that under cl. 23 of the contract entered into between the plaintiff and the first defendant all disputes arising out of the contract were to be referred to the Deputy Chief Superintending Engineer for the time being whose decision would be final, and that the Deputy Chief Superintending Engineer had in fact considered and rejected the plaintiff's claim. In these circumstances the defendants submitted that the suit was not maintainable under S. 32 of the Arbitration Act, and that under S. 34 of the same Act it was incumbent upon them to apply for the proceedings to be stayed.

There was clearly some confusion in the mind of the person who drafted this application and the learned Civil Judge very properly required these defendants to state whether their application was to be deemed to be one under S. 32 or under S. 34. They elected that it be treated as an application for stay of proceedings under S. 34. That application was considered and dismissed by the learned Judge by an order dated 31-3-1954, on the ground that if the arbitration clause applied to the dispute arising out of the contract of 25-2-1948, there had been an award by the arbitrator. No appeal was filed against this order which has become final.

(4) The learned Civil Judge left undecided the question whether the arbitration clause applied to the dispute between the parties; his order of 31-3-1954, concluded as follows:

"The plaintiff challenges the existence of the aforesaid arbitration clause in the bond. It is therefore necessary that this question should also be decided before passing any further order. If the question is decided in favour of the plaintiff the suit will proceed and if it is answered in the affirmative the suit will stand dismissed under S. 32 of the Arbitration Act. Put up for disposal of this question on the 11th April."

(5) On the 11th April the learned Judge heard counsel on this question and by an order dated the 15th April he held that the arbitration clause did not apply to the dispute between the plaintiff and the first and second defendants and directed that the suit should proceed. It is against this order that the first and second defendants have filed the appeal which is now before us.

(6) Upon the appeal coming up for hearing learned counsel for the appellant conceded that

no appeal lay but he prayed that the memorandum of appeal be treated as an application under S. 115 of the Civil P. C. and Art. 227 of the Constitution, and we have heard argument on that basis.

(7) The argument for the applicant is that the decision of the learned Judge that the arbitration clause had no application to the subject matter of the dispute is wrong in law and that as a result of this erroneous decision the learned Judge will, unless the order be set aside, exercise a jurisdiction not vested in him by law. There is no doubt that this Court can in such circumstances exercise its powers of revision under cl. (c) of S. 115 of the Code provided the decision is in a case which has been decided within the meaning of that sub-section: see — 'Joy Chand Lal v. Kamalaksha Chaudhury', AIR 1949 PC 239 (A), which was approved by the Supreme Court in — 'Keshardeo v. Radha Kissen', AIR 1953 SC 23 (B).

(8) The question which however arises in this case is whether the order which we are asked to revise is one which was made in a "Case which has been decided". In my opinion it was not.

(9) Under O. 8, R. 2, of the Code a defendant must raise by his pleading all matters which show the suit not to be maintainable. A defendant may therefore aver the existence of an arbitration agreement and of an award thereon disposing of the claim the subject of the suit, and plead that by virtue of S. 32 of the Arbitration Act the suit is not maintainable. The Court will then, under O. 14, R. 1 frame issues upon which it will in due course record its finding. But an issue which arises out of the pleadings must in my opinion now be held, as a result of the recent decision of a Full Bench of the Court in — 'Ramrichpal Singh v. Dayanand Sarup', AIR 1955 All 309 (C), not to amount to a case decided if the decision of the Court on that issue does not result in the termination of the suit and the passing of a decree.

(10) In — 'Ramrichpal Singh's case (C)', the Court held that an order refusing to stay the hearing of a suit made under S. 10 of the Civil P. C. was a case decided within the meaning of S. 115, on the ground that the order related to a matter which was separate from the trial of the suit. The question as to what constitutes a 'case decided' was exhaustively discussed, and all the learned Judges were of opinion that the decision of an issue which properly arose on the pleadings would not unless by that decision the suit was finally disposed of, constitute a 'case decided'. A plea based on S. 10 of the Code was held not to be a defence to a suit and not therefore an issue which properly arose on the pleadings. In his judgment at page 313 Malik, C. J., said:

"This matter has been recently dealt with by me in — 'Malkhan v. Mehar Chand', AIR 1955 All 307 (D), where I said that 'if a court decides to determine preliminary issues of law under O. 14, R. 2, and as a result of that decision decides that it is not necessary to go into other questions, it has to pass a decree, but if as a result of the decision of those issues the other issues of fact have also to be determined, then the decision of the preliminary issues if only a part of the judgment and so long as the judgment has not been completed by the decision of the other issues of fact or of law that had been left undetermined, a decree cannot be passed.

The Court on determination of the preliminary issue if it comes to the conclusion that the case has to proceed and the other issues have to be decided, has not got to pass any formal order incorporating the result of its decision. In the circumstances, it cannot be said that it has decided a case or even a part of a case".

Agarwala J. at page 314 said :

"A decision on any one of the issues raised in the suit arising out of the defence in respect of matters mentioned in O. 8, unless it disposes of a severable part of the plaintiff's claim cannot in my judgment amount to a 'case.' Therefore normally a separate decision on one of the issues in this suit is not to be treated as a case decided. .....in my opinion the decision on a question of jurisdiction of the Court to hear and determine a suit or that the suit is barred by limitation or 'res judicata' is not to be treated as a case decided, unless the suit itself is disposed of by the decision."

(11) There is in my opinion a very clear distinction between an application under S. 10 of the Civil P. C. and one under S. 32 of the Arbitration Act. An application under S. 10 does not raise the question of the nonmaintainability of the suit; all that is claimed by the applicant is that he is entitled to have the hearing of the suit stayed until the decision of a previously instituted suit which is pending. On the other hand a plea founded on S. 32 of the Arbitration Act is plea that the suit is not maintainable at all.

(12) Had reliance been placed upon the provisions of S. 32 in a written statement filed by the first and second defendants and had an issue been framed thereon, the decision of that issue against the defendants would not have amounted to a case decided. In the present case no written statements have yet been filed. The question of the applicability of the provisions of S. 32 was raised by the first and second defendants in their application dated 6-10-1952. I do not think this makes any difference. The question whether the suit is maintainable has been raised, and once raised it became an issue between the parties. As the decision of the learned Civil Judge on that issue has not resulted in the termination of the suit, his order, cannot in my judgment be revised by this Court under S. 115 of the Code.

(13) It is however said on behalf of the applicants that this Court should set that order aside in exercise of its powers under Art. 227 of the Constitution. Under that Article the Court has a power of judicial superintendence, but as pointed out in — 'Waryam Singh v. Amarnath', AIR 1954 SC 215 (E), that is a power to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.

((14) Article 227 substantially reproduces the provisions of S. 107 of the Government of India Act, 1915; and prior to that a power of superintendence had been conferred on the High Courts by S. 15 of the High Courts Act of 1861. The nature of that power has been considered in a number of cases, particularly by Norman, J. in — 'Gopal Singh v. The Court of Wards', 7 Suth WR 430 (F), and by Roe, J. in — 'Parmeshwar Singh v. Kailaspati', AIR 1916 Pat 292 (FB) (G). The learned Judges in these cases pointed out that superintendence is a term which has a legal force and signification which are well known to the Legislature, and after a careful examination of the earlier authorities Roe J. in the second of these cases stated his conclusion in the following passage at page 298:

"I am satisfied upon this investigation that the power of superintendence is not a legal fiction

whereby a High Court Judge is vested with omnipotence. It is a term having a legal force and signification. It is the power by which English Courts interfere by Prohibition and 'Mandamus'. It is confined to cases in which the Court has acted without jurisdiction, or in excess of jurisdiction, or has refused to exercise a jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings. It will interfere if the irregularity has been so serious that one of the parties has suffered prejudice. By prejudice is meant disability to lay before the Court that party's version of the facts of the case and the law to be applied. It will not interfere with any decision arrived at after a fair trial however erroneous in law or fact that decision may appear to be."

(15) Rankin C. J. in — 'Manmatha Nath Biswas v. Emperor', AIR 1933 Cal 132 (H), similarly rejected the argument that the High Court has an unlimited power to correct the errors of a subordinate court. "The general superintendence" he said "which this Court has over all jurisdictions subject to appeal, is a duty to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner. It does not involve responsibility for the correctness of their decisions, either in fact or law."

In a recent case of the Calcutta High Court, — 'Dalmia Jain Airways Ltd. v. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (I). Harries, C. J. said:

"The power of superintendence.... is not a power given to this Court to correct errors, otherwise it would be tantamount to a right to entertain appeals on law and fact. The right should be exercised only in cases where the Courts have clearly done something which they are not entitled to do. The power must be used to keep the Courts below within the bounds prescribed by law for such Courts."

With this opinion I respectfully agree. The Court's powers of superintendence are exercised primarily through S. 115 of the Civil P. C. and Art. 226 of the Constitution. and it appears to me that Art 227 confers upon it supplementary power not differing substantially in content but exercisable in case to which those provisions are not appropriate, as for example, to correct the arbitrary decision of a Rent Controller (as 'Waryam Singh's case (E)) or to issue directions to an Election Tribunal (as in 'Hari Vishnu Kamath v. Ahmad Ishaque', (S) AIR 1955 SC 233 (J).

(16) The duty of this Court is to ensure that subordinate Courts and tribunals keep within the bounds of their authority. It is not its duty in the exercise of its powers of superintendence to correct mere errors of fact or law unless the latter are apparent on the face of the record and there is no adequate alternative remedy. Nor in my opinion should it so exercise its power of superintendence as to effect an alteration in the judicial system the maintenance of which it should be its object to uphold.

(17) Section 115 of the Code gives this Court powers to revise an order of a subordinate court on certain limited grounds provided that order is one from which no appeal lies to the High Court and which has been made in a "case which has been decided." This Court has held it to be the law that the decision of an issue which does not result in the termination of the suit is not a "case decided", the remedy of the dissatisfied party being by way of appeal at a later stage. In such circumstances this Court is not in my opinion justified in setting aside such an order in the exercise of its powers under Art. 227 for by so doing it would, in effect, be extending the provisions of S. 115 to cases which do not come within the ambit of that section. The consequences of such a course would be not only to prolong the time taken in hearing such a suit but would introduce an element of uncertainty in the administration of justice which it is most desirable to avoid. As Lord Denham C. J. said in — 'The Queen v. Bolton', (1841) 1 QB 66 at p. 76 (K):

"It is of much more importance to hold the rule of law straight than, from a feeling of the supposed hardship of any particular decision, to interpose relief at the expense of introducing a precedent full of inconvenience and uncertainty in the decision of future cases.'

(18) For these reasons I would dismiss the present appeal with costs which I would assess at Rs. 200/-.

RANDHIR SINGH, J.:

(19) I have had the benefit of reading the judgment of my Lord the Chief Justice. I do not think I can usefully add anything to what has been said in the judgment. I agree entirely with the conclusions arrived at and I would dismiss the appeal which has been treated as a revision, with costs.

(20) BY THE COURT: This appeal is dismissed with costs which we assess at Rs. 200/-.

D.H.Z. Appeal dismissed.

°AIR 1955 Allahabad 676 (V. 42 C. 199 Dec.)

AGARWALA AND MULLA JJ.

Rameshwar Swarup, Appellant v. Surajmal Shyam Sunder and another, Respondents.

S. A. F. O. Nos. 4 and 5 to 11 of 1953, D/- 21-2-1955, against order of Dist. J., Farrukhabad, D/- 25-4-1953.

Trusts Act (1882), Ss. 86, 66 — Money received under fraudulent contract — Amounts identified — Rights of the parties.

Equity protects a person who has been defrauded and therefore declares that if the amount paid by him can be traced in the hands of the person who has received it, the receiver is charged with a trust for the benefit of the person defrauded. This principle is embodied in S. 86, Trusts Act. (Para 4)

A, posing himself to be a supplier of various goods, sent bogus railway receipts to his customers without supplying any goods thereunder. As against the railway receipts, A drew hundies & his customers B, C and D paid the amounts of hundies through banks. The amounts were credited to the account of A with the Bank. In case of B and C's credits, there was no withdrawal by A with the result that the amount at A's credit was larger than the claim of B and C.

In the case of D, however, A withdrew certain amounts after D's amount was credited and so the amount in the account was less than D's claim. A was declared insolvent and B, C and D applied under S. 4, Provincial Insolvency Act claiming the amounts as their own.

Held that S. 86, Trusts Act, applied to the case and the money which was transferred by the claimants to the account of the insolvent under a contract induced by fraud which was

liable to be rescinded, was liable to be treated as trust money in the hands of the bank and not money over which the insolvents would have a disposing power for their own benefit. (Para 4)

(2) That in the case of money it was not necessary that coins in specie should be identifiable. It was enough that the amount could be ascertained and separated from the other amount with which it had been mingled. (1921) 1 KB 321, Ref. (Para 4)

(3) That the amount to the credit of the insolvent being larger than the amounts which were paid by the claimants B and C and there being no withdrawals after the claimants had made the payment, the amount paid by the claimants was clearly identifiable, traceable and severable from the rest of the amount. (Para 4)

(4) In D's case also, the amounts had been paid under a contract which was vitiated by fraud, the amounts would be deemed to be held by the insolvents upon trust for the benefit of the claimants and under S. 66, Trusts Act a charge would be created in favour of D over the fund with which the amount was mingled. As the balance of the moneys in deposit in the insolvent's account was less than the amount claimed by the claimant, the whole of it was liable to be paid out to him as his property. (1816) 1 Mer 572, Disting. (Para 5)

Anno: Trusts Act, S. 66 N. 1; S. 66 N. 1.

CASES REFERRED: Paras

(A) (1921) 1921-1 KB 321: 90 LJKB 322 4
(B) (1816) 1 Mer 572: 15 RR 161 5
(C) (1880) 13 Ch D 696: 49 LJ Ch 415 5

R. C. Ghatak, for Appellant; Radha Krishna, for Respondents.

AGARWALA J.:

These are 8 connected appeals arising out of two insolvency petitions filed by two creditors against the same debtor. The facts briefly stated are as follows:

Two persons Govind Ram and Gopal Das carried on a business of supplying goods to order at Farrukhabad under the name and style of Ram Swarup Govind Ram. They set out to swindle a large number of persons in different places by pretending to be able to supply a large stock of various commodities. They would offer to supply goods against payment of 50 per cent. of the price which was to be paid against Railway Receipts of the goods on condition that the balance of 50 per cent. was to be paid as and when the goods were sold by the consignees.

This being a very tempting offer, attracted many persons who on getting Railway Receipts paid various amounts of moneys to Govind Ram and Gopal Das. It, however, turned out that the Railway Receipts were bogus as they were not in respect of any real goods. When the customers discovered the fraud, they rushed to the criminal Court and obtained orders for freezing of the money paid by them to these persons and later on two sets of creditors filed insolvency petitions against them.

These were petitions Nos. 1 and 2 of 1950. Ultimately Govind Ram and Gopal Das were declared insolvents by an order dated 8-9-1950. The Official Liquidator was appointed Receiver of the assets of the insolvents and he seized various amounts lying to the credit of the insolvent Firm in several Banks.

Thereupon five sets of creditors applied to the insolvency Court under S. 4, Provincial Insolvency Act that certain amounts specified in their applications which formed part of the amounts seized by the Official Receiver in the Banks may be declared to belong to them and not to the insolvents or in any case a charge may be declared in their favour in respect of the aforesaid amounts over the assets of the insolvents in the hands of the Official Receiver.

The Official Receiver objected to the claims on the ground that the mony which he had seized was in the account of the insolvents and was the money of the insolvents and could not be claimed by the claimants. The Insolvency Court allowed the claims of Messrs. Mahadeo Lal Ram Kumar, Seth Tara Chand and others, Messrs. Surajmal Shyam Sundar and Messrs. Ram Desh Lachmi Narain and it was ordered that the money which they had paid to the insolvents and which was traceable in the accounts of the insolvents in the various Banks be paid over to them as it belonged to them and not to the insolvents. But the claims of K. Raja Gopal Pillai were disallowed. Both K. Raja Gopal Pillai and the Official Receiver appealed against the decision of the Insolvency Court.

The learned District Judge allowed the appeal of K. Raja Gopal Pillai and declared that he should have a charge for the amount of Rs. 8000/- and Rs. 8500/- claimed by him over the assets of the insolvents and dismissed the appeal of the Official Receiver. The Official Receiver has now come up in second appeals against these orders.

(2) Second Appeal No. 4 of 1953 is against Surajmal Shyam Sunder, S. A. No. 6 of 1953 is against Seth Tarachand and others, S. A. Nos. 7 and 11 of 1953 are against Messrs. Ram Desh Lachmi Narain and S. A. No. 9 of 1953 is against Firm Mahadeolal Ram Kumar. Appeals Nos. 7 and 11 of 1953 refer to the very same claim. In all these five appeals the Courts below had declared that the amounts claimed by the claimants belonged to them.

Appeals Nos. 5, 8 and 10 of 1953 are against K. Raja Gopal Pillai. Appeals Nos. 8 and 10 of 1953 are with reference to one and the same claim in respect of Rs. 8500/- and the other appeal No. 5 of 1953 is in respect of the claim for Rs. 8000/-.

(3) The necessary facts in appeals Nos. 4, 6, 7, 9 and 11 are common. In all these cases what happened was that as against the bogus Railway Receipts sent by the insolvents to the various claimants Hundies were drawn by the insolvents and the claimants paid the amounts of the Hundies through Bank and they were credited to the amounts of the insolvents with the Bank. After the payments were made and credited to the insolvents' account there were no withdrawals by the insolvents.

There was some amount of the insolvents also in the account so that in all these cases the amount in deposit to the insolvents' credit was larger than the amount paid by the claimants and since there had been no withdrawal after the amounts paid by the claimants had been deposited in the insolvents' account, the Courts below held that the amounts could be traced and identified.

In the case of K. Raja Gopal Pillai what had happened was that after he had paid in the two sums of Rs. 8000/- and Rs. 8500/- on the basis of Hundies, drawn by the insolvents in lieu of the bogus Railway Receipts and after these amounts had been credited in the insolvents' account in the Bank, the insolvents had withdrawn large amounts from the Bank and the balance at their credit at the time when the amount was seized

by the Official Receiver was less than the amounts paid by him to the account of the insolvents.

In the former group of cases the Courts below held that the amount paid by the claimants could be identified and therefore those amounts were ordered to be paid over to the claimants, but in the case of K. Raja Gopal Pillai, the lower appellate Court held that the amount could not be clearly identified because it was mixed up by the insolvents with their own money and a charge was declared in his favour over the assets of the insolvents.

(4) In these appeals learned counsel for the Official Receiver has vehemently urged that because the amount was paid in cash by the claimants and it was mingled with the cash belonging to the insolvents it could not be said that the amount paid by the claimants was identifiable. According to learned counsel the amount can be said to be identifiable only when the very same coins which had been paid in by the claimants could be identified and separated from the coins that had been put in by the insolvents in the Bank.

There is no force in this contention. In the case of money it is not necessary that coins in specie should be identifiable. It is enough that the amount can be ascertained and separated from the other amount with which it has been mingled, See—'Banque Belge P. Etranger v. Hambrouck', (1921) 1 KB 321 (A). There can be no doubt that this was a case in which the amounts were paid by the claimants under a fraud committed upon them.

Equity protects a person who has been defrauded and therefore declares that if the amount paid by him can be traced in the hands of the person who has received it, the receiver is charged with a trust for the benefit of the person defrauded. The principle is embodied in S. 86, Trusts Act which says:

"Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to the re-payment by the latter of the consideration actually paid."

In the present case no consideration was actually paid because the Railway Receipts were bogus. So there is no question of the re-payment of any consideration. The money was transferred by the claimants to the account of the insolvents under a contract which was liable to be rescinded and was induced by fraud. The money, therefore, which was lying to the credit of the insolvent with the Bank was liable to be treated as trust money in the hands of the bank and not money over which the insolvents would have a disposing power for their own benefit.

In the groups of appeals Nos. 4, 6, 7, 9 and 11, the amount to the credit of the insolvents being larger than the amounts which were paid by the claimants had there being no withdrawals after the claimants had made the payment, the amount paid by the claimants was clearly identifiable, traceable and severable from the rest of the amount. The Court below was, therefore, perfectly justified in making the order that it did.

(5) So far as the case of K. Raja Gopal Pillai is concerned, his amounts were held by the Court below to be incapable of identification because of the subsequent withdrawals of amounts by the insolvents. Since in his case also the amounts had been paid under a contract which was vitiated by fraud, the amounts would be deemed to be held by the insolvents upon trust for the benefit of the claimants, and a charge would be created in favour of claimant over the fund with which the amount was mingled. This principle is embodied in S. 66, Trusts Act which reads as follows:

"Where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

The withdrawals in a case of this kind are deemed to be out of the amount belonging personally to the insolvents so far as the same could extend. The principle established in — 'Clayton's case', (1816) 1 Mer 572 (B), attributing the first drawing out to the first payments in, does not apply to such cases, see — 'In re, Hallet's estate; Knatchbull v. Hallet', (1880) 13 Ch D 696 (C).

As the balance of the moneys in deposit in the insolvent's account was less than the amount claimed by the claimant, the whole of it was liable to be paid out to him as his property. The Court below was in error in holding that the amount belonging to the claimant was not traceable. Since, however, there is no appeal by the claimant, we cannot interfere with the order of the Court below. The Receiver's contention obviously has no force and his appeals must be dismissed.

(6) We, therefore, dismiss all the appeals with costs.

(7) As appeals Nos. 7 and 11 of 1953 relate to the same claim, there will be only one set of costs in these appeals. Similarly as appeals Nos. 8 and 10 relate to the same claim, there will be only one set of costs in these two appeals also.

D.R.R. Appeals dismissed.

AIR 1955 Allahabad 678 (V 42, C 200 Dec.)

AGARWALA AND OAK JJ.

Abdul Rehman Khan & others, Applicants v B. Basant Rai and others, Opposite Parties.

Civil Revn. No. 651 of 1948, D/- 21-4-1955, against order of Civil J., Etah, D/- 5-3-1948.

Arbitration Act (1940), Ss. 39 and 17 — Composite order refusing to set aside award and directing decree to be passed in terms of it — Appeal against order refusing to set aside award — Maintainability.

Normally, the Court should pass two separate orders on separate sheets of papers one deciding the objections to the award and the other directing a decree to be passed in terms of the award. Very often lower Courts do not follow this procedure. After having held that there was no force in the objections and rejecting them, they make a direction in the same order that a decree be passed in terms of the award. This procedure, though irregular, cannot, by any stretch of reasoning, take away the right of a party to appeal against the order refusing to set aside the award.

For the purposes of the appeal a copy of both the orders may have to be filed and instead of a formal order embodying the decision that the objections are dismissed, the decree which is passed in terms of the award may have to be filed, yet the substance of the appeal will have to be seen and if the order rejecting the objections to the award is challenged in the appeal, the appeal will be construed as being against the order refusing to set aside the award. (Para 3)

Anno: AIR Man.: Arbitration Act, S. 39 N. 1; S. 17 N. 10.

CASES REFERRED: Paras

(A) ('02) 29 Ind App 51: 29 Cal 167 (PC) 4
(B) (V1) AIR 1914 All 446: 36 All 69 (FB) 4
(C) (V24) AIR 1937 All 65: ILR (1937) All 317 (FB) 4
(D) (V13) AIR 1926 All 202: 48 All 226 4

C. S. Saran and Majeed Uddin, for Applicants; P. M. Varma and Devi Shanker, for Opposite Parties.

AGARWALA J.:

This is application in revision arising out of arbitration proceedings. The parties referred a suit to arbitration. There was an award. The defendants-applicants filed objections to the award and prayed that the award be set aside. The trial Court rejected the application, refused to set aside the award and then proceeded by the same order to pass a decree in terms of the award. Thus the orders refusing to set aside the award and directing that a decree be passed in terms of the award were passed as a composite order on one and the same date.

The plaintiffs opposite parties filed an appeal to the lower appellate Court and the lower appellate Court set aside the award and remanded the case to the trial Court for decision according to law. An objection was taken before the lower appellate Court that the appeal was incompetent. That Court rejected the objection.

(2) In this revision application it has been urged that the appeal to the Court below was incompetent. Learned counsel has urged that as there was a composite order and as a decree in terms of the award was prepared under S. 17, Arbitration Act, an appeal to the Court below could only lie within the limits prescribed by S. 17, namely if the decree was in excess of or not otherwise in accordance with the award. This contention has no force.

(3) Section 39, Arbitration Act confers a right of appeal against an order refusing to set aside an award. The right of appeal against an order refusing to set aside an award was not available before the enactment of the Arbitration Act of 1940, see S. 104 Civil P. C.

The mere fact that an appealable order has been followed up by a decree in terms of the award can be no ground for denying the right of appeal to a party. Section 17, Arbitration Act, contemplates that where there has been an objection to the award, that objection will be decided and if it is rejected, then a decree shall follow in terms of the award.

Normally, the Court should pass two separate orders on separate sheets of paper one deciding the objections to the award and the other directing a decree to be passed in terms of the award. Very often lower Courts do not follow this procedure. After having held that there was no force in the objections and rejecting them, they make a direction in the same order that a decree be passed in terms of the award. This procedure, though irregular, cannot, by any stretch of reasoning, take away the right of a party to appeal against the order refusing to set aside the award.

For the purposes of the appeal a copy of both the orders may have to be filed and instead of a formal order embodying the decision that the objections are dismissed, the decree which is passed in terms of the award may have to be filed, yet the substance of the appeal will have to be seen and if the order rejecting the objections to the award is challenged in the appeal, the appeal will be construed as being against the order refusing to set aside the award.

(4) Learned counsel has referred us to certain decisions of this Court and of the Privy Council, e.g., — 'Ghulam Khan v. Muhammad Hassan', 29 Ind App 51 (PC) (A); — 'Lutawan v. Lachya', AIR 1914 All 446 (FB) (B); — 'Mt. Mariam v. Mt. Amina', AIR 1937 All 65 (FB) (C) & — 'Suraj Singh v. Phul Kumari', AIR 1926 All 202 (D). But these cases were all decided before the enactment of the Arbitration Act, 1940.

As already pointed out there was no provision in the Civil Procedure Code for an appeal against an order refusing to set aside an award and the cases cited by the learned counsel have, therefore, no bearing on the point we have to consider in the present revision application.

(5) There is no force in this application. It is dismissed with costs.

G.M.J. Application dismissed.

AIR 1955 ALLAHABAD 679 (Vol. 42 C. 201 Dec.)

AGARWALA AND NARAIN SAHAI JJ.

(25-2-1955)

Radha Ballabh, Defendant-Appellant v. Bahore Ram Chand Plaintiff-Respondent.

Special Appeal No. 75 of 1953, against decree of Sapru J., in S. A. No. 1264 of 1952, D/- 11-8-1953.

(a) **T. P. Act (1882), S. 106 — Presumption of yearly tenancy.**

The presumption laid down in S. 106 applies only in the absence of a contract to the contrary. Where, therefore, there is a specific contract that the rent will be paid from month to month and the lease is for a fixed period of eleven months only, then under the contract it cannot be said that the lease is from year to year and that as such it can only be determined by a six months' notice on the plea that the lease of the premises is for manufacturing purpose. (Para 5)

Anno. AIR Com., T. P. Act, S. 106 N. 12.

(b) **T. P. Act (1882), S. 116 — "Agreement to the contrary" — By holding over tenant does not acquire greater right than he possessed under original lease.**

Renewal of a lease from year to year or from month to month, according to the purpose for which the property is leased, is to be presumed only when there is no "agreement to the contrary". Where there is an agreement to the contrary, it cannot be said that by holding over the tenant acquires greater rights than what he possessed under the original lease.

Where the original lease is not an yearly lease, holding over will be deemed to be a tenancy from month to month. AIR 1952 All 634, Rel. on. (Para 7)

Anno: AIR Com., T. P. Act, S. 166 N. 11.

CASE REFERRED: Para

(A) (V39) AIR 1952 All 634: 1951 All WR HC 72 8

G. P. Bhargava and N. D. Ojha, for Appellants; Baleshwari Prasad, for Respondent.

AGARWALA J.:

This is a defendant's appeal arising out of a suit for ejectment. The plaintiff respondent is the owner of a building which was let out to the defendant appellant under an unregistered rent-note executed by the defendant-appellant. The rent agreed to be paid was from month to month

at the rate of Rs. 50/- per month according to the Hindi Calendar.

(2) The evidence disclosed that the lease was for the purpose of establishing a Dal factory, that is, for a manufacturing purpose. The defendant-appellant held over after the expiry of the rent note and rent was accepted by the plaintiff-respondent. On the 13th January, 1950, the plaintiff-respondent gave fifteen days' notice to the defendant-appellant for vacating the premises and when the defendant-appellant did not vacate, he filed the present suit for his ejectment.

The defendant-appellant's contention, inter alia, was that the notice was defective inasmuch as the lease being for a manufacturing purpose he was entitled to six months' notice under the provisions of S. 106, T. P. Act. The trial Court held that only fifteen day's notice was necessary and decreed the suit.

The lower appellate Court held that since the defendant-appellant had been holding over for a number of years the original lease of eleven months should be construed to have become a lease from year to year and that six months' notice was necessary and therefore allowed the appeal and dismissed the suit. In Second Appeal a learned Judge of this Court upheld the trial Court's decision and restored its decree.

(3) In this Special Appeal the learned counsel for the appellant has urged that by holding over the lease became a yearly tenancy and that six months' notice was necessary because the lease was for a manufacturing purpose.

(4) In our opinion there is no force in the contention of the learned counsel. The rent-note, as we have already observed, was for a period of eleven months and there was an express contract in the lease that the rent would be paid from month to month. S. 106, T. P. Act provides as follows.

"106. Duration of certain leases in the absence of written contract or local usage. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee by thirty days' notice."

(5) The presumption laid down under this section is that a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year and can be terminated by six months' notice, in the absence of a contract to the contrary. In the present case there was a specific contract that the rent would be paid from month to month. Further the lease was for a fixed period of eleven months only.

Consequently under the contract it could not be said that the lease was from year to year and that as such it could only be determined by a six months' notice.

(6) No doubt the appellant held over for a number of years. Under S. 116 of the Transfer of Property Act the effect of holding over has been described in these words:

"116. Effect of holding over. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in S. 106".

(7) Renewal of a lease from year to year or from month to month, according to the purpose for which the property is leased, is to be presumed only when there is no "agreement to the contrary". The agreement referred to in S. 116 may be an agreement after determination of the original lease or it may be in the original lease itself.

In the present case in the original lease itself (we are assuming that the rent-note was a lease) the agreement was that the rent was to be paid every month and the period of the lease was eleven months. There was, therefore, an agreement to the contrary in the present case, and it could not be held that by holding over the defendant appellant acquired greater rights than what he possessed under the original lease.

By holding over the defendant-appellant's tenancy never became a tenancy from year to year, but remained a tenancy from month to month. If we were to hold that it became a tenancy from year to year by reason of holding over. We would be defeating the object of S. 107, T. P. Act.

That section requires that a lease of immovable property from year to year, or for any term exceeding one year, or reserving an yearly rent, can be made only by a registered instrument. Where the original lease is not an yearly lease, holding over will be deemed to be a tenancy from month to month.

(8) In this connection we may refer to the observations of a learned Single Judge of this Court in — 'Kishan Lal v. Ram Chander.' AIR 1952 All 634 (A), with which we respectfully agree.

(9) We, therefore, find no force in this appeal and we dismiss it with costs.

V.S.B. Appeal dismissed.

°AIR 1955 Allahabad 680 (V 42 C 202 Dec.)

AGARWALA AND MULLA JJ. (22-2-1955)

Mool Chand and others, Appellants v. Smt. Brijmani Devi and others, Respondents.

S. C. A. No. 100 of 1954.

(a) Constitution of India, Art. 133(1)(b) — Decree of variance — (Civil P. C. (1908), S. 110).

A decree of variance must be one where there is variation in the substantive relief in respect of the whole or part of a party's claim. AIR 1927 Pat 379 and AIR 1928 Pat 190, Rel. on. (Para 7)

The trial Court in a suit for ejectment passed a decree in favour of the plaintiff. No express direction was, however, given in the decree about the plaintiff being entitled, if the defendant did not remove the materials within the time fixed by the Court, to have them removed through Court. Further, the decree did not specifically mention that the plaintiff was to obtain possession over the materials if they were not removed by the defendant within the time fixed. In the judgment it was ordered that the defendant was to remove the constructions within six months, but as in the judgment there was no direction as to what would happen if the defendant failed to comply with this direction, the decree passed in pursuance of the judgment was also silent about it.

In the appeal the High Court affirmed in substance the decree but differed from it in two res-

pects. Firstly, the ambiguity in the decree of the court below was removed by inserting in the decree a clause to the effect that if the defendant failed to remove the materials within the time fixed the plaintiff was to have the liberty to have the materials removed through the agency of the Court. Secondly the time fixed for the removal of the materials by the trial Court was enlarged from six months from the date of the trial Court's decree to one year from the date of High Court's decree.

There was no other variation in the decree as passed by the High Court. The dispute in the case affected property over the value of Rs. 20,000. An application for leave to appeal to the Supreme Court was filed claiming that the two variations made by the High Court — namely, the enlargement of the period fixed for the removal of the constructions and the grant of a right to move the Court for the removal of the constructions through the agency of the Court in case the defendant failed to remove the materials within the time fixed by the Court rendered the judgment one of variance and not affirmance.

Held that so far as the enlargement of the period fixed for the removal of the constructions was concerned it was a point which was not really one of the issues in the case but arose incidentally in the course of passing the final order in the case. The date fixed for the removal of the constructions by the trial Court had already elapsed during the pendency of the appeal and it would have been unfair if that date had been stuck to and so the High Court enlarged the period for the removal of the materials for the sole benefit of the applicant himself. This could not be said to be such a variation in the decree of the lower Court as to lead to the conclusion that the decree of the High Court was not one of affirmance when the decree affirmed all the findings of the Court below.

Such a variation might very well be termed as incidental or consequential. As regards the second variation, namely the mention of the right of the plaintiff to get the materials removed through the agency of the Court if the defendant failed to do the same himself, it could not be said to be a variation at all. This was in reality the clarification of what was implicit in the judgment of the trial Court. Therefore, no variation in substance was made by the High Court and the applicant, could not claim that he was entitled to appeal to the Supreme Court as a matter of right.

(Paras 7, 8)

Anno: AIR Com.: Const. of Ind., S. 133 N. 16.
AIR Com.: Civil P. C., S. 110 N. 13.

(b) Transfer of Property Act (1882), S. 112 — "Any other act".

Waiver of one's rights cannot be inferred when a clear intention not to waive a right already acquired is ascertainable.

A who had leased out a land to B served a notice on the latter terminating the tenancy under S. 111(g). Subsequently he sold away the property and all his rights over it to C. C gave a notice to B in which she stated that his tenancy was terminated by A's notice and "is hereby terminated" and that he had no right therefore to remain a tenant of the land and claimed arrears of rent instead of damages. B did not comply with the notice and C filed a suit claiming possession and also arrears of rent. The question arising as to whether by claiming 'rent' both in the notice and plaint C had waived the forfeiture.

Held that both in the second noice and in the plaint C had made it clear that the tenancy had been forfeitted under the first notice and it was plain upon a reading of these documents, that it was not at all the intention of the plaintiff to waive the forfeiture that had already been incurred.

(Para 10)

Anno: AIR Com.: T. P. Act, S. 112 N. 4.

CASES REFERRED: Paras

(A) (V14) AIR 1927 Pat 379: 103 Ind Cas 703 7
(B) (V15) AIR 1928 Pat 190: 106 Ind Cas 243 7
(C) (V14) AIR 1927 PC 117: 54 Cal 586 (PC) 7

Ambika Prasad and Rajeshwari Prasad, for Appellants; Gopi Nath Kunzru and Kailash Nath Agarwal, for Respondents.

AGARWALA J.: This is an application for leave to appeal to the Supreme Court. The facts, briefly stated, are as follows:

(2) Certain plots of land were let out by three persons, Govind Prasad Sen, Krishna Prasad Sen & Ram Prasad Sen, brothers, to one Moolchand by means of a deed of lease D/- 30-9-35 for a period of ten years on a monthly rent of Rs. 52/8/-. The lease was renewable at the expiration of ten years for another period of ten years. There was a condition in the lease that in case of default of payment of rent for six months the lease was to determine and the lessors were given a right of re-entry over the land. The lessee Mool Chand made costly constructions over the land and it is alleged that this was done under an agreement of sale between the lessors and the lessee which, however, did not materialise.

Later on Moolchand sublet the land and the buildings to the applicant before us, namely, Sri Theatres Limited, on an annual rent of Rs. 1560/-. Moolchand did not pay the monthly rent as agreed upon in the lease, and consequently the Sens gave him notice on 7-8-1952 determining his teancy and requiring him to vacate the land.

On 27-9-1943 the Sens sold the land and all their rights over it in favour of Brijmani Devi, plaintiff-opposite party in the present application. Brij Mani Devi gave a fresh notice to Moolchand on 21-10-1944 in which she stated after reciting the facts and that Moolchaad had paid rent for only one year to her predecessors-in-interest and no rent thereafter, that Moolchand had contravened the conditions embodied in the lease and that the tenancy had been terminated by means of the notice dated 7-8-1942.

She went on to state that "your tenancy has been and is hereby terminated, and now you have no right or title to remain a tenant of the land aforesaid", but demanding the arrears of rent (instead of damages) for the past six years amounting to Rs. 3780/- with interest, and also the removal of the constructions which had been made as provided under the lease.

Moolchand did not comply with the request contained in the notice, whereupon Brijmani Devi filed the suit, which has given rise to these proceedings, on 30-11-1944. In the plaint it was stated that Moolchand had paid rent only for one year and did not pay anything else by way of rent and that accordingly the vendors of the plaintiff had sent a notice under the provisions of S. 111(G), Transfer of Property Act on 7-8-1942 terminating the tenancy, and that the plaintiff herself had sent a fresh notice to Moolchand on 21-10-1944 reminding him of the termination of the tenancy and terminating his tenancy under the provisions of S. 111 (G), Transfer of Property Act.

The first two reliefs claimed in the plaint were that:

(a) A decree may be passed for ejectment of the defendants and for awarding possession

and occupation to the plaintiff in respect of the property specified below (that is to say, the land). Defendant 1 may be directed to remove his materials from the property specified below within the time fixed by the Court, otherwise the plaintiff may be put in possession and occupation thereof (obviously the constructions), valued at Rs. 630/-, arrears of rent for one year.

(b) A sum of Rs. 3780/- on account of principal amount of arrears of rent for the past six years and Rs. 415/- interest at the rate of annas 8 per cent. per mensem by way of damages, in all Rs. 4195/- may be awarded as against the person and property of defendant 1.

It is not necessary to detail the other reliefs claimed in the plaint. It is also not necessary to state what the defence to the suit was.

(3) Moolchand filed a counter-suit for the specific performance of the contract of sale on the basis of the agreement which was alleged to have been entered into between the Sens and himself. The plaintiff was a party to the suit and it was alleged that the plaintiff had notice of the agreement. The applicant was not a party to that suit. He was a party, however, to the suit for ejectment. The trial Court dismissed the suit of Moolchand for specific performance, and its decree was confirmed by this Court. Moolchand has submitted to the decree and there is no longer any question of specific performance of the contract entered into between him and the Sens.

The trial Court decreed the plaintiff's suit for ejectment as against Moolchand and the present applicant. No express direction was, however, given in the decree about the plaintiff being entitled, if the defendant did not remove the materials within the time fixed by the Court, to have them removed through Court. Further, the decree did not specifically mention that the plaintiff was to obtain possession over the materials if they were not removed by the defendant within the time fixed. In the judgment it was ordered that the defendant was to remove the constructions within six months, but as in the judgment there was no direction as to what would happen if the defendant failed to comply with this direction, so the decree passed in pursuance of the judgment was also silent about it.

Against this judgment and the decree there was an appeal to this Court both by Moolchand and by the present applicant. In the appeal one of the points urged was that the determination of the tenancy by means of the notice dated 7-8-1942 must be deemed to have been waived by the second notice dated 21-10-1944 and the fresh determination of the tenancy by means of that notice must be deemed to have been waived by the plaint in the present suit itself.

The reasoning was that both in the second notice, as well as in the plaint of the present suit, the plaintiff had claimed not damages but rent for the period after the tenancy had been determined by the first notice, and that, therefore, she had accepted the plaintiff as a tenant for the period prior to the suit and had waived the forfeiture of tenancy.

The Bench hearing the appeal repelled this contention and held that neither by means of the second notice, nor by means of the plaint, had the determination of tenancy been waived or cancelled. It was urged on behalf of the plaintiff that the Court had awarded to the plaintiff not only a decree for possession over the land, but also a decree for possession over the materials since the defendant had failed to remove the materials within the period fixed by the Court. This contention also was repelled by the Court and the decree of the Court below was in substance affirmed by this Court.

But in two respects the decree passed by this Court differed from the decree of the Court below. Firstly, the ambiguity in the decree of the Court below was removed by inserting in the decree a clause to the effect that if the defendant failed to remove the materials within the time fixed the plaintiff was to have the liberty to have the materials removed through the agency of the Court. Secondly, the time fixed for the removal of the materials by the trial Court was enlarged by this Court from six months from the date of the trial Court's decree to one year from the date of this Court's decree. There was no other variation in the decree as passed by this Court. The valuation of the suit was Rs. 5025/-, including Rs. 4195/- as arrears of rent with interest.

(4) The applicant now seeks to obtain leave for appeal to the Supreme Court as of right on the ground that this Court has not affirmed the decree of the trial Court, and that the valuation of the subject-matter of the dispute in the Court of first instance, as also in the proposed appeal to the Supreme Court, is over Rs. 20,000/-. He also claims that in case it is held that this Court's decree is one of affirmance, then there is a substantial question of law involved in the appeal and on that ground certificate may be granted under Art. 133(1)(b) of the Constitution.

(5) After hearing the arguments of the learned counsel for the parties we have come to the conclusion that there is no force in any of the contentions of the applicant and the application is liable to be dismissed.

(6) As regards the valuation of the subject-matter of the dispute in the Court of the first instance and in the proposed appeal to the Supreme Court, we have no doubt that it is over Rs. 20,000/-. Though ostensibly the suit was for possession over the land there was also a prayer for the demolition of the constructions. The constructions admittedly are valued at over Rs. 20,000/-. The dispute in the case therefore affects property of the value of over Rs. 20,000/-.

(7) We are, however, not prepared to say that this Court's decree was not one of affirmance. As we have stated already, all the contentions on the matters in dispute between the parties were decided against the applicant so far as the decree for ejectment and recovery of arrears of rent and damages was concerned. It is alleged that the two variations made by this Court — namely, the enlargement of the period fixed for the removal of the constructions and the grant of a right to move the Court for the removal of the constructions through the agency of the Court in case the defendant failed to remove the materials within the time fixed by the Court — render the judgment one of variance and not affirmance.

So far as the enlargement of the period fixed for the removal of the constructions is concerned it was a point which was not really one of the issues in the case but arose incidentally in the course of passing the final order in the case. The date fixed for the removal of the constructions by the trial Court had already elapsed during the pendency of the appeal and it would have been unfair if that date had been stuck to and so this Court enlarged the period for the removal of the materials for the sole benefit of the applicant himself.

This, in our opinion, cannot be said to be such a variation in the decree of the Court below as to lead to the conclusion that the decree of this Court was not one of affirmance when the decree of this Court affirmed all the findings of the Court below. A decree of variance must be one where there is variation in the substantive relief in respect of the whole or part of a party's claim. A variation such as was made in the present case cannot be said to be of that nature. Such a variation might very well be termed as incidental or consequential

We are supported in our view by a decision of the Patna High Court in — 'Mohammad Tabarak Ali Khan v. Dalip Narain Singh', AIR 1927 Pat 379 (A). (See also — 'Mahdeo Lal v. Dalip Narain Singh', AIR 1928 Pat 190 (B)). The decree against which the application for leave to appeal to the Privy Council was made in the Patna case is printed as — 'Basiram Saha Ray v. Ram Ratan Roy', AIR 1927 PC 117 (C). In that case also there was a variation in the period of grace for the payment of the mortgage amount.

It was obseved that for purposes of S. 110, Civil P. C. the substance of the matter has to be looked at. It was held that the variation made in that case was not a variation of the trial Court's decree within the meaning of that section.

(8) As regards the second variation, namely the mention of the right of the plaintiff to get the materials removed through the agency of the Court if the defendant failed to do the same himself, it cannot be said to be a variation at all. This was in reality the clarification of what was implicit in the judgment of the trial Court. The trial Court had clearly ordered the defendant to remove the materials within the period of six months. If this order was not complied with by the defendant what was the Court to do?

Obviously the Court must be deemed to have the power to have that done what was required by its order to be done. This power of the Court is based on the principle that where power is vested to do or to require a certain thing to be done, in some Court or other authority, that Court or authority must have the incidental and necessary power to effectuate its orders. If we were to assume that the Court had no power to have the constructions removed through its own agents, we would in effect be nullifying the very order of the Court.

This Court in making it explicit that the plaintiff could ask the Court to have the materials removed merely did what the trial Court could have itself done under the decree as was passed by it without the addition of that direction. Therefore, in our opinion no variation in substance was made by this Court. The applicant, therefore, cannot claim that he is entitled to appeal to the Supreme Court as a matter of right.

(9) We have then to consider whether there is any substantial question of law involved in the proposed appeal. The only point urged before us is that on the question whether on the facts of the present case the forfeiture would be deemed to have been waived, there is a difference of opinion in the Courts in India. The matter has been dealt with at length by the Bench of this Court deciding the appeal, and in our opinion the matter can admit of no doubt. The use of the word 'rent' in the second notice and in the plaint of the present suit instead of 'damages' is a loose way of expressing the idea of 'rent by way of damages'. It may be noted that the amount of past and future damages claimed in respect of the use of the property till the date of delivery of possession is also the same as the amount of rent, vide relief (d) in the plaint.

(10) Waiver of one's rights cannot be inferred when a clear intention not to waive a right already acquired is ascertainable. Both in the second notice and in the plaint the plaintiff had made it clear that the tenancy had been forfeited under the first notice and it is plain to us upon a reading of these documents, that it was not at all the intention of the plaintiff to waive the forfeiture that had already been incurred. We do not think that any substantial question arises in the proposed appeal.

(11) We, therefore, find no force in this application and we dismiss it, but in the circumstances of the case we make no order as to the costs of this application.

M.K.S. Application dismissed.

AIR 1955 ALLAHABAD 683 (V. 42 C. 203 Dec.)

RAGHUBAR DAYAL AND AGARWALA JJ.

(6-9-1954)

Mahant Indra Narain Das, Appellant v. Mahant Ganga Ram Das and another, Respondents.

First Appeal No. 203 of 1953 against decree of Addl. Civil J., Banda, D/- 26-2-1953.

(a) **Specific Relief Act (1877), S. 42 — Discretion of Court — Exercise of.**

Under S. 42, the Court is given a discretion to make the declaration sought and the plaintiff need not ask for any further relief. The relief being discretionary, no person can claim the declaration as of right. But, at the same time, the court being a court of justice its discretion is fettered by principles of law laid down by the courts themselves, though not by Legislature and the discretion cannot be exercised arbitrarily, but must be exercised in accordance with the settled principles of law. When a case, therefore, is covered by the principles already settled, the court has to decide the case in accordance with those principles and has really no discretion in the matter. (Para 2)

Anno: Spe. Rel. Act, S. 42 N. 6(a).

(b) **Specific Relief Act (1877), S. 42 — Proviso — Relief must be available at date of suit — Change in position of parties during pendency of suit need not be considered.**

The further relief contemplated in the proviso is a relief which was available to the plaintiff at the time of the institution of the suit and which he failed to pray for. If there is a change in the position of the parties during the pendency of a suit, and if by reason of this change the plaintiff becomes entitled to seek further relief, then that is not the relief contemplated in the proviso. AIR 1941 Mad 822 (FB), Disting.; AIR 1937 Pat 229, Not Approved. (Para 2)

Anno: Speci. Rel. Act, S. 42 N. 7, 9.

(c) **Specific Relief Act (1877), S. 42 — Proviso — Relief which is not at all necessary.**

The proviso refers to a relief not such that the plaintiff may or may not ask for it, but one which the plaintiff must seek in order to get actual and substantial relief suitable for him — a relief which the plaintiff will have to seek by means of some subsequent suit or application in order that he may make the declaratory relief fruitful to himself. It does not refer to a relief which is not at all necessary in view of the declaratory relief, which may be granted to him and which alone will

serve his purpose quite well. AIR 1942 Cal 394, Disting. (Para 2)

Anno: Speci. Rel. Act, S. 42 N. 8.

(d) Specific Relief Act (1877), S. 42 — Proviso — Relief against third party.

The further relief which a plaintiff is bound to seek by reason of the proviso is a relief which he can obtain against the defendant or defendants to the suit and not against a third party. AIR 1943 PC 94, Ref. (Para 2)

Anno: Speci. Rel. Act, S. 42 N. 16.

CASES REFERRED: Paras

(A) (1900) 1900 All WN 172 2
(B) ('03) 26 All 215: 1903 All WN 236 2
(C) (V22) AIR 1935 Lah 332: 16 Lah 729 2
(D) (V35) AIR 1948 Bom 396: 50 Bom LR 274 2
(E) (V30) AIR 1943 PC 94: ILR (1943) Kar PC 93 (PC) 2
(F) (V28) AIR 1941 Mad 822: ILR (1942) Mad 13 (FB) 4
(G) (V29) AIR 1942 Cal 394: 207 Ind Cas 461 4
(H) (V24) AIR 1937 Pat 229: 170 Ind Cas 84 4

V. K. S. Chaudhary and W. R. Sharma, for Appellant; Jagadish Narain Agarwal, for Respondents.

AGARWALA J.:

This is a plaintiff's appeal arising out of a suit for a declaration that the plaintiff was the Mahant of certain temples. The facts briefly are these:

There are two temples in which three deities are installed. One temple is situated in village Atrauli Maufi and the other in village Katra Gudar. One Mahant Salig Ram Das was the Mahant and Sarbarakar of the deities of the two temples. He died on 7-10-1946.

One Lachchman Das applied for having his name mutated in the revenue records over the property belonging to the deities. He was opposed by one Ganga Ram Das who is one of the defendants-respondents in the present litigation. During the pendency of the mutation proceedings the revenue Court appointed a receiver to take charge of the endowed property. The receiver took possession of the property on 27-2-1947. Lachchman Das was later murdered in May, 1947, and upon his death his two chelas came forward claiming the Mahantship as successors of Lachchman Das.

One was Rameshwar Das and the other was Gobind Das. Rameshwar Das also died on 2-6-1947, and in his place the plaintiff-appellant applied for mutation on the ground that he was the successor of Rameshwar Das who alone was the successor of Lachman Das. The plaintiff's application was, however, dismissed because the revenue court held that the court had no power to implead the heirs of claimants in mutation proceedings. Upon his application for mutation being dismissed he filed the suit, which has given rise to this appeal, in the civil court for a declaration of his title to the Mahantship of the endowment.

At this time, the appointed receiver was in possession of the property. The Assistant Collector was dealing with the mutation case, and held that he was not able to decide who was in possession of the property, and therefore, ordered that the receiver was to remain in possession till the title was decided by a competent civil Court.

Against this order Govind Das appealed to the Collector. The Collector held that as between Govind Das and Ganga Ram, Govind Das was better entitled to the property, and he, therefore, ordered mutation to be effected in his name, and he also ordered the receiver to hand over possession of the property to Govind Das. Consequently, Govind Das came into possession over this property.

(2) The Civil Suit then came up for decision, and the learned Civil Judge dismissed it on the ground that since the plaintiff was not in possession over the property his suit for a mere declaration was barred by reason of the proviso to S. 42, Specific Relief Act. The plaintiff has appealed to this Court against the decision of the learned Civil Judge, and the only point for consideration is whether the suit was barred by the proviso to S. 42, Specific Relief Act. Section 42 of the Specific Relief Act with its proviso is as follows:

"Any person entitled to any legal character or to any right as to any property, may institute a suit against any person, denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief.

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief that a mere declaration of title, omits to do so."

The first thing to be noted in connection with S. 42 is that it enables a person to institute a suit for a declaration as to his legal character or right to any property against a person denying or interested in denying his legal character or right.

The second thing to be noted is that the court is given a discretion to make the declaration sought and the plaintiff need not ask for any further relief. The relief being discretionary, no person can claim the declaration as of right. But, at the same time, the court being a court of justice its discretion is fettered by principles of law laid down by the courts themselves, though not by the Legislature and the discretion cannot be exercised arbitrarily, but must be exercised in accordance with the settled principles of law.

When a case, therefore, is covered by the principles already settled the court has to decide the case in accordance with those principles and has really no discretion in the matter. The third thing to be noted in connection with this section is that a relief for a declaration is not to be granted where the plaintiff "being able to seek further relief than a mere declaration of title, omits to do so".

By reading the proviso along with the main section is at once clear that the further relief contemplated in the proviso is a relief which was available to the plaintiff at the time of the institution of the suit and which he failed to pray for. If there is a change in the position of the parties during the pendency of a suit, and if by reason of this change the plaintiff becomes entitled to seek further relief, then that is not the relief contemplated in the proviso. This point is covered by authorities and is well settled, vide: — 'Surjan Singh v. Baldeo Prasad', 1900 All WN 172 (A); — 'Ram Adhar v. Ram Shankar', 26 All 215 (B); — 'Hurmat Ali Shah v. Tufail Mohammad', AIR 1935 Lah 332 (C); — 'Meghaji Mohanji v. Anant Pandurang', AIR 1948 Bom 396 (D).

Further, by reading the last clause of the main section where it is stated that the plaintiff need not ask for any further relief and the proviso together, it appears to us that the proviso refers to a relief not such that the plaintiff may or may not ask for it, but one which the plaintiff must seek in order to get actual and substantial relief suitable for him — a relief which the plaintiff will have to seek by means of some subsequent suit or application in order that he may make the declaratory relief fruitful to himself.

In other words, the proviso does not seem to refer to a relief which it is not at all necessary, in view of the declaratory relief, which may be granted to him and which alone will serve his purpose quite well. Lastly, it has to be noted that the further relief which a plaintiff is bound to seek by reason of the proviso is a relief which he can obtain against the defendant or defendants to the suit and not against a third party. This was pointed out by the Privy Council in — 'Humayun Begam v. Shah Mohammad Khan', AIR 1943 PC 94 (E). Let us now examine what the position in the present case is.

(3) As already noted, on the date of the institution of the suit though the plaintiff was not in possession of the property, the defendant also was not in possession thereof. He had not even obtained a declaration in his favour from the revenue court. The property was in possession of a receiver at the date of the suit. Therefore, the plaintiff was unable to seek the relief for possession because the defendant was not in possession. Furthermore, the property being in charge of a receiver appointed by a court, must be deemed to be in possession of the receiver on behalf of the rightful owner of the property.

A receiver appointed by a court takes charge of the property as an officer of the court, and not as an agent of a party. The court appoints a receiver in order that the property may ultimately be delivered to the person held by it or by some other competent court to be entitled to that property. Normally and usually the court decides the dispute between the parties arrayed before it, and, therefore it is, often said that the receiver holds the property for the party on the record ultimately found to be entitled to it.

But it may be that a person, who is not a party before the court appointing the receiver, may get his title declared by another competent court in a suit in which all the parties before the court appointing the receiver are impleaded. In that case the party declared to be entitled to it by the competent court would be entitled to have delivered to him possession over the property by the receiver.

The receiver was, therefore, at the date of the suit holding the property for the rightful owner including the plaintiff. It, therefore, follows that the plaintiff was entitled to sue for a mere declaration and was not "able to seek further relief" at the date of the suit as against the defendant. The change in the position of the parties during the pendency of the suit, as already noted above, did not affect the position with regard to the right of the plaintiff to sue for a mere declaration.

(4) A number of cases were cited by counsel for both the parties before us. In — 'Kandaswami v. Vagheesam Pillai', AIR 1941 Mad 822 (FB) (F), it was held that a plaintiff who is asking for a declaration that he is the rightful Mahant of certain endowed property, must ask for possession over the property also and his failure to do so vitiates the suit. That was on the ground that the office of Mahant could not be separated from the properties and a mere suit for a declaration to the office of the Mahant without a relief for possession over the property was not maintainable.

In that case, the defendant was in possession of the properties. The position here is quite different as the defendant on the date of the suit was not in possession of the properties at all. In — 'Annapurna Dasi v. Sarat Chandra', AIR 1942 Cal 394 (G), the suit was for a declaration that a mortgage decree was not binding on the plaintiff or on the estate of which a receiver had been appointed. Execution of the mortgage decree had started before the institution of the declaratory suit.

During the course of the suit the properties were sold in execution of the mortgage decree and were purchased by a third party. The purchaser was added as a third party, but without a relief for possession being added. It was held that the suit as not maintainable because although it was not necessary for the plaintiff to sue for possession, he should have asked for the relief for injunction restraining the defendants from executing their decree.

The facts of the present case are different. No decree was in the course of execution in the present case at the instance of the defendant. As no order had been made in favour of the defendant by the revenue court prior to the date of the institution of the suit we do not think that it was necessary for the plaintiff to have asked for the relief of injunction.

In — 'Mt. Bibi Zubaida v. Mohan Ram', AIR 1937 Pat 229 (H), certain mortgaged property was put to sale in execution of a mortgage decree obtained by A against B. A suit was brought by B's wife and mother for a declaration that the decree was not binding on them and that the mortgaged property could not be sold as it was wakf property. Subsequently, plaintiffs applied for an injunction staying further proceedings in execution. This was refused.

Later on, possession was given to A, the decree-holder, on account of the happening of certain events. The court dismissed the suit in the end as the plaintiffs had not prayed for the grant of an injunction in the plaint or apply subsequently to add the relief for possession. It was held that the declaration originally prayed for could not be given partly because it would have been utterly infructuous and partly because the absence of a prayer for an injunction barred the suit under the provisions of S. 42, Specific Relief Act.

It may be noticed that the declaration sought was that a certain property was not liable to be sold in execution of a decree and that the decree was not binding on the plaintiffs. After the decree had been fully executed and satisfied, the grant of the declaration sought was rendered infructuous, and therefore, the court may be said to be justified in refusing to grant the declaration asked for.

But the observation that the injunction should have been sought in the plaint itself, and because it was not sought the suit was not maintainable under S. 42, Specific Relief Act, does not appeal to us. At the date of the suit the property had not been sold and if we have to consider the state of affairs existing at the date of the suit, we cannot say that the plaintiff was under any necessity of suing for a relief by way of injunction.

The learned Judge, if we may say so with respect, did not take into consideration the well settled principle that changes in the situation of the parties that might occur during the course of litigation need not be taken into account by a plaintiff when he sues for a mere declaration.

(5) We think that the court below was in error in dismissing the suit.

(6) The result, therefore, is that we allow this appeal, set aside the decree of the court below and remand the case to that court for trial according to law. The plaintiff will have his costs of the appeal. The cost of the lower court will abide the result.

(7) The stay order is discharged.

H. G. P. Case remanded.

AIR 1955 ALLAHABAD 686 (V. 42 C. 204 Dec.)

RAGHUBAR DAYAL AND AGARWALA JJ.

(23-8-1954)

Mani Shanker, Judgment-debtor, Appellant v. Niranjan Swarup, Decree-holder, Respondent.

Second Appeal No. 986 of 1950. from decision of Civil J., Aligarh, D/- 26-5-1950.

(a) **Civil P. C. (1908), Ss. 47, 2(2) — Conversion of application into plaint — Order amounting to refusal to execute decree — Appeal.**

Where a decree-holder in execution of his decree for possession claimed compensation for the loss caused to the immovable property by the judgment-debtor after the decree, and the executing Court after holding that the execution application did lie to him, ordered the execution application to be converted into a plaint. In substance, his order amounted to a refusal to execute the decree, and hence appeal lay against it under S. 47(2) read with S. 2(2). AIR 1931 Mad 270, Disting. and Expl. (Para 2)

Anno: Civil P. C., S. 47 N. 84; S. 2 N. 14.

(b) **Civil P. C. (1908), S. 47(2) — Discretion under — Exercise of.**

The discretion vested in the execution Court under Sub-s. (2) of S. 47 is to be exercised when the execution Court finds that it has no jurisdiction to execute the decree, but that by some bona fide mistake or oversight the decree-holder instead of instituting a suit has filed an execution application. The discretion cannot be exercised to convert an execution application into a plaint when no suit lies and when the matter must be decided in the execution department. The discretion vested in the execution Court is a discretion in aid of the law and not to contravene it. (Para 2)

Anno: Civil P. C., S. 47 N. 82.

(c) **Civil P. C. (1908), S. 47, O. 21, R. 31 — Decree for possession of immovable property — Damage to property — Claim for compensation — Suit not necessary.**

Order 21, R. 31, Civil P. C. shows that the execution Court has got the power to determine the amount of compensation payable to a decree-holder in case the property which he is to obtain under the decree is not delivered to him in the same condition in which he was entitled to get it. The principle of the rule applicable to the cases of specific moveable property laid down in R. 31 may well be applied to the cases of immoveable property.

In a case of a decree for possession of certain immovable property the decree-holder is entitled to get possession over the property in the state in which it was on the date of the decree subject to such wear or tear or depreciation as would happen in the course of nature. If the judgment-debtor misappropriates or wilfully causes loss to the property a claim for compensation is a claim for delivery of the subject-matter of the decree which can be obtained in execution department. A separate suit is not necessary. Case law referred. AIR 1949 All 263, Disting. (Para 3)

Anno: Civil P. C., S. 47 N. 71a, 72; O. 21 R. 31 N. 5.

(d) **Civil P. C (1908), S. 47 — Scope — Duty of executing Court.**

The execution Court has to determine each and every question whether complicated or not, if it relates to the execution, discharge or satisfaction of a decree. (Para 5)

Anno: Civil P. C., S. 47 N. 2.

CASES REFERRED: Paras

(A) (V18) AIR 1931 Mad 270: 130 Ind Cas 475 2
(B) (V10) AIR 1923 Bom 391: 73 Ind Cas 443 3
(C) (V12) AIR 1925 Bom 385: 89 Ind Cas 205 3
(D) (V20) AIR 1933 Mad 825: 57 Mad 49 3
(E) (V32) AIR 1945 Mad 179: 221 Ind Cas 522 3, 4
(F) (V24) AIR 1937 Mad 879: 176 Ind Cas 920 4
(G) (V20) AIR 1933 Lah 169: 141 Ind Cas 188 4
(H) (V36) AIR 1949 All 263: 1949 OWN 316 4

S. S. Varma and Baleshwari Pd., for Appellant; S. B. L. Gaur, for Respondent.

AGARWALA J.:

This is a judgment-debtor's appeal arising out of execution proceedings. A decree for possession over a house and for arrears of rent was passed against the judgment-debtor appellant. The decree-holder applied for the execution of the decree and obtained possession over the house. After having obtained possession, the decree-holder found that some materials of the house had been removed and damage had been done to it after the passing of the decree.

He then applied to the execution court for compensation to be awarded against the judgment-debtor appellant to the extent of Rs. 10,000/-. The application was made under S. 47, Civil P. C. The judgment-debtor objected that such an application did not lie under S. 47, Civil P. C., and that if at all, the decree-holder could file a separate suit to obtain the relief claimed by him.

The learned Munsif held that an application did lie under S. 47, Civil P. C. but, because the application was of a high valuation, he directed that the application be converted into a plaint and then presented for trial to the proper court. The decree-holder appealed against this order to the lower appellate court on the ground that in the circumstances of the case the learned Munsif had no jurisdiction to order the conversion of the application into a plaint and that he should have entertained the application and tried it himself.

The lower appellate court held that the application under S. 47, Civil P. C. was entertainable by the learned Munsif and that he was in error in ordering that it be converted into a plaint. A preliminary objection was also raised before the lower appellate court against the order of the Munsif. That was also decided by it against the appellant. The lower appellate court, therefore, allowed the appeal and directed the Munsif to proceed with the execution application according to law. Against this order the judgment-debtor has come up in appeal to this Court.

(2) Three points have been raised by the learned counsel for the appellant in this appeal. Firstly, it has been contended that the order of the Munsif directing the conversion of the execution application into a plaint was not appealable to the court below. This objection has no force. The learned Munsif, though holding that the execution application was maintainable, in effect refused to execute the decree by ordering that the execution application be converted into a plaint.

The refusal to execute a decree is a question relating to the execution, discharged or satisfaction of the decree within the meaning of S. 47, Civil P. C. As defined in sub-s. (2) of S. 2, Civil P. C., such an 'order' is a 'decree'. Learned counsel for the appellant relied upon a decision of the Madras High Court in — 'Ramanuja v. Soliappa', AIR 1931 Mad 270 (A).

It was held in that case that no appeal lies from an order merely allowing the conversion of an execution petition into a suit as permitted by

S. 47(2). Though the order was passed under S. 47 it was not one relating to the execution, discharge or satisfaction of the decree. The facts of that case were different from the facts of the present case.

There both the parties agreed that the execution application did not lie in respect of a particular relief. The first court refused to exercise the discretion vested in it for converting the execution application qua the relief which was not entertainable under S. 47, Civil P. C., into a plaint. In these circumstances, it was observed that no appeal lay from such an order.

The Madras case was, therefore, purely one in which the exercise of the discretion under sub-s. (2) of S. 47 was in question in the appeal.

In the present case what the learned Munsif did was that after holding that the execution application did lie to him, ordered the execution application to be converted into a plaint. In substance, his order amounted to a refusal to execute the decree.

The appeal, therefore, by the decree-holder to the lower appellate court was really against an order refusing to execute the decree and not against the mere exercise of the discretion vested in the execution court to convert or not to convert the execution application into a plaint.

The discretion vested in the execution court under sub-section (2) of S. 47 is to be exercised when the execution court finds that it has no jurisdiction to execute the decree, but that by some 'bona fide' mistake or oversight the decree-holder instead of instituting a suit has filed an execution application. The discretion cannot be exercised to convert an execution application into a plaint when no suit lies and when the matter must be decided in the execution department.

The discretion vested in the execution court is a discretion in aid of the law and not to contravene it. There was really no exercise of discretion under sub-s. (2) of S. 47 in the present case. It was in substance a refusal to execute the decree. Against an order refusing to execute a decree, an appeal certainly lies.

(3) The next contention of the learned counsel is that the relief for awarding compensation for the loss caused to the property in respect of which a decree for possession had been passed in favour of the decree-holder, the loss having been caused after the passing of the decree and before the date of the delivery of possession cannot be obtained in the execution department and that it can be obtained by means of a suit alone.

This contention also in our opinion has no force. The decree was for possession of certain property. The decree-holder was entitled to get possession over the property in the state in which it was on the date of the decree subject to such wear or tear or depreciation as would happen in the course of nature. If the judgment-debtor misappropriates or wilfully causes loss to the property, the decree-holder is not getting the fruits of his decree because he is not getting the property in the state in which he was entitled to get it under the decree.

A claim for compensation in such cases is a claim for the delivery to the decree-holder of that part of the subject-matter of the decree which has not been delivered to him or its equivalent in money value.

An express power is conferred on the execution court in respect of moveable property under O. 21, R. 31, Civil P. C. which provides that in the case of a decree for possession of specific moveable property if the decree is not complied with, the execution court may attach the property of the judgment-debtor and if within six months of such an attachment the decree has not been obeyed the attached property may be sold and out of the proceeds the court may award to the decree-holder compensation for the specific moveable property.

This provision shows that the execution court has got the power to determine the amount of compensation payable to a decree-holder in case the property which he is to obtain under the decree is not delivered to him in the same condition in which he was entitled to get it.

The principle of the rule applicable to the cases of specific moveable property may well be applied to the cases of immoveable property. The majority of the High Courts in India have accepted this view; vide — 'Hari Shridhar v. Sakharam Padmanna Magdum', AIR 1923 Bom 391 (B); — 'Bai Lalbu v. Mohanlal Gokaldas', AIR 1925 Bom 385 (C); — 'Dhana Rajagerji v. Parthasarathy', AIR 1933 Mad 825 (D); — 'Ramanatha Ayyar v. S. Abdul Salam Sahib', AIR 1945 Mad 179 (E).

(4) In — 'Gangamma v. Mahabala Bhatta', AIR 1937 Mad 879 (F), Varadachariar J. expressed a doubt as to the soundness of this view, but he did not decide the case against this view because he thought that the previous rulings of the Court should be followed by him, especially when the case before him involved a small amount. The doubt expressed by the learned Judge was adversely commented upon in the subsequent Madras case reported in AIR 1945 Mad 179 (E), already quoted.

In the Lahore case — 'Kanshi Ram v. Diwan Chand', AIR 1933 Lah 169 (G), a learned Single Judge expressed similar doubt about the soundness of the view expressed in the Bombay and Madras cases. But he decided the case on other points and his observations were merely obiter dicta. No case of this Court has been brought to our notice in which the point now in dispute was considered and decided.

Our attention has been drawn to a Single Judge decision of this Court in — 'Panchoo Jolaha v. Mohammad Ismail', AIR 1949 All 263 (H). The facts of that case were different. That was a case in which the judgment-debtor claimed compensation from the decree-holder for losses caused to him by the decree-holder in demolishing a cattle-shed which was not the subject-matter of the decree in execution of decree for possession over land.

The learned Single Judge held that this was a matter entirely outside the scope of the execution of the decree. We are not here concerned with the compensation in respect of something which was not included in the decree. We are concerned with the compensation for losses caused to the property which was the subject-matter of the decree.

(5) The last contention of the learned counsel for the appellant is that the trial court was within its jurisdiction to order the conversion of the execution application into a plaint on the ground that the execution application raised complicated questions.

No authority has been cited to us in support of this contention and we can discover no reason why the execution court should not be able to tackle complicated questions though we doubt very much that there were any complicated questions in the present case. The execution court, to our mind, has to determine each and every question whether complicated or not, if it relates to the execution, discharge or satisfaction of a decree. No other point was urged.

(6) There is no force in this appeal. It is dismissed with costs.

H.G.P. Appeal dismissed.

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*AIR 1955 ALLAHABAD 688 (V. 42 C. 205 Dec.)

RAGHUBAR DAYAL AND BEG JJ.

Haji Mohd. Sayeed and others, Appellants v. Abdul Ghafoor and others, Respondents.

Second Appeal No. 1078 of 1950, D/- 5-1-1955, against order of Civil J., Azamgarh, D/- 12-1-1950.

(a) **Muhammadan Law — Mosque — Right of prayer in — Strained relations between two sects of Muhammadans—Injunction to restrain members of one sect from interfering with rights of other sect to offer prayers in congregation in mosque controlled and managed by the former — Whether can be granted — (Specific Relief Act (1877)-, S. 56).**

Members of Ahl-e-Hadis sect residing in a town brought a suit in a representative capacity claiming injunction against the members of Hanafi sect residing in the same town, also in a representative capacity, to restrain them from interfering with the rights of the plaintiffs to offer prayers in a congregation of their own and according to their own rituals, in certain mosque in the town.

It was found that since 1915 the Hanafis had been holding congregational prayers in the said mosque, that they had been throughout supervising, controlling and managing the said mosque and that, accordingly, the right to hold congregational prayers vested in them. It was further found that since a long time past in the town there had prevailed a practice under which the Hanafis and the Ahl-e-Hadis had been performing their congregational prayers separately in their respective mosques, and the said practice being ancient, certain and reasonable it had the force of a local custom.

The plaintiffs themselves did not allege that they would suffer any inconvenience or hardship if they were not allowed to say congregational prayers in the mosque in question.

Held (i) that from the fact that every Muhammadan possesses a right to offer prayers in a mosque as an individual, it does not necessarily follow that every separate sect has a right to hold congregational prayers in a mosque. AIR 1916 Pat 87 — AIR 1933 All 284 and AIR 1936 Pesh 65. Rel. on.; 7 All 461 (FB) and 12 All 494 (FB), Disting. (Paras 14, 15)

(ii) That the effect of granting the prayer to the plaintiffs might be to defeat the efficient and proper holding of prayers by the defendants in their own fashion, a right which they had been exercising for a fairly long time. Moreover, in view of the bitter relations that have existed between the two sects for a long time, the result of the grant of the above relief in the case would be to create a situation that would be explosive and fraught with danger. (Para 8)

In this view, the action of the plaintiffs appeared to be clearly mala fide and indefensible in law and equity. (Para 9)

The relief claimed by the plaintiffs was an equitable one. In granting the said relief, the Court should not only look to the effect of the grant of such relief, but also to the conduct of the plaintiffs. It was also to be borne in mind that the grant of such equitable relief was discretionary, and the Court might very well refuse it, if a party had by its conduct forfeited it claim to it, or there existed circumstances which made it inequitable to grant it. (Para 12)

In this view, the plaintiffs were not entitled to the relief prayed for. (Para 16)

Anno: AIR Man., Spe. R. Act, S. 56 N. 10

(b) **Muhammadan Law — Texts — Conflicting authorities.**

Where no clear authority is available on a point or where the authorities available are of a conflicting nature, it is open to jurists even according to a school of Muslim Law to resort to principles of equity for the purpose of deciding a particular question at issue before them. Particularly, it would be open to Courts to draw upon this source where rigidity or narrowness of rules suggested need adjustment in the light of changes brought about by the altered conditions of life and society in a particular age. (Para 12)

CASES REFERRED: Paras

(A) (V3) AIR 1916 Pat 87: 2 Pat LJ 108 15

(B) (V20) AIR 1933 All 284: 1933 All LJ 513 15

(C) (V23) AIR 1936 Pesh 65: 161 Ind Cas 652 15

(D) ('85) 7 All 461: 1885 All WN 117 (FB) 16

(E) ('90) 12 All 494: 1890 All WN 179 (FB) 16

N. D. Pant, for Appellants; Mukhtar Ahmad, Shanti Bhushan and Harnandan Prasad, for Respondents.

BEG J.:

This is a plaintiff's second appeal. It arises out of a suit for injunction and some other reliefs. The suit was brought in a representative capacity against a number of defendants who were also sued in a representative capacity. Both the plaintiffs as well as the defendants are Muhammedans residing in the town of Mau Nath Bhanjan in the district of Azamgarh. It appears that among the Muhammedans of this town strained relations have existed between the two sects of Sunni Muslims — one calling itself Ahl-e-Hadis and the other calling itself Hanafi.

The former sect is also nicknamed as Wahabi by the latter. The present suit marks the culmination of a long-standing dispute between them. There appear to be differences between the two sects in the mode of offering prayers and rituals connected therewith. It is said that the Ahl-e-Hadis recite the 'Surai Fateha' or the first chapter of the Quran behind the Imam in a loud tone, but the Hanafis do not recite it.

Further it is said that the Ahl-e-Hadis pronounce the word 'Amin' after 'Surai Fateha' in a loud tone. whereas the Hanafis recite it in an inaudible or low tone. The Ahl-e-Hadis perform the gesture of 'Rafu'ul-Yadain' (raising of the hands) when pronouncing the Takbir, viz., the words 'Allaho Akbar' (God is Great) and also every time before bending during the prayers, whereas the Hanafis raise their hands during 'Takbir only once and not higher than the ears.

During the prayers the Ahl-e-Hadis fasten their hands over the chest, whereas the Hanafis fasten their hands over the navel. The differences between them had given rise to both civil as well as criminal litigation in the past. In the mosque in dispute the hanafis had been offering prayers behind an Imam of their own for a long time past. Adjoining this mosque there is an Arabic school called the Madrasa-i-Alia which was established by the Ahl-e-Hadis.

In this Madrasa (school) the Ahl-e-Hadis used to educate students of their own sect. This Madrasa faces the mosque on the east with only a 'galli' intervening the two. The suit was brought

by the plaintiffs on the allegation that the members of their sect had been offering prayers in this mosque in the past, and that they had an apprehension that the members of the Hanafi sect would restrain them from performing their prayers in future.

They accordingly claimed a relief that the defendants should be restrained from interfering with the rights of the plaintiffs to offer prayers in a congregation of their own and according to their own rituals. It was further alleged by the plaintiffs that there were certain rooms in the said mosque which were constructed by them to be used as a hostel for the students of Madrasa-i-Alia. They claimed possession over these rooms. The plaintiffs further alleged that there was an apprehension that their right of way to Madrasa-i-Alia through the 'galli' which intervened between the school and the mosque would be interfered with.

They, therefore, prayed for a further injunction to the effect that the defendants be restrained from interfering with their right of way.

(2) The suit was resisted by the defendants on a number of grounds. They alleged that the mosque was founded by a Hanafi for the purpose of enabling the Hanafis to offer prayers in the same. They further alleged that in the town of Mau there was prevalent an old custom according to which the Hanafis and the Ahl-e-Hadis had their separate mosques, and the two sects offered their congregational prayers separately in their respective mosques.

The mosque in question was a Hanafi mosque, and the supervision, management and control of the said mosque had always vested in the Hanafis and they were accordingly entitled to hold congregational prayers in it. For the aforesaid reasons they denied that the Ahl-e-Hadis had any right to hold congregational prayers in it. They further alleged that the rooms in question belonged to the mosque, and were a part and parcel of it and denied that they constituted a hostel of the students of Madrasa-i-Alia or were ever used as such.

(3) The trial Court held that the plaintiffs were not entitled to hold prayers in the said mosque in a congregation of their own. It further held that the rooms in question appertained to the mosque, and did not constitute the hostel of the Madrasa-i-Alia. It, accordingly, dismissed the plaintiff's suit for injunction and possession in this regard. It, however, held that the plaintiffs had a right of way to the Madrasa-i-Alia through the northern and southern gates of the passage adjoining the mosque, and gave a declaration in favour of the plaintiffs to that effect.

(4) The plaintiffs took the matter up in appeal in respect of the refusal of the relief of injunction and possession, and the defendants filed cross-objections against the declaration regarding the right of way.

(5) The appellate Court remanded the case to the trial Court after framing a number of fresh issues. After the findings of the trial Court on the fresh issues were received, the appellate Court gave its own findings to the effect that since 1915 the Hanafis had been holding congregational prayers in the said mosque, that they had been throughout supervising, controlling and managing the said mosque and that, accordingly, the right to hold congregational prayers vested in them.

The appellate Court further found that since a long time past in the town of Mau there had prevailed a practice under which the Hanafis and the Ahl-e-Hadis had been performing their congregational prayers separately in their respective mosques, and the said practice being ancient, certain and reasonable it had the force of a local custom. It further upheld the finding of the trial Court to the effect that the rooms in question appertained to the said mosque, and were never used by the students of the Madrasa-i-Alia as their hostel.

It, accordingly, dismissed the appeal of the plaintiffs in this regard. As to the right of way, the appellate Court held that the plaintiffs had succeeded in establishing the said right. It, accordingly, modified the decree of the trial Court in this regard by granting the plaintiffs a relief of injunction against the defendants, and decreeing their suit to this extent. In this view of the matter, the cross-objections of the defendants were also dismissed.

(6) Dissatisfied with the said judgment the plaintiffs have filed a second appeal in this Court. The defendants have similarly filed cross-objections relating to the right of way, and the same points have been reagitated before us.

(7) Learned counsel for the appellants has challenged the correctness of the conclusions arrived at by the lower appellate Court. He has argued that the lower Court having held that every individual professing moslem faith has a right to pray in a mosque, it should logically have further held that every sect of the Muslim religion has a right to hold congregational prayers in any mosque. We do not think that the latter is a necessary corollary of the former.

The nature of the two rights as well as the considerations that apply to each of them are different. The former is an individual right. The latter is a joint right. In the former case the prayers are performed singly and without an Imam, or any leader. In the latter case the prayers are performed jointly, i. e., in a congregation, and behind an Imam whom the congregation is expected to follow.

The result is that in the former case there is a greater scope of individual variation and less chance of disturbance of the rights of others than in the latter. The fallacy in the argument of the learned counsel for the appellants appears to us to be that from the fact that every Mohammedan possesses a right to offer prayers in a mosque as an individual, he argues that it necessarily follows that every separate sect has a right to hold congregational prayers in a mosque.

For the latter proposition of law he has been unable to cite any ruling in his favour. He has, however, cited certain extracts from the famous commentary of Raddul Muhtar which, according to him, support his contention. We have, however, looked into these extracts and we are of opinion that they do not in clear terms warrant the proposition which he seeks to establish. In particular he has placed strong reliance on the following passage at page 368 of the Raddul Muhtar in the chapter entitled "Azan":

"It has been known to you that it is right that the saying of the prayer by the second congregation, provided that the place of the Imam in the second congregation is in another Mahrab, is not forbidden".

The passage, as cited before us by the learned counsel, has been divorced from its previous context. To understand its proper import, we think that it is necessary to reproduce the passage preceding the one cited above in the same commentary and which runs as follows:

"The basis of what Imam Halwani said is that during the byegone age of ancestors the congre-

gational prayers used to be held once only and not twice. The same used to be the practice during the period of the Prophet, and after him during the period of the Caliphs, i. e., the congregational prayers used to be held once. Let it, therefore, be known to you that the holding of a second congregation is on a consensus of opinion considered to be 'Makruh' (improper).

(The word 'Makruh' according to Craven's Royal Dictionary means odious, abominable, improper, unbecoming, loathsome, something to be detested, disliked or disapproved).

After the above sentence follows the above-quoted passage cited by the learned counsel for the appellants. Read in the previous context, the matter, in our opinion, assumes a different complexion. Construed as a whole, to our mind the passage clearly condemns the holding of a second congregation. At any rate, it does not recommend or consider it as a desirable course at all.

It might be that the intention was to permit it only under necessity, and as a matter of last resort. No such necessity exists in the present case. On the other hand, the evidence shows that in a criminal litigation in the year 1915, the parties agreed to say their congregational prayers in separate mosques of their own, and this usage which has since then ripened into custom has been prevailing in the said locality.

The report of the Commissioner shows that there are at least six mosques which bear the inscription that they are meant exclusively for offering prayers by the Hanafis, and there are about seven mosques which bear the inscription that they are to be used for offering prayers by the Ahl-e-Hadis alone. Further, only about fifty paces away from the mosque in question, the Ahl-e-Hadis have got their own mosque where they can and do pray separately in congregation.

Even the plaintiffs themselves do not allege that they suffer or would suffer any inconvenience or hardship if they are not allowed to say congregational prayers in the mosque in question. The above passage from Ruddul Muhtar further shows that even when such a course is permitted, a condition is laid down to the effect that the Imam holding the second congregation should change his original position, and should stand in a place different from the place where the Imam in the first congregation stood.

Thus the sanction accorded appears to be only under exceptional and unusual circumstances. It appears to be a measure of emergency, and is hedged round with conditions. The passage even if stretched to the utmost degree in favour of the plaintiffs falls short of warranting the claim that they have set up in this case viz., that they are legally entitled to hold congregational prayers in the mosque at all times under all circumstances even though it might result in a denial of the same right to the defendants.

(8) Even if it be conceded for a moment that it is permissible in certain circumstances to allow the holding of more than one congregation we find it difficult to understand how that will be enough to entitle the plaintiffs to the equitable relief of injunction in their favour against the defendants. In the present case it has to be remembered that the plaintiffs belong to a sect different from that to which the defendants belong.

It is also beyond doubt that the defendants have been holding congregational prayers according to their form in the said mosque for a long time, and the effect of granting the prayer to the plaintiffs might be to defeat the efficient and proper holding of prayers by the defendants in their own fashion, a right which they have been exercising for a fairly long time, and which, by virtue of its strength and uniform practice has ripened into a local custom.

Moreover, in view of the bitter relations that have existed between the two sects for a long time, and which during the last fifty years have led to a crop of civil as well as criminal litigation, the result of the grant of the above relief in the present case would be to create a situation that would be explosive and fraught with danger.

It is bound to lead to a position in which a violent clash between the parties might take place any moment with the result that no sect would be able to perform any prayer at all.

At any rate the tempestuous mood in which the minds of parties are worked up is certainly not one which will be conducive to the .effective peaceful or efficient performance of joint worship by either.

(9) The learned counsel for the appellans has also relied on another passage of Raddul Muhtar on page 527 which is as follows:

"If each Muslim set has a separate Imam of its own as is the practice prevailing in our days then it is better to say prayer behind its own Imam whether he says the prayer with the first congregation or with the second congregation. It has been agreeable to all Muslims, and all the Muslims of Makka, Madina, Baitulmoqaddas, Egypt, and Sham have acted upon this principle. Those, who do contrary, are not reliable."

It is noteworthy that in the above passage the position envisaged appears to be that of an agreement voluntarily entered into or accepted by the parties, and the emphasis appears to be on the choice of an Imam when two congregations are permissible and are held in the same mosque by different sects. Further it is to be noted that even in such a situation, in order to preserve the interests of harmony and peace, and to minimise the chances of the disturbance of the prayer of others, it is recommended that each sect should prefer to offer prayers behind the Imam of its own sect.

We can conceive of a position where harmonious relations prevail and where by agreement between the parties or by established usage or custom, two congregations of different sects might be held in a mosque. From the above passage, however it does not follow that every sect has a right to hold congregational prayers according to the form prescribed by the tenets of that sect in every mosque even though the differences between them have repeatedly in the past assumed the shape of an armed conflict and culminated in violent clashes.

What the exact position should be where one sect has already been managing a mosque and performing congregational prayers in it for a long time, and another sect suddenly makes up its mind to assert the same right in the same mosque in open, clear and defiant disregard of the prior rights of the other sect and in clear violation of a previous agreement by members of their own sect is a situation that is not dealt with in any of the passages cited above.

The action of the plaintiffs appears to us to be clearly mala fide and indefensible in law and equity. Thus so far as the exact question with which the Court in the present case is concerned, no clear authority has been cited in support of the contention advanced on behalf of the appellants, and we are loathe to give effect to an argument that would lead to results that are so

unfair and inequitable, unless constrained to do so by injunctions of law that are clear, emphatic and unambiguous.

(10) So far as the Muslim Law is concerned, the two primary sources of authority are the Holy Quran and the 'Hadis'. The Quran is the holy book of the Mohammedans believed by the Muslims to be the word of God revealed through the mouth of the Prophet in moments of inspiration. The injunctions in this book are considered to be mandatory and binding by every Mohammedan. Next comes the 'Hadis' which consists of precepts, sayings and traditions of the Prophet as disclosed from his conduct in every day life in this world.

So far as these two primary sources of the Muslim Law are concerned, the learned counsel conceded that it was not possible to ascertain any clear authority in support of the proposition which he seeks to advance. His incapability to do so may be explicable on the ground that the birth of multifarious sects in Mohammadan religion being an incident that followed the demise of the Prophet, the problem did not arise in this specific form at the time when the two aforementioned primary sources of Moslem Law held sway.

So far as the appellants are concerned their counsel informs us that they are Ahl-e-Hadis, and further states that according to the tenets of their own sect they are not allowed to go beyond the Quran and the 'Hadis' for the purpose of seeking any authority in support of religious injunctions. In the above circumstances, we cannot see how it is conscientiously possible for his clients to vehemently rely in their favour on a proposition of law based on authorities which they themselves repudiate as unworthy of credence and belief.

(11) Learned counsel has, however, chosen to rely on other sources. We have looked into them and fail to extract from them any clear or consistent answer to the specific problem presented in this case. The third source of authority is the Ijmaa. Ijmaa has been defined in the Principles of Muhammadan Jurisprudence by Abdul Rahim (1907 Edn. 115) as follows: "Ijmaa is defined as agreement of the jurists among the followers of Mohammad in a particular age on a question of law."

(12) The fourth source of authority is 'Qeyas' or analogy the nature of which as expounded at page 139 of the same book is as follows:

"Rules of law analogically deduce do not rank so high as authority, as those laid down by a text of the Quran, or Hadith, or by consensus of opinion. The reason is that with respect to analogical deductions one cannot be certain that they are what the Lawgiver intended, such deductions resting as they do upon the application of human reason which is always liable to err. In fact it is a maxim of the Sunni jurisprudance that a jurist may be right or may be wrong.

A Qadi in deciding a case is not, therefore, bound by a particular rule of juristic law merely because it has the approval of certain doctors, but may follow his own view."

The appellants' learned counsel has been unable to provide us with any clear or consistent authority on the point in issue before us either from Ijmaa (consensus of authority of jurists in a particular age) or from Qeyas (analogy). Where no clear authority is available on a point or where the authorities available are of a conflicting nature, it is open to jurists even according to a school of Muslim Law to resort to principles of equity for the purpose of deciding a particular question at issue before them.

This particular source is the fifth one and is termed as 'istehsan' (Juristic Equity). Particularly, it would be open to Courts to draw upon this source where rigidity or narrowness of rules suggested need adjustment in the light of changes brought about by the altered conditions of life and society in a particular age. The following extract from Abdur Rahim's Commentary on Mohammadan Jurisprudence is relevant for the purpose of disclosing the amplitude of 'Istehsan' (Juristic Equity) as a source of Muslim Ecclesiastical law:

"It may happen that the law analogically deduced fails to commend itself to the jurist, owing to its narrowness and inadaptability to the habits and usages of the people and being likely to cause hardships and inconvenience. In that event also according to the Hanafis, a jurist is at liberty to refuse to adopt the law to which analogy points, and to accept instead a rule which in his opinion would better advance the welfare of men and the interests of justice.

The doctrine by which a jurist is enabled to get over a deduction of analogy, either because it is opposed to a text or consensus of opinion, or is such that his better judgment does not approve of it, is technically called Istihsan (literally, preferring or considering a thing to be good) which I have translated juristic preference or equity."

The present case appears to us to be a case where the matter should be decided according to the equitable considerations arising in the case in question. It may also be worthy of note that the relief claimed by the plaintiffs is an equitable one. In granting the said relief, the Court should not only look to the effect of the grant of such relief, but also to the conduct of the plaintiffs.

It is also to be borne in mind that the grant of such equitable relief is discretionary, and the Court might very well refuse it, if a party has by its conduct forfeited its claim to it, or there exist circumstances which make it inequitable to grant it.

(13) If the relief in question is granted to the plaintiffs, it appears to us that the effect of it would be not to promote the efficient conduct of worship but to defeat it. If each sect of Muslims residing in a particular local area was to start asserting independently its right of holding congregational prayers in the mosque, the necessary result of allowing such a right would be that no one would be able to hold any prayers of any kind.

Further, the diversity in the rituals and the form of prayers offered by the various sects might not be such as to be tolerated by the rival sect. In fact one sect may regard the other as heretic or 'kafir'. The simultaneous exercise of the right to pray by one sect might seriously interfere or disturb the performance of a similar right by the other sect. Under such circumstances, to grant such relief in an indiscriminate fashion must necessarily result in a breach of the peace.

It has been suggested on behalf of the appellants that this Court may fix times for prayers to be held by the Hanafis & the Ahl-e-Hadis sects in the village as the time for prayers by Ahl-e-Hadis falls a little earlier than that of Hanafis. We are unable to accept this suggestion. It is possible that there may be other sects also in the village; and in any case, there is nothing to prevent other sects springing up in future.

If the right to have time fixed for prayers is conceded in favour of the two contending sects that are parties to this litigation, there appears to be no reason why a similar right should not be conceded in favour of other sects who may claim it. The position would thus be reduced to absurdity. Even between the two parties before us such a course would not only be undesirable but impracticable.

Such times would vary with different seasons. In fact so far as the 'Maghrib' or the sunset time prayer is concerned, learned counsel concedes that it is impossible for the Court to fix two points of time because the time for this prayer of both the sects coincides. Moreover, even if such a course were to be adopted, it will not be possible for the Court to enforce it on the spot, and this Court would be reluctant to grant a decree that could be flouted or made futile at the whim or option of a particular party especially when the relief to be granted is discretionary.

Supposing for a moment such times were to be fixed, it is possible for a sect whose time is fixed earlier to prolong its prayers so as to make the recitation of prayers by the other sect impossible. The only effect of allowing such relief to every party would be, as we have observed above, to invite a breach of the peace an event which would result in the mosque being attached and put beyond the use of all the sects.

In the above situation, we are of opinion that the only reasonable and fair course is that which has been adopted by the Courts below. They have come to the conclusion that since 1915 the members of the Hanafi sect have been continuously holding congregational prayers in the said mosque and have been managing, supervising and controlling the same. This practice has crystallised in the form of a custom so clearly that mosques in this town bear labels in the form of inscriptions showing that they are for Hanafis or for Ahl-e-Hadis exclusively.

The lower Court has also found that apart from the daily prayers each sect offers its Friday prayers in separate mosques of its own. Further, it has found that each sect has got a separate Idgah of its own where its adherents offer their Idd prayers separately every year. As mentioned above, a mosque of Ahl-e-Hadis exists only fifty paces away from the mosque in question. There appears to us to be absolutely no reason why the plaintiffs should not resort to this mosque which is their own, and in which they can worship and hold their congregational prayers in peace without disturbance either to themselves or to others.

As mentioned before, there is on record also an agreement between some members of the sect of Ahl-e-Hadis and some members of the Hanafi sect of as long as 1915 when they agreed to offer their congregational prayers in a separate mosque. Learned counsel for the appellants argued that they were not parties to the said agreement, and hence the said agreement should not be considered binding on them.

This objection ignores the fact that the agreement is cited not because it is not considered to be binding on the parties to the present case, but as an explanation of the practice which has been found as a fact to be existing in the town of Mau, and according to which both the sects have been offering their congregational prayers separately in different mosques of their own. We see no reason why this particular agreement should be ruled out as inadmissible.

It is certainly admissible for the purpose of explaining the origin of this practice, especially when we find from circumstances as well as from what has been happening in this particular town that the said practice has been observed continuously. The said practice has, according to the clear finding of the lower Court hardened into a custom. The lower appellate Court has further found that the said custom is ancient, reasonable and certain, and that it possesses all the incidents and features of a valid custom.

Under the above circumstances, the question in the present case resolves itself into one of regulation of rights of various parties on the principles of justice, equity and good conscience in the light of the particular circumstances emerging in the case before us.

(14) It is not the first time that a question of this nature has arisen in Court. Authorities are not wanting where, in view of the insurmountable difficulties which would be generated by taking the contrary view the Courts had no hesitation in holding that the right of each and every sect to hold congregation prayers in a particular mosque should not be upheld.

(15) In this connection the remarks made in — 'Khalil Ahmad v. Israfil', AIR 1916 Pat 87 (A), are instructive and relevant. A Bench of the Patna High Court in the said case held that

"Every mosque is open to any Mahomedan, to whatever sect he may belong, who chooses to pray in it. But members of any and every sect of Mahomedans are not entitled to pray in every mosque as a separate congregation behind an Imam chosen by themselves."

This case was followed by a Bench of the Allahabad High Court in — 'Sifat Ali Khan v. Ali Mian', AIR 1933 All 284 (B), in which it was laid down that—

"Mohammedans of the Ahmadia sect are entitled to enter a Sunni mosque if they please and to offer up prayers with the regular congregation behind the Imam chosen by the members of the congregation, but they are not entitled to pray in a separate congregation behind an Imam of their own in a mosque which has always been used by orthodox Mohammadans."

The Patna case was also followed by a Bench in — 'Amir Hussain Shah v. Hafiz Ghulam Rasul', AIR 1936 Pesh 65 (C), in which it was held that:

"Every Mahomedan has right to say his prayers in any mosque and behind the regular Imam provided he does not disturb or interrupt other worshippers. A particular sect is not however entitled to have a separate call of prayer made or to hold a separate congregation behind an Imam of their own, as it would lead to insurmountable difficulties and continual friction."

We find ourselves in accord with the view expressed in these cases.

(16) Learned counsel for the appellants further argued that at any rate the members of the Ahle-e-Hadis sect have an individual right to pray in the said mosque. In this connection he cited two Full Bench rulings of the Allahabad High Court, viz., — 'Queen Empress v. Ramzan', 7 All 461 (FB) (D); and — 'Ataullah v. Azimullah', 12 All 494 (FB) (E). In the present case, however, the plaintiffs did not claim a relief asserting their individual right to pray in the said mosque, nor have they claimed any relief in respect of their right to join and pray in the congregational prayer which has been held in the said mosque for a long time past.

They have claimed a right to form a separate and exclusive congregation of their own and to offer their prayers in this fashion. Any observations made by us in this judgment relate to cannot for the reasons already given by us, be

and are confined to this right only. Such a right granted to them in the circumstances of the present case. The two Allahabad cases cited by them did not deal with the question which has arisen in this case, and are, thereofre, irrelevant and unhelpful in the determination of the matter before us.

It was further argued on behalf of the appellants that if the plaintiffs possessed a right and lawfully exercised it in a bona fide manner, they cannot be deprived of it merely because their exercise of such a right might result in a breach of the peace. It has already been held by us that the plaintiffs have no right to offer congregational prayers in the mosque in question.

Further, we are also of opinion that the exercise of the exclusive congregational right claimed by them is neither lawful nor bona fide. This argument, therefore, cannot be of any avail to them. In the form in which the plaintiffs have claimed the relief, we are of opinion that we must refuse it for reasons given by us above, and dismiss the plaintiff's suit for injunction in this regard.

(17) The remaining part of the plaintiffs' appeal relates to their claim for possession of the rooms which are alleged by them to be a part of the hostel of Madarsa-i-Alia. Both the Courts below have disbelieved the plaintiffs' case in that regard, and have concurrently found that the said rooms appertain to the mosque in question. It has been rightly conceded on behalf of the appellants that this matter is concluded by finding of fact, and cannot, therefore, be reagitated at this stage.

For the above reasons we are of opinion that the appeal of the plaintiffs should be dismissed with costs. We order accordingly.

(18) So far as the cross-objection of the defendants relating to the right of way is concerned, both the Courts below have concurrently found in favour of the plaintiffs, and have held that the alleged right of way exists. The lower appellate Court has, accordingly granted an injunction in favour of the plaintiffs in that regard. No error of law or defect of procedure has been pointed out before us to enable us to subvert this finding of fact, which is based on admissible evidence and is, on the face of it, just and fair. We accordingly uphold it and dismiss the defendants' cross-objections with costs.

V.B.B. Appeal dismissed.

°AIR 1955 ALLAHABAD 693 (V. 42, C. 206 Dec.)

LUCKNOW BENCH — MULLA J. (26-7-1955)

Mohd. Rasool, Applicant v. Mst. Rabbo and another, Opposite party.

Criminal Revn. No. 61 of 1955, against order of S. J., Lucknow, D/- 18-2-1955.

Criminal P. C. (1898), S. 488 (8) — "Where he last resided".

There is nothing in the language of S. 488(8) to suggest that the words 'last resided' should mean where the husband and the wife last resided permanently. The language of the section clearly suggests that proceedings can be started against the husband apart from the place where he permanently resides. A temporary residence within its territorial limits is therefore enough to confer jurisdiction on a court to hear an application under S. 438.

A stay for above five or six months with the intention of having one's wife treated cannot be called a casual visit. It amounts to a temporary residence and, therefore, it is enough to confer jurisdiction. 32 All 203 (FB), Distinguished.; AIR 1927 All 291 — AIR 1930 Bom 348 and AIR 1953 Mad 78, Applied. (Paras 6, 9)

Anno: AIR Com., Criminal P. C., S. 488 N. 28 Pt. 9.

CASES REFERRED: Paras

(A) (V17) AIR 1930 Bom 348: 31 Cri LJ 1157 6, 9

(B) ('10) 32 All 203: 5 Ind Cas 871 (FB) 8

(C) (V13) AIR 1926 Oudh 268: 30 Oudh WN 231: 27 Cri LJ 820 8

(D) (V38) AIR 1951 Nag 248: ILR (1951) Nag 493 8

(E) (V27) AIR 1940 Lah 449: 42 Cri LJ 705 8

(F) (V14) AIR 1927 All 291: 28 Cri LJ 494 9

(G) (V40) AIR 1953 Mad 78: 1953 Cri LJ 274 9

S. L. Suri, for Applicant; Nazir Ahmad, for Opposite Party.

ORDER: This is an application of revision arising out of proceedings under S. 488, Criminal P. C.

(2) Shrimati Rabbo, daughter of Dilley Kabaria, resident of Lucknow, filed an application under S. 488, Criminal P. C., against her husband Mohammad Rasul, a resident of Barabanki. She claimed that she was the married wife of Mohammad Rasul and out of this marriage a son named Abdul Khaliq was born. This marriage took place some four or five years before filing the case and she went to Barabanki to live with her husband there.

Her husband acted cruelly towards her and occasionally gave her a beating. On one occasion he threw her down the stairs as a result of which she received such a severe injury in her hip joint that she has become a cripple. According to her, after she received this injury, her husband brought her to Lucknow for treatment and resided with her at Lucknow for about five or six months. He then deserted her and in spite of her efforts to secure maintenance from him, he refused to maintain her. She had been living with her father at Lucknow all this time.

(3) Mohammad Rasul admitted that Shrimati Rabbo was his married wife and Abdul Khaliq aged about one year was his son. He however, denied that he ever illtreated Shrimati Rabbo. He also denied that he resided with Shrimati Robbo at Lucknow at her father's house. It was contested on his behalf that the Lucknow Courts had no jurisdiction to hear these proceedings.

(4) The trial court accepted the version given by Shrimati Rabbo and found that Mohammad Rasul had resided at Lucknow for five or six months when he had brought her for treatment and thus the Lucknow courts had jurisdiction to hear this case. It ordered Mohammad Rasul to pay his wife Shrimati Rabbo Rs. 15/- per month as her own maintenance allowance and Rs. 8/- per month as the maintenance allowance for Abdul Khaliq.

Mohammad Rasul went up in revision against the order of the trial Court, but the Sessions Judge, Lucknow, maintained the order holding that as the trial court had accepted the case of the wife about her husband staying in Lucknow for five or six months with her, which statement was corroborated by two witnesses, the Lucknow courts had jurisdiction in these proceedings. Mohammad Rasul has now come up in revision before this Court.

(5) The counsel for the applicant before me has urged two grounds. Firstly, it was contested that Mohammad Rasul did not reside with Shri mati Rabbo at Lucknow and the trial court has erred in evaluating the evidence on that point. This question has been concluded by the findings of fact and I am not willing to reopen it. I find that the statement of Shrimati Rabbo is supported by two other witnesses and the trial court was entitled to believe these statements in preference to the version given by Mohammad Rasul or his witnesses.

There is no illegality committed by the trial court in believing the wife's version and I see no reason to re-assess the evidence on that point.

(6) Th second contention raised by the counsel for the applicant was that the Lucknow courts had no jurisdiction to hear this case, even if it is admitted that Mohammad Rasul came and stayed at the house of his father-in-law for about five or six months, as his permanent residence is at Barabanki. According to him this visit of Mohammad Rasul to Lucknow was only a casual visit and cannot be interpreted as residing together within the meaning of sub-s. (8) of S. 488, Criminal P. C. Sub-s. (8) of S. 488 Criminal P. C., runs as follows:

"Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, ..."

In my opinion the words of the section contemplate that there are three places where proceedings can be started by a wife against her husband under S. 488, Criminal P. C. Firstly, she can proceed against him in the district where he resides, secondly in the district where he is at the moment and thirdly, in the district where he last resided with her. There is nothing in the language to suggest that the words 'last resided' should mean where they last resided permanently.

I think that the language of the section clearly suggests that proceedings can be started against the husband apart from the place where he permanently resides. I am in agreement with the observations of Broomfield J., — 'In re Sama Jetha', AIR 1930 Bom 348 (A).

"There is nothing in the language of S. 488, Cl. (8) which makes it necessary and if it is not necessary it is for obvious reasons undesirable to assign a strict or technical meaning to the words 'last resided' in that clause or to treat those words as denoting permanent residence only."

In my opinion a temporary residence within its territorial limits is enough to confer jurisdiction on a court to hear such an application.

(7) Of course, if the husband and wife have resided at some other place after residing within the jurisdiction of a court, it would not be entitled to hear these proceedings, because the residence of the husband and wife within its territorial jurisdiction cannot be described as the place where they last resided together.

(8) The counsel for the applicant relied on certain decisions which were mainly based on the Full Bench decision of the Allahabad High Court in — 'Arthur Flowers v. Minnie Flowers', 32 All 203 (FB) (B). This was a case under the Divorce Act, but as the words used in the Divorce Act are the same which are used in sub-s. (8) of S. 488, Criminal P. C., that decision was placed before me as an authority for interpreting the words 'last resided' together. The facts of that case are quite different from the facts of this case and it can be distinguished.

The other decisions relied upon by him are, — 'Mt. Ramdei v. Jhunni Lal', AIR 1926 Oudh 268 (C); — 'Devid v. Mrs. Esther Dennis', AIR 1951 Nag 248 (D), and — 'Charan Das v. Mst. Surasti bai', AIR 1940 Lah 449 (E). In these decisions it has been held that the test which should be applied in determining the point in issue is whether the husband and wife lived together merely as casual visitors or whether they came and stayed with an intention to stay for an indefinite period.

The Lahore authority cited above after reviewing the case law on the point came to the following conclusion:

"The principle deducible from these authorities appears to be that in the case of persons who have a fixed residence, a visit to another place for however long a period, so long as it is casual, will not confer jurisdiction."

In this decision, however, it has not been determined what will amount to a casual visit and what will amount to a temporary residence.

(9) In my opinion a stay for above five or six months with the intention of having one's wife treated cannot be called a casual visit. It amounts to a temporary residence and, therefore, it is enough to confer jurisdiction. It was held in — 'Sher Singh v. Mt. Amir Kuer', AIR 1927 All 291 (F)." The point at which a visit or a stay becomes capable of being held to be residence is one that it is difficult to define."

Still the learned Judge in that case found that a residence of two months at a place even though the husband went back to his permanent residence for days in between, was enough to give jurisdiction to a court as it amounted to temporary residence. In my opinion the rule of law laid down in 'AIR 1927 All 291 (F)'; 'AIR 1930 Bom 348 (A)', and — 'Sampoornam v. N. Sundaresan', AIR 1953 Mad 78 (G), applies to the present case.

In 'AIR 1953 Mad 78 (G)', the entire case law was again reviewed and the learned Judges observed:

"The word 'resided' in S. 488, Criminal P. C., has been the subject of several decisions. It implies something more than paying a casual visit, ... but is not equivalent to something in the nature of having a domicile in a particular place. ....."

"In short sub-s. (8) of S. 488, Criminal P. C., does not necessarily refer to a permanent residence and it refers also to temporary residence and the word 'residence' implies something more than a brief visit but not such a continuity as to amount to domicile."

I find myself in agreement with the view expressed above and I think that in the circumstances of the present case the Lucknow court had jurisdiction to decide it.

(10) I, therefore, uphold the order passed by the Magistrate and dismiss this application of revision. The stay order passed in the case is vacated.

(11) Prayer for certifying it as a fit case for appeal to the Supreme Court is rejected.

V.R.B. Revision dismissed.

°AIR 1955 ALLAHABAD 694 (V. 42 C. 207 Dec.)

OAK J. (20-7-1955)

Kamra, Applicant v. Pt. Murari Lal, Opposite Party.

Criminal Ref. No. 406 of 1953.

(a) Criminal P. C. (1898), Ss. 435 and 438 — Inferior Court — Power of Sessions Judge to make reference with respect to order passed by Additional Sessions Judge.

An Additional Sessions Judge is not inferior to the Sessions Judge. Hence under S. 435, Cr. P. C. A sessions Judge is not competent to call for records of the Additional Sessions Judge. (Para 3)

However, the operation of S. 438, Cr. P. C. is not confined to cases faling under S. 435, Cr. P. C. The word 'otherwise' appearing in S. 438, Cr. P. C. shows that, it is permissible to make a report to High Court even in cases which do not fall under S. 435, Cr P.C. Thus under S. 438 Cr P. C. a Sessions Judge may make to the High Court a report touching an order passed by an Additional Sessions Judge. AIR 1938 Bom 225 (FB) Rel. on. (Para 4)

Although a Sessions Judge may be justified in Special cases in making a reference with respect to an order passed by an Additional Sessions Judge, a Sessions Judge should ordinarily be reluctant to report against an order passed by an Additional Sessions Judge. Special circumstances may, however, make it imperative to adopt such an unusual course. (Para 5)

Anno: AIR Com Cr. P. C. S. 435 N. 8; S. 438 N. 4, 8.

(b) Criminal P. C. (1898), S. 476B — Power of appellate court to direct further inquiry.

An order of remand directing the lower Court to make further inquiry passed by an appellate Court hearing an appeal under S. 476-B is without jurisdiction. AIR 1937 All 305 (FB), Foll. (Para 6)

Anno: AIR Com. Cr. P. C. S. 476-B N 4

(c) Criminal P. C. (1898), Ss. 438 and 439 — Limitation.

There is no limitation for taking action under Ss. 438 and 439, Cr. P. C. — In appeal under S. 476-B Cr. P. C. Additional Sessions Judge passing an illegal order for further inquiry by the Magistrate — No revision filed against the order — Further enquiry — Order passed on, appealed to Sessions Judge — Sessions Judge can make a reference to High Court under S. 438 — High Court can correct the illegal order passed by the Additional Sessions Judge even though no revision was filed against it. (Para 7)

Anno: AIR Com Cr. P. C. S. 439 N. 42

CASES REFERRED: Paras

(A) (V25) AIR 1938 Bom 225: 39 Cr LJ 495 (FB) 4

(B) (V24) AIR 1937 All 305: 1937 All LJ 192: 38 Cri LJ 561 (FB) 6

J. R. Bhatt, for State; K. C. Mital and B. L. Gupta, for Opposite Party.

ORDER: This reference by the learned Sessions Judge of Meerut arises out of a proceeding under S. 476, Cr P. C. The matter has arisen thus.

(2) Kamra filed a complaint under Ss. 447, 352 and 506, I. P. C. against Smt. Rajdulari and others. That criminal case ended in the acquittal of the accused persons. Subsequently Murari Lal, on behalf of Smt. Rajdulari, moved the learned Magistrate for taking proceedings under S. 476, Cr. P. C. against Kamra and Shabbir Ahmad on on the ground that, they had given false evidence on oath during the trial. The learned Magistrate (Sri Harihar Prasad) rejected the application under S. 476, Cr. P. C. Against that order passed by Sri Harihar Prasad two separate appeals were filed. They were numbered as 69 and 70 of 1952.

The two appeals were directed against Kamra and Shabbir Ahmad. Those two appeals were disposed of on 31-7-1952 by Sri Kazmi, who was then the Additional Sessions Judge of Meerut. He set aside Sri Harihar Prasad's order, and remanded the case for further enquiry. The matter was subsequently dealt with by another Magistrate, Sri Chaturvedi. After holding further enquiry under S. 476, Cr. P. C. Sri Chaturvedi passed an order on 26-12-1952 ordering the prosecution of Kamra, but refusing to file a complaint against Shabbir Ahmad Khan.

Against this order dated 26-12-1952, two separate appeals were filed by the parties. Kamra filed Criminal Appeal No. 73 of 1953 against the order in so far as the order directed his prosecution. Criminal Appeal No. 115 of 1953 was filed by Murari Lal against the same order in so far as Sri Chaturvedi declined to file a complaint against Shabbir Ahmad Khan. These two connected appeals (Nos. 73 and 115 of 1953) came up for disposal before the learned Sessions Judge of Meerut. A point was raised before the learned Sessions Judge that, Sri Kazmi's order dated 31-7-1952 remanding the case for fresh enquiry under S. 476, Cr. P. C. was bad in law.

The learned Sessions Judge accepted this contention, and has, therefore, made this reference to the High Court recommending that, Sri Kazmi's order dated 31-7-1952 and subsequent proceedings before the first class Magistrate should be quashed.

(3) Mr. Mital appearing for the complainant raised a preliminary objection that, the learned Sessions Judge was not competent to make a reference against an order of an Additional Sessions Judge. The present reference has been made by the learned Sessions Judge under S. 438, Cr. P. C. Section 438(1), Cr. P. C. states:

"The Sessions Judge may..... on examining under S. 435 or otherwise the record of any proceeding, report for the orders of the High Court....."

Section 435, Cr. P. C. confers upon certain Courts the power to call for record of inferior Courts. An Additional Sessions Judge is not inferior to the Sessions Judge. I, therefore, agree with Mr. Mital that under S. 435, Cr. P. C. the learned Sessions Judge was not competent to call for records of the Additional Sessions Judge.

(4) However, the operation of S. 438, Cr P. C. is not confined to cases falling under S. 435, Cr. P. C. The word 'otherwise' appearing in S. 438, Cr. P. C. shows that, it is permissible to make a report to High Court even in cases which do not fall under S. 435, Cr. P. C. In the case of — 'Emperor v. Bhatu Sadu Mali', AIR 1938 Bom 225 (A) it was observed by a Full Bench of Bombay High Court that, a Sessions Judge may refer a matter to the High Court if he came to the conclusion that he had himself made a mistake which ought to be corrected by the High Court in revision.

The same reasoning will apply to an order passed by a court of co-ordinate jurisdiction. I, therefore, overrule the preliminary objection, and hold that under S. 438, Cr. P. C. a Sessions Judge may make to the High Court a report touching an order passed by an Additional Sessions Judge.

(5) Although a Sessions Judge may be justified in special cases in making a reference with respect to an order passed by an Additional Sessions Judge, a Sessions Judge should ordinarily be reluctant to report against an order passed by an Additional Sessions Judge. Special circumstaces may, however, make it imperative to adopt such an unusual course. In the present case the learned Sessions Judge of Meerut was called upon to hear Criminal Appeals Nos. 73 and 115 of 1953.

In dealing with those appeals the learned Sessions Judge had to discuss the propriety of Sri Chaturvedi's order dated 26-12-1952. It was in that connection that the learned Sessions Judge was obliged to observe that, Sri Kazmi's order dated 31-7-1952 was bad in law.

(6) In the case of — 'Munni Lal v. Emperor', AIR 1937 All 305 (B), it was held by a Full Bench of this Court that an appellate Court hearing an appeal under S. 476B, Cr. P. C. is not competent to remand the case to the lower court for further evidence being taken. It was held by Sulaiman, C. J. that, the appellate court has no jurisdiction to return the case to the lower court with the direction to take evidence. On the authority of this Full Bench decision I hold that Sri Kazmi's order dated 31-7-1952 remanding the case for further inquiry was without jurisdiction.

(7) Mr. Mital pointed out that the point under consideration was not raised in the grounds of appeal filed before the learned Sessions Judge. Nevertheless the learned Sessions Judge thought it necessary to consider the point. Mr. Mital further urged that it is now too late to set aside that order dated 31-7-1952. There is no limitation for taking action under Ss. 438 and 439, Cr. P. C. The question is whether it is expedient to adopt the course suggested by the learned Sessions Judge.

The learned Sessions Judge has recommended that Appeals Nos. 69 and 70 of 1952 should not be re-heard. If the reference is accepted, Appeals Nos. 69 and 70 of 1952 will have to be re-heard. If the reference is to be rejected, the Sessions Judge will have to hear Appeals Nos. 73 and 115 of 1953. It cannot be said that the second course is simpler than the first course. It is true that no revision was filed against the order dated 31-7-1952. But an order passed by the learned Magistrate in pursuance of that illegal order is still open to appeal. It is, therefore, still possible to correct Sri Kazmi's order dated 31-7-1952.

(8) The reference is accepted. Sri Kazmi's order dated 31-7-1952 and the subsequent proceedings held before the learned Magistrate are quashed. The learned Sessions Judge of Meerut is directed to readmit Criminal Appeals Nos. 69 and 70 of 1952, and dispose of those two appeals in accordance with law. It will be open to the learned Sessions Judge to transfer those two appeals to some other competent court

K.S.B. Reference accepted.

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*AIR 1955 ALLAHABAD 696 (V. 42 C. 208 Dec.)

ROY J. (24-8-1955)

Pulpil Singh, Applicant v. The State, Opposite Party.

Criminal Rev. No. 1645 of 1953, against order of S. J., Basti, D/- 12-9-1953.

(a) **Criminal P. C. (1898), S. 239(f) — "The possession of which has been transferred by one offence".**

The phrase "the possession of which has been transferred by one offence" has a reference to the original theft of the stolen property. Consequently several persons can be jointly tried under S. 411, P. C. that is to say with regard to the receiving of stolen property, where there is evidence to show that the property was originally stolen on one occasion. AIR 1932 Bom 201, AIR 1928 Pat 38, AIR 1935 Oudh 475 and AIR 1938 Cal 525, Rel. on. (Para 4)

Anno: AIR Com.: Cr. P. C., S. 239 N. 17.

(b) Evidence Act (1872), S. 114 Illus. (a) — "Unless he can account for his possession" — Meaning.

The words "unless he can account for his possession" in Illus. (a) of S. 114, Evidence Act do not mean that any sort of explanation in regard to possession would be acceptable. The explanation must be a reasonable explanation. The Court of course is not bound to draw a presumption under S. 114, Illus. (a) . It is at the option of the Court to draw it; but it does not in any way shift the burden of proof to the accused. The words "can account for his possession" do not mean that the accused must prove it positively that he had received the property in the manner indicated by him. (Para 5)

Anno: AIR Man. Evi. Act, S. 114 N. 7.

CASES REFERRED	Paras
(A) (V19) AIR 1932 Bom 201: 33 Cri LJ 394	4
(B) (V15) AIR 1928 Pat 38: 28 Cri LJ 962	4
(C) (V22) AIR 1935 Oudh 475: 36 Cri LJ 1206	4
(D) (V25) AIR 1938 Cal 525: 39 Cri LJ 739	4

B. C. Saxena, for Applicant; Aqiq Hasan, Brief Holder of Asst. Govt. Advocate, for Opposite Party.

ORDER: This is an application in revision by Pulpil Singh against an order of the learned Sessions Judge of Basti by which he confirmed an order of the learned Magistrate of first class convicting and sentencing the applicant under S. 411, I. P. C. to 18 months' rigorous imprisonment and to a fine of Rs. 200/- or in default to a further three months' simple imprisonment.

(2) Certain bales of cloth were booked from Kanpur to Ghazipur city. The wagon containing those bales left Kanpur on 10-6-1951. The train reached Maghar Station on 11-6-1951 and on the verification by the railway authorities it was found that 32 bales were intact and one bale had been tampered with from which certain articles were removed. The seal of the wagon was found damaged. When the wagon reached Lucknow five more bales were found missing. That was not the end of the matter. When the wagon reached Gorakhpur four more bales were found missing. Report was made with the police and investigation was taken up.

During the course of the investigation certain articles were recovered from Lallan Singh and certain other articles together with the gunny forming part of the outer covering of one of the bales were recovered from Pulpil Singh, applicant. Both these persons are residents of village Katasai within police circle Paikaulia. Certain more articles were recovered from one Hidayat Ullah alias Mangrey Darzi of Gour, and still certain other articles were recovered from one Gajadhar Ahir of village Masjidya within police circle Kotwali.

All these articles were the contents of one bale that had been stolen from the wagon. The gunny bag that was recovered from Pulpil Singh bore the railway mark that had been assigned to it at the time when the consignment had been booked. Lallan Singh died on 27-1-1952, so the proceedings against him abated. The other three persons were jointly tried and charged under S. 411, I. P. C. The learned Magistrate acquitted Hidayat Ullah alias Mangrey and Gajadhar and convicted the applicant under S. 411 and sentenced him in the manner stated above.

The defence of the applicant was that the cloth and the gunny bag that had been recovered from his possession came into his possession after he had purchased them from a hawker of cloth who hailed from Punjab. His contention was that

he was not the receiver of any stolen property and that he was in bona fide possession of the same.

The learned Magistrate repelled his plea on the ground that the prosecution evidence was clear, cogent and consistent and that the presumption arising under S. 114, Evidence Act must be drawn against the applicant, more so because he did not produce the Punjabi hawker. Against his conviction and sentence, the applicant preferred an appeal and the learned Sessions Judge in a very brief judgment upheld the conviction & sentence and dismissed the appeal. In revision before this Court three points have been urged.

(3) Firstly: that a joint trial of the applicant with Hidayat Ullah and Gajadhar was against the provisions of S. 239(f), Criminal P. C. and was therefore illegal. Secondly: that no presumption under S. 114, Evidence Act could be drawn against the applicant; and the applicant's contention that he was in bona fide possession of all the articles should have been accepted. Thirdly: that in any event the sentence awarded is severe.

(4) On the first question the evidence that was produced in this case proved positively that the articles that had been recovered from the four persons formed part of one single bale that had been stolen from out of the consignment. In fact the finding of the learned Sessions Judge was to the same effect. The articles that were recovered from the applicant as also from the three others mentioned above obviously formed part of one single offence of theft.

Section 239(f), Criminal P. C. lays down that persons accused of offences under S. 411, Penal Code in respect of stolen property the possession of which has been transferred by one offence may be charged and tried together.

It has been contended by learned counsel for the applicant that the words "the possession of which has been transferred by one offence" would mean that possession has been transferred to these four persons in one single transaction, and since there was no evidence to substantiate it the trial was defective. The phrase "the possession of which has been transferred by one offence" has a reference to the original theft of the stolen property.

Consequently several persons can be jointly tried under S. 411, Penal Code, that is to say with regard to the receiving of stolen property, where there is evidence to show that the property was originally stolen on one occasion. This was the view taken by a Division Bench of the Bombay High Court in — 'Emperor v. Lakha Amra', AIR 1932 Bom 201 (A).

The same view had been taken by the Patna High Court in an earlier decision in — 'Mt. Guljania v. Emperor', AIR 1928 Pat 38 (B). There it was held with reference to S. 239(f), Criminal P. C. and S. 411, Penal Code that a joint trial of several persons for the offence of receiving stolen property is legal provided the articles are stolen in the course of one and the same theft. This Patna decision had been followed by the Oudh Court in — 'Shakur v. Emperor', AIR 1935 Oudh 475 (C).

The Bombay and the Oudh view had been approved by the Calcutta High Court in — 'Ram Khelawan v. Emperor', AIR 1938 Cal 525 (D) at p. 526; where it was observed that as to the offence of receiving stolen property the possession of which has been transferred by one offence, it means property which constitutes the proceeds of one single theft.

In the present case, since the articles that were recovered from Pulpil Singh, Lallan Singh, Hidayat Ullah and Gajadhar formed part of one single act of theft as these articles were contained in the same bale, Pulpil Singh could be tried jointly with the other two in view of the provisions of S. 239 (f), Criminal P. C. for an offence under S. 411, I. P. C. The property was stolen originally at one occasion. The property had been received by Pulpil Singh under circumstances which would import to him the knowledge that it was stolen property.

In fact Pulpil Singh was not found merely with possession of some of the articles of cloth inside the bale but also with the outer covering of the bale on which the distinctive mark of the railway that had been put at the time of its consignment. I am, therefore, of the opinion that the trial did not contravene the provisions of S. 239(f), Criminal P. C. and was therefore not bad.

(5) Coming now to the second point, it has been urged on behalf of the applicant that no presumption should have been drawn against the applicant on his failure to produce the hawker from whom he contended he had purchased those articles. It has further been urged that an explanation had been offered by the applicant as to how he came by those articles and that that explanation was reasonable and ought to have been accepted. I am unable to agree with this proposition, having regard to the facts and circumstances of the present case. The theft was committed from the train on 11-6-1951. The recovery had been made from the applicant on 16-6-1951. Illustration (a) of S. 114, Evidence Act says that the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

The question in the present case, therefore, is: has the applicant accounted for his possession so as to dislodge the presumption which the Court might make under Illus. (a) of S. 114, Evidence Act. In my opinion the explanation that had been offered by the applicant, in the absence of the hawker from whom he alleged he had purchased the articles, was much too puerile to bear acceptance. It was a false explanation which did not admit of any scrutiny.

The words "unless he can account for his possession" in Illus. (a) of S. 114, Evidence Act do not mean that any sort of explanation in regard to possession would be acceptable. The explanation must be a reasonable explanation. The Court of course is not bound to draw a presumption under S. 114. Illus. (a). It is at the option of the Court to draw it; but it does not in any way shift the burden of proof to the accused.

The words "can account for his possession" do not mean that the accused must prove it positively that he had received the property in the manner indicated by him. If the explanation given is not inherently improbable or palpably false and the Court trying the case finds it to be reasonably true, the adverse presumption is deemed to have been rebutted. But where, as in the present case, the explanation given was inherently improbable and palpably false the presumption arising under Illus. (a) of S. 114, Evidence Act was not in any way rebutted.

In my opinion the trial Court made a correct appreciation of the evidence that was led on behalf of the prosecution in coming to the conclusion that the charge under S. 411, I. P. C. was brought home to the accused beyond any shadow of doubt.

(6) On the question of sentence I do not think that it errs on the side of severity. Thefts from

running trains are getting much too common and when such a theft is detected it cannot lightly be dealt with. Moreover it appears from the record that the applicant has several previous convictions to his credit. Under the circumstances I am not inclined to interfere with the sentence that has been passed in this case.

(7) The result, therefore, is that the application is rejected. The applicant is on bail; he must surrender to his bail to serve out the sentence.

D.S.P. Application rejected.

°AIR 1955 Allahabad 698 (V. 42, C. 209 Dec.)

RAGHUBAR DAYAL AND KIDWAI JJ.

(22-7-1955)

Oudh Behari Singh, Plaintiff-Appellant v. Gajadhar Jaipuriya and others, Defendants-Respondents.

First Appeal No. 157 of 1942, against decree of Civil Judge, Banaras, D/- 19-11-1941.

Muhammadan Law — Pre-emption — Sale of lessee's rights if can be pre-empted — Sale of parjawatdari tenure — Landlord cannot pre-empt.

The law of pre-emption is to be strictly enforced and is not to be extended beyond what is laid down in the Muhammadan Law or in the precedent law interpreting the Muhammadan Law. (Para 11)

The law of pre-emption creates a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale. It does not impose limitation or disability on any other right of property, namely, rights like those of a lessee or a mortgagee. Hence the sale of lessee's rights cannot be the subject of pre-emption under the Muhammadan Law. AIR 1921 Pat 164; 7 All 775 and AIR 1941 Bom 262 (FB) Rel. on. (Para 10)

A sale of parjawatdari tenure cannot be pre-empted by the landlord under the Muhammadan Law. (Para 11)

The landlord's conduct in granting parjawatdari rights which gives the rights to a parjawatdar to sell his rights to anyone subject to the owner's getting one-fourth of the sale price amounts to a condition that the owner creating those rights would not pre-empt any sale of such rights even if such sales were pre-emptible.

If such a construction be not put on the conduct the right given to the parjawatdar would be absolutely illusory. He would be compelled to sell his rights back to his own landlord, in case that landlord happens to satisfy other conditions which create the right of pre-emption in him. (Para 12)

CASES REFERRED Paras

(A) (V41) AIR 1954 SC 417: 1954 All LJ 529 (SC) 9

(B) (V8) AIR 1921 Pat 164: 58 Ind Cas 534 10

(C) ('85) 7 All 775: 1885 All WN 228 10

(D) (V28) AIR 1941 Bom 262: ILR (1941) Bom 460 (FB) 10

J. Swarup, for Appellant; S. N. Misra and K. L. Misra, for Respondents.

RAGHUBAR DAYAL, J.:

Rai Manmatha Nath Bose and others, defendants 2 to 5, held the enclosure bearing municipal No. D-37/84 situate in Mohalla Baradeo, Banaras, on parjawatdari tenure from Babu Oudh Behari Singh and others. They executed a sale deed of their rights of possession to the parjawat land to Gajadhar Jaipuriya, defendant 1 under a sale deed scribed on 29-3-1941 and registered on 1-4-1941.

(2) Oudh Behari Singh instituted the suit against defendants 1 to 6 pre-empting the aforesaid sale alleging that custom of pre-emption prevailed in the entire city of Banaras and that he had the right to pre-empt on account of his owning property adjacent to this enclosure which had been sold.

(3) Gajadhar Jaipuriya, the vendee, contested the suit on various grounds, two of which were that the plaintiff had not made the necessary demands required by the Muhammadan Law of Pre-emption and that the plaintiff had no right to take possession by dispossessing the parjawatdar in possession, on the pretext of enforcing the right of pre-emption, and in breach of the parjawatdari agreement.

The issues framed in the suit did not include a specific issue on the basis of the second contention mentioned above. There was an issue about the plaintiff's making demands according to Muhammadan Law and also about the plaintiff having a right of pre-emption and about the existence of the custom of pre-emption in mohalla Baradeo and in the case of existence of such a custom whether the defendants-respondents of another Province were bound by that custom.

(4) The trial Court held that the plaintiff did not make the necessary demands and that there was a custom of pre-emption in mohalla Baradeo in Banaras City and that such custom was, however, not binding on the defendants as they were residents of another Province. It accordingly dismissed the suit. The plaintiff's appeal was dismissed by this Court also. He then appealed to the Privy Council. The appeal was finally heard by the Supreme Court. The Supreme Court reversed the decision of this Court and held that the defendants were bound by the custom of pre-emption which prevailed in Banaras even though they were residents of another Province.

It accordingly set aside the decree of this Court and remanded the case for consideration of the two questions left undecided, namely, whether the plaintiff had made the demands in due compliance with the forms prescribed by the Muhammadan Law and, secondly, whether the plaintiff being landlord could eject his own tenants in the exercise of the right of pre-emption.

(5) On the question about the making of demands accroding to the requirements of Muhammadan Law of Pre-emption we are of opinion that the evidence on the record is sufficient to establish that the demands were so made. (After discussion of the evidence on this point his Lordship proceeded:)

(6) We are therefore of opinion, as mentioned earlier, that the plaintiff's evidence suffices to establish that the plaintiff has made the two demands according to the Muhammadan Law of Pre-emption.

(7) The second question already mentioned is with respect to what was pleaded in para. 3 of the written statement of Gajadhar Jaipuriya, defendant 1. It is necessary to reproduce it in order to indicate the true import of the contention for the defendant specially when the point urged before us is not exactly in the form in which the question is framed.

The point urged before us is that the plaintiff who is the landlord of the land sold cannot

pre-empt the sale of the lessee rights of the lessees defendants 2 to 5 who hold the land from him on a tenure known as Parjawatdari tenure. The contention is that a pre-emptor can pre-empt the sale of land or property but not the sale of lessee rights in land or property.

The question as expressed seems to assume that the plaintiff had a right to pre-empt but in the exercise of that right has no right to dispossess his lessee. Paragraph 3 of the written statement of defendant 1 is:

"Assuming the false allegations of the plaintiff that the land aforesaid is held on ground rent and the plaintiff is the zamindar thereof to be correct even then the predecessors of the defendant and the defendant have, on the ground of the agreement with the zamindar of the said land, been in possession of the land aforesaid, with power to make all sorts of transfers, on payment of ground rent. The plaintiff who alleges himself to be the representatives of the zamindar, has according to law and justice, no right to take possession by dispossessing the parjawatdar in possession, on the pretext of enforcing the right of pre-emption, and in breach of the parjawatdari agreement."

It is not disputed that the parjawatdar has right to sell his right to possess under that tenure. The plaintiff himself admits in cross-examination that the parjawatdars are entitled to transfer their right of occupation and that the proprietors cannot eject any of the parjawatdars. The suit was for obtaining possession ever the enclosure and buildings sold on payment of sale consideration in the exercise of the right of pre-emption.

The contention of the defendant was, therefore, that if the plaintiff as a successful pre-emptor was to be substituted for the vendee and delivered possession that would effect that dispossession of the parjawatdar on account of the parjawatdar exercising his right of selling his parjawatdari right granted to him by his landlord who happened to be the plaintiff pre-emptor and that such a thing could not be possible in law.

He did not put it so clearly in the written statement that as a matter of law the sale of lessee right could not be pre-empted, the point of law which has been really urged before us. The defendants could also mean that the conduct of the plaintiff in granting parjawatdari right to defendants 2 to 5, the lessees, with the right to sell the parjawatdari right and that the condition that the plaintiff would be entitled to get one-fourth of the sale consideration meant that the plaintiff waived his right to pre-empt the sale in case when the parjawatdar did sell his rights.

(8) We shall consider this contention of the defendants in the written statement in its both aspects.

(9) It is very relevant to the questions before us to refer to what has been said by their Lordships of the Supreme Court in their judgment in the appeal in this very case. Their judgment is reported in 'Audh Behari Singh v. Gajadhar Jaipuriya,' AIR 1954 SC 417 (A). Their Lordships propounded this first question, whether the burden and benefit of a right of pre-emption are incidents annexed to the lands belonging respectively to the vendor and the pre-emptor or is the right merely one of re-purchase, which a neighbour or co-sharer enjoys under Muhammadan Law, and which he can enforce personally against the vendee in whom the title to the property has already vested by sale.

After considering some cases they observed at p. 422:

"In our opinion it would not be correct to say that the right of pre-emption under Muhammadan Law is a personal right on the part of the pre-emptor to get a re-transfer of the property from the vendee who has already become owner of the same ....

It is true that the right becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land.....

The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale and compels him to sell the property to his co-sharer or neighbour as the case may be. The person who is a co-sharer in the land or owns lands in the vicinity consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled, even though it does not amount to an actual interest in the property sold.

The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself.... In our opinion the law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser."

(10) It would appear from these observations that the law of pre-emption creates a limitation or disability upon the ownership of a property to the extent that it restricts the owner's unfettered right of sale. It does not impose limitation or disability on any other right of property, namely, rights like those of a lessee or a mortgagee.

It should follow, therefore, that there was no such disability upon the parjawatdari rights of defendants 2 to 5 which they had sold and that therefore the plaintiff could not enforce his right of pre-emption in connection with the sale of lessee rights. This view that the lessee's right cannot be the subject of pre-emption has been expressed in some earlier cases of the various High Courts.

In 'Mohomed Jamil v. Khub Lal', AIR 1921 Pat 164 (B), it was held that the right of pre-emption did not extend to such cases under the Muhammadan Law where only the mokurari interest was transferred and unless the proprietary possession was transferred the right of pre-emption did not accrue. In the body of the judgment it is mentioned at p. 165 that Hedaya defines pre-emption,

"As the becoming proprietor of lands sold for the price at which the purchaser has bought them although he be not consenting thereunto. The term shaffa is derived from the root which signifies conjunction and the land sold are here conjoined to the land of shafee or person claiming the right of pre-emption."

Reference was made to the case of — 'Govind Dayal v. Inayat Ullah', 7 All 775 (C), where Mahmood J. defines shaffa as.

"a right which the owner of certain immovable property possesses as such for the quiet enjoyment of that immovable property, to obtain in substitution for the buyer proprietary possession of certain other immovable property not his own on

such terms as those on which such latter immovable property is sold to another person"

This view was accepted in — 'Dashrathlal v. Bai Dhondubai', AIR 1941 Bom 262 (FB) (D),

(11) In Tyabji's Muhammadan Law, Edn. 3, it is mentioned in para 539 on p. 701 that "Aqar or land alone may validly be the subject of pre-emption. "This means that one can pre-empt the sale of Aqar or land. To have a right to pre-empt the sale of land is something different from a vendee's right to pre-empt the sale of a lessee's right in land or to pre-empt the sale of a mortgagee's rights in land.

The law of pre-emption is to be strictly enforced and is not to be extended beyond what is laid down in the Muhammadan Law or in the precedent law interpreting the Muhammadan Law. No case has been brought to our notice in which the sale of a lessee's rights had been held to be pre-emptible under the Muhammadan Law.

We are therefore of opinion that the sale of parjawatdari tenure corresponding to the lessee's rights cannot be pre-empted.

(12) So for as the particular case is concerned, we further agree that the contention of the contesting defendant that the plaintiff's conduct in granting parjawatdari rights which gives the right to a parjawatdar to sell his rights to anyone subject to the owner's getting one-fourth of the sale price amounts to a condition that the owner creating those rights would not pre-empt any sale of such rights even if such sales were pre-emptible. If such a construction be not put on the conduct the right given to the parjawatdar would be absolutely illusory.

He would be compelled to sell his rights back to his own landlord, in case that landlord happens to satisfy other conditions which create the right of pre-emption in him. We are, therefore, of opinion that the plaintiff cannot pre-empt the sale and cannot by any such exercise of general right of pre-emption indirectly deprive the lessee, the parjawatdar, of the rights granted to him.

(13) In view of the above, we hold that the plaintiff's suit must fail though on grounds different on which the suit was dismissed by the trial Court. We, therefore, dismiss the appeal with costs.

K.S.B. Appeal dismissed.

AIR 1955 Allahabad 700 (V. 42 C. 210 Dec.)

LUCKNOW BENCH — H. S. CHATURVEDI AND MULLA JJ. (19-4-1955)

The State v. Mohammad Ali, Accused-Respondent.

Criminal Appeal No. 654 of 1954, against order of Judl. Officer, Sitapur, D/- 27-2-1954.

(a) Arms Act (1878), Ss. 19(f) and 4 — **"Fire Arms" — Possession of unserviceable arms.**

A court before convicting an accused person is entitled to satisfy itself that the arms recovered from the possession of an accused person fulfils the definition of arms given under S. 4 of the Arms Act. In judging whether a particular weapon is a fire-arm or not the test is not whether that particular weapon is serviceable at the time, but whether it has lost its specific character and ceased to be a fire-arm.

A weapon does not cease to be a fire-arm if it has not lost its specific character, but the onus of proving that a weapon has not lost its specific character is upon the prosecution. Where doubts are entertained about it, it is necessary for the prosecution to satisfy the court that the weapon still possesses its specific character. Where admittedly the weapon is in an unserviceable condition and no evidence is led to show that slight repairs or changes could turn the weapon into a serviceable weapon the prosecution fails to discharge the onus and the acquittal of the accused is not wrong. (Paras 2, 3, 4)

Anno: AIR Man., Arms Act, S. 4 N. 5a, 9; S. 19 N. 12.

AIR Man. Ev. Act, Ss. 101-103 N. 3.

(b) **Criminal P. C. (1898), S. 428 — If it thinks necessary.**

Application in appeal to send back case for further evidence, fourteen months after decision by trial court — Case not so important — On the record decision of trial court, not faulty — Held that application should be refused. (Para 5)

Anno: AIR Com., Cr. P. C., S. 428 N. 4.

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 353 : 1953 Cri LJ 762 3

(B) ('98) 21 Mad 360 : 1 Weir 659 (FB) 3

Addl. Govt. Advocate, for the State; Mohd. Ayub, for Accused.

MULLA J.:

Mohammad Ali, the opposite party in this case, was prosecuted under S. 19(f) of the Arms Act by the police of Talgaon, district Sitapur.

(2) The charge against Mohammad Ali was that a pistol was recovered from his possession. The trial court felt a doubt whether this pistol could be used as a fire-arm and thereupon asked the State prosecutor to satisfy him that it could be used as a fire-arm. The State prosecutor instead of satisfying the trial court on that point put in an application stating that there is no provision in law which empowered the accused to ask for a demonstration.

When the court asked the State prosecutor to satisfy it regarding the condition of the fire-arm recovered, it was not the accused who was making this demand. A court before convicting an accused person is entitled to satisfy itself that the arms recovered from the possession of an accused person fulfils the definition of Arms given under S. 4 of the Arms Act. As the trial court found that the weapon recovered in this case did not fulfil this definition, it acquitted the opposite party.

It is against this order of acquittal that the State has come up in appeal.

(3) Before us the learned Additional Government Advocate has stressed that a fire-arm even if it is not in working order remains a fire-arm within the meaning of S. 4 of the Arms Act. He relied upon the decision in — 'Swami Dayal v. State', AIR 1953 All 353 (A).

In this decision learned Judge of this Court observed that in judging whether a particular weapon is a fire-arm or not the test is not whether that particular weapon is serviceable at the time, but whether it has lost its specific character and ceased to be a fire-arm. This observation was based upon a Full Bench decision of the Madras High Court in — 'Queen-Empress v. Jayarami Reddi', 21 Mad 360 (FB) (B). We are in agreement with the view expressed above, but we do not find that this helps the State counsel in this case.

It is true that a weapon does not cease to be a fire-arm if it has not lost its specific character, but the onus of proving that a weapon has not lost its specific character is upon the prosecution. Where doubts are entertained about it, it is necessary for the prosecution to satisfy the court that the weapon still possesses its specific character. In this case the trial court felt a doubt and even gave an opportunity to the State prosecutor to satisfy him, yet this opportunity was not availed of by the State prosecutor.

Under the circumstances there is nothing on the record of the case to show that the weapon recovered in this case had not ceased to be a fire-arm within the meaning of S. 4 of the Arms Act. Admittedly this weapon is not in a serviceable condition and the only question that remains to be decided is whether by slight repairs it can be rendered serviceable.

(4) On the evidence before us we are not in a position to determine whether slight repairs or changes could turn this weapon into a serviceable weapon or not. The prosecution has, therefore, failed to discharge the onus. We, therefore, find that no error of law was committed by the trial court.

(5) The State counsel made a request that we should permit him to examine an expert at this stage of the case or that we should send back the case for further evidence being taken on the point. The case was decided on 27-2-1954, and about fourteen months have elapsed since that time. The case does not seem to us to be so important so that a further opportunity should be given to the prosecution to prove its case. On the record, as it stands, no fault can be found in the decision of the trial court.

(6) We, therefore, uphold the order of the trial court and dismiss this appeal. The opposite party is on bail. He need not surrender and his bail bonds are cancelled.

M.K.S. Appeal dismissed.

AIR 1955 ALLAHABAD 701 (V. 42 C. 211 Dec.)

JAMES J. (4-8-1955)

Chiranji Lal, Applicant v. The State through others, Opposite Parties.

Criminal Misc. Case No. 972 of 1955.

Criminal P. C. (1898), S. 526(f) (a) — Grounds for transfer.

A senior advocate cannot be debarred from appearing before a Court merely because he has under training a relative of the presiding officer of that Court. This mere fact cannot be deemed to be a reasonable ground for transfer of the case. (Paras 3, 4)

Anno: AIR Com., Cr. P. C., S. 526 N. 4, 5.

Bhagwan Das Gupta, for Applicant; N. Kumar, G. Kumar and J. R. Bhatt, Asst. Govt. Advocate, for Opposite Parties.

ORDER : This transfer application raises an important question of principle should a senior advocate be debarred from appearing before a Court merely because he has under training a relative of the presiding officer of that Court?

(2) The facts are briefly these. One Chiranji Lal filed a complaint against four persons for an offence under S. 394 read with S. 397, I. P. C. an offence exclusively triable by the Court of Session before the Sub-Divisional Magistrate of Amroha, who transferred it for disposal to Sahu Hari Krishna, Special Magistrate first class of Moradabad. Chiranji Lal's counsel was Mr. R. B. Pandey, a leading criminal lawyer of Moradabad.

During the relevant period he had under training Mr. Jagmohan Krishna, a law graduate, who happens to be the son of Sahu Hari Krishna. The Special Magistrate recorded all the evidence, took the statements of the accused persons, heard the arguments of the parties and fixed a date for pronouncing final orders. But before orders could be pronounced the accused persons applied to the Additional District Magistrate for a transfer of the case from the Court of Sahu Hari Krishna. In their transfer application they took up a number of grounds.

The learned Additional District Magistrate overruled the other grounds as being vague or irrelevant, but he directed a transfer of the case on one ground. This was that Mr. Pandey was training the Special Magistrate's son and this provided a reasonable ground to the accused persons to apprehend that the Special Magistrate would not decide the case with an unbiased mind. Chiranji Lal has now come up to this Court and challenges the correctness of the Additional District Magistrate's order.

(3) There would of course have been no quarrel with the Additional District Magistrate's order had it been based on the ground that the Special Magistrate by his actions had displayed a bias in favour of Mr. Pandey's client or against the accused persons. But the question is whether the mere fact that Mr. Pandey was training the Special Magistrate's son can be deemed to be a reasonable ground for transfer. My answer is emphatically in the negative.

It is necessary to bear in mind that a law graduate who is under training with a senior counsel takes no part whatsoever in the conduct of the case; if he happens to be present at the hearing his sole object is to watch the proceedings and thereby learn legal procedure. There is nothing he can do which can influence the proceedings in the slightest. Besides, in the case before me it cannot be overlooked that the Special Magistrate was only making an enquiry in an offence exclusively triable by the Court of Session and therefore had no final authority to make any pronouncement on the innocence or guilt of the accused persons.

Moreover, as already mentioned, the transfer application of the accused persons was made at the last possible stage, i.e., when all that remained was the delivery of judgment, and no explanation for this undue delay has been furnished. These grounds are by themselves sufficient to disentitle the accused persons from securing a transfer from the Special Magistrate's Court.

(4) But in my opinion the principle underlying the Additional District Magistrate's order is of even greater import. What does the learned Magistrate imply? He implies that if a law graduate seeks legal training and happens to be related to or connected with the presiding officer of a certain Court the senior advocate to whom he attaches himself should never appear before that Court, for the opposite party can always accuse the presiding officer of prejudice against itself.

This is indeed a dangerous principle, and I for one cannot approve it. The Additional District Magistrate does not seem to have realised that a law graduate satisfying the aforementioned conditions would find it almost impossible to persuade a senior or leading counsel to give him training.

(5) For the encouragement of presiding officers of subordinate Courts I might add that there have been several similar instances in the High Court, but no one has ever dreamed of suggesting partiality on the part of an Hon'ble Judge merely because some relative of his happened to be receiving training from some leading advocate of the High Court.

(6) In view of this discussion I have no hesitation in overruling the Additional District Magistrate. Accordingly I set aside his transfer and direct the re-transfer of the case to Sahu Hari Krishna. He will not take any further evidence but will be entitled to re-hear arguments before pronouncing orders. He must do so as expediti-

ously as possible, since the case has been pending for a considerable time.

D.H.Z. Order accordingly.

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*AIR 1955 ALLAHABAD 702 (V. 42 C. 212 Dec.)

M. L. CHATURVEDI J. (25-2-1955)

Vishwamitra Karyalaya Press, Applicant v. Authority appointed under Payment of Wages Act, 1936 for Kanpur and others, Opposite Party.

Civil Misc. Writ Nos. 970, 971 and 987 of 1953.

(a) Payment of Wages Act (1936), S. 17 — Direction under S. 15 (3) — Appeal

According to the wording of S. 17, an appeal against a direction made under sub-s. (3) of S. 15 lies to the District Court. The question whether S. 15 applied to the facts of the cases or not would make no difference to the maintainability of an appeal against an order which is expressly made under the provisions of sub-s. (3) of S. 15. If there is an order under that provision of law, that is enough to give a right of appeal to the aggrieved party. (Para 4)

Anno: AIR Man., Payment of Wages Act, S. 17 N. 1.

(b) Constitution of India, Art. 226 — Other remedy open — Remedy of appeal under S. 17, Payment of Wages Act not availed of and becoming time-barred — Petition under Art. 226 is not maintainable — (Payment of Wages Act (1936), S. 17).

Under the Payment of Wages Act an appeal lies under S. 17 against a direction under S. 15(3). Where the petitioner has not availed himself of this remedy and the appeal is time-barred he cannot maintain an application under Art. 226, Constitution of India. He cannot say that the petition under Art. 226 should be heard because his appeal under S. 17, Payment of Wages Act would be barred by time. It is due to his own fault that the appeal has become barred and he cannot take advantage of his own fault. (Para 4)

Anno: AIR Com., Const. of India, Art. 226 N. 19.

(c) Factories Act (1948), S. 2, Cls. (m) and (k) — Manufacturing process — Composing — (Payment of Wages Act (1936), S. 2(i)).

The composition is a necessary part of the process of the printing itself, and is included within the definition of the expression 'manufacturing process'. It cannot be said that the definition should be confined to the process by which impression is created on the paper and to no other process preceding or succeeding the marking of the impressions on the paper to be printed. Everything that is necessary before or after to complete the process would be included within the definition of the words 'manufacturing process'.

Hence the premises where composing is being carried on is a factory within the meaning of the definition under Payment of Wages Act even though the printing is being carried on on another premises. (Para 6)

(d) Payment of Wages Act (1936), S. 2 (ii) (f) — 'Industrial establishment' — Premises where composing is being carried on.

Where a newspaper is printed on one premises and composing of the type is being carried on on another premises, the latter premises also comes within the definition of the expression 'Industrial establishment' as defined in S. 2(ii), Payment of Wages Act. (Para 9)

Anno: AIR Man., Payment of Wages Act, S. 2 N. 1.

J. Swarup and H. Swarup, for Applicant; S. C. Khare and S. N. Dwivedi, for Opposite Party.

ORDER : These are three petitions under Art. 226 of the Constitution, which may conveniently be disposed of by the same judgment, because the points that arise in them are common and relate to the same institution namely, the Vishwamitra Karyalaya (Press).

(2) The petitioner in these petitions is the Vishwamitra Karyalaya (Press), Mahatma Gandhi Road, Kanpur. The press publishes a Hindi newspaper known as 'Vishwamitra' at Kanpur. The press has been registered as a factory under the Factories Act and there is a licence for the premises No. 965 Mahatma Gandhi Road. The respondents 2 to 14 of petitions Nos. 970 and 971 of 1953, and 2 to 9 of petition No. 987 of 1953, are the employees or were the employees of this Karyalaya.

Some of them were sub-editors, some compositors and one was a Daftari. There were certain disputes between the Karyalaya and respondents 2 to 14 of petition No. 970 of 1953, which were referred for adjudication to some Industrial Tribunal, and the matter went up to the Supreme Court.

After the decision by the Supreme Court, there were certain complaints that the management had not paid the wages of the respondents within the period provided by law, and applications were filed by the Chief Inspector of Factories to the Magistrate, who had been authorised under S. 15, Payment of Wages Act, 1936, to hear and decide all claims arising out of deductions from wages or delay in the payment of wages. Certain preliminary objections were taken to the applicants, and after they had been disposed of, the learned Magistrate framed issues and went into the matter.

After discussing the facts and law of the points raised before him, he came to the conclusion that the respondents had not been paid their wages within the period provided by S. 5, Payment of Wages Act. A number of legal points were also raised before him, but he decided all of them against the petitioner and directed payment of wages, as claimed by the Chief Inspector. The order of the Magistrate is dated 22-10-1953 and petitions Nos. 970 and 971 of 1953 were filed in this Court on 12-11-1953 and petition No. 987 of 1953 on 23-11-1953.

The prayers contained in these petitions are that the order passed by the Magistrate directing the payment of wages be quashed, and that writs of mandamus be issued directing the respondent 1 not to recover from the petitioner the amount awarded under the order aforesaid.

(3) The learned counsel for the petitioner has raised a number of points in support of the petitions, and the learned counsel for the Respondents has raised a preliminary objection to the hearing of the petitions. I proceed to decide first the preliminary objection raised by the learned counsel for the respondents. The objection is to the effect that appeals lay against the impugned orders under S. 17, Payment of Wages Act, and the petitioner having omitted to file these appeals, he has disentitled himself to present these petitions.

Sub-section (3) of S. 15, Payment of Wages Act says that where an application under sub-s. (2) by the Inspector is entertained, the authority shall hear the applicant and the employer and, after such enquiry as may be necessary, direct the refund to the employed person of the amount deducted, or may order the payment of the delayed wages together with the payment of such compensation as the authority may think fit, not exceeding a certain figure.

Section 17 says that an appeal against a direction under sub-s. (3) of S. 15 may be preferred within 30 days of the date on which the direction was made before the District Court, if the total sum directed to be paid by way of wages and compensation exceeds Rs. 300/-.

The contention of the learned counsel for the respondents is that applications were made under sub-s. (2) of S. 15 of the said Act by the Chief Inspector of Factories, that they were entertained by the Magistrate appointed to deal with them, and in the end the learned Magistrate directed the payment of daily wages to the workers. The order was fully covered by sub-s. (3) of S. 15 and an appeal clearly lay under S. 17 to the District court.

(4) The reply of the learned counsel for the petitioner to this argument is that, according to his case, the premises at Birhana Road, where the respondents were working, do not come within the definition of the word 'factory' and no application could have been filed by the Chief Inspector under sub-s. (2) of S. 15, and if no application could have been filed, the matter could not have been decided and no appeal could have been preferred against the decision.

I do not agree with the contention of the learned counsel. According to the wording of S. 17, an appeal against a direction made under sub-s. (3) of S. 15 lay to the District court and the orders impugned in the present cases were clearly directions given under sub-s. (3) of S. 15. The question whether S. 15 applied to the facts of the cases or not would make no difference to the maintainability of an appeal against an order which was expressly made under the provisions of sub-s. (3) of S. 15.

If there is an order under that provision of law, that is enough to give a right of appeal to the aggrieved party. The question, whether any payment of wages could have been or should have been ordered, according to the terms of sub-s. (3) of S. 15, could be raised in the appeal, and it could have been contended that the Magistrate had no jurisdiction to deal with this matter, inasmuch as the Payment of Wages Act did not apply to the cases of these employees.

As a matter of fact, the point was raised before the learned Magistrate and he decided it on merits against the petitioner. An appeal, under the circumstances, clearly lay and the petitioner had another alternative remedy provided to him (Manager) by the statute itself, which he failed to avail himself of. He cannot now come to this court and say that this petition should be heard, because his appeal would now be barred by time.

It is due to his own fault that the appeal has become barred now after the lapse of all this period, and he cannot take advantage of his own fault. I think, therefore, these petitions can be dismissed only on this preliminary objection raised by the learned counsel for the respondents. But I also propose to give my own opinion briefly on the points that have been raised on the merits of the case by the learned counsel for the petitioner.

(5) The first submission is that the employees working at Birhana Road cannot be said to have been employed in any factory. The proved facts of the case appear to be that the actual printing was done at the premises on Mahatma Gandhi Road, Kanpur, editing and composing was done at Birhana Road, and the question is whether the premises at Birhana Road can also be said to come within the definition of the word 'factory' as defined in the Payment of Wages Act.

In the Payment of Wages Act it is merely said that 'factory' means a factory, as defined in cl. (m) of S. 2, Factories Act, 1948. Clause (m) of S. 2, Factories Act defines 'factory' as under

"Factory means any premises including the precincts thereof

(i) whereon ten or more workers are working, or were working on any day of the preceding 12 months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on or

(ii) whereon 20 or more workers are working, or were working on any day of the preceding 12 months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on but does not include a mine subject to the operation of Indian Mines Act or a Railway running shed."

According to the definition of 'factory' given above there must have been some manufacturing process going on and any premises where such a process was going on would come within the definition of 'factory', if there were ten or more workers in the case of the process being carried on with the aid of power, and where there were 20 or more workers in the case of premises where the process was being carried on without the aid of power. We have, therefore, to see what a manufacturing process means. 'Manufacturing process' is defined in cl. (k) of S. 2, Factories Act as (amongst other things)

"(iv) printing by letterpress, lithography, photogravure or other similar work or book binding, which is carried on by way of trade or for purposes of gain, or incidentally to another business so carried on."

(6) It is admitted that Vishwamitra paper is printed by letterpress, but the argument is that that printing is going on in the premises at Mahatma Gandhi Road and not in the premises at Birhana Road and, therefore, the premises at Birhana Road did not come within the definition of a factory. The definition, as given in the Factories Act, uses the expression 'manufacturing process' which means 'any process for printing by letterpress etc.'

So that any process for printing by letterpress would be included within the definition of words 'manufacturing process'. Before the paper could be printed at Mahatma Gandhi Road, it was essential that the types should have been set on a block prepared for the purpose, and the composition or preparation of this block, containing the necessary types, is a process essential before the paper could be printed at the printing machine.

The composition, in my opinion, is a necessary part of the process of the printing itself, and is included within the definition of the expression 'manufacturing process'. I do not think that the definition should be confined to the process by which impression is created on the paper and to no other process preceding or succeeding the marking of the impressions on the paper to be printed. Everything that is necessary before or after to complete the process would be included within the definition of the words 'manufacturing process'.

It is not necessary to consider whether editing is also a part of the printing of a newspaper, because if composing which is admittedly carried on at Birhana Road came within the definition of expression 'manufacturing process', the premises at Birhana Road would also come within the definition of the word 'factory', because Birhana Road, on the above finding, is a place where a part of the process of manufacturing, namely, the composition of the letterpress is being carried on.

The other condition is that there should be 20 or more workers working there, but the question was nowhere raised either before the Magistrate or in the present petition or the affidavit filed in the case, that less than 20 workers were working at Birhana Road.

If an objection had been taken on this score that at Birhana Road less than 20 persons were working and, therefore, it did not come within the definition of 'factory', the matter would have been considered by the magistrate, and the respondents would have been in a position to show that more than 20 persons were actually working there. In the absence of any such ground or assertion in the petition I cannot hold that less than 20 persons were working at Birhana Road.

(7) Even supposing that the number of persons working at Birhana Road was less than 20, I do not think that that would make any difference, because the factory, in the present case, would include both the premises, namely, the premises at Birhana Road and that at Mahatma Gandhi Road, and it is admitted that, if the number of workers of both the places is taken into account, it would certainly exceed 20.

This was a factory where the manufacturing process was going on at two different premises. A part of it was being carried on at Birhana Road and the other part at Mahatma Gandhi Road, and it is also admitted that the work at Mahatma Gandhi Road was carried on with the aid of power.

(8) For the above reasons, I think that both these premises, jointly as well as separately, come within the definition of the word 'factory', as defined in the Indian Factories Act, and the respondents were the employees in the factory.

(9) The learned counsel for the respondents contended that besides this being a factory, the premises at Birhana Road also came within the definition of the expression 'industrial establishment', as defined in S. 2, sub-s. (ii), Payment of Wages Act, where 'Industrial Establishment' is defined as meaning, (amongst other things).

"(f) workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale."

The contention of the learned counsel is that both these premises were workshops in which the processes for the production, adaptation or preparation of the newspaper Vishwamitra were carried on. The types were set in the premises at Birhana Road preliminary to the printing and I think that process would be included within the definition of an 'industrial establishment'.

Under sub-s. (5) of S. 1, the State Government has been given authority to extend the provisions of Payment of Wages Act to any establishment by issuing a notification in the official Gazette, and it appears that a notification was issued by the State Government on 24-3-1939, which was to the effect that the Government was pleased to extend the provisions of Payment of Wages Act to all the printing presses in the United Provinces wherein or within the precincts of which ten or more workers were working on any day in the preceding 12 months.

This notification would include presses not worked by power when only 10 or more persons were working. The result of this provision is that even if less than 20 persons were working in the establishment at Birhana Road, the provisions of Payment of Wages Act would apply to those premises also.

(10) I have considered the questions raised by the learned counsel for the parties on their own merits, but it was not necessary to do so in these petitions, because the orders of the learned Magistrate could be quashed only if there was any error apparent on the face of the record in those orders. In my opinion, the decision of the learned Magistrate is correct and, in any case, I do not think it can possibly be said that there is any error apparent on the face of the record as far as the orders of the learned Magistrate are concerned.

(11) The result is that these petitions fail and are dismissed with costs.

D.S.P. Petitions dismissed.

(S) AIR 1955 ALLAHABAD 704 (V. 42 C. 213 Dec.)

AGARWALA AND SAHAI JJ. (12-1-1955)

L. Shri Chand, Judgment-debtor, Appellant **v.** Hira Lal and another, Decree-holders Purchasers-Respondents.

Ex. First Appeal No. 408 of 1954, against decree of 1st Civil J., Saharanpur, D/- 24-9-1954.

Civil P. C. (1908), O. 21 R. 85 — Deposit by decree-holder purchaser.

Where the decree-holder auction-purchaser deposits in Court the difference between the decretal amount and the sale price but the sale is set aside and in the subsequent auction sale the decree-holder agrees to bid the same amount which he had bid at the previous auction and the sale is concluded in his favour, it is not necessary for him to first withdraw the amount from court and then to re-deposit it. Law does not contemplate futile or unnecessary proceedings. (Para 1)

Anno: AIR Com. C. P. C. O. 21 R. 85 N 4; 1953 Mulla, O. 21 R 85 P 887, N "Proviso" (Topic in AIR Com. extra).

Babu Ram Avasthi, for Appellant.

BY THE COURT:

This is a judgment-debtor's appeal. In execution of decree of Rs. 31,106/15/ against the appellant the sale of the appellant's property took place first on 15-12-1953. The auction price was Rs. 31,500/- and the last bid was of the decree-holder. This sale was however set aside. A second time the same property was put up for sale on the 15th of March, 1954, and this time the decree-holder's bid was Rs. 30,500/-.

This was the highest bid. But this sale was also set aside. A third time the property was sold on 14-5-1954 and the bid of the decree-holder was of Rs. 25,000/- only which was the highest. The Amin did not accept it and reported the matter to the Judge. On 9-7-1954, the decree-holder agreed to bid Rs. 31,500/- the amount which he had bid at the time of the auction held on 15-12-1953.

The difference in the decretal amount and the bid, about Rs. 400/-, had been deposited by the decree--holder in time when the property was sold on 15-12-1953. As the amount deposited by him was in deposit, he was not required to make any further deposit when the sale was concluded in his favour on 9-7-1954. The sale was challenged on the ground of material irregularity in conducting and publishing it.

The objections to the sale were rejected and a first appeal from the order rejecting the objections has been filed in this Court by the judgment-debtor which is pending.

Another appeal which is headed as execution first appeal has now been filied by the judgment-debtor against the order confirming the sale on a fresh ground which had not been raised in the court below in the proceedings under O. 21, R. 89, C. P. C. This ground is that the decree-holder did not deposit the balance of the amount due from

him after deducting the amount of decree from the sale price.

This ground is frivolous as the decree-holder had already deposited the amount in the previous sale which amount was still held by the execution court. It was not necessary for him to first withdraw the amount from court and then to re-deposit it. This would have been futile. Law does not contemplate futile or unnecessary proceedings. A little common sense would have shown that it was wholly unnecessary.

(2) There is no force in this appeal. It is accordingly dismissed under O. 41, R. 11, C. P. C.

G.M.J. Appeal dismissed.

°AIR 1955 ALLAHABAD 705 (V. 42 C. 214 Dec.)

MEHROTRA J. (31-3-1955)

Manoharlal Kanodia, Applicant v. Sri S. N. Verma, and others, Opposite Parties.

Civil Misc. Writ No. 1017 of 1954.

(a) Criminal P. C. (1898), S. 10(2) — Person acting as District Magistrate can be appointed as an Additional District Magistrate in another district.

The Additional District Magistrate and the District Magistrate when exercising their functions as a Court, are only the Magistrate, first class appointed by the State Government to act either as a District Magistrate or as Additional District Magistrate. There is nothing in S. 10 which debars a person acting as a District Magistrate, to be appointed as an Additional District Magistrate in another district. (Para 2)

Anno: AIR Com., Cr. P. C., S. 10, N. 4 and 5.

(b) Constitution of India, Art. 226 — Writ of prohibition — Trial not pending before Magistrate — Writ of prohibition cannot be issued restraining him from delivering judgment.

A fundamental distinction between a writ of certiorari and a writ of prohibition is that they are issued at different stages of the proceedings. When an inferior Court takes up for hearing a matter over which he has no jurisdiction the person against whom proceedings are taken can move the superior Court for a writ of prohibition in which an order will follow forbidding the inferior Court to continue the proceedings.

If the Court has heard the case and given decision, a writ of certiorari will go to quash the decree. There may be cases where an order has been passed not completely disposing of the case; in that event both the writs will go. A writ of certiorari quashing the order and a writ of prohibition forbidding the Court from continuing with the case will stand. A writ of prohibition will lie when the proceedings to any extent are pending.

Where a Magistrate had jurisdiction when the trial started before him and the evidence was recorded by him and he completed the trial, a writ of prohibition cannot be issued at that stage restraining him from delivering the judgment. (Paras 6 and 7)

Anno: AIR Com., Const. of India, Art. 226, N. 144.

CASE REFERRED: Para

(A) (V42) (S) AIR 1955 SC 233: 1955 SCR 1104 (SC) 7

S. N. Dwivedi, for Applicant.

ORDER: This is a petition under Art. 226 of the Constitution praying that a writ of prohibition be issued to the opposite party No. 1 restraining him from delivering the judgment in Criminal Case No. 412 of 1949 (State versus Manoharlal Kanodia and others). The petitioner along with others were prosecuted of an offence under S. 7, Essential Supplies (Temporary Powers) Act 1946, read with cl. 24, Cotton Textile Control Order 1948.

The opposite party No. 1, who was the Additional District Magistrate, Rural Areas, Kanpur, tried the case, heard the evidence but could not deliver the judgment for he was transferred to Tehri Garhwal as District Magistrate. He handed over the charge to the opposite party No. 2 on 9-9-1954 and thereafter the case was fixed for 8th December for delivery of judgment. An application was moved by the petitioner that he was unable to attend the court on account of illness.

On that an order was passed directing the applicant to appear before the court on 14-9-1954, and file a fresh bail bond and give an undertaking not to leave Kanpur without the permission until the judgment was pronounced. The opposite party No. 1 thereafter fixed 28-9-1954 for delivery or judgment in the case. On this fact the present petition was filed in which it is alleged that after handing over charge, the opposite party No. 1 ceased to be the magistrate of Kanpur and had no right to pronounce the judgment in the case referred to above.

Notice has been issued to the other side. Counter-affidavit has been filed along with which a copy of the notification issued by the State Government on 25-9-1954, has been filed. The said notification has been issued under S. 10, sub-s. (2), Criminal P. C., by which the opposite party No. 1, Sri S. N. Verma, District Magistrate, Tehri Garhwal, was appointed as the Additional District Magistrate, Kanpur in addition to his own duties and that he was to have all the powers of a District Magistrate under the said Code.

It is contended by the State Counsel that from the date of the notification he had jurisdiction to deal with the case and he had the power to pronounce judgment.

(2) Mr. Dwivedi who appears for the petitioner has urged that he should be permitted to challenge the validity of the notification issued by the State Government investing Sri S. N. Verma with the powers of the Additional District Magistrate, Kanpur, in addition to his duties as District Magistrate, Tehri Garhwal. The contention of Mr. Dwivedi is that the State Government under S. 10 (2), Criminal P. C., has no power to appoint a magistrate to act as Additional District Magistrate of a district in addition to his duties as a District Magistrate of another district. Section 10, sub-s. (2), Criminal P. C., reads as follows:

"The State Government may appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force as the State Government may direct."

Section 6 of the Code of Criminal Procedure reads thus:

"Besides the High Courts and the courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in India, namely:

1. Courts of Sessions:
2. Presidency Magistrates:
3. Magistrate of the first class:
4. Magistrate of the second class:
5. Magistrate of the third class.

It is, therefore, clear that the courts recognised under the Code of Criminal Procedure are the five courts enumerated above and the Additional District Magistrate and the District Magistrate when exercising their functions as a court, are only the ma-

gistrates first class appointed by the State Government to act either as a District Magistrate or as Additional District Magistrate.

There is nothing in S. 10 which debars a person, acting as a District Magistrate, to be appointed as an Additional District Magistrate in another district.

(3) Reliance has been placed by the petitioner on S. 12 of the Code which provides that :

"the State Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates of the first, second or third class in any district outside the presidency towns and the State Government or the District Magistrate subject to the control of State Government may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code".

(4) The contention of the petitioner is that in this section all magistrates are to be appointed as first, second or third class magistrates besides the District Magistrate, but the word "Additional District Magistrate" is not added along with the District Magistrate in the said section. It is, therefore, urged that the Additional Distrct Magistrate is to be appointed out of the Magistrate of first, second or third class in the district.

I do not think there is any force in this contention of the petitioner. Section 12, Cr. P. C., gives power to the State Government to appoint first, second or third class Magistrate in a particular district. The appointments of the Additional District Magistrates are made under S. 10 (2). There are no limitations placed under S. 10 by which only the magistrate in the district can be invested with the powers of the first class magistrate and in any case under S. 10 it is not laid down that the District Magistrates of other districts cannot be invested with the powers of the Additional District Magistrate in a different district.

(5) My attention was drawn to the language of S. 9, sub-s. (4) which provides that :

"A Sessions Judge of one sessions division may be appointed by the State Government to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in either division as the State Government may direct."

The contention of the petitioner is that if the Legislature intended to invest the District Magistrate of one district with the powers of Additional District Magistrate of another district, one would have found in S. 10 the language similar to that of S. 9, sub-s. (4).

To my mind, this argument has no force. If the Legislature intended to limit the power of the State not to invest the District Magistrate of one district with the powers of Additional District Magistrate of another district, the Legislature could have used clear language in S. 10, sub-s. (2). There is no force in this contention of the petitioner.

(6) So far the State Government has issued a notification under S. 10 (2) investing Sri S. N. Verma with the powers of the Additional District Magistrate of Kanpur in addition to his duties as District Magistrate, Tehri Garhwal, and prima facie it cannot be said that such a notification could not be issued under S. 10 (2) of the Cr. P. C. Sri S. N. Verma had jurisdiction when the trial started before him and the evidence was recorded by him and he completed the trial.

Under those circumstances a writ of prohibition cannot be issued at this stage restraining him from delivering the judgment.

(7) A fundamental distinction between a writ of certiorari and a writ of prohibition is that they are issued at different stages of the proceedings. When an inferior court takes up for hearing a matter over which he has no jurisdictions the person against whom proceedings are taken can move the superior court for a writ of prohibition in which an order will follow forbidding the inferior court to continue the proceedings. If the court has heard the case and given decision, a writ of certiorari will go to quash the decree.

There may be cases where an order has been passed not completely disposing of the case, in that event both the writs will go. A writ of certiorari quashing the order and a writ of prohibition forbidding the court from continuing with the case will stand. As has been observed by their Lordships of the Supreme Court in — 'Hari Vishen Kamath v. Ahmad Syed Isak', (S) AIR 1955 SC 233 at p. 241 (A). "A writ of prohibition will lie when the proceedings to any extent are pending".

According to the case of the petitioner the court of Sri S. N. Verma is no longer in existence and no case is pending before him. Under these circumstances no writ of prohibition can issue against the opposite parties not to continue the case before Sri S. N. Verma.

(8) If after the judgment has been delivered, the petitioner is advised that the order is without jurisdiction he may approach this Court for a writ of certiorari quashing the order passed by him. In my opinion no writ of prohibition can be issued at this stage restraining Sri S. N. Verma from delivering the judgment.

(9) The next point which was urged by the petitioner was that the petitioner is entitled to a de novo trial even if the case is taken after the notification by Sri S. N. Verma for delivery of judgment. It is open to the petitioner to raise this question before him and it will be for Mr. Verma to decide this question on the provisions of the Code of Criminal Procedure. It is not necessary for this Court to give any decision on this question at this stage.

(10) There is therefore no force in this petition and it is accordingly rejected.

D.S.P. Petition dismissed.

(S) AIR 1955 ALLAHABAD 706 (V. 42 C. 215 Dec.)

LUCKNOW BENCH — KIDWAI J. (19-1-1955)

Allah Singh Plaintiff-Applicant v. Tara Singh and another, Defendant-Opposite Party.

Appln. No. 38 of 1949, from judgment of Sm. C. C. J., Lucknow, D/- 31-3-1949.

Transfer of Property Act (1882), S. 68 (1) (b) — Destruction of security.

Mortgaged property in Pakistan — Mortgagor and mortgagee both abandoning property and coming away to India — Security held was not destroyed by reason of partition of India. (Para 1)

Anno: T. P. Act, S. 68 N. 3.

Vishwanath Seth, for Applicant; Ram Saran Bhatia, for Opposite Party No. 1.

ORDER: This is a Small Cause Court case in which the plaintiff sued on the basis of a loan which was secured by an usufructuary mortgage. The mortgage provided for realisation of the money from the person of the mortgagor if there was a defect in title. It is not even alleged that there was any defect in the title of the mortgagor. Since this was an usufructuary mortgage, no suit could be brought on the basis of it apart from the question of personal liability unless it was

shown that the property was destroyed by any cause other than the default of the mortgagor or the mortgagee.

In the present case the property was in the Punjab and the mortgagor and the mortgagee both abandoned it and came away to India. The partition of India did not legally have the effect of destroying the rights of Hindu owners of property in Pakistan or of Muslim in India. The plaintiff is not in possession of the property merely because he chose to abandon it and came away to India. It was no doubt due to the fact that he apprehended danger to his person that he came away to India. That will not, however, affect the position. It was in fact owing to his act that the property was abandoned. The decision of the lower courts must, therefore, be upheld and this application fails and is dismissed with costs.

V.R.B. Application dismissed.

°AIR 1955 ALLAHABAD 707 (V 42, C 216 Dec)

MEHROTRA J. (6-5-1955)

Noor Ali, Plaintiff-Applicant v. Kanpur Omnibus Service Ltd., Defendant-Opposite Party.

Civil Revn. No. 960 of 1950, against order of Sm. C. C. J., Kanpur, D/- 13-2-1950.

(a) Limitation Act (1908), Art. 7 — Bus driver is artisan.

Any person who participates in industrial activities or is a mechanic can be classed as artisan. The word 'artisan' is not confined to an artist who carries on activities in fine arts only. A bus driver employed by a limited concern may not be regarded as a domestic servant. But as the driver has not only to operate upon a bus but in the event of breakdown, he has to repair the bus and has to be a mechanic also, he should, therefore, be included in the category of artisan within the meaning of Art. 7. AIR 1927 Rang 279 — AIR 1936 Cal 808 and AIR 1936 Lah 661, Rel. on. (Paras 3, 4)

Anno: AIR Com., Lim. Act, Art. 7 N. 5.

(b) Payment of Wages Act (1936), S. 18 — Authority appointed under S. 15(1) — Proceedings before him are not civil proceedings within Limitation Act (1908), S. 14.

An authority appointed under S. 15(1), Payment of Wages Act, is a persona designata and cannot be regarded as a Civil Court within the meaning of S. 14, Limitation Act. The proceedings before such an authority cannot be regarded as civil proceedings. (Para 5)

Anno: AIR Com., Lim. Act, S. 14 N. 13.

(c) Limitation Act (1908), Art. 7 — Starting point — Employee suspended and later reinstated — Suit for recovery of wages for period of suspension — Limitation starts from date of suspension and not from date of reinstatement.

Where an employee employed in a Bus Service Company is suspended from service but is later on reinstated in the service, then the cause of action for the recovery of wages for the period of suspension accrues from the date of suspension and not from the date of his reinstatement, unless he pleads the existence of a fresh contract of service, one of the terms of which was that the employer had to pay the full salary of the employee for the period of suspension. (Para 6)

Anno: AIR Com., Lim. Act, Art. 7 N. 6.

CASES REFERRED: Paras

(A) (V14) AIR 1927 Rang 279: 5 Rang 477 3

(B) (V23) AIR 1936 Cal 808: 167 Ind Cas 294 3

(C) (V23) AIR 1936 Lah 661: 160 Ind Cas 1042 3

M. H. Beg, for Applicant; J. Swarup, for Opposite Party.

JUDGMENT: This is a plaintiff's application in revision against the order of the Small Cause Court, Kanpur, dismissing the plaintiff's suit on the ground that the suit is barred by limitation.

(2) The facts briefly are that the plaintiff was an employee of the Kanpur Bus Service Ltd. He was suspended by the management on 3-9-1947 on account of some theft which took place in the premises of the defendant. He was subsequently prosecuted but on 16-7-1948 he was acquitted. On 27-8-1948 after his acquittal he was reinstated by the management. Thereafter the plaintiff brought the present suit for recovery of his arrears during the period of suspension, namely from 3-2-1948 to 26-8-1948. The case set up by the plaintiff was that subsequent to his acquittal he made several applications to the defendant asking for the payment of his wages for the period of suspension but no redress was given to him. Thereafter he took the matter to the Labour Commissioner on 17-8-1948 under S. 15, Payment of Wages Act. Ultimately on 6-12-1948 the Labour Commissioner refused to adjudicate upon the matter and directed the plaintiff to file a suit in a Court of Law. On these facts the present suit was brought and the plaintiff claimed that the cause of action arose to him on 16th July when he was acquitted by the criminal Court and the period from 17-8-1948 to 6-12-1948 during which the matter was prosecuted before the Labour Commissioner should be excluded under S. 14, Limitation Act. The present suit was filed on 26-8-1949.

(3) The Small Causes Judge held that the suit was barred by limitation and dismissed it. The Judge, Small Causes further remarked that it has been admitted by the counsel for the parties that the period of limitation for the present claims is one year as provided in Art. 7, Limitation Act. In the present petition, however, it has been contended that the present suit is not governed by Art. 7, Limitation Act. According to the applicant the Article which is applicable to the present case is Art. 102. Article 7 provides for a suit for the wages of a house-hold servant, artisan or labourer not provided for by the schedule in Art. 4. The starting point of the Limitation is when the wages accrue due. Article 102 provides for the wages not otherwise expressly provided for by the schedule. The contention of the applicant is that he was employed as a bus driver. He can neither be regarded as a house-hold servant nor an artisan or labourer and consequently Art. 7 does not apply to his case. It is contended that an artisan is one who is engaged in some productive work. A bus driver who has only to operate upon a bus and is to observe rules of traffic cannot be regarded as one engaged in productive activities. In Oxford Dictionary the word 'artisan' has been defined to mean a mechanic also. A driver has not only to operate upon a bus but in the event of breakdown, he has to repair the bus and has to be a mechanic also. In the case — 'Sewa Ram v. Lachmi Narayan', AIR 1927 Rang 279 (A), it was held that a motor car driver must possess some skill in manipulating the different parts of the mechanism of the car and he should therefore be included in the category of artisan. This case was tried to be distinguished by the learned counsel for the applicant upon the ground that it was held in that case that the driver should be treated as a domestic servant. In the case of a driver employed by a private individual, it may be said that he is as much a domestic servant as any other servant in the house. But

in the present case the applicant was employed by a limited concern and therefore he cannot be regarded as a domestic servant. It is true that in the Rangoon case the decision was based both on the ground that the driver was included in the word 'artisan' as well as in the words 'domestic servant.' But it cannot be said that it was not decided in that case that the case of a driver is covered by Art. 7, Limitation Act. This case has been followed by the Calcutta High Court in the case of — 'Khagendra Nath Chatterjee v. Kanti Bhushan Banarjee', AIR 1936 Cal 808 (B); and by the Lahore High Court in — 'Sita Ram v. Jagan Nath Singh', AIR 1936 Lah 661 (C). In the Calcutta case it was held that a driver is an artisan and Art. 7 applies to a suit brought by him for the recovery of his wages.

(4) I am in agreement with the view expressed by the Calcutta and the Rangoon High Courts referred to above. In the modern age when the industries have considerably advanced any person who participates in industrial activities or is a mechanic can be classed as artisan. The word 'artisan' is not confined to an artist who carries on activities in fine arts only. Besides this in the present case, as has been observed by the Small Causes Judge, the parties had conceded that Art. 7 applies to the present case. In view of my decision that Art. 7 applies to the present case Art. 102 cannot apply as that is a residuary Article.

(5) The next contention of the applicant is that the period during which he was bona fide prosecuting his claim before the Labour Commissioner should be excluded in computing his claim. Reliance has been placed on S. 14, Limitation Act which provides that in computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due deligence another civil proceedings, whether in the Court of the first instance or in the Court of appeal against the defendant shall be excluded where the proceedings are founded upon the same cause of action and prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain. In the present case an application under S. 15, Payment of Wages Act was made by the plaintiff to the Labour Commissioner for recovery of the arrears of pay. Section 15, sub-s. (2), Payment of Wages Act gives a right to a workman to apply for a direction in cases where contrary to the provisions of the Act any deductions had been made from the wages of an employed person or any payment of wages had been delayed. Reliance has been placed on the provisions of S. 18 which lays down that every authority appointed under sub-s. (1) of S. 15 shall have all the powers of the Civil Court under the Code of Civil Procedure for the purposes of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents and every such authority under Ss. 15 and 17 should be deemed to be the Civil Court for the purposes of S. 195, Chap. XXXV, Criminal P. C. It is strongly contended that an authority under this Act has all the trappings of a Court and the proceedings before such an authority is a civil proceeding. Section 18 only gave power of a civil Court to such an authority for the purposes of requiring the attendance of witnesses and for the purposes of S. 195, Criminal P. C., but still such an authority is a persona designata and cannot be regarded as a civil Court within the meaning of S. 14, Limitation Act. The proceedings before such an authority cannot be regarded as civil proceedings. They are special proceedings under the provisions of an Act for the purposes of giving a speedy relief to a worker, but those proceedings cannot be regarded as Civil proceedings contemplated under S. 14, Limitation Act. The order passed by the learned Commissioner is not before me & it is difficult for me to find out the reasons on which the application was rejected. In the absence of the order of the Labour Commissioner it cannot be held that the application made by the plaintiff applicant before the Labour Commissioner was rejected on account of any defect of jurisdiction and there is therefore no force in this contention of the applicant.

(6) The last point urged by him was that the starting point of limitation was the day on which he was acquitted by the criminal Court and reinstated. The words in col. 3 of Art. 7, Limitation Act are "when the wages accrue due." The case of the plaintiff is that his employment continued uninterrupted. The effect of the reinstatement order was that the suspension order was withdrawn and he was accepted to have continued in his employment from the very beginning. On those facts the right to the wages accrued to him when fell due and his right to sue accrues from the date of suspension. If the case of the plaintiff had been that after his reinstatement a fresh contract of service came into existence and one of the terms of that contract was that the employer had to pay the full salary of the plaintiff for the period of suspension the plaintiff may have been entitled to urge that the cause of action arose on the date when he was re-employed. But the present suit is not based on any fresh contract. It is based on a ground, as I have already pointed out, that the employment of the plaintiff continued as before. He would be regarded as if he was never dismissed from service and on this allegation the cause of action accrued to the plaintiff on the date when he was suspended. There is therefore no force in this revision and it is rejected. I make no order as to costs.

V.S.B. Revision rejected.

AIR 1955 ALLAHABAD 708 (V. 42 C. 217 Dec.)

AGARWALA AND SAHAI JJ. (30-3-1955)

Abdul Wajid, Appellant v. State of U. P. and others, Respondents.

Special Appeal No. 17 of 1955, from judgment of V. Bhargava J. in W. P. No. 166 of 1955.

(a) Municipalities — U. P. Municipalities Act (2 of 1916), S. 87A(3) — It is not necessary that full text of non-confidence motion should be sent along with notice.

In the case of non-confidence motion against the President the law does not require that the full text of the motion should be sent along with the notice. It is enough that the substance of the motion is made known to the members in the notice circulated to them for the meeting to be held to consider the same. The rule printed at P. 630 of the Municipalities Act does not appear to apply to notices issued under S. 87A. (Paras 5 and 8)

(b) Municipalities — U. P. Municipalities Act (2 of 1916), S. 87A — As far as possible a member should be allowed to speak only once.

It would certainly be a wise procedure that so far as possible, a member is allowed to speak only once except the mover of the motion who would, in ordinary circumstances, be given an opportunity to reply to the debate. Ordinarily it is privilege of

the mover to reply to the debate and no other member can speak, as of right, twice except with the permission of the Presiding Officer. (Para 11)

(c) Municipalities — U. P. Municipalities Act (2 of 1916), S. 47A (3) — S. 47A (3) is not ultra vires — (Constitution of India, Art. 14).

Section 47-A gives the President a choice, either to resign at once when a motion of non-confidence has been passed against him or to ask the State Government to dissolve the Board. When he takes recourse to the latter alternative he had to give reasons why the Board should be dissolved. The reasons may be multifarious. The State Government has been given power to consider those reasons and then to decide whether to act upon the advice of the President by dissolving the Board or to ask the President to resign. The State Government has to consider the reasons given, and to weigh the pros and cons of the request made, by the President and has to come to a decision either in favour of the request or against it. Obviously in such a case the State Government has to act reasonbly as the circumstances of the case may require. In such matters a discretion limited only to the two courses pointed out in the section is a discretion which cannot be said to be arbitrary or uncontrolled. It is controlled because the discretion is limited to the two courses pointed in the section; and no further rules for the guidance of that discretion are feasible because the reasons given by the President may be, as already stated, many and varied. It would be an impossible task to lay down rules in such matters as these. It is best to leave such matters to the State Government. The giving of such a discretion, in these circumstances to the State Government cannot, by any stretch of imagination, be called the vesting of discriminatory or arbitrary powers in the hands of the State Government. S. 47A (3) is therefore not ultra vires: AIR 1954 SC 728 and AIR 1954 SC 224, disting. (Paras 16, 17)

Anno: AIR Com., Const. of India, Art. 14 N. 42.

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 728: 1954 SCA 1218 (SC) 15, 18

(B) (V41) AIR 1954 SC 224: 1954 All LJ 203 (SC) 15, 19

S. C. Khare, for Appellant; Standing Counsel for Respondents.

AGARWALA J.:

This is a special appeal against the decision of a learned Single Judge of this Court dismissing the appellant's petition under Art. 226 of the Constitution. The facts briefly are as follows:

(2) In October 1953, the appellant was elected a President of the Municipal Board, Bareilly. On 15-12-1954, a notice of intention to move a non-confidence motion was given by twenty-seven members of the Board to the District Magistrate along with the motion of non-confidence. This was under S. 87A (2) of the Municipalities Act.

(3) Thereupon the District Magistrate issued notice to the members of the Board that a meeting to consider the non-confidence motion would be held on 17-1-1955, at 11 A. M. in the Municipal Office. The notice, however, was not accompanied with a full copy of the non-confidence motion. On 17-1-1955 a meeting was held and the Chairman of the meeting was Mr. R. P. Saksena, Civil & Sessions Judge of Bareilly. He had no copy of the non-confidence motion with him. It was sent for from the office of the District Magistrate within five minutes and the proceedings were commenced by reading out the text of the motion of non-confidence. Thereafter discussions took place, and after discussions votes taken, and 32 persons are said to have voted for the motion, out of 38 that were present. The Presiding Officer thereupon declared the motion to be carried and sent intimation of the same to the District Magistrate and the appellant.

(4) These proceedings are challenged by the appellant on several grounds. It is alleged that the meeting was neither properly convened, nor properly conducted, nor properly constituted. The appellant alleges that as the full text of the motion of non-confidence was not supplied to the members along with notice of the meeting, the meeting was not properly convened. It is further alleged that at the meeting one Om Prakash, a member of the Board, wanted to reply to the allegations made against the President, i. e., the appellant, but he was not allowed to speak by the Presiding Officer on the ground that he had already spoken once. It is alleged that as the discussion could be had for full three hours, and there was enough time and as every member had a right to reply to what had been stated by the other side, the meeting was vitiated because Om Prakash was stopped from replying. Then it is stated that the members of the public were allowed to sit amongst the members of the Board with the result that it was impossible to distinguish as to who was the member of the Board and who was a non-member, and when the recording of the votes was taken by show of hands it was not possible to say whether non-members had raised their hands or not. It was next alleged that when the result of the show of hands was declared by the Presiding Officer 'Om Prakash demanded a poll' which was, however, refused.

(5) So far as the allegation that the full text of the motion for non-confidence was not supplied to the members of the Board along with the notice of holding the meeting is concerned, the law does not require that the full text of the motion should be sent along with the notice. It is enough that the substance of the motion is made known to the members in the notice circulated to them for the meeting to be held to consider the same. S. 87A (3) requires that

"the District Magistrate shall convene a meeting for the consideration of the motion to be held at the office of the Municipal Board on the date and at the time appointed by him and he shall send by registered post a notice of such meeting and of the date and time appointed therefor, to every member of the Board."

(6) Thus it would appear that under this section it would be quite in order if the substance of the motion is communicated to the members in the notice sent to the members.

(7) At page 630 of the Municipalities Act are given rules for the manner of convening meetings and of giving notice thereof. Reliance is placed upon a rule made under S. 297 (1) of the Act for

the manner of convening the meeting and of giving notice thereof. A model is printed at page 630 of the Act and it is alleged that this rule has been adopted by the Municipal Board of Bareilly. The rule provides:

"(1) Not less than three days before a meeting a notice to attend the meeting, signed by the secretary, or, in his absence, by the president or a vice-president, shall be circulated to each member of the Board.

(2) A notice to attend a meeting shall specify every motion or proposition to be brought forward at the meeting along with the case referred to in sub-s. (6) of S. 94 of the Act, the further particulars required by that sub-section and shall state generally any other business to be transacted thereat."

(8) This rule certainly does require that the motion or proposition to be brought forward at the meeting shall be "specified", which means that the full text thereof shall be given in the notice circulated to members. It is, however, doubtful whether this rule applies to the procedure prescribed for motions of non-confidence against the President. S. 87A (1) says, that subject to the provisions of this section, a motion expressing non-confidence in the President shall be made only in accordance with the procedure laid down below. The procedure to be followed for the form of notice is the procedure laid down in S. 87A (6) and above rule does not appear to apply to notices issued under S. 87A.

(9) At the same time, however, it must be stated that it is highly desirable that the full text of the non-confidence motion is mentioned in the notice.

(10) But even if we were of the opinion that the full text of the notice should have been sent to the members, we would have been unable to hold that, in the present case, the meeting was vitiated because of the omission to do so. It is not alleged that the text of the motion was not read at the meeting as stated on behalf of the opposite party. Therefore all the members knew of the text at the commencement of the meeting. But nobody raised any objection that because the text of the motion had not been supplied to them they were not prepared to discuss the motion. The defect in the notice not having been pointed out by any member at the meeting, it would be too late for any one of them to make it a ground of attack against the validity of the meeting. It seems to us that every one knew what the motion was and whoever wanted to say anything had enough opportunity of ventilating his views. No harm was caused by the omission. In the circumstances, it cannot be said that the meeting was not properly or legally convened.

(11) The allegation that Om Prakash, member of the Board, was stopped from replying to the allegations made against the President by the speakers who spoke in favour of the motion of non-confidence is controverted in the affidavit of the Presiding Officer, Mr. R. P. Saksena, filed before us. Even assuming that Om Prakash asked for an opportunity to reply after he had already once spoken at the meeting, it does not appear to us that the action of the Presiding Officer in refusing an opportunity to him to speak a second time was, in anyway, improper. It may be noted that the time limit for such meetings under S. 87A is only three hours. There were 45 members of the Board and if everyone wanted to speak no member could be given more than four minutes. It would certainly be a wise procedure that so far as possible, a member was allowed to speak only once except the mover of the motion who would, in ordinary circumstances, be given an opportunity to reply to the debate. Om Prakash was not a mover of the motion. Ordinarily it is the privilege of the mover to reply to the debate and no other member can speak, as of right, twice except with the permission of the Presiding Officer. We, therefore, do not consider that there is any force in the allegation made by the appellant on this point.

(12) The allegation, that non-members were allowed to sit along with the members and that it was not possible to distinguish the members from the non-members, with the result that nobody could say whether the members alone participated in the voting, is also denied in the affidavit sworn by the Presiding Officer. He has clearly stated that the non-members were sitting separately from the members and they were clearly distinguishable and there was no difficulty in ascertaining whether the members alone were voting or somebody else was also participating in the vote. There is, therefore, no force in this allegation.

(13) It was then urged that when the result of the voting by show of hands was announced by the Presiding Officer, Om Prakash at once demanded a poll. This allegation also is denied by the Presiding Officer in his affidavit. Affidavits of some other persons have been filed on behalf of both the parties in which contradictory allegations have been made on this point. We see no reason, however, to disbelieve the statement of the Presiding Officer.

(14) Lastly it was urged that sub-s. (3) of S. 47A, which prescribes the procedure after the motion of non-confidence has been carried out in the meeting held under S. 87A, is 'ultra vires'. Section 47A lays down that:

"If a motion of non-confidence in the President has been passed by the board and submitted to the State Government and communicated to the President in accordance with the provisions of S. 87A the President shall within ten days of such communication either resign or represent to the State Government to dissolve the Board, stating the reasons therefor."

If such a representation is made the State Government "may after considering the same 'either ask the president to resign or dissolve the Board including the President'". (S. 47-A (2)). It is argued that this sub-section gives an unbriddled power to the State Government either to ask the President to resign or to dissolve the Board and that no rule has been laid down to guide the discretion of the State Government in this respect.

(15) Reliance has been placed upon the decisions of the Supreme Court in — 'Saghir Ahmad v. State of U. P.', AIR 1954 SC 728 (A); and — 'Dwarka Prasad Laxmi Narain v. State of U. P.', AIR 1954 SC 224 (B). We are of the opinion that there is no force in the contention of the learned counsel on this point.

(16) Section 47-A gives the President a choice, either to resign at once when a motion of non-confidence has been passed against him or to ask the State Government to dissolve the Board. When he takes recourse to the latter alternative he has to give reasons why the Board should be dissolved. The reasons may be multifarious. The State Government has been given power to consider those reasons and then to decide whether to act upon the advice of the President by dissolving the Board or to ask the President to resign. The State Government has to consider the reasons given, and to weigh the pros and cons of the request made, by the President and has to come to a decision either in favour of the request or against it. Obviously in such a case the State Government has to act reasonably as the circumstances of the case may require.

(17) In such matters a discretion limited only to the two courses pointed out in the section is a discretion which cannot be said to be arbitrary or uncontrolled. It is controlled because the discretion is limited to the two courses pointed in the section; and no further rules for the guidance of that discretion are feasible because the reasons given by the President may be, as already stated, many and varied. It would be an impossible task to lay down rules in such matters as these. It is best to leave such matters to the State Government. The giving of such a discretion, in these circumstances, to the State Government cannot, by any stretch of imagination, be called the vesting of arbitrary power in the hands of the State Government.

(18) The facts of the two cases cited by the learned counsel were quite different. In 'AIR 1954 SC 728 (A)', S. 3. U. P. Road Transport Act, II of 1951, authorised the State Government to declare that the road transport service in general or on particular routes should be run and operated by the State Government exclusively or by the State Government in conjunction with a railway or partly by the State Government and partly by others in accordance with the provisions of the Act. The whole question was how was the last part of that section to be implemented and carried out? The Supreme Court observed:

"If the State can choose any and every person it likes for the purpose of being associated with the transport service and there are no rules to guide its discretion, plainly the provision would offend against Art. 14 of the Constitution."

But the provision was held not to be 'ultra vires' because the discretion was to be regulated by the provisions of the Motor Vehicles Act. What was urged by the learned counsel was that in the present case the discretion is not to be regulated by any other provision.

(19) In 'AIR 1954 SC 224 (B)', the provisions of Cl. 4 (3), U. P. Coal Control Order, which related to the granting and refusing of licence were held to be 'ultra vires' on the ground that the licensing authority had been given an absolute power to grant, renew or refuse to renew a licence, suspend, cancel, revoke or modify any licence under this Order and the only thing he had to do was to record a reason of the action taken by him; and further that the power could be exercised by any person to whom the State Controller might chose to delegate the same, and the choice could be made in favour of any or every person. In these circumstances it was held that the Order committed to the unrestrained will of a single individual the power to grant, withhold or cancel licence in any way he chose and there was nothing in the order which could ensure a proper execution of the power or operate as a check upon injustice that might result from improper execution of the same.

(20) The State Government in the present case has not been given such unfettered power. It has to weigh the reasons stated by the President for his request of dissolving the board and it is only then that the State Government is expected to come to the conclusion whether to grant the request or not grant it. We are not prepared to hold that these provisions can be termed to be discriminatory or uncontrolled delegation of power.

(21) The result, therefore, is that this appeal fails and is dismissed with costs. We direct that the costs of the State Counsel shall be taxed at Rs. 160/-.

D.S.P. Appeal dismissed.

(S) AIR 1955 ALLAHABAD 711 (V. 42 C 218 Dec.)

HARISH CHANDRA J. (30-8-1954)

Kali Charan and another, Applicants v. State through Chandra Bahadur, Opposite Party.

Criminal Revn. No. 976 of 1952, against decision of Addl. S. J., Bareilly, D/- 9-4-1952.

Criminal P. C. (1898), Ss. 350, 350A — Change in bench of Magistrates — AIR 1953 All 137, Not Foll.

There is no reason why S. 350 should not apply when the personnel of a bench of the Magistrates is changed during the trial. If at the time when such change occurred the accused on being asked whether he wanted a de novo trial did not demand that the witnesses or any of them be resummoned and reheard and the trial proceeded, it could not be regarded as illegal. AIR 1943 All 20, Rel. on; AIR 1953 All 137, Not foll (Para 1)

Anno: Cr. P. C., S. 350 N. 2; S. 350A N. 4.

CASES REFERRED: Paras

(A) (V40) AIR 1953 All 137 : 1952 All LJ 760: 1953 Cri LJ 379 1

(B) (V30) AIR 1943 All 20: 44 Cri LJ 203 1

B. C. Saxena, for Applicants; Aqiq Hasan, for Opposite Party.

ORDER: The learned Additional Sessions Judge of Bareilly set aside the conviction and the sentence passed upon the opposite party Chander Bahadur on the ground that both the Bench Magistrates who delivered the judgment had not been present throughout the proceedings in that case. The judgment in the case was delivered by two members of the Bench, namely, Sri Mohan Lal and Srimati B. Goel. The former was present throughout the proceedings, but Srimati B. Goel appeared at a later stage. But when she joined the bench and replaced another member of the bench at the hearing of this case, the accused was asked whether he wanted a 'de novo' trial and he said that he did not. The provisions of S. 350 Criminal P. C., were thus substantially complied with, and I do not see how the further trial of the case by Sri Mohan Lal and Srimati B. Goel can be regarded as illegal.

The learned Additional Sessions Judge relied upon a case decided by this Court on 26-2-1952, Criminal Revn. No. 551 of 1951 — 'Jai Ram v. The State', AIR 1953 All 137 (A). In that case, however, the effect and scope of S. 350A alone seem to have been considered. There was a num-

ber of changes in the constitution of the bench in that case and almost on every occasion the accused were asked whether they wanted a 'de novo' trial and they said that they did not. But the effect of the statement made by the accused persons on each occasion on which the constitution of the bench was changed that they did not want a 'de novo' trial does not seem to have been considered.

There is another case of this Court — 'Har Narain v. Emperor', AIR 1943 All 20 (B), which was decided by Allsop J. He saw no reason why S. 350 should not apply when the personnel of a bench, is changed during the trial. If at the time when such change occurred the accused did not demand that the witnesses or any of them be resummoned and reheard and the trial proceeded, it could not be regarded as illegal. I am, therefore, of the view that the learned Sessions Judge did not correctly set aside the conviction and the sentence passed upon the applicant merely because there had been a change in the constitution of the bench during the trial of the case.

(2) I, accordingly, set aside the order of the learned Additional Sessions Judge dated 9-4-1952, and direct that the appeal be reheard on the merits and decided according to law.

D.H.Z. Revision allowed.

°AIR 1955 Allahabad 712 (V. 42 C. 219 Dec.)

JAMES J. (14-7-1955)

Jagannath Singh and another, Applicants v. Bidheshi and others, Opposite Party.

Criminal Reference No. 211 of 1953 and Misc. No. 540 of 1955.

Criminal P. C. (1898), Ss. 369, 561-A, 439 and 440 — Power of High Court to review its decision.

In normal circumstances the High Court has no power to review its previous decision in a criminal case but where a mandatory provision of law has been contravened resulting in abuse of the process of the Court it is entitled to correct an obvious error. (Para 2)

Thus, where a reference to the High Court arising out of the proceedings under S. 145, Criminal P. C., is decided ex parte without hearing the successful party or his counsel there is no contravention of any mandatory provision of law and the High Court is not entitled to review its decision or order. In such a case the absent party was neither an accused person within S. 439 (2) nor had a right to be heard in view of S. 440. (Paras 5, 6)

Anno: AIR Com., Criminal P. C., S. 369 N. 5; S. 439 N. 45; S. 440 N. 2; S. 561A N. 3, 4.

S. N. Misra, for Applicants; V. K. S. Choudhary and P. C. Chaturvedi, for Opposite Party.

ORDER: In a case under S. 145, Criminal P. C., Jagannath Singh and another were one contesting party and Bidheshi Chamar and others the other party. The Magistrate held Bidheshi Chamar etc., to be in possession of the disputed property and forbade the other party from interfering with their possession. Jagannath Singh and his colleague went up in revision to the Sessions Judge, who after hearing the parties and examining the evidence made a reference to this Court recommending that the Magistrate's order be set aside.

The reference came up for hearing before me on 7-3-1955. That day Jagannath Singh and his colleague were duly represented by counsel, but Bidheshi Chamar etc., were found absent despite personal service, nor was there any counsel to represent them. After examining the Sessions Judge's order of reference and hearing the counsel for Jagannath Singh I held that the reference was a perfectly correct one; accordingly I accepted it.

Subsequently Bidheshi Chamar, etc., through Sri S. N. Misra, Advocate, filed this application praying that the order of 7-3-1955 be recalled, the Sessions Judge's reference restored to its original number and disposed of after hearing the parties.

(2) It is this restoration or review application which is now before me for final orders, and the question for decision is whether or not in the circumstances of the case I have power to review my previous order. Mr. S. N. Misra for the applicants has cited a number of rulings to show that I have such power, while Mr. P. C. Chaturvedi relying on some recent rulings has argued that I have not.

After a careful examination of these rulings and also of the decisions mentioned at page 2183 of B. B. Mitra's "Code of Criminal Procedure" (12th Edn.) my view is that in normal circumstances the High Court has no power to review its previous decision in a criminal case but that where a mandatory provision of law has been contravened resulting in abuse of the process of the Court it is entitled to correct an obvious error.

(3) It should here be stated that it appears that on notice of the Sessions Judge's reference being given to the parties Bidheshi Chamar, etc., engaged Mr. Misra and accordingly he filed his 'parcha' in the office. But through some mistake the parcha was not brought on the record, with the result that Mr. Misra's name was omitted from the cause List. This was the reason why he was unable to appear when the reference was taken up by me on 7-3-1955.

Accordingly Mr. Misra contends that since it was through no fault of his that Bidheshi Chamar,etc., remained unrepresented at the hearing an abuse of the process of the Court has taken place, which I should now remedy under S. 561A, Criminal P. C.

(4) I am prepared to concede that had this been an appeal by a convicted man there would have been force in Mr. Misra's argument, for such a man has a right to be heard before his appeal is decided and any decision without hearing him would be in breach of a mandatory provision of the law.

(5) Further, even in a revision no order can be made to the prejudice of the accused person unless he has had an opportunity of being heard either personally or by counsel in his own defence — Vide S. 439 (2), Criminal P. C. But in the present case Bidheshi Chamar, etc., are neither convicted men nor accused persons, while S. 440, Criminal P. C., clearly lays down that no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision.

It is manifest that Mr. Misra's clients in the Reference had no right to be heard by this Court either personally or through him. It follows that if the Reference was decided without hearing them no contravention of any mandatory provision of the law took place. On the other hand, the order of Reference, which incidentally gives all the facts in detail, was carefully considered before final orders were passed on 7-3-1955.

(6) In these circumstances I am firmly of opinion that I am not entitled to review my order of that date. This application must therefore be dismissed.

(7) Leave is refused.

V.S.B. Application dismissed.

END

THE

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1955

[Vol. 42]

ANDHRA SECTION

WITH COMPARATIVE TABLE FOR

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ANDHRA HIGH COURT

1955

CHIEF JUSTICE:

The Hon'ble Mr. Justice K. Subba Rao, B.A., B.L., (5-7-1954).

PUISNE JUDGES:

The Hon'ble Mr. Justice P. Chandra Reddy, B.A., B.L. (5-7-1954).
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" " Bhimasankaram, M.A., B.L. (1-11-1954).
" " P. Satyanarayana Raju B.A., B.L. (1-11-1954).
" " N. D. Krishna Rao, M.A. Bar-at-Law, I.C.S. (21-2-1955).

AD HOC JUDGES:

The Hon'ble Mr. Justice P. Satyanarayana Rao, M.A., M.L. (7-3-1955).
(appointed as Member, Law Commission from 5-9-1955).
The Hon'ble Mr. Justice A. V. Viswanatha Sastri, B.A., B.L. (7-3-1955).

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Messrs. Rama Rao and Reddy Advocates, Guntur,

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Andhra High Court

(S) A.I.R. 1955 ANDHRA 1 (Vol. 42, C.N. 1)

SUBBA RAO C. J. (28-10-1954)

Janni Bibi, Petitioner v. Mohammed Abdul Rahaman, Respondent.

Criminal Revn. No. 693 and Cri. Revn. Petn. No. 647 of 1954, from order of Dist. Magistrate, West Godavari at Eluru, D/- 30-6-1954.

(a) Criminal P. C. (1898), Ss. 488, 489(1) and 490 — Order under S. 488 — Foundation of — Divorce of wife — Cancellation of order.

The existence and continuation of conjugal relationship is the foundation of an order directing payment of maintenance under S. 488 and for enforcing it under S. 490. The Magistrate is, therefore, bound to decide the question of the woman's status as a wife, or the question of divorce if raised at the time of making the order or even at the time when the wife seeks to enforce it. There is no justification for not conferring that power on a Magistrate to cancel an order of maintenance, if an application to that effect is filed before him. Divorce of the wife is certainly a change in the circumstances for she loses her status as a wife. Consequently the Magistrate can alter an order of giving allowance by cancelling it. AIR 1921 Nag 7 and AIR 1947 Mad 461, Followed. 5 All 226 and 19 All 50 (FB), Not followed. (Para 10)

Anno: Cr. P. C., S. 488 N. 8 Pts. 1, 2, 3, 8; S 489 N. 3 Pts. 1 to 5; S. 490 N. 1 Pt. 1.

(b) Criminal P. C. (1898), Ss. 488(6) and 489 — Order under S. 489 — Notice to party — Principle of natural justice.

The fact that S. 488(6) provides that evidence should be taken in the presence of the husband and the fact that such a provision is absent in the case of an application for modifying that order cannot by necessary implication abrogate the salutory rule based upon principles of natural justice, that a judicial order cannot be made affecting a party without giving reasonable notice. (Para 11)

Anno: Cr. P. C., S. 489 N. 1.

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(J) (V12) AIR 1925 Mad 491: 48 Mad 503: 26 Cri LJ 732 9

N. C. V. Ramanujachari, for Petitioner; M. A. Khader, for Respondent; Public Prosecutor, for the State.

ORDER: This is a revision against the order of the Court of the District Magistrate, West Godavari, setting aside the order awarding maintenance to the petitioner under S. 488, Criminal P. C.

(2) The petitioner and the respondent are Muhammadans. She married the respondent some years ago, and had three children by him. She filed M. C. No. 5 of 1950 on the file of the Sub-Divisional Magistrate's Court, Eluru, under S. 488, Criminal P. C., and obtained an order for maintenance at the rate of Rs. 30/- per month. Subsequently, in M. C. No. 2 of 1952, the Honorary Additional Ist Class Magistrate enhanced the rate of maintenance from Rs. 30/- to Rs. 32/- per month.

The respondent alleging that he divorced the petitioner by uttering 'Talak' thrice before respectable people on or about 27-4-1954, filed M. C. No. 10 of 1954 before the District Magistrate, Eluru, for cancelling the order of maintenance. After infructuous attempts to serve the petitioner, she was declared ex parte. After examining P. W. 1 and the documents filed, the learned District Magistrate declared that the orders made in M. C. No. 5 of 1950 and 2 of 1952 were unenforceable from 27-4-1954 and accordingly set them aside. The wife has filed the aforesaid revision.

(3) The learned counsel for the petitioner contended that the District Magistrate had no jurisdiction to cancel the order of maintenance on the ground that the wife was divorced. He also

argued that the learned Judge violated the principles of natural justice in making an order behind the back of the petitioner. The learned counsel for the respondent countered the argument by contending that the Magistrate had ample power to do so under S. 489, Criminal P. C., and that, under the provisions of that section, the presence of the wife was not required for making any order against her.

(4) To appreciate the contentions of the parties, it may be convenient at this stage to read the relevant provisions of the Criminal Procedure Code:

"Sec. 488:

(1) If any person having sufficient means neglects or refuses to maintain his wife..... the District Magistrate, a Presidency Magistrate a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such persons to make a monthly allowance for the maintenance of his wife .....at such monthly rate.....

(6) All evidence under this Chapter shall be taken in the presence of the husband.....or when his personal attendance is dispensed with, in the presence of his pleader and shall be recorded in the manner prescribed in the case of summons cases:

Provided, that if a Magistrate is satisfied that he is wilfully avoiding service or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case ex parte. Any order so made may be set aside for good cause shown on application made within three months from the date thereof.

Sec. 489:

(1) On proof of a change in the circumstances of any person receiving under S. 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit: Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

Sec. 490:

A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid, and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due."

(5) A combined reading of the provisions may be stated thus: A wife, who has been neglected, or refused to be maintained, may apply to a Magistrate against her husband for payment of a monthly allowance. Such an application shall be decided in the presence of the husband. But to prevent abuse of the provision an ex parte procedure is prescribed, which enables the Magistrate to pass an ex parte order and also gives a right to the husband to get it set aside for good cause. If there is a change in the circumstances of either party, the order can be altered suitably. The order originally made or subsequently modified can be enforced by a Magistrate against a person bound by that order.

The entire fascicule of the sections pre-supposes the continued existence of the marital relationship. If a woman files an application under S. 488(1) for maintenance against her alleged husband the said claim can be certainly be defeated by alleging and proving that she is not his wife, for in that case, the foundation of the claim disappears.

(6) There is a consensus of judicial opinion in support of this view. It has been held by all the High Courts that it is the duty of the Magistrate to decide that question if raised. The 'ratio decidendi' of the said decisions is clearly brought out by Mahmood J. in a very early decision in — 'the matter of the petition of Din Muhammad', 5 All 225 (A), wherein the learned Judge stated that it is

"as essential to the continued operation, as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed, and consequently a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce."

It cannot also be disputed that, if the conjugal relationship ceases, the order of maintenance becomes unenforceable under S. 490, Cr. P. C. This view has been accepted by a long line of cases: — 'Abdur Rohoman v. Sakhina', 5 Cal 558 (B); — 'In re. Kasam Pirbhai', 8 Bom HCR Cr 95 (C); — 'In re. Abdul Ali Ismailji', 7 Bom 180 (D); — 'Mahomed Abid Ali v. Ludden Sahiba', 14 Cal 276 (E) and — 'Ahmad Kassim v. Khatun Bibi', AIR 1933 Cal 27 (F). The principle accepted by those decisions is succinctly stated by Mahmood J. at page 229:

"The whole of Chapter XLI, Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of conjugal relation as a condition precedent to an order of maintenance, and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. When and in what manner a cessation of the conjugal relation takes place, is a question which 'ex necessitate rei' must be determined according to the personal law to which the parties concerned are subject."

(6a) There ends the unanimity of opinion. There is a conflict on the question whether, in such a contingency, an application under S. 489, Cr. P. C., is maintainable. Under S. 489 an order fixing a monthly allowance under S. 488 can be altered on proof of a change in the circumstances of a party to that order. The question is whether the dissolution of the marriage by divorce is one of the changes in the circumstances which empowers a Court to alter the allowance given to the wife. There are two views on this question. Mahmood J. in — 'In the matter of the petition of Din Muhammad (A)' while construing the provisions of S. 536 of Act 10 of 1872, corresponding to the present S. 489, held that the alteration in the

allowance contemplated therein only refers to a power to alter the amount and not to a total discontinuance thereof. The view of Mahmood J. was accepted by the Full Bench in — 'Shah Abu Ilyas v. Ulfat Bibi', 19 All 50 (G). Aikman J. who delivered the leading judgment, made the following observations:

"The change in circumstances referred to in S. 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed and not a change in the status of the parties which would entail the stoppage of the allowance."

(7) A contrary view was expressed by the Nagpur High Court in — 'Emperor v. Shaik Daud', AIR 1921 Nag 7 (H) wherein Halifax A. J. C. countered the arguments advanced for the former view in the following terms:

"I am unable in the first place to see what the position of the words 'wife or child' has to do with the question. They are merely a part of the description of one of two classes of persons in whose circumstances a change would empower the Magistrate to make an alteration in the allowance. They are indeed otiose and might easily have been omitted. As to the limitation of the amount, that is merely a maximum, and to say that because of that limitation the alteration could not be to nothing, would be to say that because of the same limitations in S. 488 the Magistrate could not refuse to give allowance on proof that the applicant was not the wife or child of the non-applicant."

(8) The former is a stricter view, but the latter is a more equitable one. Though equity has no place in construing statutory provisions, there is no reason why it should not be adopted if the express words without doing violence to the language bears such a meaning. Yahya Ali J. in — 'In re Mohammed Rahimullah', AIR 1947 Mad 461 (I) had to consider the conflict between these two views and concluded his discussion in the following words:

"I hold, therefore, in agreement with the view expressed by the Nagpur High Court in the case cited above which is the view consistently obtaining in all the Courts that in circumstances such as those which are assumed to exist in the present case, the Magistrate is not only bound to refuse to enforce the order under S. 490, Cr. P. C., but is also empowered under S. 489, Cr. P. C., to alter the amount payable under it to nothing, that is to say by a combined effect of both these provisions he is competent to set aside the order."

(9) So too, Krishnan J. in — 'Meenakshi Ammal v. Karuppanna Pillai', AIR 1925 Mad 491 (J), rejected the contention that, under S. 489 the Magistrate could not altogether cancel the order of maintenance, but could only alter it or reduce it. In the learned Judge's view the word "alter" was not used in any such restricted meaning and the reduction of the maintenance to nothing would also come within the meaning of the word "alteration". The opinion expressed by Kuppuswamy Ayyar J. at the earlier stage, when the learned Judge remanded the matter for fresh disposal, was explained by Yahya Ali J. in — 'AIR 1947 Mad 461 (I)' when he finally disposed of the case on the ground that the observations were only obiter.

(10) The legal position may, therefore, be enumerated. The existence and continuation of conjugal relationship is the foundation of an order directing payment of maintenance under S. 488, Cr. P. C., and for enforcing it under S. 490, Cr. P. C. The Magistrate is, therefore, bound to decide the question of the woman's status as a wife, or the question of divorce if raised at the time of making the order or even at the time when the wife seeks to enforce it. To that extent, there is no conflict. So much conceded, I do not see any justification for not conferring that power on a Magistrate to cancel an order of maintenance, if an application to that effect is filed before him.

The question is whether the wording of S. 489(1) is comprehensive enough to make in an application to cancel an order of maintenance on the question of divorce. It may be that the wording is susceptible of conflicting views. But when the power of the Magistrate to decide the status of the woman is conceded, there is no reason to prefer the narrower view to a more comprehensive one. The words "change in the circumstances" and "alteration in the allowance" are wide enough without doing violence to the language to take in divorce and cancellation of the allowance.

Divorce of the wife is certainly a change in the circumstances for she loses her status as a wife. Consequently the Magistrate can alter an order giving allowance by cancelling it. This interpretation would prevent a lacuna in the Code and also multiplicity of proceedings. I would prefer to accept the broader view expressed by Yahya Ali J. to that of Mahmood J. I would hold that the application under S. 489 read with S. 490 was maintainable for cancelling the order giving maintenance to the petitioner.

(11) It is then argued for the petitioner that from a comparative study of the provisions of Ss. 488(5) and 489, S. 488(5) expressly provides for ex parte procedure, whereas S. 489 does not prescribe any such procedure. It is clear that, in the latter case, no ex parte order can legally be made. An equally extreme contrary view was suggested by the learned counsel for the respondent that, in the case of a cancellation or modification of an order affecting the wife, her presence is not legally required, under the section. The two views, if I may say so, are based on a misapprehension. There is a distinction between ex parte procedure and the procedure complying with the principles of natural justice. Unless a statute expressly conferred a power, a final decree or order, whether ex parte or on merits, cannot be set aside.

But in accordance with the maxim 'aude alteram partem' no judicial order can be made affecting the rights of a person, unless a reasonable opportunity has been given to him to show why it should not be made. This necessarily implies a notice to the affected party giving him an

opportunity to show cause. The fact that S. 488(6) provides that evidence should be taken in the presence of the husband and the fact that such a provision is absent in the case of an application for modifying that order cannot, in my view, by necessary implication abrogate the salutary rule based upon principles of natural justice, that a judicial order cannot be made affecting a party without giving reasonable notice.

In the case of an order against the husband for maintenance a specific provision was made as it would be an executable order. But once an order is made in favour of the wife, there is no reason or principle why it should be modified either in favour of the husband or wife without giving them reasonable opportunity to show cause against it. In such circumstances, the procedure should be governed by principles of natural justice. Though an abortive attempt was made to save the petitioner, I am not satisfied from the record that such an opportunity was given. Now that the petitioner is before this Court, in the interests of justice, the matter may be remanded to be disposed of in her presence in accordance with law.

(12) Before I leave this case, another argument advanced by the learned counsel for the respondent may be mentioned. It is said that the divorce was in bidaat (sinful or abominable) form and not in ahaam (best) form and that the bidaat form operates as an immediate and effective divorce. This question also may be raised before the Magistrate.

(13) In the result, the order of the Magistrate is set aside and the matter is remanded to him for fresh disposal according to law.

V.R.B. Order set aside.

(S) A.I.R. 1955 ANDHRA 4 (Vol. 42, C.N. 2)

UMAMAHESWARAM J. (15-9-1954)

Kondapaneni Raghavaiah and another, Petitioners v. Inguva Lakshminarayana and another, Respondents.

Civil Misc. Petn. No. 7127 of 1954.

Civil P. C. (1908), S. 151 — Stay of sale in execution of decree obtained in independent suit to which applicant was not a party.

High Court in exercise of its inherent jurisdiction can stay not only the trial of an independent suit in the course of the proceedings pending before it, but also proceedings in execution of a decree in an independent suit if it is in the interests of justice or to prevent abuse of process of the Court and there is no other remedy available to the applicant. In order to attract the terms of S. 151, C. P. C., two conditions have to be satisfied; (1) that the applicant for stay has no other remedy available in law, which he can seek from a competent civil court, and (2) that the stay has to be ordered in the ends of justice or to prevent abuse of process of the court. The mere fact that the suit, the trial of which is sought to be stayed, is an independent suit and is not in any way connected with the suit under appeal is not a sufficient ground for denying the exercise of the power under S. 151, C. P. C. (Para 3)

Stay of sale of property in execution of a mortgage decree obtained in a suit to which the applicant was not a party was granted pending the disposal of an appeal in which the question of title to the property was in dispute. (Para 3A)

Anno: Civil P. C., S. 151 N. 2.

CASES REFERRED: Paras

(A) (V35) AIR 1948 Mad 138: 1947-1 Mad LJ 330 3

(B) (V35) AIR 1948 Mad 150: 1947-1 Mad LJ 365 3

(C) (V37) AIR 1950 Mad 219: 1949-2 Mad LJ 645 3

A. Subrahmanyam for Row and Choudari, for Petitioners; G. Chandrasekhara Sastry (for No. 1) and K. Suryanarayana (for No. 2), for Respondents.

ORDER: The appellant and the 4th respondent in A. S. No. 106 of 1950 filed C. M. P. No. 7127 of 1954 under S. 151, C. P. C., to stay the proceedings in E. P. No. 98 of 1954 in O. S. No. 170 of 1950 on the file of the District Munsif's Court of Tenali, pending disposal of A. S. No. 106 of 1950 in the following circumstances:

(2) The 1st petitioner purchased the property which is the subject-matter of the dispute in the appeal, from one Satyanarayana, the adopted son of Narasimham. The plaintiff who filed O. S. No. 170 of 1950 claimed those properties from the widow of Narasimham and the Court below held that Narasimham's widow was absolutely entitled to the suit property and that Satyanarayana has no right to sell the property to the 1st defendant. He has, therefore, preferred A. S. No. 106 of 1950.

The 2nd respondent who is impleaded as a party to C. M. P. No. 7127 of 1954, is a mortgagee from Satyanarayana. He filed a suit for the enforcement of his mortgage and obtained a decree in O. S. No. 170 of 1950 on the file of the District Munsif's Court of Tenali, impleading the petitioners herein, Satyanarayana and the 1st respondent herein as parties to his suit. The 1st respondent herein contended that he was not a necessary party as he was not claiming title from Satyanarayana, but only from his adoptive mother and the objection was upheld. The mortgagee is now proceeding to bring the mortgage properties to sale and hence the application for stay under S. 151, C. P. C., was filed in the appeal impleading the mortgagee-decree-holder as a party.

(3) The main contention of the learned Advocate for the petitioners is that if they succeed in the appeal and their title is upheld, they will deposit the mortgage amount due under the decree. If the appeal is dismissed, and the decree of the Court below that Satyanarayana has no title to the property is confirmed, they will not be bound to pay the amount in O. S. No. 170 of 1950. So they seek orders of stay under S. 151, C. P. C.

The learned Advocate for the respondents contends that the petition is not maintainable as the proceedings in O. S. No. 170 of 1950 on the file

of the District Munsif's Court of Tenali, have become final, no appeal having been preferred therefrom, and that the inherent powers of the Court ought not to be exercised for granting stay in an appeal to which he is not a party. I do not agree with the contention of the learned Advocate for the respondent.

Mr. Justice Yahya Ali held in — 'Balaji Rao v. Natesa Chetty', AIR 1948 Mad 138 (A) and — 'Kumarappa Goundan v. Ramaswamy Goundan', AIR 1948 Mad 150 (B) that the High Court in exercise of its inherent jurisdiction can stay the trial of an independent suit in the course of the proceedings pending before it, if it is in the interests of justice or to prevent abuse of process of the court and there is no other remedy available to the applicant.

In order to attract the terms of S. 151, C. P. C., two conditions have to be satisfied; (1) that the applicant for stay has no other remedy available in law, which he can seek from a competent civil court, and (2) that the stay has to be ordered in the ends of justice or to prevent abuse of process of the court. The mere fact that the suit, the trial of which is sought to be stayed, is an independent suit and is not in any way connected with the suit under appeal has been held not to be a sufficient ground for denying the exercise of the power under S. 151, C. P. C.

Mr. Justice Somasundaram followed the two decisions of Mr. Justice Yahya Ali referred to supra in — 'Ahmed Abdul Sukkoor v. Vallabhadas Kanji Firm', AIR 1950 Mad 219 (C). I agree with those decisions and hold that this court in the exercise of its powers under S. 151, C. P. C., is entitled to stay not only the trial of an independent suit, but also proceedings in execution of a decree in an independent suit. If this court is entitled to stay the trial of a suit, there is no reason why it should have no power to stay the execution of a decree in appropriate cases. The reasoning contained in the decisions referred to supra equally applied to execution proceedings, if the interests of justice so require.

(3A) So the only question that has to be considered in the present case is whether the facts warrant stay being granted. As the title of Satyanarayana has been found against, the petitioners herein are not now interested in averting the sale, but if they should succeed in the appeal, they would be vitally interested in paying off the amount due under the mortgage decree and prevent the sale. So till the question of title is decided by the High Court, it is not just and proper that the properties should be brought to sale. Moreover, it is not in public interests that a property which is found not to belong to Satyanarayana should be brought to sale in execution of the decree, in O. S. No. 170 of 1950 obtained by a mortgagee from Satyanarayana.

I do not agree with the contention of Mr. Chandrasekhara Sastri that the properties may be permitted to be brought to sale, though there is a cloud on the title and purchased by a speculator for a song. It is not proper that the property should be brought to sale when the question of title is still pending appeal in the High Court. The mere fact that Satyanarayana or the mortgagee from him, i.e., the 2nd respondent herein, is not a party to the suit or appeal does not affect the question. So in my opinion, the interests of justice would be best served by directing stay.

(4) The application for stay was not filed till the properties were brought to sale and the 2nd respondent incurred expenses for sale. I would, therefore, direct the petitioner to pay a sum of Rs. 100/- by way of costs of sale to the 2nd respondent herein within two weeks from today. So, I grant stay on condition of the petitioners paying Rs. 100/- to the 2nd respondent's advocate within two weeks.

(5) I understand that the appeal was heard in part in 1953 and was referred to a Bench. I direct that the appeal should be posted for hearing as early as possible after the re-opening of the High Court after Dasara holidays.

R.G.D. Order accordingly.

(S) A.I.R. 1955 ANDHRA 5 (Vol. 42, C.N. 3)

UMAMAHESWARAM J. (24-9-1954)

Eluri Krishnamurthy and others. Defendants Appellant v. Eluri Suryakantamma, Plaintiff, Respondent.

Appeal No. 751 of 1950, against judgment and decree, of Sub. J., Masulipatam, D/- 25-2-1950.

(a) Hindu Law — Maintenance — Widow — Rate of — (Civil P. C. (1908), Preamble — Precedents — Andhra High Court to normally follow Madras Full Bench and Division Bench rulings).

So far as the Madras High Court is concerned, while awarding maintenance to a widow what has to be taken into consideration is the share which her husband would have been entitled to on partition were he then living at the time of the filing of the suit for maintenance or for enhancement or reduction of maintenance. AIR 1915 Mad 26; AIR 1953 Mad 159 (FB) Followed. (Para 7)

With a view to avoid uncertainties or unnecessary complications, the Andhra High Court should normally follow the Full Bench or Bench Divisions of the Madras High Court in matters of procedure or even substantive law unless those decisions are manifestly wrong or opposed to legal principles. (Para 8)

The Court, in determining the rate of maintenance, should have regard to the value of the estate, the income derived therefrom, position and status of the family and the reasonable wants of the widow including not only the ordinary expenses of living, but what she might reasonably expend for religious and other duties incidental to her status in life. (Where the net income representing her husband's share was Rs. 500/- or Rs. 600/- the amount of maintenance fixed by the Court below, that is Rs. 400/- was held to be reasonable and proper.) (Para 8)

As regards the basis for arrears of maintenance, his Lordship agreed with AIR 1953

Mad 159 (FB), that if the income representing the undivided share of the husband, which has survived to the other members increases or decreases, the rate of maintenance payable to the widow has also to be varied according to the circumstances. The co-parceners to whom the right has passed by survivorship are not bound to pay more than the income representing that undivided share. It is certainly the income derived by the family as on the date of the suit for maintenance, or on the date when the suit for enhancement or reduction of maintenance is filed, that will have to be taken into account. But on the question of whether it necessarily follows that what has to be taken into consideration is not the share which the husband was entitled to at the time of his death, but the share which he would have been entitled to on partition were he then living as on the date of the suit for maintenance, or for the enhancement or reduction of maintenance, his Lordship did not express any opinino. 27 Mad 45 considered. (Para 9)

Anno: C. P. C. Preamble N 15

(b) **Hindu Law — Maintenance — Widow — Arrears — Right to — Demand and refusal is not necessary.**

The claim to maintenance arises when it is unlawfully withheld by the members of the family. The widow is entitled to maintenance from the date of her husband's death. The law of limitation provides that she is entitled to claim arrears of maintenance for a period of 12 years. No demand and refusal are necessary to create that right. AIR 1934 Mad 401, Followed. AIR 1954 Mad 713, Relied on. (Para 10)

The only legal grounds on which arrears of maintenance may be disallowed are waiver, abandonment or estoppel. The conduct of the widow must be such as to estop her from claiming arrears or lead to such an inference that she abandoned or waived her claim. There is no discretion left in the Court either to cut down the period or reduce the amount of past maintenance. (Para 11)

If the right of the widow is a legal one and if under the law of limitation she is entitled to claim arrears of maintenance for a period of 12 years, the courts are not entitled to exercise a wide discretion in cutting down the period or the rate of arrears. Mayne's Hindu Law 11th Edn. P. 830, Foot note (f) — not followed. AIR 1929 PC 128 Explained. (Para 11)

CASES REFERRED: Paras

(A) (V2) AIR 1915 Mad 26: 27 Mad LJ 291 6, 7
(B) (V26) AIR 1939 Mad 37: ILR (1939) Mad 234 6, 7
(C) (V36) AIR 1949 Mad 31: ILR (1948) Mad 803 7
(D) (V40) AIR 1953 Mad 159: 1952-2 Mad LJ 734 (FB) 7, 9
(E) ('04) 27 Mad 45 9
(F) (V39) AIR 1952 Mad 419: ILR (1952) Mad 835 (FB) 9
(G) (V41) AIR 1954 Mad 576: 1954-1 Mad LJ 250 (FB) 9
(H) (V21) AIR 1934 Mad 401: 57 Mad 1003 10, 11
(I) (V41) AIR 1954 Mad 713: 67 Mad LW 420 11
(J) (V16) AIR 1929 PC 128: 8 Pat 840 (PC) 11

D P. Narayana Rao, for Appellants; G. Chandrasekhara Sastri, for Respondent.

JUDGMENT: The defendants are appellants. O. S. No. 63 of 1945 was filed by the respondent herein on the file of the Subordinate Judge's Court of Masulipatam, for recovery of maintenance, past and future, and for other incidental reliefs.

Her case was that her deceased husband Narsimha Rao and appellants were brothers, that her husband died about 25 years ago soon after her marriage and that no maintenance whatsoever was provided by the appellants to her.

She alleged that the net income realised by the family of the defendants was not less than Rs. 5,000/- a year and that she was entitled to claim future maintenance at the rate of Rs. 50/- per mensem. So far as the past maintenance was concerned, she limited her claim to the sum of Rs. 300/- a year for a period of 12 years. She also prayed that provision might be made for cattle, utensils and residence.

(2) The 4th defendant filed a written statement, which was adopted by his brothers i.e., defendants 1 to 3. He contended that after the death of the father of defendants 1 to 4, their maternal uncle, that is, the plaintiff's father, was managing their affairs and providing maintenance for the plaintiff out of their family income, that the maintenance claim of the plaintiff was settled by providing her with a thatched house and allotting 40 cocoanut trees and 15 palmyrah trees, and that she was not entitled to claim any maintenance, past or future. He also urged that, in any event, having regard to the income of the family, not more than Rs. 100/- per annum should be awarded to her.

(3) The Subordinate Judge of Masulipatam discussed the evidence bearing on this question of settlement of maintenance in paragraphs 5 and 6 and found that the defendants' story was absolutely false. He found that the family income was not less than Rs. 3,000/- per year and awarded future maintenance at the rate of Rs. 400/- per year. He held that the plaintiff was entitled to claim arrears of maintenance for a period of 12 years at the rate of Rs. 200 per year. In lieu of residence, he directed that either a lump sum of Rs. 300/- or a sum of Rs. 2/- per month might be paid. For utensils and other moveables, he allowed Rs. 100/-. The entire "A" schedule properties attached to the plaint were charged for the maintenance decreed.

The defendants have preferred the above appeal reiterating the several objections raised by them in the trial court and the plaintiff has filed a memo of cross-objections claiming enhancement of future maintenance by Rs. 100/-.

(4) So the questions that arise for consideration in the appeal are:

1. Whether the respondent's claim was settled by allotment of a thatched hut and 40 cocoanut trees and 15 palmyrah trees?
2. What is the income of the appellants' family and what amount should be decreed to the respondent for future maintenance?
3. Whether the respondent is entitled to any arrears of maintenance, and if so, how much?

(5) In paragraph 3 of the written statement, the date of the settlement and the names of the mediators who were present at the time are not mentioned. The circumstances under which the settlement took place are also not specified in detail. There is no document evidencing the settlement. The only two witnesses who are examined in support of this statement are the 2nd defendant and his mother, that is, the mother-in-law of the respondent. The court below rightly rejected their evidence as being interested and not worthy of credence. They also do not specify where exactly the cocoanut trees and palmyrah trees allotted to the respondent stand. I have carefully gone through the oral evidence of D. Ws. 1 and 2 and I agree with the finding of the trial court that the settlement pleaded is absolutely false.

(6) So far as the income from the family lands is concerned, I think the estimate of the Subordinate Judge, fixing it at not less than Rs. 3,000/- is a moderate one. (His Lordship went through the evidence and continued:) The learned advocate for the respondent contended that I should take into consideration the income of the family and the share which the respondent's husband would be entitled to as on the date when she filed the suit for maintenance and that I should therefore allow the memo of cross-objections and award future maintenance at the rate of Rs. 500/- per year.

In support of that contention he relied upon the Bench decision of the Madras High Court in — 'Manikka Mudaliar v. Soubagia Ammal', 27 Mad LJ 291: (AIR 1915 Mad 26) (A). The two propositions laid down in that decision are neatly set out in the head-note and are as follows:

"(1) The amount of maintenance should be fixed by reference to the income of the family as it stood at the date of the suit and not as it stood at the date of her husband's death.

(2) The basis of calculation also should have reference to the husband's share as at the date of suit if he were then alive, and not as it was at the date of his death".

In — 'Veerayya v. Chellamma', AIR 1939 Mad 37 at pp. 38-39 (B), Wadsworth J. followed the decision, referred to supra. He distinguished some of the earlier decisions of the Madras High Court and held as follows:

"But on this question of the date with effect from which the husband's share is to be estimated, there is a very clear ruling of a Bench of this Court in — 'Manikka Mudaliar v. Soubagia Ammal', (A), which is later than the cases just referred to, and, so far as I know, has not been challenged by subsequent rulings of this Court in the twenty four years that had elapsed since the decision was passed.

In that case, it was definitely laid down that the maximum amount of maintenance of a widow should be fixed with reference to the income from the husband's share not calculated as on the date of his death but as on the date of the suit regard being had to the increase of the family property, which had taken place in the interval between the date of the husband's death and the date of the suit. That decision must be taken as authoritative, at least so far as I am concerned.

I think it follows that in a suit for enhancement of maintenance the maximum which could be awarded to the widow would be the amount of the income of the share to which the deceased husband would have been entitled had he been alive and co-parcener at the date of the suit for enhancement."

(7) In — 'Audemma v. Varada Reddy', AIR 1949 Mad 31 (C), though the conflict of the Bench decisions of the Madras High Court on this point was noticed, the matter was not referred to a Full Bench. But in — 'Veerraju v. Narayanamma', AIR 1953 Mad 159 at p. 161 (FB) (D), the Full Bench of the Madras High Court approved the decision of the Bench in — 'Manikka Mudaliar v. Soubagia Ammal', (A). Rajamannar C. J., who delivered judgment of the Full Bench, observed as follows:

"On principle we are in entire agreement with the decisions in — 'Manikka Mudaliar v. Soubagia Ammal', (A) and 'Veerayya v. Chalammal', (B). The law is well settled that the widow of a deceased co-parcener in a joint Hindu family has a right of maintenance against the surviving co-parceners 'quoad' the share of her deceased husband which survives to them. This is an absolute right which accrues to her as a member of the joint family.....

"It follows, therefore, that on the death of her husband, a widow continues to be a member of the joint family along with the male co-parceners. Her fortunes are bound up with the fortunes of the family. If the income of the family increases, she will be entitled to the benefit of it. Likewise, if the income of the family decreases, she must submit to a reduction of her maintenance. The learned Advocate for the appellants did not contest the proposition that the quantum of maintenance to which a widow is entitled is subject to variation, even when fixed by the court, by reason of a change of circumstances. This feature is inconsistent with the contention of the appellants that the widow's maintenance should be fixed taking into consideration her husband's share in the income of the joint family at the time of his death and at no subsequent time".

There is, therefore, no doubt that so far as the Madras High Court is concerned, it is authoritatively laid down that what has to be taken into consideration is the share which her husband would have been entitled on partition were he then living at the time of the filing of the suit

for maintenance or for enhancement or reduction of maintenance.

(8) With a view to avoid uncertainties or unnecessary complications, this court should normally follow the Full Bench or Bench Divisions of the Madras High Court in matters of procedure or even substantive law unless those decisions are manifestly wrong or opposed to legal principles. In this particular case, it does not very much matter, as already stated, whether the share of the husband is fixed at 1/6th as on the date when he dies or at 1/5th as on the date of the filing of the suit for maintenance for the difference between 1/5th and 1/6th is only about Rs. 100/-. It is nowhere laid down that the maintenance awarded to the widow should be equal to the share of the husband, though that is the maximum awardable. The Court, in determining the rate of maintenance, should have regard to the value of the estate, the income derived therefrom, position and status of the family & the reasonable wants of the widow including not only the ordinary expenses of living, but what she might reasonably expend for religious and other duties incidental to her station in life. So, whether the net income representing her husband's share is Rs. 500/- or Rs. 600/- the amount of maintenance fixed by the court below, that is Rs. 400/- is, in my opinion, reasonable and proper. I, therefore, confirm the finding of the trial court as regards the quantum of futue maintenance.

(9) Having regard to the facts of the present case, it is unnecessary for me to express my final view as to whether the Full Bench decision of the Madras High Court in — 'Veer Raju v. Narayanamma', (D), should be followed in its entirety or the observations of that eminent Judge Bhashyam Ayyangar in — 'Jayanti Subbiah v. Alamelu Mangamma', 27 Mad 45 at p. 48 (E), should be followed. In his characteristic and forcible way, the learned Judge summed up the legal position as follows:

> "When an undivided Hindu family consists of two or more males related as father and sons or otherwise and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners 'quoad' the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners & though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually, it could be made a specific charge on a reasonable portion of the joint family property, such portion of course not exceeding her husband's share or interest therein".

I quite agree with the reasoning of the Full Bench that if the income representing the undivided share of the husband, which has survived to the other members increases or decreases, the rate of maintenance payable to the widow has also to be varied according to the circumstances. The coparceners to whom the right has passed by survivorship, are not bound to pay more than the income representing that undivided share. It is certainly the income derived by the family as on the date of the suit for maintenance, or on the date when the suit for enhancement or reduction of maintenance is filed, that will have to be taken into account. But does it necessarily follow that what has to be taken into consideration is not the share which the husband was entitled to at the time of his death, but the share which he would have been entitled to on partition were he then living as on the date of the suit for maintenance, or for the enhancement or reduction of maintenance? If the Full Bench decision is followed in entirety, the following difficulties or anomalies might arise.

Assuming that the husband was entitled to 1/X share at the time of his death and to 1/Y share at the time of the filing the suit for maintenance, how and on what basis are the arrears of maintenance to be fixed for the period of 12 years prior to the filing of the suit for maintenance? Is it on the basis of 1/Y share or on the basis of 1/X share? Assume that at the time of filing the suit for maintenance the share of the husband was 1/Y and a charge was created on 1/Y share of the property at the time of filing the suit, for enhancement, or reduction of maintenance, the share of the husband would be 1/Z; is the charge created under the prior decree in respect of 1/Y share to be altered to 1/Z? Why should any uncertainty by reason of the fluctuations in the shares in the joint family be introduced in fixing the maintenance?

The rule laid down by Bhashyam Ayyangar J. in '27 Mad 45 (E)' appears to be more simple and definite as the widow would be entitled to maintenance from and out of his undivided share which passed by survivorship at the time of his death to the surviving co-parceners. Why not apply the reasoning underlying the seventh rule laid down by the Full Bench of the Madras High Court in — 'Peramanayakam Pillai v. Sivaraman', AIR 1952 Mad 419 (FB) (F) which is in the following terms:

> "The share or in other words the fraction of the share which the alienee acquires is unalterably fixed on the date of the alienation and is not subject to fluctuation either by subsequent births or deaths in the family and in all respects his rights must be determined and equities worked out as on the date of the alienation."

The share which the husband was entitled to at the time of his death might be taken as the basis for fixing the maintenance in the same way as the Full Bench has laid down the share of the alienor at the time of the alienation should be taken into account in working out the rights of the alienee.

The recent Full Bench decision of the Madras High Court in — 'Parappagari v. Nagamma', AIR 1954 Mad 576 (G) dealing with the interpretation of S. 3(2), Hindu Women's Right to Property Act, is to the effect that the widow is entitled to the

share which her husband would be entitled to as on the date of instituting the suit for partition and not the share as on the date of his death.

The following observations of Subba Rao J. at page 578 viz.,

"The rights of a widow under general Hindu law in the joint family were well settled. Under the Mitakshara School, a wife of a co-parcener becomes a member of the family though she does not attain the status of a co-parcener. In remote antiquity her claim to a share was recognised; but the later development of law, perhaps due to her subordinate position in the family reduced the content of her rights and confined it to a claim for maintenance from and out of the joint family properties. But her husband's interest in the family property would pass by survivorship to the other members of the family. In essence, her right to maintenance was attached to property for it is payable from out of the property of the joint family and under certain circumstances, it could be made a charge on the joint family property. As a corollary to the aforesaid state of law, it follows that the quantum of maintenance would depend upon the number of sharers in the joint family, the extent of its property and other circumstances obtaining at the time when she seeks to enforce her right"

support the view taken by the earlier Full Bench in — 'Veerraju v. Narayanamma', (D).

As full arguments have not been addressed before me, and as it is not necessary on the facts of the present case to decide as to whether the view of Bhashyam Ayyangar J. in — 'Jayanti Subbiah v. Alamelu Mangamma', (E) or that of the Full Bench in — Veerraju v. Narayanamma', (D) should be followed, I wish to reserve my opinion for a future occasion.

(10) The next question that arises for consideration is whether the Subordinate Judge acted rightly in allowing arrears of maintenance for a period of 12 years at Rs. 200/- per year. The main argument for the learned Advocate for the appellant was that there was no demand made by the widow for maintenance and that she was consequently not entitled to any arrears whatsoever.

He invited my attention to the passage in the deposition of the plaintiff examined as P. W. 1, which is as follows:

"As I was maintained by my father when he was alive, I did not ask for separate maintenance. I asked for maintenance after my father's death about six years back. I demanded through E. Subbiah".

The learned Advocate contended that she had not substantiated her case as to demand, as she did not examine Subbiah and that in any event, she was not entitled to arrears for more than six years as according to her the demand was made only after her father's death.

In my opinion, there is no force in the contention of the learned Advocate for the appellants. The claim to maintenance arises when it is unlawfully withheld by the members of the family. The widow is entitled to maintenance from the date of her husband's death. The law of limitation provides that she is entitled to claim arrears of maintenance for a period of 12 years. No demand and refusal are necessary to create that right.

The law on this point is well summed up by Mr. Justice Krishnan Pandalai in — 'Sobhanadramma v. Varahalakshmi Narasimhaswami', AIR 1934 Mad 401 (H) at page 405 thus:

"The principle of this and subsequent decisions appears to be that the claim to maintenance which arises when it is unlawfully withheld is a legal right. A demand and refusal is not necessary to create the right. They are only of evidentiary value to show that afterwards the withholding must have been wrongful or that there could not be any support of the theory of abandonment or waiver. In the same way, mere non-payment of maintenance though by itself it does not constitute the withholding wrongful is still evidence to show that the withholding was wrongful. The only legal answer to such a claim is either abandonment or waiver or such conduct on the part of the plaintiff as may have misled the defendant into thinking that such a claim would not be made thereby inducing him not to make any provision for it, especially as maintenance is a provision to be made out of the current income of the estate or of the person liable. For the rest, the discretion of the court when applied to the grant of arrears of maintenance will be found to have either been exercised in adjusting the rate at which the arrears have been awarded or in limiting the period by inference from facts of an implied waiver or abandonment or conduct such as above mentioned. The language of the authorities is not in all cases careful to make this distinction clear."

(11)) In this connection, it is sufficient if I refer to a recent decision of the Madras High Court in — 'Nagendramma v. Ramakotayya', AIR 1954 Mad 713 (I) wherein all the cases bearing on this question are collected and discussed in detail. I follow the decision in — 'Sobanadhramma v. Narasimhaswami (H)', and hold that the only legal grounds on which arrears of maintenance may be disallowed are waiver, abandonment or estoppel. The conduct of the widow must be such as to estop her from claiming arrears or lead to such an inference that she abandoned or waived her claim. In my opinion, there is no discretion left in the court either to cut down the period or reduce the amount of past maintenance.

The learned Advocate for the appellant, no doubt, drew my attention to the decisions of the High Courts of Allahabad, Bombay and Nagpur, in which it is held that there is a wide discretion exercisable by the court in awarding arrears. Those decisions take into consideration a number of circumstances such as the want of the widow during that period, the debts contracted by her for supporting herself and the oppressive result of a sudden claim for a large amount by way of

arrears. If the right of the widow is a legal one and if under the law of limitation she is entitled to claim arrears of maintenance for a period of 12 years, I am unable to understand how the Courts are entitled to exercise a wide discretion in cutting down the period or the rate of arrears. If as already stated, she had waived or abandoned her claim for arrears, she might not be entitled to claim any amount. By her conduct she might have led the co-parceners to believe that she would not claim any past maintenance and she might thereby be estopped. I, therefore, find it difficult to follow the passage in Mayne's Hindu Law, 11th Edn. at page 830 or the reasoning of the decisions mentioned in foot-note (f). The passage referred to runs as follows:

"While the right to arrears of maintenance is a legal right, the Court has a discretion to award them at lower rate than future maintenance."

The decision of the Privy Council in — 'Ekradeshwari Bahuasin v. Homeshwar Singh', AIR 1929 PC 128 (J) does not warrant the exercise of any such discretion either in cutting down the period or the rate. If the income of the family during the period for which arrears are claimed is less than the income at the time of the institution of the suit, arrears may certainly be allowed at a lesser rate. In the present case, the respondent has not filed a memorandum of cross-objections claiming arrears of maintenance at a rate higher than that awarded by the court below.

The evidence does not disclose that the widow by living with her parents and not claiming any arrears of maintenance had waived or abandoned the claim or misled the defendants into thinking that she would not claim any arrears. Moreover, there is no plea of waiver or abandonment or estoppel in the written statement. The story that was put forward was that her claim was settled by allotting to her a thatched hut, 40 cocoanut trees and 15 palmyrah trees. The claim has already been found by me to be false. In the circumstances, I see no reason to disturb the decree passed by the court below in regard to the arrears.

(12) In the result, the appeal fails and is dismissed with costs. The memo of cross-objection is dismissed without costs.

R.G.D. Appeal dismissed.

(S) A.I.R. 1955 ANDHRA 10 (Vol. 42, C.N. 4)

SUBBA RAO C. J. (21-9-1954)

Samudrala Srinivasacharyulu, Appellant v. Marripati Hanumantha Rao and others, Respondents.

Second Appeal No. 1627 of 1950, against decree of Dist. J. of Krishna at Masulipatam in A. S. No. 56 of 1949.

Civil P. C. (1908), S. 66 — Scope and applicabiiity — Sale in execution of an award held under rules framed under Madras Co-operative Societies Act — Section does not apply — (Madras Co-operative Societies Act (6 of 1932), S. 57-A, 65(o) and Rr. 15 and 22 framed under S. 65 (o)) — (Interpretation of Statutes — Language clear and unambiguous — Arguments based on possible anomalies are of no relevance).

The bar under S. 66, Civil P. C., is imposed only in respect of a sale under a certificate issued by the Court in the manner prescribed. The Civil Procedure Code defines the word "prescribed" as "prescribed by the rules". "Rules" are defined as meaning "Rules and forms contained in the first schedule or made under S. 122 or 125 of the Code of Civil Procedure." The operation of this section should therefore be confined only to sales in execution of decrees of civil Courts. (Para 4)

Hence, S. 66 can have no application to a case where neither the sale was held, nor the certificate was issued under the rules in the first schedule of the Civil Procedure Code but the sale was held in execution of an award of the Registrar of Co-operative Societies under the rules made under the Madras Co-operative Societies Act, and the sale certificate was also issued under the said rules. Case law discussed. (Para 5)

Arguments based on possible anomalies are not of relevance when the provisions of the section are clear and unambiguous. Assuming that S. 66 would apply in case an award is executed through Court under R. 15(7) of the rules framed under that Act, that cannot be a reason for holding that in the case of a sale under the rules made under the Madras Co-operative Societies Act, S. 66 would apply. When S. 66 in terms will not apply, it cannot be applied by analogy unless it is held that it embodies a well settled general principle of law applicable to all cases. On the other hand, benami transactions are valid. Unless a statute specifically and directly strikes at a particular category of benami transaction, the real owners are certainly entitled to a declaration of their title as neither the Act nor the Rules framed thereunder prohibit benami purchases. (Para 6)

Anno: Civil P. C., Pre. N. 7; S. 66 N. 2, 17.

CASES REFERRED: Paras

(A) (V24) AIR 1937 All 176: ILR (1937) All 113 4

(B) (V28) AIR 1941 Nag 84: ILR (1941) Nag 90 4

(C) ('70) 14 Suth WR 372 4

(D) ('75) 23 Suth WR 358 (PC) 4

(E) ('05) 15 Mad LJ 419: 28 Mad 526 4

(F) ('06) 16 Mad LJ 505: 29 Mad 473 4

(G) ('09) 19 Mad LJ 270: 3 Ind Cas 124 4

(H) ('87) 14 Cal 583 4

(I) (V29) AIR 1942 Mad 154: 1941-2 Mad LJ 717 4

Advocate General and K. B. Krishnamurti, for Appellant; M. S. Ramachandra Rao and M. Krishna Rao, for Respondents.

JUDGMENT: The question in the second appeal is whether S. 66, Civil P. C., is a bar to the maintainability of the suit.

(2) The plaintiff Hanumantha Rao, Ramakrishna Rao and the 3rd defendant are brothers. Defendants 4 to 6 are the undivided sons of the plaintiff and his two brothers. The 3rd defendant,

the youngest of the brothers, became indebted to the Krishna Co-operative Urban Bank Limited, Masulipatam, as a surety, the principal debtor being Velagapudi Ranga Rao, who is the plaintiff's son-in-law. The Registrar of Co-operative Societies passed an award No. 1170 of 1940 against the 3rd defendant and Velagapudi Ranga Rao. The award was sought to be executed in E. P. No. 30/1941-42 and the undivided 1/3 share of the 3rd defendant along with the other items was brought to sale. At that stage, it was arranged between the brothers and the 2nd defendant that the 2nd defendant should advance the necessary funds and liquidate the debts of the plaintiff and the 3rd defendant and subsequently recoup himself from their properties. This arrangement, it is said, was arrived at even before 1-3-1942, though an actual trust deed was executed in favour of the 2nd defendant on 29-3-1942.

In implementation of that arrangement, the 2nd defendant gave some amount to the 1st defendant and got the undivided 1/3 share in the suit house purchased in the 1st defendant's name benami for the 2nd defendant. The 1st defendant subsequently executed a letter dated 16-3-1942 in favour of the 2nd defendant setting forth the circumstances under which the property was purchased in his name and agreeing to execute the necessary conveyance in favour of the 2nd defendant soon after the confirmation of the sale. On 29-3-1942, the 2nd defendant relinquished his interest in favour of the plaintiff and defendants 3 to 6 under a registered document. Meanwhile, the 1st defendant sold the 1/3 undivided share purchased in his name to the 7th defendant. The plaintiff filed O. S. No. 72 of 1948 on the file of the Court of the Principal Subordinate Judge of Masulipatam, for a declaration that the plaintiff and defendants 3 to 6 are jointly entitled to the 1/3 share in the suit house and for a permanent injunction restraining defendants 1 and 7 from interfering with their possession.

(3) Defendants 1 and 7 pleaded, inter alia, that the suit was not maintainable by reason of S. 66, C. P. C. The learned Subordinate Judge and, on appeal, the learned District Judge, negatived the contention of the defendants and decreed the suit. The 7th defendant has preferred the above second appeal.

(4) The learned Advocate General appearing for the appellant contended that the 1st defendant claimed title under a purchase certified by a court, and, therefore, a suit for a declaration that he made the purchase on behalf of the 2nd defendant or the plaintiff would not lie and that S. 66, C. P. C., was a bar to such an action; whereas the learned Counsel for the respondents argued that S. 66 (1), C. P. C., should be confined only to a sale certified by the court under any of the rules framed under the Civil Procedure Code and that, as in the present case the sale was pursuant to the rules made under the Co-operative Societies Act, the said section has no application. Section 66 (1), C. P. C., runs thus:

> "No suit shall be maintained against any person claiming title under a purchase certified by the court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims".

The bar under that section is imposed only in respect of a sale under a certificate issued by the court in the manner prescribed. The Civil Procedure Code defines the word "precribed" as "prescribed by the rules". "Rules" are defined as meaning "Rules and forms contained in the first schedule or made under Ss. 122 or 125, Civil P. C." Sulaiman C. J., in — 'Bishan Dayal v. Kesho Prasad', AIR 1937 All 176 (A), construed the provisions of S. 66 and, after noticing the definition of the words "prescribed" and "rules" observed:

> "It is, therefore, patent, that a person, who is not claiming title 'under a purchase certified by' the court under any of the rules framed under the Code would not be protected under S. 66, C. P. C."

Stone C. J. and Clarke J. in — 'Shrideo Ram Janki Mandir v. Nathuram Nanhebhai', AIR 1941 Nag 84 (B), followed the decision of the Allahabad High Court. At page 86, the learned Judges stated the arguments of the learned Counsel and met it as follows:

> "It is said that as S. 66, strikes against purchases benami, where these purchases are effected at a court auction, it is enunciating a matter of general policy, and is in terms laying down a principle that should be applied to all public sales always assuming that those sales are in some way conducted in a manner similar to the mode of conducting sales adopted in the rules by the Civil Courts in execution. Needless to say, there is no case in support of that proposition. On the other hand, there are cases going back to 1870 to the contrary. The case law commences with — 'Brijo Beharee Singh v. Shaw Wajed Hossein', 14 Suth WR 372 (C), where the Bombay High Court refused to apply the provisions of the then Civil Procedure Code to revenue sales. Five years later, in 1875, the Privy Council in — 'Lokhee Narain Roy v. Kallypuddo Bandopadhya', 23 Suth WR 358 (PC) (D), expressed the view that this section, cutting, athwart ordinary principles of law as it does, must be construed strictly and literally and as it strikes at suits against a certified purchaser, it does not affect the position of a defendant sued by a certified purchaser. Later in — 'Muthunaiyan v. Sinna Samavanjan', 15 Mad LJ 419 (E); — 'Narayansami Padayachi v. Govindasami Padayachi', 16 Mad LJ 505 (F), and — 'Venkatachallam Pillai v. Purshotama Naicker', 19 Mad LJ 270 (G), it was indicated that the mere fact that the sale is under the Revenue Act does not preclude any one from contending that the purchaser is only a benamidar. The same view is expressed in — 'Fazal Rahaman v. Imam Ali', 14 Cal 583 (H), where it was regarded as obvious that the analogous section of the old Civil Procedure Code has no application to any other kind of sale than sales in execution of decrees of Civil Courts".

From the aforesaid passage, it is manifest that from 1870 the Courts have taken the view that the operation of S. 66, C. P. C., and its corresponding section in the earlier Code should be

confined only to sales in execution of decrees of Civil Courts. This question was again considered by Venkatarmana Rao J. in — 'Muthukumaru Maniakarar v. Pethia Maniakarar', AIR 1942 Mad 154 (I). There a sale was held in execution of a decree for arrears of rent by the Revenue Court under the provisions of the Madras Estates Land Act. The question for decision in that case was whether the plaintiffs were precluded by S. 66 from praying for a declaration that the said sale was benami. The learned Judge, after considering the relevant provisions of the Civil Procedure Code and the case law on the subject, posed the question for decision as follows:

> "The question, therefore, is whether the purchase by the fourth defendant can be said to be one certified by the Court under any of the rules framed under the Civil Procedure Code. If it is not, the section will not apply".

The learned Judge then pointed out that the procedure followed in a sale in execution of a decree for arrears of rent was that provided by the Madras Estates Land Act, that as the sale certificate was issued under that Act, neither the sale was made nor the certificate issued under the rules in the 1st schedule of the Civil Procedure Code. I respectfully agree with the aforesaid decisions and reasons given by the learned Judges.

(5) In the present case, neither the sale was held, nor the certificate was issued under the rules in the first schedule of the Civil Procedure Code. The sale was held in execution of an award made by the Registrar of Co-operative Societies under the Madras Co-operative Societies Act. Under S. 57-A, the Registrar, or any person subordinate to him empowered by the Registrar in that behalf may, subject to such rules, as may be prescribed by the Provincial Government and without prejudice to any other mode of recovery provided by or under this Act, recover any amount due under a decision or award of the Registrar. Section 65 (o) enables the Provincial Government to make rules for the enforcement of the decisions or awards. Rule 22 of the Rules made by the Government under the Co-operative Societies Act prescribes the procedure for executing awards made by the Registrar. The procedure prescribed with some variations is analogous to that provided for under the Civil Procedure Code, and under Rule 22 (10) (v), after the confirmation of the sale, the said Registrar shall grant a certificate of sale bearing his seal and signature to the purchaser. There is no provision analogous to S. 66, C. P. C., in the said rules. It is, therefore, clear that the sale was held under the rules made under the Madras Co-operative Societies Act, and the sale certificate was also issued under the said rules. If so, it follows that, as neither the sale was held nor the certificate was issued under the rules in the 1st schedule of the Code of Civil Procedure, S. 66 has no application to the sale in question.

(6) It was argued by the learned Counsel for the appellant that this conclusion would lead to an anomaly as under R. 15 (7) of the rules made under the Madras Co-operative Societies Act, the Registrar has the option either to collect the sums due under R. 22 of the Rules or through the Collector under the Revenue Recovery Act or through a Civil Court, and that in the third case S. 66 would apply, whereas in the first two cases, if the aforesaid decisions were correct S. 66 would not be a bar. Arguments based on possible anomalies are not of relevance when the provisions of the section are clear and unambiguous. Assuming, without deciding that S. 66 would apply in case an award is executed through Court, in my view that cannot be a reason for holding that in the case of a sale under the rules made under the Madras Co-operative Societies Act, S. 66 would apply. When S. 66 in terms will not apply, it cannot be applied by analogy unless it is held that it embodies a well-settled general principle of law applicable to all cases. On the other hand, benami transactions are valid. Unless a statute specifically and directly strikes at a particular category of benami transactions, the real owners are certainly entitled to a declaration of their title as neither the Act nor the Rules framed there under prohibit benami purchases. I would, therefore, hold that S. 66 is not a bar to the maintainability of the suit.

(7) The appeal fails and is dismissed with costs. No leave.

K.S.B. Appeal dismissed.

(S) A.I.R. 1955 ANDHRA 12 (Vol. 42, C.N. 5)

SUBBA RAO C. J. (17-9-1954)

Maddi Sudarsanam and others, Appellants v. Borogu Viswanadham Brothers represented by its power of Attorney and Partner Venkatarathnam and others, Respondents.

Second Appeal No. 1620 of 1950, against decree of Dist. J. Guntur in Appeal Suit No. 554 of 1948.

(a) Partnership Act (1932), S. 42 — Retirement of one partner — Partnership is not dissolved.

There is no corresponding provision in the Partnership Act as there was in S. 253(7), Contract Act providing for the dissolution of the partnership on any member of the partnership ceasing to be a partner. When an express provision in the Contract Act is omitted in compiling a separate Act for Partnership, it is obvious that the omission is designed and not accidental. It follows that the retirement of a partner from the partnership has not the legal effect of dissolving it.

(Paras 9, 10)

(b) Partnership Act (1932), S. 42 (c) — Death of Partner — Dissolution of firm — Contract to contrary.

Under S. 42 (c) a firm is dissolved by the death of a partner, unless there is a contract to the contrary. Whether there is a contract to the contrary falls to be considered on the construction of the Articles of the Partnership agreement.

A deed of partnership recited that the partnership was composed of two categories of partners, namely, (i) principal partners and (ii) working partners. A distinction was maintained between the two classes of partners. In the case of the former, the principal part-

ners included not only the contracting partners, but also their heirs, executors and administrators, whereas in the case of the latter, the partners did not include their heirs.

Held that, under the terms of the partnership deed it was not intended that the death of any principal partners would dissolve the partnership. (Para 11)

Anno: Partnership Act, S. 42, N. 3.

(c) Partnership Act (1932), S. 69 (2) and S. 63 (1) — Non-compliance with S. 63 (1) — Effect on maintainability of suit under S. 69 (2).

A default made by a firm in not notifying the retirement of a partner and death of another partner as required under S. 63(1) is not of any relevance in considering the question of the maintainability of the suit under S. 69(2). There is an essential distinction between the constitution of a firm and its dissolution. Non-compliance with the provisions of S. 63(1) may have other consequences, but under S. 69(2) only two conditions should be complied with by a firm to enforce a right arising from a contract. And if those two conditions are complied with then a suit will be maintainable. (Para 12)

Anno: Part. Act, S. 69 N. 6.

(d) Partnership Act (1932), S. 39 — Extension of business.

The mere fact that the scope of the business has been enlarged is not decisive on the question whether the firm was dissolved, for an existing firm can always extend the scope of the business by a separate agreement. (Para 14)

Anno: Part. Act, S. 39 N. 1.

CASE REFERRED: Para

(A) (V21) AIR 1934 Mad 633: 67 Mad LJ 401 (FB) 9

P. Somasundaram, for Appellant; M. S. Ramachandra Rao and M. Krishna Rao, for Respondent (No. 1).

JUDGMENT: The question in this Second Appeal is whether S. 69(2), Partnership Act, 1932, is a bar to the maintainability of the suit.

(2) The facts giving rise to the said question of law may be stated: A firm known as "Burugu Viswanadham Bros." consisting of five persons viz., Burugu Mahadevudu, his brother Burugu Veerayya, Parripati Venkatarathnam, and his two brothers Subrahmanyam and Venkata Subba Rao as partners was formed in 1925. They executed a registered agreement on 8-6-1925 setting out the terms and conditions of the partnership. The Partnership Act (hereinafter referred to as the Act) came into force in 1932. The firm of Burugu Viswanadham Bros. consisting of those partners was registered under the Act in 1933. The names of the said five partners are shown in the Register of Firms as partners of the firm. Burugu Veerayya died on 17-7-39. Parripati Venkatarathnam and his two brothers became divided on 11-11-1939. Under the partition the interests of the three brothers in the assets and liabilities of the firm was taken over by Venkatarathnam and his brother Subrahmanyam. The third brother Venkata Subba Rao retired from the partnership.

On 24-6-1940 Mahadevudu, Venkatarathnam and Subrahmanyam executed a fresh agreement of partnership Ex. B. 1. No notice either of the death of Veerayya or of the retirement of Venkatasubba Rao had been given to the Registrar. The suit dealings with the defendant firm, the Bala Tripura Sundari Groundnut Mill & Company, Inkole, Bapatla, were commenced after 1940. The suit was filed by the plaintiff firm for recovery of a sum of Rs. 3951-4-0 from the defendants in respect of the dealings they had with them.

(3) The defendants, inter alia, contended that the plaintiff firm was different from that constituted in the year 1925, that it was not registered under the Partnership Act, and that S. 69(2) of the Act was a bar to the maintainability of the suit.

(4) The first Court accepted the contention of the defendant and dismissed the suit. The appellate Court held that the plaintiff firm was the same firm as that formed in 1925, and registered under the Act, and that the suit was, therefore, maintainable. The defendants have preferred the above Appeal.

(5) The learned Counsel for the appellants raised before me two points (i) by the death of Burugu Veerayya, one of the partners, on 17-7-1939, and by the retirement of Venkatasubba Rao, another partner from the partnership on 11-11-1939, the partnership formed in the year 1925 was automatically and legally dissolved and the plaintiff firm was a new firm constituted under Ex. B-1, and (ii) Ex. B-1 expressly dissolved the old firm and constituted a new firm in its stead.

(6) The relevant provision of the Act is S. 69 (2). It reads:

> "No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of firms as partners of the firm."

Under this Section, a firm is disabled to file a suit against a third party unless two conditions are complied with (i) the firm is registered and (ii) the persons suing are shown in the Register of firms as partners of the firm. The first question, therefore, is whether the suit firm "Burugu Viswanadham Brothers" was registered under the Act.

(7) The firm was originally constituted under the partnership agreement Ex. A-15 dated 8-6-1925. Admittedly, that was registered under the Partnership Act and the names of the five partners were shown in the Register. But, it is contended that the death of one of the partners and the retirement of another had the effect of dissolving that firm. This leads on to the consideration of the two subsidiary questions, viz., (i) what is the effect of the retirement of a partner on the constitution of the firm, and (ii) what is the effect of the death of a partner on its constitution?

(8) Before the enactment of the Partnership Act in the year 1932, the rights of the partners were governed by the Contract Act. Section 253 prescribed the rules determining the partners'

mutual relations where there is no contract to the contrary. Section 253, Cl. (7) says:

"If from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members."

(9) A Full Bench of the Madras High Court in — 'Commr. of Income-tax, Madras v. Muthukaruppan Chettiar', AIR 1934 Mad 633 (A), on the basis of that section held that, upon the retirement of a partner from the partnership, the partnership was dissolved as between all the other members. This view certainly is unexceptionable as the provisions of S. 253(7) are clear. But after the enactment of the Partnership Act, the rules governing the dissolution of the partnership are laid down in Ss. 39 to 44 of that Act. In the Contract Act the circumstances under which the dissolution of a partnership takes place, and its consequences are not exhaustively and separately laid down. But in the Partnership Act, a separate chapter has been allotted and definite rules are prescribed for dissolution and its consequences. Pollock and Mulla in their book on the Indian Partnership Act summarise the relevant sections at page 113 as follows:

"We have now rules, mainly following those laid down in the English Act, for dissolution by consent (Section 40) by operation of Law (Section 41) automatically (Section 42) optionally (Section 43) and judicially (Section 44) and the consequent winding up of the firm affairs and settlement of accounts."

There is no corresponding provision to S. 253(7), Contract Act providing for the dissolution of the partnership on any member of the partnership ceasing to be a partner.

(10) The learned Counsel for the appellants contended that the Legislature omitted the rule as the principle embodied in S. 253(7), Contract Act was well-settled and self-evident and its separate enactment was unnecessary. What is more settled than the impact of the death of a partner on the constitution of a partnership? But yet the Partnership Act provides for it. When an express provision in the Contract Act is omitted in compiling a separate Code for partnership, it is obvious that the omission is designed but not accidental. It follows that the retirement of Venkatasubba Rao from the partnership on 11-11-1939 had not the legal effect of dissolving it.

(11) The next question is whether the death of Burugu Veerayya on 17-7-1939 had such an effect. Section 42, Partnership Act governs the situation. It reads:

"Subject to contract between the partners a firm is dissolved.....(c) by the death of a partner."

Under this section, a firm is dissolved by the death of a partner, unless there is a contract to the contrary. Whether there is a contract to the contrary falls to be considered on the construction of the Articles of the Partnership agreement Ex. A-15, dated 8-6-1925. The relevant Article reads:

"Now these presents witness that the said Burugu Mahadevudu and Burugu Veerayya of the first part hereinafter jointly called the principal partners, which expression, unless it is repugnant to the subject or contract shall mean and include not only the said Burugu Mahadevudu and Veerayya, but also their survivors, heirs, executors and administrators, and the said Parripati Venkatarathnam, Venkata Subba Rao and Subrahmanyam of the second part hereinafter referred to as working partners, have agreed to continue the said business at Guntur, subject to the terms and stipulations hereunder set forth."

It will be seen from the aforesaid recitals that the partnership is composed of two categories of partners (i) principal partners and (ii) working partners. A clear distinction is maintained between the two classes of partners. In the case of the former, the principal partners include not only the contracting partners, but also their heirs, executors and administrators, whereas in the case of the latter, the partners do not include their heirs. It is obvious from the distinction that, under the terms of the partnership, it was not intended that the death of any principal partners would dissolve the partnership. I would, therefore, hold that there is a contract to the contrary in Ex. A-15 excluding the operation of S. 42(c), Partnership Act. It follows that the death of Burugu Veerayya on 17-7-1939 did not put an end to the partnership, and that the partnership constituted and carried on in the name and style of Burugu Viswanadham and Brothers was not dissolved. The suit now filed is by the same firm, which was duly registered under the Act.

(12) The second condition laid down in S. 69 (2) is also satisfied. The persons now suing i.e., the present partners are shown in the Register of firms as partners of the firm, though the same Register shows two other partners, one of whom died and the other retired. It may be that the fact of retirement of one of the partners and the death of another should have been notified to the Registrar under S. 63(1) as the said events effected a change in the constitution of the firm. But the default made by the firm is not, in not so notifying, of any relevance in considering the question of the maintainability of the suit under S. 69(2). There is the essential distinction between the constitution of a firm and its dissolution. Non-compliance with the provisions of S. 63 (1) may have other consequences, but under S. 69(2) only two conditions should be complied with by a firm to enforce a right arising from a contract and those two conditions are complied with in the present case.

(13) It is then contended that, under Ex. B-1, the old firm was expressly dissolved and a new firm was formed thereunder. Exhibit B-1 is the partnership agreement, dated 24-6-1940. The agreement is between Burugu Mahadevudu of the one part and Parripati Venkatarathnam and Subrahmanyam of the other part. The document in the preamble mentions that changes in the constitution of the partnership have taken place, that Burugu Veerayya died, that the joint Hindu family of Parripati brothers was divided, and that Venkatasubba Rao, one of the partners retired and that the remaining partners wished to continue the business in partnership for their benefit. In the operative portion, it is expressly

stated that the business of the firm still continues to be carried on under the name and style of Burugu Viswanadham Brothers. The same banking business is agreed to be carried on, but the scope of the business is extended by including the tobacco business. There is some variation in the shares.

(14) The learned Counsel for the appellant relying upon the recital "Whereas it is therefore expedient and necessary that the terms of this new partnership and constitution should be specified" and also the fact that tobacco business was also started by the firm, argued that Ex. B-1 constituted expressly as well as in fact a new partnership. I cannot hold that the mere use of the words in the document "this new partnership" makes it a new firm, if it is not in fact a new business. Those words are loosely used to convey the idea of a change in the constitution of the firm. Under Ex. B-1, the business is agreed to be carried on by the remaining partners, notwithstanding the changes in the constitution of the firm under the same name viz., Burugu Viswanadham and Bros.

The document only records the changes in the constitution and provides for continuing the existing business. It does not either express or by unnecessary implication dissolve the earlier partnership and form a new firm. There is nothing on record to show that the earlier accounts were looked into and the rights and liabilities of the partners were settled. The mere fact that the scope of the business has been enlarged is not decisive on the question whether the firm was dissolved for an existing firm can always extend the scope of the business by a separate agreement. After going through the aforesaid recitals in Ex. B-1, I have no hesitation in deciding that under the said document, a new partnership was not formed, but the old partnership was continued with certain changes, in the constitution. If so, it follows that S. 69(2) is not a bar to the maintainability of the present suit.

(15) In the result, the appeal fails and is dismissed with costs. No leave.

V.S.B. Appeal dismissed.

A.I.R. 1955 ANDHRA 15 (Vol. 42, C.N. 6)

SUBBA RAO C. J. (16-9-1954)

Ryali Macharayya, Appellant v. Palakollu Chintanna and others, Respondents.

Second Appeal No. 1599 of 1950, against decree of Court of Sub. J. of Amalapuram D/- 21-7-1950.

Madras Hereditary Village Offices Act (3 of 1895) S. 21 — Bar of Civil Suit — Suit in Civil Court to recover possession of service inam when not barred — (Civil P. C. (1908), S. 9)

A suit by a service holder claiming a right to succeed or in actual possession of the office for recovery of the emoluments is cognizable by a Revenue Court. The denial of the character of the property by the defendant does not affect the jurisdiction. But the essential requisite is that the plaintiff shall allege and rely upon the fact that the land is an emolument attached to the office and make that a foundation for the relief claimed. But where the cause of action of the plaintiff and his right to relief do not depend upon his title as a service holder, to the emoluments but only on his right to possession, S. 21 is no bar. Thus where the plaintiff's father had permitted the defendants to enjoy the suit property doing service during his lifetime and after his death the defendants instead of returning the land to his heirs, continue in possession as trespassers the plaintiffs are entitled to succeed, if they establish that their father permitted the defendants to enjoy the land for a purpose and that the permission given was revoked by his death. It is not necessary for them to prove that they are service-holders and that the lands are emoluments annexed to the service and hence S. 21 is not a bar to the maintainability of the suit in a Civil Court. (Paras 8,9)

Anno. C. P. C., S. 9, N. 51.

CASES REFERRED: Paras

(A) ('07) 30 Mad 126: 16 Mad LJ 514 (FB) 5

(B) ('10) 33 Mad 208: 5 Ind Cas 137 6

(C) ('06) 16 Mad LJ 333: 1 Mad LT 102 6

(D) (V13) AIR 1926 Mad 505: 50 Mad LJ 267 6

(E) (V25) AIR 1938 Mad 505: 1933 1 Mad LJ 406 7

G. Chandrasekara Sastri for Appellant; M. S. Ramachandra Rao and M. Krishna Rao for Respondents.

JUDGMENT: The question in this Second Appeal is whether S. 21, Madras Hereditary Village Offices Act (Act III of 1895) (hereinafter referred to as the Act) is a bar to the maintainability of the suit.

(2) The facts found by the courts below may be stated. The plaint schedulue property bearing Old Survey No. 182 and Re:Survey No. 231 of the extent of 2 acres 14 cents is situated in Magam village and is a potter service inam. Palakollu Subbanna was the original service-holder, enjoyed the said inam during his lifetime. After his death, the plaintiff's father Maridi became the service-holder and was in enjoyment of the said land.

As Maridi has service inams in Innavalli also, he appointed the defendant's father Narasayya as deputy for him to do service on his behalf in Magam. Narasayya died on 19-9-1948. After his death, plaintiff's father continued the defendants as deputies. When Maridi died on 9-11-1945 the authority conferred by Maridi on the defendants came to an end. Though the plaintiffs asked the defendants to deliver possession of the suit land, they refused to do so. In the circumstances, the plaintiffs filed O. S. No. 199 of 1948 on the file of the Court of the District Munsif of Amalapuram for recovery of possession of the property mentioned in schedule "A" annexed to the plaint and for profits.

(3) Both the courts found that, after the death of Maridi, the authority conferred on the defendants to deputise for him ceased and therefore the plaintiffs would be entitled to possession. The contention raised by the defendants that S. 21 of

the Act would be a bar to the maintainability of the suit was negatived. Hence, the Second Appeal.

(4) The only question raised in the Second Appeal is whether S. 21 of the Act is a bar to the maintainability of the suit. The relevant provisions of the Act may now be read:

"Section 13: Any person may sue before the Collector for any of the Village Offices specified in S. 3 or for the recovery of the emoluments of any such offices, on the ground that he is entitled under Sub-s. 2 or 3 of S. 10 of the Madras Proprietory Estates Village Service Act, 1894 or under Sub-s. 2 or 3 of S. 10 or Sub-s. 2 or 3 of S. 11 or S. 12 of this Act, as the case may be to hold such office and enjoy such emoluments.

Section 21: No civil court shall have authority to take into consideration or decide any claims to succeed to any of the offices specified in S. 3 or any question as to the rate of the amount of the emoluments of any such office or except as provided in proviso (ii) to Sub-s. 1 of S. 13 any claim to recover the emoluments of any such office".

(5) These two sections were the subject of judicial scrutiny. Some of the decisions, which may throw some light on the scope of the Sections, may be noticed. In —'Kesiram Narasimhulu v. Narasimhulu Patnaidu', 30 Mad 126 (A) (FB), a Bench of three Judges held that the jurisdiction of a civil court is excluded by S. 21, Madras Hereditary Village Offices Act in cases in which the plaintiff sues for recovery of the land as emoluments of his office, and the defendant resists the claim on the ground that the land is not the emolument of the office. At page 129, Sir Arnold White C. J. defines the scope of S. 21 as follows:

"Section 13, subject to the proviso, gives the Collector jurisdiction to decide such ,a claim, whilst S. 21 subject to the exception takes away the jurisdiction of the civil courts".

At page 127, the learned Chief Justice observed:

"The plaintiff's sole ground of action is that the lands sued for are the emoluments of his office, and it seems to me the claim is nonetheless a claim for the emoluments within the meaning of the section because the defendant denies that the lands in question constitute the emoluments".

It may be observed that, in that case, the suit was filed on the basis that the plaintiff was entitled to recover the land as emoluments of his office, and therefore, it was a clear case coming within the scope of S. 13.

(6) 'Muvvala Seetham Naidu v. Doddi Rami Naidu', 33 Mad 208 (B) was a decision arising out of a suit for the recovery of a village Officer's inam land on the expiry of a lease granted by the Village Officer to the defendant. The learned Judges Benson, O. C. J. and Krishnaswamy Ayyar J. held that such a suit was maintainable in a civil court. The learned Judges accepted the following observations of Subramania Iyer J. in — 'Narasimhulu v. Narasimhulu', 16 Mad LJ 333 (C)

"According to the general law, the landlord can eject the tenant without showing more than the letting and the expiry of the term as he is not called upon to allege or prove his right to the land or to the office, the tenant being estopped in such a case from raising any question as to the title of the party etc".

This decision was based upon the principle that the plaintiff's title to the land as emoluments annexed to his office was not the basis for the recovery of the land. As a landlord whatever might be the nature of the land held by him, he was entitled to recover the same as lessor after the expiry of the lease.

Devadoss and Wallace JJ held in — Yellamanda v. Chitambaram', AIR 1926 Mad 505 (D) that a suit for possession of service inam lands, not based on the fact that the plaintiff is the holder of an office and that the land is attached as emoluments to that office, but on the allegation that the defendants were tenants holding over after the expiry of a lease, is cognisable by civil court. At page 506 Devadoss J observes:

"But where a person sues for the possession of land, which is his, whether it be against a trespasser or against a co-sharer, he does not base his claim on his being the holder of the office, but he bases his claim on his right to the land. The mere fact that it is inam land does not mean that the cause of action is based on his being the holder of the office. In this case, the plaintiff does not come into court for recovery of land on the strength of his being an office holder and that the lands being the emoluments of the office. He seeks the court's aid for recovering possession of the property which has been unlawfully taken from him."

Later on, the learned Judge proceeded to state that S. 21 does not take away the jurisdiction of a court to entertain a suit for the recovery of possession of an inam land from a trespasser, or a tenant, holding over or from a co-sharer, who, in order to defeat the plaintiff, sets up a title in himself and denies the title of the plaintiff.

(7) Venkata Subba Rao J. in — 'Veeranna v. Mocharamma', AIR 1938 Mad 505 (E) with his usual clarity, brought out the principles underlying Ss. 9, 13, and 21 of the Act in bold relief. There a village blacksmith alienated to various persons portions of his service inam lands and was dismissed. His widow was appointed to the office. She brought a suit against the defendant, an alienee of one of the portions. Both the Deputy Collector, and on appeal, the Collector, gave her a decree. In a Writ of Certiorari, the question was raised whether they had jurisdiction to entertain the suit. The learned Judges Venkata Subba Rao and Abdur Rahman JJ. held that S. 21 barred the suit.

At page 506 Venkata Subba Rao J. laid down the tests for ascertaining whether a particular suit comes within the mischief of S. 21 of the Act. The learned Judge said:

"The test for deciding whether the Revenue or the civil court has jurisdiction has been laid down in several cases. Where it is necessary

for the plaintiff to allege in order to maintain his action that the land in suit is an emolument of a service inam, the jurisdiction will remain with the Revenue court under Section 13 of the Act ..... Where the plaintiff sues on the ground of a trespass or on the ground that the land is his property, or upon the footing of a lease that has expired, there is no need for him to rely upon the fact of the land being an emolument of a service inam". The simple test laid down by the learned Judge may be put thus. Is it necessary to rely upon the fact of the land being an emolument of service inam in order to get a relief in the suit?

(8) To summarise, Section 21 ousts the jurisdiction of civil courts only in regard to matters in respect whereof jurisdiction is conferred under Section 13 on the Revenue Court. A suit by a service holder claiming a right to succeed or in actual possession of the office for recovery of the emoluments is cognisable by a Revenue Court. The denial of the character of the property by the defendant does not affect the jurisdiction. But the essential requisite is that the plainiff shall allege and rely upon the fact that the land is an emolument attached to the office and make that a foundation for the relief claimed. But, if his cause of action and his right to possession do not depend upon his title to the emoluments as a service holder, but on a collateral fact, S. 21 is not a bar. If he is dispossessed by a trespasser, if his lessee refuses to deliver possession after the expiry of the term, if a person holding a derivative title under him does not give him possession after the termination of the derivative title either on the expiry of the term or otherwise, in all these cases his cause of action and his right to relief do not depend upon his title as a service holder, to the emoluments but only on his right to possession.

(9) If the aforesaid principles are applied what will be the result in the present case? The plaintiff's father permitted the defendants to enjoy the suit property doing service during his lifetime. After his death, instead of returning the land to his heirs, they continued in possession as trespassers. The plaintiffs are entitled to succeed, if they establish that their father permitted the defendants to enjoy the land for a purpose and that the permission given was revoked by his death. It is not necessary for them to prove that they are service-holders and that the lands are emoluments annexed to the service. If so, it follows that S. 21 is not a bar to the maintainability of the suit in a Civil Court. The conclusion arrived at by the courts below is correct.

(10) The appeal fails and is dismissed with costs. No leave.

M.K.S. Appeal dismissed.

(S) **A.I.R. 1955 ANDHRA 17 (Vol. 42, C.N. 7)**

UMAMAHESWARAM J. (14-9-1954)

Thellakula Jalayya, Petitioner v. Namana Venkateswara Rao and others, Respondents.

Civil Misc. Petn. No. 13063 of 1953.

Constitution of India, Art. 226 — Order of Election Commissioner — Writ admitted — Proper order to pass — (Municipalities — Madras District Municipalities Act (5 of 1920), S. 49(2)(g)).

Where the Election Commissioner having by order set aside the election of a Municipal Councillor on the ground that he was disqualified to stand as a candidate under S. 49(2)(g) a writ of a certiorari is admitted by the High Court against the order, the order is no longer final and conclusive and the proper order to pass when a writ has been admitted is to preserve 'status quo ante' and to permit the petitioner to function as a Municipal Councillor until the writ is disposed of. (Para 3)

Anno: Constitution of India, Art. 226 N. 39(d).

CASES REFERRED: Paras

(A) (V13) AIR 1926 Mad 132: 90 Ind Cas 819 3
(B) (1880) 16 Ch D 143: 50 LJ Ch 31 3
(C) (V10) AIR 1923 Mad 475: 47 Mad 585 3
(D) (V11) AIR 1924 Mad 797: 47 Mad 700 3
(E) (V38) AIR 1951 Mad 1044: ILR (1952) Mad 308 3

Neti Subramaniam, for Petitioner; P. Somasundaram, (for No. 1) and Addl. Govt. Pleader, (for Nos. 2 and 3), for Respondents.

ORDER: This application was filed by the petitioner to stay the operation of the order of the Election Commissioner, Guntur, dated 18-12-1953 passed in O. P. No. 126 of 1952 pending disposal of writ petition No. 1059 of 1953. The Election Commissioner held that under S. 49(2)(g), Madras District Municipalities Act, the petitioner herein was disqualified from standing as a candidate and that his election for Ward No. 23 as Municipal Councillor was, therefore, void. The 1st respondent herein was duly declared elected as Municipal Councillor. The writ was admitted by Rajagopala Iyengar J. on 29-12-1953 and interim stay of operation of the order as regards the declaration that the 1st respondent was duly elected was ordered. In regard to the second prayer, that the petitioner might be allowed to continue as a member of the Municipality till the disposal of the writ petition, notice was ordered to the respondents.

(2) The 1st respondent filed C. M. P. No. 6651 of 1954 to advance the hearing of the writ petition No. 1059 of 1953. Chandra Reddy J. passed the following order on 28-7-1954:

"As the request of both sides, hearing of the case is fixed for 4th of August; post it at the top of the list, subject to part-heard cases."

In spite of that direction, it was posted before me for hearing and on 4-8-1954, I passed the following order:

"I find that there is an order passed by Mr. Justice Chandra Reddy that the writ should be heard on 4-8-1954 and it should be posted at the top of the list subject to part-heard cases. I do not know why the writ has not been posted for hearing. If for any reason the writ cannot be heard, the learned Advocate for the petitioner Mr. P. Somasundaram requests that the application to vacate the interim injunction might at least be posted for hearing. Either

the writ or the application may be posted for hearing tomorrow."

On 5-8-1954, C. M. P. No. 13063 of 1953 was posted before me for final disposal and after hearing arguments, I passed the following order:

"I see no reason to dissolve the interim order passed by Mr. Justice Rajagopala Iyengar on 29-12-1953. The writ having been admitted, the order was rightly suspended. The proper course is to dispose of the writ as early as possible. That was the order passed by Mr. Justice Chandra Reddy on 28-7-1954. I make the interim order absolute and the writ may be posted as early as possible for hearing."

The learned advocate for the petitioner by his letter dated 26-8-1954 invited my attention to the fact that I did not pass final orders in so far as the second prayer was concerned and I directed the application to be posted for further hearing. By mistake, both the advocates appearing for the petitioner and respondent did not draw my attention to the fact that Mr. Justice Rajagopala Iyengar directed notice so far as the second prayer in the application was concerned. I, therefore, heard arguments on this question.

(3) The contention of the learned advocate for the petitioner was that the order of the Election Commissioner setting aside his election was erroneous and that, as the writ had been admitted by Rajagopala Iyengar J. 'status quo ante' should be maintained and that he should be allowed to function as a Municipal Councillor, pending the disposal of the writ. Mr. P. Somasundaram, learned counsel for the respondent, argued that as the election of the petitioner was set aside on the ground that he was disqualified under S. 49(2)(g), Madras District Municipalities Act, the order of the Election Commissioner should not be suspended and the petitioner permitted to continue as a Municipal Councillor. He sought to re-open the order passed by me on 5-8-1954, suspending the operation of the order of the Election Commissioner declaring his client as having been duly elected.

The order dated 5-8-1954 has become final and it is therefore not open to the learned counsel to question it at this stage. He drew my attention to a decision of Jackson J. reported in — 'Gopalakrishna Konar v. Vilanga Konar', AIR 1926 Mad 132 (A) in support of the proposition that I should not have suspended the order of the Election Commissioner and restrained his client from taking his seat as Municipal Councillor. This decision was not brought to my notice at the hearing on 5-8-1954. The decision does not also support the contention that this Court has no jurisdiction to pass an appropriate order. The learned Judge proceeded on the assumption that the Court has ample jurisdiction. On the facts of the case, he held that there would be no substantial injury to the petitioner by refusing to issue an order of injunction and thereby permitting the Municipal Councillor who was declared elected to take his seat.

He referred to — 'Aslatt v. Corporation of Southampton', (1880) 16 Ch D 143 (B) in support of the proposition that generally an injunction should issue to preserve 'status quo ante and this decision in — '(1880) 16 Ch D 143 (B)' was also followed and applied by a Bench of the Madras High Court in — 'Sarvothama Rao v. Chairman, Municipal Council, Saidapet', AIR 1923 Mad 475 (C) and in an earlier case by Mr. Justice Jackson in — 'Venkatasubbiah Chettiar v. Sesha Aiyar', AIR 1924 Mad 797 (D). I follow that decision of the English Court and the observations of Jackson J. that the proper order to pass, when a writ has been admitted, is to preserve 'status quo ante' and to permit the petitioner to function as a Municipal Councillor until the writ is disposed of. The order passed by the Election Commissioner, declaring the election as void, is no longer final and conclusive, inasmuch as the writ has been admitted, and this Court has to decide, whether the election is void or not.

In — 'Satyanarayana v. Venkatarattamma', AIR 1951 Mad 1044 (E), Chief Justice Rajamannar pointed out delivering the judgment of the Bench at page 1045 that

"it is obvious that the decision in the appeal is again set at large as if lost its finality the moment this Court issued the rule nisi. This Court can, on this application for certiorari, set aside by quashing the order in the appeal. Surely in such circumstances, it must be said that the appeal is pending."

There is, therefore, no substance in the contention of the learned advocate for the respondent that a different rule should be followed and that 'status quo ante' should not be preserved in cases where an election has been declared void. No authority whatsoever was cited in support of that contention. The petitioner had secured a huge majority of votes. Even as admitted by the 1st respondent himself, in paragraph 3 of his affidavit dated 25-7-1954, the petitioner "is continuing to function all these seven months".

I see no reason why the petitioner who was continuing to function all these months as a Municipal Councillor should not continue to do so till the writ petition is finally disposed of and why the operation of the order of the Election Commissioner, declaring his election void should not be suspended. I, therefore, grant the second prayer, namely that the petitioner should be allowed to continue as a member of the Municipality till the disposal of the writ petition, by suspending the operation of the order of the Election Commissioner in O. P. No. 126 of 1952 that his election was void.

V.R.B. Order accordingly.

(S) A.I.R. 1955 ANDHRA 18 (Vol. 42, C.N. 8)

SUBBA RAO C. J. (15-9-1954)

Gutha Hariharabrahmam and others, Appellants v. Doddappaneni Janikiramaiah, Managing Trustee of Sri Janardhanaswami and Sri Malleswaraswami Temples, Chataparru and others, Respondents.

Second Appeal No. 701 of 1950, against decree of Sub. J., Eluru, in A. S. No. 96 of 1949.

(a) Limitation Act (1908), S. 10 — Scope of S. 10 — Suit for account — AIR 1938 Nag 30, Dissented from.

Where the property has become vested in trust for a specific purpose, S. 10 applies to three categories or reliefs against a trustee or his legal representatives, namely, (i) for the purpose of following in his hands the trust property, (ii) for the purpose of following in his hands the proceeds of the trust property, and (iii) for an account of such property or proceeds. The three purposes must be read disjunctively, and, if so read the three reliefs will be independent of each other. (Para 5)

Section 10 does not relate only to tracing actions. It can be used for following property in the hands of a trustee or for an account of such property so that the section applies to a case where the trustee or his legal representative is asked to account for money that was in his hands as trustee. AIR 1943 Mad 691, Foll. AIR 1938 Nag 30, Dissent from. (Para 5)

Anno: Lim. Act, S. 10 N. 2 and 23.

(b) Limitation Act (1908), Art. 98 — Scope.

Article 98 governs suits for the recovery of the loss occasioned by a breach of trust in the cases of trusts other than those provided for under S. 10. (Para 6)

Anno: Lim. Act, Art. 98 N. 1.

(c) Limitation Act (1908), S. 10 and Art. 98 — Suit for account against legal representatives of ex-trustees — Nature of suit.

Where the legal representatives of the trustees are in possession of the general estate of their fathers, the ex-trustees, and the basis of the suit claim against them is that their fathers misappropriated the amounts, and, if so, the amount misappropriated must have formed part of the general estate of the trustees, then as the amounts are misappropriated and mixed up with the trustees' other properties, the suit may be treated as one for tracing the trust property in the hands of the legal representatives of the ex-trustees. AIR 1938 Nag 30, Applied. (Para 6)

Anno: Lim. Act, S. 10 N. 23; Art. 98 N. 1.

(d) Limitation Act (1908), S. 10, Para 2 (added by Act 1 of 1929) — Property comprised in Hindu religious endowment — Property vests in trust for specific purpose.

By reason of the provision added by Act 1 of 1929 in S. 10, any property comprised in a Hindu religious endowment is now to be deemed to be property vested in trust for a specific purpose. Thus the necessary condition for the application of S. 10 is satisfied by the fiction introduced. It will not be, therefore, necessary in each case to establish by independent evidence that the property has become vested in trust for any specific purpose. (Para 7)

Anno: Lim. Act, S. 10 N. 25.

(e) Limitation Act (1908), S. 10 — Trust for a specific purpose.

The conducting of pujas and ceremonies and the upkeep of the temple are sufficiently specific to satisfy the requirements of S. 10. AIR 1943 Mad 691, Foll. (Para 7)

Anno: Lim. Act, S. 10 N. 7 and 13.

(f) Limitation Act (1908), Pre. — Retrospective effect.

It is a settled principle of law that once a debt has been barred by time, it cannot be revived by any subsequent change in the law of limitation. (Para 8)

Anno: Lim. Act, Pre. N. 15.

(g) Limitation Act (1908), S. 10 — Suit for account — Case of back accounting — Discretion of Court.

In a suit brought against the ex-trustees of a temple for accounts of the property misappropriated by them, the case being one of back accounting, a Court has discretion to limit the period of accounting and if it is found to be a fit case it can exercise that discretion in favour of the defendants. (1822) 37 ER 918; AIR 1919 Mad 943, Relied on. (Para 9)

(Note — It was held that in the circumstances of the case, the interests of justice would be satisfied if accounts are directed to be taken for a period of six years prior to 1938 though the relief related to a period from 1901 to 1938).

CASES REFERRED: Paras

(A) (V25) AIR 1938 Nag 30: ILR (1940) Nag 94 5

(B) (V30) AIR 1943 Mad 691: ILR (1944) Mad 284 5

(C) (V9) AIR 1922 PC 123: 44 Mad 831 (PC) 7

(D) (1822) 37 ER 918: 1 Jacob 443 9

(E) (V6) AIR 1919 Mad 943: 35 Mad LJ 661 10

G. Balaparmeswaram Rao, for Appellant; M. Sheshachalapati instructed by M. V. Srinivasa Rao and S. Ramamurthy, for Respondents.

JUDGMENT: This Second Appeal arises out of O. S. No. 305 of 1947 on the file of the Court of the District Munsif of Eluru, a suit filed by the plaintiff in O. S. No. 24 of 1944 for rendition of accounts in respect of the management of the temples of Sri Janardhanaswami and Sri Malleswaraswami of Chattaparru. The plaintiff is the present Managing Trustee of the said temples. The suit was filed for rendition of accounts in respect of the management of the temples by the Ex-Trustee Gutta Pichayya, Gutta Subramanyam and Gutta Venkatasubbamma, the 9th defendant. Defendants 1 to 3 are the sons of Gutta Pichayya. Defendants 2 to 7 are the sons of Gutta Sitaramabrahman. The 8th defendant is Sitaramabrahman's brother. It was alleged in the plaint that Gutta Pichayya and the 9th defendant as guardian of Sitaramabrahmam managed the said temples as trustees from 1901, that the 9th defendant acted as a trustee till Sitaramabrahmam attained majority, that Pichayya and Sitaramabrahmam after he attained majority acted as trustees till the year 1938, that during the period of their management the trustees collected large sums of money, from the debtors of the temples and from the temple properties and misappropriated the same, that the trustees were guilty of acts of misfeasance, malfeasance, and non-feasance and that, therefore, they were liable to render accounts to the temples for the period of their management and to pay the amount due to the temples with interest.

(2) The defendants, inter alia, pleaded that they were not guilty of any misappropriation, that the suit was barred by limitation, and that S. 73, Madras Hindu Religious Endowments Act, was a bar to the maintainability of the suit.

(3) The learned District Munsif held that the suit was barred by limitation against the 9th defendant, but was well within time against the other defendants. He also found that S. 73 was not a bar to the maintainability of the suit. In the result, he gave a preliminary decree for accounts with a direction that the Commissioner shall take an account of the management of the temples and the properties by Pichayya and Sitaramabrahmam from 1901 to 1938. On appeal, the learned Subordinate Judge took the same view on the two questions raised and dismissed the appeal. Hence the Second Appeal.

(4) The first question that arises in the Second Appeal is whether the suit against the legal representatives of the Ex-Trustees, Gutta Pichayya and Sitaramabrahmam, was barred by limitation. The relevant provisions of the Limitation Act relied upon at the bar may be extracted:

"Section 3: Subject to the provisions contained in Sections 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence."

"Section 10: Notwithstanding anything hereinbefore contained, no suit against a person in whom property has been vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property, or proceeds, shall be barred by any length of time.

For the purpose of this section, any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of any such property shall be deemed to be the trustee thereof." (Inserted by Act 1 of 1929).

Article 98 :

To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years.	The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.

(5) The question is whether S. 10 or Art. 98 of the Limitation Act would govern a suit filed by the present trustee of a temple against the Ex-trustee of a temple or his legal representatives for accounts on the ground of misappropriation, malfeasance or non-feasance. It was conceded that if S. 10 applies, Art. 98 cannot be invoked. But it was argued that S. 10 applies to what are called tracing actions, whereas Art. 98 governs a suit for an account against an Ex-Trustee to recover the loss from his general estate. The distinction is borne out by the decision of a Division Bench of the Nagpur High Court, but it is not accepted by the Division Bench of the Madras High Court.

In — 'Mt. Sahaudra Bai v. Shri Deo Radha Ballabhji Mandir', AIR 1938 Nag 30 (A) the facts are: One Jaggannadh Prasad constructed the plaintiff temple and, on 20-11-1911, executed a deed of gift in favour of the temple and, at the same time, constituted a body of trustees, he himself being one of them. Among the properties gifted was a sum of Rs. 2,000/-. Soon after the gift, he loaned this money to the 3rd and 4th defendants. The plaintiffs' case was that the loan was without the sanction of the trustees and that it constituted a breach of trust. Jagannadh Prasad died on 15-1-1927. The 1st defendant, as his legal representative, was in possession of the entire estate. The present trustees filed the suit for recovery of the amounts. The question was whether the suit was governed by S. 10 or Art. 98 of the Limitation Act. Bose J. who delivered the judgment on behalf of the Bench, made the following observations at pp. 32 and 33:

"The next question we have to determine is whether the suit is within limitation. The cause of action against the 1st defendant is, as we have said, in respect of a breach of trust committed by her father. She herself was not a trustee and she had not committed any wrong act; also the defalcated money is not in her possession; nor is there anything else in her hands which can be said to represent it. Therefore, the suit against her is clearly one to make good the loss occasioned by Jagannath's breach of trust out of his general estate. To such a suit, Art. 98 of the Limitation Act would, in our opinion, apply."

Dealing with S. 10, the learned Judge stated:

"It is in our opinion essential that the actual property, or something into which it has been converted, should be in the hands of the person sued.....Since the money in question has not been converted, into any portion of Jagannath's estate or in any way mixed up with his own money, it cannot be said to have been in his hands during his lifetime or in those of his legal representatives after his death."

It is, therefore, clear from the abovesaid decision that S. 10 can only apply to a suit for the purpose of following property defalcated and it is essential for its application that the said property should be in some form or another in the hands of the defendant and that Art. 98 would govern a case where the amount or property, which is not in the hands of the trustee or his legal representatives and not mixed up with his estate, is sought to be recovered from out of the general estate. It may also also be pointed out that, on the facts of that case, the amount was lent out to a third party and therefore in no sense of the term the said amount became part of the general estate of the trustee.

In — 'S. C. V. Devasthanam v. Chidambaram', AIR 1943 Mad 691 (B), a Division Bench of the Madras High Court, consisting of Wadsworth and Horwill JJ. put a different interpretation of S. 10. At page 695, Horwill J. who delivered the judgment observed:

"Another objection to the applicability of S. 10 suggested by the learned advocate for the res-

pondent is that S. 10 relates only to tracing actions. We do not, however, think that the application of S. 10 can be so limited. Section 10 can be used for following property in the hands of a trustee or for an account of such property so that the section seems to apply to a case like the present where the trustee or the legal representative is asked to account for money that was in his hands as trustee."

There a Receiver appointed in a suit between two branches of trustees filed a suit against the legal representative of a deceased trustee to account for the money that was in the hands of his father.

I would prefer to follow the Madras view as it is in accord with the wide terms of S. 10. If the property had become vested in trust for a specific purpose—whether it is so vested in this case or not I shall consider at a later stage—Sec. 10 applies to three categories or reliefs against a trustee or his legal representatives, (i) for the purpose of following in his hands the trust property, (ii) for the purpose of following in his hands the proceeds of the trust property and (iii) for an account of such property or proceeds. The three purposes must be read disjunctively and, if so read, the three reliefs will be independent of each other. If the relief for accounts is ancillary to the main relief of tracing the property in the hands of the defendant, the conjunction "and" would have been used instead of "or". It can only mean that, if the property cannot be traced to the hands of the trustee, he can be asked to account for it.

A relief for an account necessarily implies that the amount found due would be recoverable from the trustee. This is also not without any legal basis. What is the justification for the distinction between a case where the trustee or the legal representative who succeeded to his estate is in possession of misappropriated trust property and a case where he parted with it in favour of a third party? In either case he has the benefit of the property. If, in the former case, he is bound to restore it, whatever the length of time that elapsed, there is no reason why, in the latter case, he should escape his liability and benefit by his misappropriation. Nor can it make any difference if the property is taken by the legal representatives or assigns without consideration and misappropriated by them. I would, therefore, accept the Madras view.

(6) Then it may be asked for what classes of cases the provisions of Art. 98 would apply. The fact that the said provisions may become unnecessary cannot be a ground for limiting the wide scope of the clear provisions of S. 10, for S. 3 of the Limitation Act makes the other provisions of the Act subject to Sections 4 to 25 of the Act. Further Art. 98 does not become nugatory. It will govern suits for the recovery of the loss occasioned by a breach of trust in the cases of trusts other than those provided for under S. 10.

In the present case, even if the stricter view accepted by the Nagpur High Court is followed, the defendants would not be in a better position. Admittedly the legal representatives are in possession of the general estate of their fathers—the Ex-trustees. The basis of the suit claim aganist them is that their father misappropriated the amounts, and, if so, the amount misappropriated must have formed part of the general estate of the trustees. As the amounts are misappropriated and mixed up with the trustees' other properties, the suit also may be treated as one for tracing the trust property in the hands of the legal representatives of the Ex-trustees.

(7) There is another obstacle in the way of the application of S. 10. The necessary condition for its application is that the property should be vested in the trustee for a specific purpose. Section 10 was amended by Act 1 of 1929, whereby the following paragraph was inserted:

"For the purpose of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to the property vested in trust for a specified purpose, and the manager of such property shall be deemed to be the trustee thereof."

This amendment was occasioned by the decision of the Judicial Committee in — 'Vidya Varuthi Thirtha Swamigal v. Baluswami Ayyar', AIR 1922 PC 123 (C), wherein their Lordships held that properties of religious institutions in India are not vested in the hands of the institution, but belong to the idols and that, therefore, the heads of these institutions could not be trustees. In view of that decision, S. 10 became inapplicable to suits filed against the trustees of temples and other religious institutions.

To overcome this difficulty the said provision was inserted in the section and, by reason of the said provision any property comprised in a Hindu Religious endowment shall be deemed to be property vested in trust for a specific purpose. If so, the necessary condition for the application of S. 10 is satisfied by the fiction introduced. It would not be necessary in each case to establish by independent evidence that the property has become vested in trust for any specific purpose. Apart from that, Wadsworth and Horwill JJ. in the decision already quoted, held that the conducting of pujas and ceremonies and the upkeep of the temple are sufficiently specific to satisfy the requirements of S. 10, Limitation Act.

(8) It is then contended that S. 10 will not apply to that part of the claim barred before 1939. It is a settled principle of law that, once a debt has been barred by time, it cannot be revived by any subsequent change in the law of limitation, but it has not been shown how any part of the claim had become barred even before 1939. I would, therefore, hold that S. 10 would govern the present suit and the plaintiff would be legally entitled to ask for an account of the management of the temples from 1901 to 1938 when Pichayya was removed from the office and when Sitaramabrahmam died.

(9) The next question is whether, in a case of back accounting a Court has discretion to limit the period of accounting and whether this is a fit case to exercise that discretion in favour of the defendants. Sir Thomas Flumer Master of

the Rolls said in — 'Attorney General v. Exetor Mayor etc. of', (1822) 37 ER 918 (D) as follows:

"It has, I think, been properly stated on both sides that there is no fixed limit of time in directing an account against a trustee of a charity.....It does not, however, follow that the relief will be given after a great length of time, it being the constant course of Courts of Equity to discourage stale demands; even in cases of fraud, in which, if recent, there would have been no doubt, lapse of time has induced the Courts to refuse their interference. In cases of charities, this principle has often been acted on. When there has been a long period, during which a party has, under an innocent mistake, misapplied a fund, from the laches and neglect of others, that is, from no one of the public setting him right, and when the accounts have in consequence become entangled, the Court, under its general discretion, considering the enormous expense of the enquiries, the great hardships of calling upon representatives to refund what families have spent, acting on the notion of its being their property, has been in the habit, while giving the relief, of fixing a period to the account."

(10) These observations were followed by a Division Bench of the Madras High Court consisting of Wallis C. J. and Seshagiri Iyer J. in — 'Sanyasayya v. Murthamma', AIR 1919 Mad 943 (E). The suit was filed for an account for the year 1884 and the first defendant was asked to account for the management of his father and grand-father. The learned Judges, having regard to the aforesaid observations fixed the period of accounting for a period of 12 years.

In the instance case, the account is asked for a period of 37 years. The entire property owned by the temples is Ac 9-39 Cents. The accounts were filed in the connected suit. Though there are some gaps, the entire period of management was covered by the accounts. Though the accounts were not kept in a systematic manner, that is expected of a trustee, it cannot be said that no account of the dealings with the trust property was maintained. From 1901 to 1915, and from 1925 to 1935, the management of the properties of the temples is disclosed in the personal account of the trustees. From 8-3-1915 to 23-8-1925 the dealings with the properties of the temples are disclosed in the accounts of Kollipara Venkatarathnam & Co. From 1935 separate accounts were maintained for the management of the temple properties. All the relevant account books were filed in the other suit. Further, the villagers and the Committee of villagers took an account of the management of the trustees in 1918, 1930, 1935 and 1938 and approved of the same.

In 1935 the accounts were audited at the instance of the Madras Hindu Religious Endowments Board. Since 1935, on the suggestion made by the auditor separate accounts were kept for the temples. In the case of village temples before the Hindu Religious Endowments Act was passed, it was not an uncommon thing for the trustees to mix up the temple accounts with their private accounts. Sometimes they spent amounts in excess of the temple income from their own personal funds. Particularly when their action was justified by the village headman as in the present case, it is neither fair to the legal representatives of the Ex-trustees nor necessary in the interests of the public to re-open a stale claim. It does not prima facie appear that there is any serious misappropriation of temple funds in this case. In the circumstances, the interests of justice would be satisfied if accounts are directed to be taken for a period of six years prior to 1938.

(11) The decree of the lower Appellate Court is accordingly modified. The parties will bear their own costs in the appeal. No leave.

V.S.B. Decree modified.

(S) A.I.R. 1955 ANDHRA 22 (Vol. 42, C.N. 9)

SUBBA RAO C. J. (8-9-1954)

Kalathooru Raghavareddi, Appellant v. Kalathooru Venkatareddi and others, Respondents.

Second Appeal No. 1023 of 1950, against decree of Dist. J., Chittoor in A. S. No. 29 of 1949.

Registration Act (1908), Ss. 17(1)(b) and 49 — Admission of partition or award enabling party to get decree — Invalidity of partition or award — Suit on basis of such award — (Arbitration Act (1940), S. 17) — (Hindu law — Partition).

An admission of a partition or an award enabling the other party to get a decree on the basis of that partition or award must be an admission of a valid partition or a valid award. A combined reading of S. 17 and S. 49, Registration Act shows that an unregistered partition deed or an award cannot affect any immovable property comprised therein. It is not a question of admissibility of a document. The non-registration invalidates the transaction altogether. When an invalid document is specifically relied upon by the plaintiff and when it is found in favour of the defendants, the fact that the execution of the invalid document was admitted cannot, by any process of reasoning, validate the invalid document. If the award is invalid, the legal position would be that there would be no partition at all and the party relying upon an invalid partition should bring a suit for partition on the basis of co-ownership. A suit for declaration that the plaintiffs are entitled to a specific item alleged to have been allotted to them in the partition on basis of such award is not therefore maintainable. (Para 3)

Anno: Registration Act, S. 17 N. 67; S. 49 N. 33 Pt. 1.

CASES REFERRED: Paras

(A) (V34) AIR 1947 Mad 422: 1947-2 Mad LJ 116 3

(B) (V19) AIR 1932 Mad 693: 63 Mad LJ 303 3

(C) (V31) AIR 1944 Mad 550: ILR (1945) Mad 160 (FB) 3

P. Satyanarayana Raju, for Appellant; S. Alladi Kuppusami and T. Ramachandra Rao, for Respondents.

JUDGMENT: This appeal is by the 1st defendant against the decree & judgment of the Court of the

District Judge of Chittoor, setting aside that of the District Munsif's Court of Thirupati in O. S. No. 371 of 1945, a suit filed by the plaintiffs for a declaration of their title to 5 ankanams of thatched cattle shed and for a permanent injunction restraining the defendants from entering the plaint schedule property. The facts of the case may be briefly stated.

The plaintiffs, defendants and others constituted members of a joint Hindu family. As disputes arose between them in regard to the division of properties, they referred their disputes to three named arbitrators, A. Venku Reddy, A. Raghava Reddy and A. Balarama Reddy, for effecting the partition. The arbitrators gave an award dividing the family assets and liabilities into four equal shares. "A" schedule was allotted to the plaintiffs, "B" schedule to Venkatarama Reddy and K. Sesha Reddy, "C" schedule to the 1st defendant and "D" schedule to the 2nd defendant.

The plaintiffs' case is that the plaint schedule property i.e., 5 ankanams of thatched cattle shed was included as item 11 in the "A" schedule properties allotted to their share. The suit was based expressly on the award and the partition lists which were annexed to the award. The 1st defendant in his written statement admitted that there was an award, but stated that, under that award, by mistake the plaint schedule property which should have been allotted to him, was put in the share of the plaintiffs. He also pleaded that the award was invalid as it was neither stamped nor registered.

To put it briefly, his defence was that the award was invalid and, alternatively that even if it was valid, the plaint schedule property was included by mistake in the properties allotted to the plaintiff's share instead of in those fallen to the 1st defendant's share. The learned District Munsif held on the evidence that there was an award and that there was no mistake in the allotment of the plaint schedule property to the plaintiff's share. But he held that as the award was neither stamped nor registered, it was invalid and the plaintiffs could not claim any title under that award.

The learned District Judge, in appeal, accepted the finding of fact given by the learned District Munsif, but held that as the defendants admitted that an award was made, whereunder the suit property was allotted to the plaintiffs' share, the plaintiffs need not prove the award, or the partition effected under the award. In that view, he set aside the decree of the trial Court and gave a decree to the plaintiffs. Hence the scond appeal.

(2) Mr. Satyanarayana Raju, the learned counsel for the appellant contended that the learned District Judge was wrong in giving the plaintiffs a decree for the plaint schedule property on the basis of an invalid award and that, in any view, the learned Judge should have either accepted or rejected the entire admission, but could not accept a part and reject the other part.

(3) From the aforesaid statement of facts, it is manifest that the defendants did not admit the partition. An admission of a partition or an award enabling the other party to get a decree on the basis of that partition or award must be an admission of a valid partition or a valid award. What the defendants say in clear terms is that there was an award, but the said award is invalid. I cannot hold that this is an admission of a valid award. When it is common ground that the award was neither registered nor stamped, I do not see how the plaintiffs can get a decree on the basis of an invalid award.

A combined reading of S. 17 and S. 49, Registration Act clearly shows that an unregistered partition deed or an award cannot affect any immoveable property comprised therein. It is not a question of admissibility of a document. The non-registration invalidates the transaction altogether. When an invalid document is specifically relied upon by the plaintiff and when it is found in favour of the defendants, the fact that the execution of the invalid document was admitted cannot, by any process of reasoning. validate the invalid document. The decisions relied upon by the learned counsel are beside the point.

In — 'Ponnuswamy Chettiar v. Kailasam Chettiar', AIR 1947 Mad 422 (A) and — 'Alimane Sahib v. Subbarayudu', AIR 1932 Mad 693 (B), it was held that when the execution of a promissory note is accepted in the written statement, S. 58, Evidence Act, enables the plaintiff to get a decree without further proof. In these cases, after the execution of the promissory note was admitted, objection was raised in the course of arguments, but that was not allowed. If the award was invalid, the legal position would be, as held by the Full Bench in — 'Ramayya v. Achamma', AIR 1944 Mad 550 (C) that there was no partition at all & the party relying upon an invalid partition should bring a suit for partition on the basis of co-ownership. This suit for a declaration that the plaintiffs are entitled to a specific item alleged to have been allotted to them in the partition is not therefore maintainable.

(4) In the result, the decree of the lower Appellate Court is set aside and that of the trial Court is restored. The appellant will get his costs both here and in the Courts below. No leave.

V.R.B. Appeal allowed.

(S) A.I.R. 1955 ANDHRA 23 (Vol. 42, C.N. 10)

SUBBA RAO C. J. (27-8-1954)

Venkayala Janaiah, Petitioner v. Board of Revenue (Andhra) and another, Respondents.

S. R. No. 4389 of 1954.

Constitution of India, Art. 226 — Territorial jurisdiction — Jurisdiction of Andhra High Court over Andhra Board of Revenue sitting in Madras.

The Board of Revenue (Andhra) is not within the territorial jurisdiction of the Andhra High Court, for, it is now in the City of Madras and is functioning only from that place. As the Board of Revenue (Andhra) is not within the Andhra State, over which the High Court has jurisdiction, no writ under Art. 226 can be issued to it. The legal position may lead to many anomalies. The Andhra High

Court may issue a writ against Tribunals subordinate to the Revenue Board, whereas the Madras High Court may issue writs against the Revenue Board. There may be conflicts in orders and jurisdiction. AIR 1953 SC 210, Followed. (Para 3-4)

Further, the situation of the Revenue Board at Madras will lead to the anomaly of one of the institutions of the Andhra State being subject to the superintendence of the High Court of another State. (Para 5)

It is for the Andhra Government to consider whether it is advisable to avoid this anomaly by shifting the Board of Revenue as early as possible to a place within the territorial jurisdiction of the Andhra High Court. (Para 6)

CASE REFERRED: Para

(A) (V40) AIR 1953 SC 210: 1953-1 Mad LJ 702 (SC) 3

P. Babulu Reddy, for Petitioner.

ORDER: This is a petition for issuing a writ of certiorari to quash the order of the Board of Revenue (Andhra) now situated in the City of Madras.

(2) The petitioner was appointed Village Munsiff of the village of Regulagadda in the year 1948. One Venkayala Koteswara Rao filed a suit before the Deputy Collector, Narasaraopet, for setting aside that order and for appointing him instead. That suit was dismissed.

His appeal to the District Collector was also dismissed. When he preferred a Second Appeal to the Board of Revenue, the Board allowed the appeal and directed that Koteswara Rao should be registered as minor Headman of Regulagadda.

The present writ is filed for quashing the order of the Board of Revenue on the ground that it has exceeded its jurisdiction in passing the said order. The office took the objection that a writ cannot be issued by this Court, as the Board of Revenue (Andhra) is situated beyond the territorial jurisdiction of this Court.

In — 'Election Commission v. Saka Venkata Rao', AIR 1953 SC 210 (A), the Supreme Court laid down the limits of the jurisdiction of the High Court under Art. 226, Constitution of India. At pp. 212-213 of the report, Patanjali Sastri C. J. observed as follows:

> "But wide as were the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction" that is to say, the Writ issued by the Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories" which clearly implies that they must be "amenable to its jurisdiction either by residence or location within those territories."

(3-4) In the present case, the Board of Revenue (Andhra) is not within the territorial jurisdiction of this Court, for, it is now in the City of Madras and is functioning only from that place. As the Board of Revenue (Andhra) is not within the Andhra State, over which this Court has jurisdiction, it is obvious that no writ under Art. 226 can be issued to it. The legal position may lead to many anomalies. The Andhra High Court may issue a writ against Tribunals subordinate to the Revenue Board, whereas the Madras High Court may issue writs against the Revenue Board. There may be conflicts in orders and jurisdiction.

(5) Further, the situation of the Revenue Board at Madras will lead to the anomaly of one of the institutions of the Andhra State being subject to the superintendence of the High Court of another State, for under Art. 227 of the Constitution

> "Every High Court shall have superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction."

(6) It is for the Andhra Government to consider whether it is advisable to avoid this anomaly by shifting the Board of Revenue as early as possible to a place within the territorial jurisdiction of this Court. The petitioner's remedy, if any, is to file a writ in the Madras High Court.

(7) The petition is dismissed.

R.G.D Petition dismissed.

A.I.R. 1955 ANDHRA 24 (Vol. 42, C.N. 11)

SUBBA RAO C. J. AND UMAMAHESWARAM J.

(22-10-1954)

In re, Dadi Abdul Gaffoor, Prisoner-Accused.

Referred Trial No. 63 of 1954 and Criminal Appeal No. 340 of 1954, from Order of Addl. S. J., Kurnool Division, D/- 26-4-1954.

(a) Penal Code (1860), Ss. 299 and 300 — Culpable homicide and murder — Distinction.

The difference between the two offences of culpable homicide and murder is fine but real. Culpable homicide is a generic term. The offence will amount to murder if the conditions laid down in S. 300 are satisfied. If the offence comes under S. 299 or under one or other of the exceptions to S. 300, it will be culpable homicide not amounting to murder. (Para 4)

The offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death, it is murder, if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine, but appreciable. (Para 4)

It is for the Court to ascertain, on the facts of each case, whether the offence committed is murder or only culpable homicide not amounting to murder. The third clause of S. 300 can be invoked only if the intended bodily injury is sufficient in the ordinary course of nature to cause death. What is the injury intended to be inflicted by the accused can be ascertained, unless the accused admits that he intended to inflict a particular injury, only by the nature of the weapon or weapons used, by the seriousness of the injury caused and by the parts of the body on which the wounds are inflicted. Whether such injuries are likely to cause death or sufficient in the ordinary course

of nature to cause death, would depend again on the different degrees of probability. If death was the most probable result, it would be murder. 1 Bom 342, Ref. to. (Para 4)

Where the accused used a stick 3½ feet in length and 3" in diameter to beat the deceased on his head causing serious injuries both external and internal including fracture of the skull resulting in compression of the brain and also he used a knife to chop off the victim's nose when he fell on the ground.

Held that the accused intended to cause bodily injury sufficient in the ordinary course of nature to cause death. The weapon used, the part of the body where it was used and the nature of the wounds caused were sufficient to infer an intention on the part of the accused to cause these wounds. The serious wounds caused in the vital part of the body of the deceased were also sufficient in the ordinary course of nature to cause death. The accused was therefore guilty of murder.

(Para 6)

Anno: Penal Code, S. 299 N. 1, 4; S. 300 N. 6, 32.

(b) Penal Code (1860), S. 302 — Sentence — Mitigating circumstances — (Criminal P. C. (1898), S. 367 (5)).

Accused a young man of 25 years beating the deceased with a stick and also cutting his nose with a knife with the intention of disfiguring him but without any intention to kill him — Quarrels existing between family of accused and that of deceased — Accused suspecting that deceased had thrown acid on his brother and in order to teach him a lesson committing the above acts resulting in death of deceased — Held that in the circumstances the extreme penalty of death should be reduced to one of transportation for life.

(Paras 8, 9)

Anno: Penal Code, S. 302 N. 2, 6, 26; Cr. P. C., S. 367 N. 14.

CASE REFERRED: Para

(A) ('75-77) 1 Bom 342 4

P. Basi Reddi, for O. Chinnappa Reddi, V. Ramakrishna and C. Padmanabha Reddi, for Accused; Public Prosecutor, for the State.

JUDGMENT: The Additional Sessions Judge of Kurnool convicted the accused under S. 302, Indian Penal Code and sentenced him to death.

(2) The prosecution case may be stated briefly. About five months prior to the date of the occurrence, Gaffoor Miah, father of the deceased Sathar Miah, rented out a house of his to the father of the accused. At the instigation of Sathar Miah, the lease was terminated and the house was let out to one Chintalayya. This led to an altercation between the members of the two families. Two months thereafter, a brother of the accused was injured by acid being thrown on him. The accused suspected that the deceased threw the acid. The accused's father reprimanded him for it. Enraged at the behaviour of the deceased, the accused at about 7-30 A.M. on the 8th of June 1953 followed him when he was going to the Handri river to take his bath, and, in the sands of that river near Gummez beat him on his head with a stick and, after he fell down, turned his face upwards and with a knife cut off his nose. The deceased was later on taken to the hospital, where he died the next day at 5-30 P.M. The evidence of the witnesses, who have spoken to this version was accepted by the learned Sessions Judge.

(3) The learned Counsel for the accused did not question the truth of the main events deposed to by the eye witnesses. He argued that, on the facts found, no case of murder has been made out and that the offence would only amount to culpable homicide not amounting to murder.

(4) The difference between the two offences of culpable homicide and murder is fine but real. Culpable homicide is a generic term. The offence will amount to murder if the conditions laid down in S. 300 are satisfied. If the offence comes under S. 299 or under one or other of the exceptions to S. 300, it will be culpable homicide not amounting to murder. Melvill J. in — 'Reg v. Govinda', 1 Bom 342 (A) ably analysed the ingredients of the two sections and brought out clearly the difference between them. For convenience of comparison, he has given a table showing the ingredients of the two sections in juxtaposition at page 344. It is not necessary to reproduce the entire table, as, on the facts of the present case, the only relevant clause is the third clause of S. 300. It will be enough if the third clause and the corresponding provisions of S. 299 are extracted. They read:

S. 299.	S. 300.
With the intention of causing such bodily injury as is likely to cause death.	With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

Dealing with this clause, the learned Judge observed at page 345:

"The offence is culpable homicide if the bodily injury intended to be inflicted is likely to cause death, it is murder, if such injury is sufficient in the ordinary course of nature to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (c) and (4) already noticed. It is a question of degree of probability. Practically, I think that it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part, may be likely to cause death, a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death."

We respectfully agree with the analysis. But the example given by the learned Judge is only illustrative. It is for the court to ascertain, on the facts of each case, whether the offence committed is murder or only culpable homicide not amounting to murder. That clause could be invoked only if the intended bodily injury is sufficient in the ordinary course of nature to cause death. What is the injury intended to be inflict-

ed by the accused can be ascertained, unless the accused admits that he intended to inflict a particular injury, only by the nature of the weapon or weapons used, by the seriousness of the injury caused and by the parts of the body on which the wounds are inflicted. Whether such injuries are likely to cause death or sufficient in the ordinary course of nature to cause death, would depend again on the different degrees of probability. If death was the most probable result, it would be murder.

(5) What are the facts found in the present case? The accused used a stick 3½ feet long and 3″ in diameter. He beat the deceased, who is a young man, on his head with that stick. The evidence of the witnesses that he beat him again on his head after he fell down may be excluded as the witnesses did not mention that fact before the Magistrate. After he fell down, the accused turned his face upwards, drew a knife 6″ long from his drawers and cut off his nose. The post-mortem examination discloses the following wounds on the body:

1. A contused incised wound obliquely placed over the left dorsum, one inch long, skin deep and with edges glued.
2. A contused punctured wound on the inner aspect of the right little finger.
3. Whole of the cartileginous nose was severed vertically from the bridge, edges were congested nasal septum could be seen.
4. An irregular contused lacerated wound on the left upper lip 3/4″ rectangular in shape.
5. A contused lacerated wound on the right occiput 1/2″ x 1/2″ and muscle deep.
6. A contused lacerated wound on the right parietal region 1″ x 1/2″ and muscle deep.
7. A contused lacerated wound on the right parietal region 1″ x 1/2″ and muscle deep just in front of injury No. 6.
8. A lacerated wound on the right frontal region 3/4″ x 1/4″ and skin deep.
9. A contused lacerated wound on the left parietal region 2″ x 1/2″ and skin deep.

The doctor who was examined as P. W. 17 says that there was extensive extravasation under the scalp, that there was a fracture 5″ in length starting in a depressed fracture and running forward on the right parietal above perite-temporal suture and ending in the frontal bone. He was of opinion that death was due to cerebral compression and that the compression of the brain was due primarily to fracture. Though the deceased was duly attended to, he passed away at 5-30 P.M.

(6) Can it be said from the aforesaid facts that the bodily injury intended to be inflicted is not sufficient in the ordinary course of nature to cause death? When an assailant used a stick 3½ feet in length and 3″ in diameter to beat a person on his head causing serious injuries both external and internal, as disclosed by the medical certificate and also when he used a knife to chop off the victim's nose, we find it very difficult to hold that he did not intend to cause bodily injury sufficient in the ordinary course of nature to cause death. The weapon used, the part of the body where it was used and the nature of the wounds caused are sufficient in this case to infer an intention on the part of the accused to cause these wounds. We are also satisfied that the serious wounds caused in the vital part of the body of the deceased are sufficient in the ordinary course of nature to cause death.

(7) Relying upon the statement of the doctor that the injuries are sufficient to cause death, it is argued that the doctor intended only to say that the injuries are likely to cause death. We do not think we are justified in attributing to the doctor the subtle legal distinction between the two categories of injuries and in holding that he intended to say that the injury caused came within the definition of culpable homicide not amounting to murder. Indeed, if any such intention should be attributed to him, the word used by him viz., 'sufficient' must have been taken from the third clause of S. 300, indicating thereby that the wounds are sufficient in the ordinary course of nature to cause death. But we would prefer to base our conclusion on the facts clearly deposed to by the doctor, rather than on the ambiguous opinion expressed by him on the nature of the offence committed. On the facts disclosed by the doctor, we have no hesitation to hold that the injuries intended to be caused were sufficient in the ordinary course of nature to cause death. We would, therefore, hold that the offence committed was murder and that the accused was rightly convicted under S. 302, I. P. C.

(8) The next question is whether there are any mitigating circumstances in favour of the accused. The accused is a young man of 25. The quarrels between his family and that of the deceased, the active part taken by the deceased in the said disputes, the suspicion that he threw acid on the accused's brother naturally enraged the young man and he wanted to teach the deceased a lesson, which he would never forget. The method he conceived was to disfigure him by cutting away his nose. It was crude and certainly cruel, but it is obvious from the evidence that he had no intention to kill. With a lesser wound and with perhaps better medical attendance, his life might have been saved.

(9) Having regard to the aforesaid circumstances, and his youth, we think the ends of justice would be served if the lesser penalty of transportation for life is inflicted. We accordingly set aside the sentence of death, and instead sentence him to transportation for life.

(10) In the result, the conviction is confirmed, but the sentence is modified.

K.S.B. Sentence reduced.

(S) **A.I.R. 1955 ANDHRA 26 (Vol. 42, C.N. 12)**

CHANDRA REDDY J. (29-10-1954)

In re, Desi Raju Venkata Krishna Sarma, Petitioner.

Criminal Revn. Case No. 629 of 1954 and Criminal Rev. Petn. No. 585 of 1954, to revise order of Addl. First Class Magistrate No. 1, Guntur, D/- 30-12-1953.

Companies Act (1913), Ss. 6(iv), 230(1) — Limited liability company — Director — Personal

liability for arrears of sales tax due to company — (Sales Tax — Madras General Sales Tax Act (9 of 1939), Ss. 8-B, (2) and 15(h)) — (Criminal P. C. (1898), S. 386).

The Managing Director of a limited liability company cannot be made personally liable for arrears of sales-tax due by the company. The taxing authorities should proceed only against the assets of the company. Sections 8B(2) and 15(h), Madras General Sales Tax Act, and S. 386, Criminal P. C., have no bearing on this question. (Paras 13, 14)

A company which is a body corporate can be made liable for the payment of taxes and in respect of taxes payable by it, the individuals constituting the company cannot be held responsible for the default in payment of such taxes. (Para 8)

Under S. 6(iv), Companies Act, the liability of the members is limited to the amount payable on the shares. There can, therefore, be no personal obligation on the shareholders or even the directors in respect of the debts or even the taxes, revenue etc., due from the company. (Para 6)

There is no statutory provision in the Companies Act which entitles either a creditor or even the Government to proceed against a director of a limited liability company in respect of taxes payable by the company. It is only the assets of the company that can be proceeded against, and if there is any unpaid share-money the members should be called upon to contribute with others. (Para 9)

It is implicit in S. 230(1), Companies Act, that even revenues, taxes, cesses and rates payable to the State are only recoverable from the assets of the Company. Therefore, the directors cannot be personally proceeded against in respect of revenues, taxes etc. AIR 1951 Mad 886 (1) and AIR 1953 Mad 332, Dist. (Para 12)

Anno: Companies Act, S. 6 N. 1; S. 230 N. 1.

CASES REFERRED: Paras

(A) (V33) AIR 1951 Mad 886 (1): 1951 Mad WN Cr 93 (2): 52 Cri LJ 1040 4, 5

(B) (V40) AIR 1953 Mad 332: 1952 Mad WN Cr 187: 1953 Cri LJ 604 4, 5

(C) (V18) AIR 1931 Pat 321: 11 Pat 174 (FB) 8, 10

K. Krishnamurthy, for Petitioner; Public Prosecutor, for the State.

ORDER: The petitioner is a Managing Director of a Company called Messrs. Uplands Trading Company Limited, Brodiepet, Guntur. A complaint was filed before the Additional First Class Magistrate No. 1, Guntur, by the Assistant Commercial Tax Officer, Guntur, against the petitioner and other directors of the said company for failure to pay sales tax for the year 1948-49, an offence punishable under S. 15(b), Madras General Sales Tax Act. The case against them was that the company exported groundnut oil through Messrs. Raleigh Brothers, and in respect of that transaction, sales tax to the tune of Rs. 3285-6-3 was payable, that notice in form B demanding payment of the tax was served upon the petitioner, the Managing Director, on 16-3-1950, and that in spite of it, this amount was not paid within the time allowed.

(2) One of the defences put forward on behalf of the petitioner was that the company was not liable to pay the tax demanded as it was already collected from their agents, Messrs. Raleigh Brothers. The pleas raised on behalf of other accused are not material in this inquiry, as they have all been acquitted. This defence has been rejected as S. 16-A, Madras General Sales Tax Act, precluded an assessee from questioning the validity of the assessment in any criminal Court in any prosecution. In this view of the matter, he found the petitioner guilty of the offence charged and convicted and sentenced him to a fine of Rs. 100/-, with two months simple imprisonment in default. Besides, there was a direction that the arrears of tax of Rs. 3285-6-3 should be recovered from him as if it were a fine. The other directors were acquitted as no notice of demand was served on them.

(3) The petitioner has not questioned his conviction under S. 15(b), Madras General Sales Tax Act, though the Andhra State Legislature while adopting this Act omitted S. 16-A. But he challenges the validity of the direction as regards the recovery of arrears of tax, as if it were a fine from him personally.

(4) In support of the contention that a personal liability cannot be imposed upon a Director of a Company, reliance is placed on two decisions of the Madras High Court — 'Public Prosecutor v. Jacob Nadar', AIR 1951 Mad 886 (1) (A) and — 'Behara Latchanna Patnaick v. State', AIR 1953 Mad 332 (B). In the first case, Subba Rao J. (as he then was) held that under the Madras General Sales Tax Act, a firm is a person for purposes of assessment and prosecution, and in default of payment of tax, was liable to be prosecuted and a partner who was not served with notice of demand of tax could not be prosecuted for default of the firm. That ruling is not apposite for the reason that in this case, it is the company that is prosecuted and not particular individuals alone. Further, the learned Judge has not decided the question whether an individual partner is personally liable for payment of taxes.

(5) To the same effect is the ruling in — 'AIR 1953 Mad 332 (B)'. Somasundaram J. relied on — 'AIR 1951 Mad 886 (1) (A)' in support of his conclusion that some of the partners alone cannot be prosecuted for failure to pay taxes assessed on a firm. So these rulings do not in any way help the petitioner. On the other hand, there is an incidental remark in the judgment of Mr. Justice Somasundaram that every partner is individually liable to pay the tax. But these observations cannot apply to the present case for the reason that the position of Directors of a Company with limited liability is different from the partner of a firm. It must be mentioned and that the company in this case is one with limited liability. In the case of a partner of a firm, he is liable personally for the debts of the partnership. But different considerations arise in the case of the

members of limited liability company which is a legal entity.

(6) Under S. 6(iv), Companies Act, the liability of the members is limited to the amount payable on the shares. There can, therefore, be no personal obligation on the share-holders or even the directors in respect of the debts or even the taxes, revenue etc., due from the Company. It is only in cases where a statute creates a personal liability that it could be enforced, and that apart from the statute, no personal liability can be fastened upon a director of a company. There are provisions in the Indian Companies Act which requires the directors to do certain things and the failure to comply with these requirements involves certain penalties for which they are made personally liable.

(7) Payment of tax is not one of such requirements. The taxes are to be paid by the company as such, and it is not the liability of the individual members.

(8) The company which is a body corporate can be made liable for the payment of taxes and in respect of taxes payable by it, the individuals constituting the company cannot be held responsible for the default in payment of such taxes. In this context, a passage from Lindley on Companies 6th edition at page 299 extracted at page 323 in — 'Harihar Prasad v. Bansi Missir', AIR 1931 Pat 321 (FB) (C) is apposite:

> "The Society (speaking of an Industrial Provident Society spoken of as the Co-operative Societies in England, see Halsbury Laws of England Vol. 17 p. 3) being incorporated, must sue and be sued by its corporate name, and its members are individually liable for its debts and engagements only so far as the statute allows. As in the case of companies registered under the Companies Act, 1862, so in the case of societies registered under the Act now in question, the members are not liable to have executions issued against them in respect of judgments obtained against the society. The members can only be reached individually by the process of winding up."

(9) There is no statutory provision in the Companies Act which entitled either a creditor or even the Government to proceed against a director of a limited liability company in respect of taxes payable by the company. It is only the assets of the company that can be proceeded against, and if there is any unpaid share-money the members should be called upon to contribute with others.

(10) Another passage from the same book at page 363 extracted at page 323 in — 'Harihar Prasad v. Bansi Missir (C)' is also appropriate:

> "If the company is not registered with limited liability the members are liable to the full amount of the company's debts and engagements, whatever they may be. The liability, however, is a liability to contribute with others and such liability can only be enforced upon the winding up and no execution can proceed against a member."

(11) It is thus clear that a personal liability cannot be fastened upon a director or even a managing director in respect of taxes payable by the company. It looks to me that in this regard there can be no difference between debts and taxes payable by the company.

(12) Section 230(1), Indian Companies Act, makes the position clear. Section 230(1) enacts:

> "In a winding up there shall be paid in priority to all other debts
>
> A. all revenue, taxes, cesses and rates whether payable to the Union of India or a State, or to a local authority, due from the company, at the date hereinafter mentioned and having become due and payable within the twelve months next before that date."

It is implicit in this section that even revenues, taxes, cesses and rates payable to the State are only recoverable from the assets of the company. Therefore, the directors cannot be personally proceeded against in 'respect of revenues', taxes etc.

(13) The learned Public Prosecutor sought to support the judgment of the lower Court on the basis of Ss. 8(B)(2) and 15(h), Madras General Sales Tax Act, and S. 386, Criminal P. C. I do not think these sections have any relevancy in this inquiry. All that S. 8-B(2) says is:

> "Every person who has collected or collects any amount by way of tax under this Act, on or after 1-4-1947, shall pay over to the State Government within such time and in such manner as may be prescribed, all amounts so collected by him, if they are in excess of the tax, if any, paid by him for the period during which the collections were made; and in default of such payment, the amounts may be recovered as if they were arrears of land revenue."

This only contemplates enforcement of payment of taxes by dealers, when they collect the sales taxes from purchasers and fail to pay them to the Commercial Tax Authorities. Nor has S. 15(h), Madras General Sales Tax Act, or S. 386, Criminal P. C., any bearing on the present inquiry. Section 15(h) only directs the Magistrate convicting a person for contravention of any of the provisions of the Act to specify in the order that the tax or fee which such convicted person has failed or evaded to pay, or wrongfully collected shall be recoverable, as if it were a fine. That does not enable a Magistrate to give such a direction in respect of tax which is not personally payable by a director. Section 386, Criminal P. C. provides only the mode of collecting the fine imposed. That also does not throw any light on the present inquiry.

(14) For these reasons, I must hold that the petitioner, the Managing Director, cannot be made personally liable for the arrears of tax due by the company. The taxing authorities could proceed against the assets of the company. If the tax has been collected from the petitioner personally, it will be refunded to him.

K.S.B. Order accordingly.

(S) A.I.R. 1955 ANDHRA 29 (Vol. 42, C.N. 13)

SUBBA RAO C. J. (24-9-1954)

P. Sowrayya and Bros., Ltd., Defendant-Appellant v. Sundaragiri Abdul Khader Saheb, Plaintiff-Respondent.

Second Appeal No. 1688 of 1950, against decree of Sub. J., Narasaraopet, in Appeal Suit No. 8 of 1950.

Civil P. C. (1908), S. 9 — Jurisdiction of Civil Court — Bar of — Principles — (Madras Local Boards Act (14 of 1920), S. 186).

It is a well-established principle of law that a Civil Court's jurisdiction is not ousted unless a particular statute expressly or by necessary implication excluded it. (Para 5)

Section 186, Madras Local Boards Act is intended to enable the person authorised to collect fees to collect the same summarily and expeditiously. It is enacted to prevent evasion of the payment of fees. The words "may seize" in S. 186(1) clearly imply that it is in the discretion of the person duly authorised to collect the fees in the manner prescribed. The section also does not provide for a remedy to the injured party, who obviously can only go to a Civil Court, if the collection is made in violation of the provisions of the Act. In short, the section is not a self-contained one. It does not expressly say that it is the only remedy open to the person duly authorised to collect the fees nor does it by necessary implication do so. The section does not exclude in terms the jurisdiction of a civil Court. (Para 6)

It is true that where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the Statute. But the liability of a person, who used another man's property for parking his carts to pay the latter for his use and occupation is not a liability created for the first time by the provisions of the Madras Local Boards Act. The liability to pay rent or damages for use and occupation existing at general law is only re-enacted by the Statute. It cannot, therefore, be held that by necessary implication the Panchayat Board's remedy to recover the amount of cart-stand fee in a Civil Court is ousted. AIR 1940 PC 105; AIR 1941 Mad 530 (FB), Disting. (Paras 8, 10)

Anno: Civil P. C., S. 9 N. 50, 53, 55, 62.

CASES REFERRED: Paras

(A) (V27) AIR 1940 PC 105: 1940-2 Mad LJ 140 (PC) 7

(B) (V28) AIR 1941 Mad 530: 1941-2 Mad LJ 47 (FB) 8

(C) (1859) 6 CB (NS) 336: 28 LJ CP 242 9

K. Kannaiah and C. Kondaiah, for Appellant; C. V. Dikshitulu and N. Rajeswara Rao, for Respondent.

JUDGMENT: The question in this Second Appeal is whether a suit for the collection of cart-stand fees would lie in a Civil Court.

(2) The facts are simple. The Gurazala Panchayat Board has provided a stand for the stopping of buses and lorries. The right to collect fees from the owners of the said vehicles was auctioned. The plaintiff was the highest bidder for the years 1946-47 and 1947-48 and he thus became entitled to collect fees from the buses and lorries stopping in the cart-stand. The defendant, who was plying one lorry and six buses, used the cart-stand during that period. The suit was filed for the recovery of a sum of Rs. 482-8-0 as the fees due from him.

(3) The defendant, inter alia, contended that the suit was not maintainable as the Madras Local Board's Act (Act XIV of 1920) provided the machinery for the collection of such fees. Both the courts negatived the said contention. Hence the appeal.

(4) The learned Counsel for the appellant contended that S. 186 provides the machinery for collection of cart-stand fees, that the Panchayat Board or the person authorised by it to collect the same should proceed to collect the said fees only under the provisions of that section and that no separate suit would lie.

(5) It is a well-established principle of law that a Civil Court's jurisdiction is not ousted unless a particular statute expressly or by necessary implication excluded it. The question, therefore, is whether the provisions of the Madras Local Boards Act providing for public cart-stands and prescribing the manner of collection of fees has ousted the jurisdiction of a Civil Court in that respect. The relevant provisions of the Act read:

"S. 184(1) The Panchayat may construct or provide and maintain public landing places, halting places and cart-stands and may levy fees for the use of the same.

(1) A: The Panchayat may (a) place the collection of any such fees under the management of such persons as may appear to it proper or (b) farm out the collection of any such fees for any periods, not exceeding three years, at a time and on such terms and conditions as it may think fit.

S. 186(1): If the fee leviable under sub-s. (1) of S. 184 in respect of a vehicle or animal is not paid on demand, the person duly authorised to collect the same may seize such vehicle or animal, or any part of its burden and detain the same in his custody.

(2) If such fee together with the expenses occasioned by such seizure and detention remains unpaid for twelve hours, the person duly authorised as aforesaid shall forthwith send the vehicle ..... animal or other property seized as aforesaid to the nearest public officer empowered to sell destrained property under the Madras Rent and Revenue Sales Act, 1839.

(3) Such Officer shall forthwith give notice to the owner of the property seized, or if the owner is not known or is not resident in the neighbourhood, to the person who was in charge of the said property at the time when it was seized, and if he is not found, publish by beat of drum that, after the expiration of two days exclusive of Sunday from the date of service or after the said publication of such notice, he will sell the property by auction at a place to be specified in the notice.

(4) If, at any time before the sale, the person to whom notice has been given or the owner of the property seized tenders to the said Officer the amount due on account of the fee and of all the expenses occasioned by the non-payment thereof and by the seizure and detention of the property the property shall be forthwith released.

(5) If no tender is made to such officer, he shall sell the said property or a sufficient portion thereof by auction and apply the proceeds of the sale to the payment of the amount due on account of the fee and the expenses incidental to the seizure, detention and the sale of the property and shall return to the person in whose possession the property was at the time of the seizure any property or sum which may remain after the sale and the application of the proceeds thereof as aforesaid."

(6) It is seen from the provisions of S. 186 that it is intended to enable the person authorised to collect fees, to collect the same summarily and expeditiously. It is enacted to prevent evasion of the payment of fees. The words "may seize" in S. 186(1) clearly imply that it is in the discretion of the person duly authorised to collect the fees in the manner prescribed. The Section also does not provide for a remedy to the injured party, who obviously can only go to a civil court, if the collection is made in violation of the provisions of the Act. In short, the section is not a self-contained one. It does not expressly say that it is the only remedy open to the person duly authorised to collect the fees nor does it by necessary implication do so. The section does not exclude in terms the jurisdiction of a civil Court.

(7) But the learned Counsel Mr. Kondiah relied upon certain decisions in support of his contention that the said provision by necessary implication excludes the jurisdiction of civil courts. — 'Secretary of State v. Mask & Co.', AIR 1940 PC 105 (A) is typical of the cases cited by him. There the importers having imported into British India a consignment of betel-nuts, the Customs authorities levied duty on them on a tariff value. The importers appealed contending that the goods should be assessed on a lesser rate, namely, as raw betel-nuts subject to duty ad valorem. The Collector of Customs dismissed the appeal, the Government of India affirming this decision. The importers, having brought an action against the Collector to recover the amount of duty which they alleged to have been over-paid, the Judicial Committee held that the Civil Courts had no jurisdiction to entertain the suit.

From the facts, it is seen that the question was whether the injured party who had an express remedy under the Land Customs Act could file a suit in a civil court ignoring the remedy provided for by the Statute. Their Lordships held, having regard to the provisions of the Act, that the Civil Court's jurisdiction is excluded by the order of the Collector of Customs on appeal under S. 188 which was final, and they did not decide the question whether prior to taking such appeal under S. 188, the respondents would have been entitled to resort to the Civil Courts or whether they would have been confined to the right of appeal under S. 188. At page 110, the Judicial Committee made the following observations :

"The determination of this question must rest on the terms of the particular Statute which is under consideration and decisions on other statutory provisions are not of material assistance except in so far as general principles of construction are laid down."

(8) So too, the Full Bench decision in — 'Secretary of State v. Jagannadham', AIR 1941 Mad 530 (B) deals with the question of the right of an aggrieved party to proceed by way of a suit in a Civil Court. The respondent in that case was the President of the Union Board of Dharmavaram. The Examiner of Local Fund Accounts, passed an order of surcharge against him in respect of a sum on the ground that he had failed to collect arrears of house tax. Under the rule relating to the powers of Auditors' to surcharge, an aggrieved person may apply to the Principal Civil Court of Original Jurisdiction to set aside the order, or in lieu of applying to the Court, may appeal to the Local Government. He applied to the Local Government for cancelling the order of the surcharge and the petition was dismissed.

Then he filed the suit in a civil Court against the Secretary of State for India in Council for recovering the amount collected from him on behalf of the Government, the contention was raised that the civil Court had no jurisdiction to entertain the suit. Leach C. J. delivering the judgment on behalf of the Bench observed at page 532 as follows :

"Therefore, we have here two principles clearly established. The first is that to exclude the jurisdiction of the civil Courts the exclusion must be explicitly expressed or clearly implied. The second is that where the liability is statutory as opposed to liability under the common law, the party must adopt the remedy given to him by the Statute. I cannot imagine a clearer case of implied exclusion of the right to file a suit than we have here."

(9) This decision turns upon the provisions of the Madras Local Boards Act and the rules framed thereunder. The aggrieved party having been given a specific and adequate remedy, the Court held that the Act by necessary implication excluded the jurisdiction of the civil Court. The principle has been correctly and authoritatively laid down by Willies J. in — 'Wolverhampton New Waterworks Co. v. Hawkesford', (1859) 6 CB (NS) 336 (C). The learned Judge stated thus:

"There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there unless the statute contains words necessarily excluding the common law remedy the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other

remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law and gives also a particular remedy for enforcing it. With respect to that class, it has always been held that the party must adopt the form of remedy given by the statute."

(10) The present case is covered by the first class of cases enumerated by the learned Judge. The liability of a person, who uses another man's property for parking his carts to pay the latter for his use and occupation is not a liability created for the first time by the provisions of the Madras Local Boards Act. The Panchayat Board or the person authorised by the Panchayat Board would certainly be entitled to recover rent from a person who occupied its land under a contract, or to recover damages for use and occupation, if there is no specific agreement. The liability to pay rent or damages for use and occupation existing at general law is only re-enacted by the Statute. It cannot, therefore, be held that by necessary implication the Panchayat Board's remedy to recover the amount in a civil Court is ousted.

The aforesaid principle, though it affords a rule of guidance for construing the provisions of S. 186 as has clearly been pointed out, the provisions of each statute should be scrutinised to ascertain whether the civil Court's jurisdiction is ousted, either expressly or by necessary implications. In this case, the remedy provided for is only discretionary and summary. It is not even self-contained as no remedy is provided for the aggrieved party. It is not a statutory liability created for the first time, but only a re-enactment of the general liability. I would, therefore, hold concurring with the courts below, that the jurisdiction of the civil Court is not ousted.

(11) In the result, the appeal fails and is dismissed with costs. No leave.

H.G.P. Appeal dismissed.

(S) **A.I.R. 1955 ANDHRA 31 (Vol. 42, C.N. 14)**

SUBBA RAO C. J. (20-10-1954)

Venkata Reddy and others, Defendants-Appellants v. Kolandarareddigari Sankara Reddi, Plaintiff-Respondent.

Second Appeal No. 1882 of 1950, against decree of Dist. J., Chittoor, in Appeal Suit No. 362 of 1949.

(a) Hindu law — Stridhan — Succession to — Shulka, meaning of — Burden of proof.

Shulka is a gratuity for the receipt of which a girl is given in marriage. Whether the gift is made in the limited sense as defined in the Mitakshara (namely, shulka is that which, having been taken the bride is given in marriage) or in a wider sense, as including gifts of household furniture, conveyance, milch cattle and ornaments as defined in Smritichandrika, in either case, it shall be a gift to a bride in the nature of a bride's price.

This form of stridhana has become obsolete. In modern society, it is not possible to assume that every gift made to a bride, either before or after the marriage for the aforesaid purpose of shulka, will be her stridhana property. A party seeking to divert succession must set up a definite case and establish by clear evidence that a particular gift is a shulka within the meaning of the text books. (Para 9)

(b) Co-owner — Right to file suit for all co-owners.

It is settled view that a co-owner can file a suit for recovery of the property from a trespasser on behalf of all the co-owners. (Para 10)

CASE REFERRED: Para

(A) (V28) AIR 1941 Mad 618: 1941-1 Mad LJ 496 8

P. Ramachandra Reddy, for Appellants; Kasturi Sivaprasada Rao for S. V. Venugopalachari, for Respondent.

JUDGMENT: This Second Appeal is filed against the judgment and decree of the Court of the District Judge of Chittoor confirming that of the District Munsif in O. S. No. 599 of 1947, a suit filed by the respondent for a declaration of the title of the joint family, of which he is the manager, to the suit properties and for possession.

(2) The plaintiff's case may be briefly stated. His paternal uncle Chengalraya Reddy purchased the suit properties in the name of his wife Sayamma under a duly registered sale deed dated 27-6-1938 for a sum of Rs. 300/-. After he purchased, as he settled down in Sumatra Island for the purpose of trade, he entrusted the management of the suit lands to the defendants, who are the brothers and mother of Sayamma. Sayamma and Chengalraya Reddy died in the years 1945 and 1946, childless. At the time of his death, Chengalraya Reddy had two brothers, Veeraswami Reddy and Munuswamy Reddi. Munuswamy Reddi died in 1946 leaving him surviving his only son, the plaintiff. On those allegations, the plaintiff claimed that he and the members of his joint family including Veeraswami Reddy have become solely entitled to the suit properties. The suit was filed for possession as defendants refused to deliver possession.

(3) Defendants 1 to 3 claimed that the suit property was purchased benami in the name of Sayamma for their family. They stated that they have been in possession in their own right. Even if Sayamma was held to be the owner, they pleaded that they would be her heirs in preference to the plaintiff.

(4) The learned District Munsif held, on the evidence, that the sale deed dated 27-6-1938 in favour of Sayamma was not benami for defendants 1 to 3. He did not think it was necessary to consider whether the said sale deed was benami for her husband. Chengalraya Reddy, as in his view, it did not make any difference in the matter of succession. He found that there was no evidence that the marriage was in Asura form and on that finding, gave a decree to the plaintiff and his family as prayed for. On appeal, the learned District Judge accepted the findings of the trial Court. When it was contended before

him that the suit was filed by the plaintiff, as manager of his family and that no decree could be given for, the entire property as Veeraswami Reddy, the owner of the other half, was not a member of the plaintiff's family, the learned Judge held that the property was held in co-ownership by the plaintiff's family for which the plaintiff was the manager and Veeraswami Reddy was a co-owner and, therefore, the suit by one of the co-owners against a trespasser would lie. In the result, he confirmed the decree. Hence the appeal.

(5) Mr. Ramachandra Reddi, learned counsel for the appellants, contended that the property was given to Sayamma as Shulka, that to such property, the defendants have preferential right to succeed to that of the plaintiff and that the burden lies upon the plaintiff to establish that Sayamma's property is not Shulka but her ordinary Stridhana, in which case alone they would be entitled to succeed. It may be pointed out that this question has not been specifically raised in the pleadings. Though in paragraphs 7 and 8 of the written statement it was stated that the position of law stated in paragraph 7 of the plaint was incorrect, and that, even if Sayamma should be deemed to be the real owner, defendants 1 to 3 being the brothers of Sayamma, would be her nearer heirs. That the property was given as Shulka to Sayamma was not raised for the simple reason that the defendants' contention throughout was that the purchase was benami for them.

There was a suggestion in the first Court that the marriage was in Asura form. But that was rejected as there was no evidence to that effect. In appeal, the learned Judge said that the plaintiff was a heir to the stridhana property, as there was no evidence to show that it was shulka stridhana. If the defendants intended to set up an alternative plea that the property was given as shulka to Sayamma, they should have set up the plea in more specific terms, so that the plaintiff could have adduced evidence to establish that it was not shulka but only the usual kind of stridhana. The learned District Judge is not justified in allowing the appellants to raise the plea that the property was given as shulka, for that question could only be decided on fresh evidence adduced.

(6) As the question was argued, I think it is advisable to express my view. The meaning of shulka is gratuity or fees. Trevelyan in his treatise on Hindu Law says at page 436:

> "It was originally paid to the father as the price of the bride, but, when that was forbidden, the father received it for the bride and it became her property as her dowry. According to the 'Virmitrodaya' shulka is what is received by the bride or a married woman as a price of household furniture, conveyance, milch cattle and ornaments."

In the Mitakshara, it is stated that the fee or shulka is that which, having been taken, the bride is given in marriage. It is clear that, if the view of Virmitrodaya or of Mitakshara be accepted, it partakes of the character of price for the bride, though in the origin, it was paid to the father; subsequently it meant only the fees taken by the father for the benefit of the daughter.

(7) Golapchandra Sirkar Sastri in his book on Hindu Law gives the reason for the different rule of succession in the case of shulka at page 644 as follows:

> "The shulka or bride's price, however, goes to a woman's uterine brother in preference to her own issue; but if there be the mother, she is to be preferred to the brother. The reason is that originally it belonged to the parents; but later on, it was declared to become the bride's stridhana; and this rule of succession appears to be a compromise between the original and the later views."

Dealing with the mode of proof, in such cases, the learned author says:

> "In order to apply the special rule of succession to 'shulka', 'it must be distinctly alleged and proved by cogent evidence that the property given to a girl was of that character, the gift having been prompted by a desire to confer preliminary benefit, immediate or ultimate, on the parents who have been induced to give her in marriage. In the present advanced stage of society every ante-nuptial settlement or gift cannot be classed as shulka'."

Mayne in his treatise on Hindu Law and Usage, 11th Edition stated the law on the subject at page 743 as follows:

> "The shulka in the older sense of bride price, ultimately received by the bride herself, is obsolete; where it is now paid to the parents or, the brother in the Asura marriage, it does not raise any question of succession to her stridhana. Where it is paid to the bride herself either as the price of ornaments or household furnishing, or as a complementary present, it would be her ordinary stridhana; for there is no reason why the dowry given to the wife by the husband in modern times, should be treated as attracting a special order of succession, which was applied to some obscure form of the ancient bride price, which really belonged to the father, but which he may have handed back to his daughter."

(8) Horwill J. in — 'Surayya v. Balakrishnayya', AIR 1941 Mad 618 (A) noticed the difference in the definition of shulka laid down in the Mitakshara and in the Smritichandrika and attempted to reconcile both the definitions. At page 619, the learned Judge observed:

> "It seems clear that even though we take the definition of shulka given in the Smritichandrika, we must still read it with the definition given in the Mitakshara and must regard as shulka the classifications given in the Smritichandrika only if there is attached to the gift some idea of a bride price. If the present is given to the girl, or to the father of the girl, for the primary purpose of purchasing a bride or securing the marriage, then it would come within the definition of shulka; but these same classes of gifts, if not tainted with the idea of purchase, being simply gifts to a prospective bride, would not fall within the definition of shulka."

The learned Judge also quoted the abovesaid passage from Mayne's Hindu Law and approved of it.

(9) It is, therefore, clear that shulka is a gratuity for the receipt of which a girl is given in marriage. Whether the gift was made in the limited sense as defined in the Mitakshara, or in a wider sense, as including gifts of household furniture, conveyance, milch cattle and ornaments, as defined in Smritichandrika, in either case, it shall be a gift to a bride in the nature of a bride's price. But this form of stridhana has become obsolete. In modern society, it is not possible to assume that every gift made to a bride, either before or after the marriage for the aforesaid purpose of shulka, such gifts would be her stridhana property and a party, seeking to divert succession, must set up a definite case and establish by clear evidence that a particular gift is a shulka within the meaning of the text books. In this instant case, as I have already stated the defendants did not specifically plead in the written statement that the property was given to Sayamma as shulka, nor did they adduce any evidence to establish that fact. The lower Court is clearly right in holding that the property is not shulka and, therefore, the plaintiff is the preferential heir to Sayamma.

(10) It is then contended that the learned Judge was wrong in giving a decree to the plaintiff on a basis totally different from that with which he came to Court. It is pointed out that, in the plaint, the plaintiff claimed to be the manager of the joint family and that, in that capacity, he asked for possession, whereas the learned Judge gave the relief on the basis that the plaintiff as manager is a co-owner with Veeraswamy Reddi. In the plaint there are clear allegations that the plaintiff and the members of the joint family including Veeraswami Reddi have only became entitled to the suit property and that the suit was filed on behalf of the entire family. But it has transpired that Veeraswami Reddi had become divided from the plaintiff's father and, therefore, the plaintiff could not be the manager of Veeraswami Reddi's branch.

But on the death of Chengalraya Reddi, Veeraswami Reddy and Munuswamy Reddi took his property as co-owners and after the death of Munuswamy Reddy, the plaintiff's family members were co-owners with Veeraswamy Reddi. It is settled view that a co-owner can file a suit for recovery of the property from a trespasser on behalf of all the co-owners. That suit was framed by the plaintiff as manager of his family and it could not have prejudiced the defendants, for, as pointed out, the plaint discloses that the plaintiff's branch as well as Veeraswamy Reddy's branch were entitled to the entire property. Whatever defences the defendants could have raised if the suit was filed on the basis of co-ownership, they could also have been raised in the suit as framed. When the learned Judge rejected the technical plea, gave a decree, I do not think I am justified in interfering with it.

(11) In the result, the appeal fails and is dismissed with costs. No leave.

V.S.B. Appeal dismissed.

(S) A.I.R. 1955 ANDHRA 33 (Vol. 42, C.N. 15)

UMAMAHESWARAM J. (14-9-1954)

In re Billa Masthan, Petitioner.

Criminal Revn. Case No. 646 and Criminal Revn. Petn. No. 600 of 1954, against order of Addl. S. J., Guntur Division, D/- 2-9-1954.

(a) Criminal P. C. (1898), Ss. 403, 494 — Withdrawal and amendment of charges.

The words "one or more of the offences for which he is tried" in S. 494 are general in character & they may be distinct offences or offences of the same kind or offences arising out of the same transaction. Those words in the earlier part of the section cannot therefore be construed differently in judging the effect of the withdrawal under Cls. (a) and (b), and it cannot be said that the withdrawal under S. 494 refers only to the withdrawal of charges which might be clubbed together under Ss. 234, 235, 236 and 239, Criminal P. C., and is not applicable to the withdrawal of charges framed in respect of distinct offences and which cannot be tried together under the mandatory terms of S. 233, Criminal P. C. (Para 4)

In C. C. No. 143 of 1953 the accused was charged for two distinct offences under Ss. 408 and 477-A, Penal Code, respectively on 29-12-1953. On the next day, the Assistant Public Prosecutor, Gurjala, filed a petition stating that the two offences being distinct, both the charges should not be tried together and that the charge under S. 477-A, Penal Code, might be separated and fresh proceedings might be permitted to be started against the accused in respect of the said offence. The Additional First Class Magistrate passed the following order on that application: "I hold that the charges under Ss. 477-A and 408, Penal Code, cannot be tried together in one trial. Hence the charge under S. 477-A, Penal Code, will be tried separately and the case against B. Mastan under S. 477-A, Penal Code, will be registered as C. C. No. 308 of 1953 and proceeded with." Another order passed was that —"The accused Billa Mastan has been charged with offence under Ss. 408 and 477-A, Penal Code, on 29-12-1953 in this case. Since the two charges are distinct and are to be tried separately, the charges framed on 29-12-1953 are hereby amended by elimination of charge under S. 477-A, Penal Code."

Held, that the petition filed by the Assistant Public Prosecutor on 30-12-1953 must be regarded as having been made under S. 494. The withdrawal or the elimination of the charge under S. 477-A, Penal Code, though coupled with a specific direction "that the case against B. Mastan, under S. 477-A, Penal Code, will be registered as C. C. No. 308/53 and proceeded with", would only amount, in law, to an acquittal. Clause (2) of S. 403 had no application to a case of this description. AIR 1949 Mad 508, Rel. on; 1934 Mad WN 1094, Distinguished. (Paras 4, 7)

Anno: Criminal P. C., S. 403 N. 2; S. 494 N. 9.

(b) Precedents — Decisions of Madras High Court — Duty of Subordinate Courts in Andhra State — (Civil P. C. (1908), Pre.).

The Andhra High Court which was inaugurated in July 1954, is not bound to blindly follow all the decisions of the Madras High Court and is entitled to examine the soundness or the correctness of those decisions in proper and appropriate cases. But those decisions are entitled to the greatest respect and weight. The Subordinate Courts in Andhra State are primarily bound to follow the decisions of the Andhra High Court. If there are no decisions of the Andhra High Court directly governing the case, they ought to follow the decisions of the Madras High Court as they have been previously doing in preference to the decisions of other High Courts. It is only when there are no decisions of the Andhra High Court or the Madras High Court dealing with the point that they are free to follow the decisions of other High Courts.

(Paras 10, 11)

Anno: Civil P. C., Pre. N. 15.

CASES REFERRED: Paras

(A) (V36) AIR 1949 Mad 508: ILR (1949) Mad 946: 50 Cri LJ 698 3, 5, 7

(B) ('34) 1934 Mad WN 1094 7

(C) (V41) AIR 1954 Andhra 29: 1954-2 Mad LJ (Andhra) 95 10

(D) ('54) Second Appeal No. 574 of 1950, D/- 10-9-1954 (Andhra) 10

T. V. Sarma and S. V. L. Narasimhalu, for Petitioner; Public Prosecutor, for the State.

ORDER: An interesting question of law arises for decision in this Criminal Revision Petition. In C. C. No. 143 of 1953 the petitioner herein was charged for two distinct offences under Ss. 408 and 477-A, Penal Code, respectively on 29-12-1953. On the next day, the Assistant Public Prosecutor, Gurjala, filed a petition stating that the two offences being distinct, both the charges should not be tried together and that the charge under S. 477-A, Penal Code, might be separated and fresh proceedings might be permitted to be started against the accused in respect of the said offence. The Additional First Class Magistrate passed the following order on that application:

"I hold that the charges under Ss. 477-A and 408, Penal Code, cannot be tried together in one trial. Hence the charge under S. 477-A Penal Code, will be tried separately and the case against B. Mastan under S. 477-A, Penal Code, will be registered as C. C. No. 308 of 1953 and proceeded with."

(2) Another petition was filed on the same day by the Assistant Public Prosecutor stating that, in view of the separation of the charge under S. 477-A, Penal Code, the charge in C. C. No. 143 of 1953 might be amended by dropping the charge under S. 477-A and the following order was passed on that application.

"The accused Billa Mastan has been charged with offences under Ss. 408 and 477-A, Penal Code, on 29-12-1953 in this case. Since the two charges are distinct and are to be tried separately, the charges framed on 29-12-1953 are hereby amended by elimination of charge under S. 477-A, Penal Code."

(3) The question that falls to be decided is, as to the effect of the order dated 30-12-1953, amending the charges framed on 29-12-1953 and eliminating the charge under S. 477-A, Penal Code. The argument addressed by Mr. Sarma, the learned Advocate for the petitioner was that the withdrawal of the charge in respect of offence under S. 477-A, Penal Code, must be regarded as made under S. 494, Criminal P. C. that under Cl. (b) it operated as an acquittal in respect of that offence, that the Additional First Class Magistrate, Narasaraopet, had no jurisdiction to try the petitioner under S. 477-A, Penal Code, in C. C. No. 308 of 1953 and that the conviction and sentence passed on the petitioner to undergo rigorous imprisonment for four months, which was confirmed on appeal by the Court of Session, Guntur, in Cr. A. No. 53 of 1954 was unsustainable.

In support of that contention, he mainly relied on the decision of Govinda Menon J. in — 'In re, Velayudha Mudali', AIR 1949 Mad 508 (A). The learned Public Prosecutor contended that the withdrawal of the charge was not under S. 494, Criminal P. C., that the amendment of the charge framed on 29-12-1953 did not attract the terms of S. 403, Criminal P. C., and that the decision relied on by the petitioner was distinguishable.

(4) For the purpose of appreciating the rival contentions it is necessary to examine the relevant provisions of the Code of Criminal Procedure. Section 233, Criminal P. C., enacts that there shall be a separate charge for every distinct offence of which any person is accused and every such charge shall be tried separately, except in the cases mentioned in Ss. 234, 235, 236 and 239. Section 234 provides that a person accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, may be charged with, and tried for not more than three such offences at one time. Under S. 235, a person who commits more than one offence in the same transaction may be charged with and tried at one trial for every such offence. Where it is doubtful which of several offences the facts which can be proved will constitute, under S. 236, Criminal P. C., the accused may be charged with having committed all or any of such offences or may be charged in the alternative with having committed one of the said offences.

Section 239 provides as to who may be charged and tried together. What emerges from an examination of these provisions is that distinct offences in respect of which separate charges are framed, ought not to be tried together. This position was realised by the Assistant Public Prosecutor, Gurjala, on 30-12-1953, after the Magistrate framed the charges on 29-12-1953. The petition filed by the Assistant Public Prosecutor on 30-12-1953, does not, in specific terms, refer to S. 494, Criminal P. C., but, in my opinion it must be regarded as having been made under that section, as the learned Public Prosecutor has not been able to invite my attention to any other section of the Criminal Procedure Code under which the charge framed under S. 477-A could have been eliminated and the trial confined to the charge under S. 408, Penal Code. There can be no doubt, that if the withdrawal was effected under S. 494, after the framing of a charge, it would operate as an acquittal under Cl. (b).

The Public Prosecutor was therefore constrained to contend that the withdrawal under S. 494 referred only to the withdrawal of charges which might be clubbed together under Ss. 234, 235, 236 and 239, Criminal P. C., and was not applicable to the withdrawal of charges framed in respect of distinct offences and which could not be tried together under the mandatory terms of S. 233, Criminal P. C. The contention is, in my opinion, unsustainable as is clear from the language of that section. Section 494, Criminal P. C., enacts that any Public Prosecutor may withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried. Clause (a) provides that, if the withdrawal is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences. Before the framing of a charge no question of misjoinder arises. The words "one or more of the offences for which he is tried" are general in character and they may be distinct offences or offences of the same kind or offences arising out of the same transaction. Those words in the earlier part of the section cannot therefore be construed differently in judging the effect of the withdrawal under Cls. (a) and (b).

(5) The decision in — 'In re, Velayudha Mudali (A)' directly governs the case. As some of the charges framed in that case were exclusively triable by a Court of Session, the Public Prosecutor applied under S. 494, Criminal P. C., for permission to withdraw the case stating that his intention was to file separate prosecutions, against the accused for those offences and the Court granted the permission for the withdrawal and discharged the accused under S. 494(a), Criminal P. C. Govinda Menon J. held that the withdrawal of the case, after the framing of a charge, amounted to an acquittal of the accused. The observations of that learned Judge are not only apt but are entitled to great weight and are directly applicable to the facts of this case.

They are as follows:

"The learned Public Prosecutor urges that the request for withdrawal was combined with the statement that the intention of the prosecution was to file separate cases against individuals or groups of accused separately and according to him, in pith and substance, the order giving permission to withdraw the case amounts also to an order empowering the institution of the present case. If the Code of Criminal Procedure contained a provision similar to O. 23, R. 1, Civil P. C., allowing the withdrawal of a case with permission to file, on the same facts, a fresh complaint, this argument is entitled to great weight. But in the absence of any such rule of law one has to envisage the result of a withdrawal in accordance with the ideas underlying the sections of the Criminal Procedure Code. If it is impossible to wipe off or obliterate a charge already framed without an acquittal or with the culmination of a charge in a conviction, any withdrawal with permission to file a fresh complaint cannot be understood as the keeping alive of a charge."

(6) The object or intentions of the Assistant Public Prosecutor in requesting the Magistrate to omit the charge under S. 477-A might be to empower him to initiate separate proceedings in C. C. No. 308 of 1953 and the object of the Magistrate in allowing the petition might equally be the same.

(7) But the question is whether such a procedure is warranted by the provisions of the Code of Criminal Procedure. Unfortunately, as there is no provision in the Criminal Procedure Code, corresponding to O. 23, R. 1, Civil P. C., permitting the withdrawal of a case with permission to file a fresh complaint, on the same facts, the withdrawal or the elimination of the charge under S. 477-A, Penal Code, though coupled with a specific direction "that the case against B. Mastan under S. 477-A, Penal Code, will be registered as C. C. No. 308/53 and proceeded with" would only amount, in law, to an acquittal. The result of such a construction may be regrettable, but the law must be given effect to. In spite of the fact that this anomaly was pointed out by a learned Jude of the Madras High Court with vast criminal experience, in 1948, the Criminal Procedure Code has not been duly amended.

It is for the Legislature to step in and remedy such defects and not for me to strain and construe the provisions of S. 494, Criminal P. C., in such a way as to avoid the result of acquittal and sustain the conviction, as contended for by the learned Public Prosecutor. I do not agree with the learned Public Prosecutor that as the two charges framed under Ss. 408 and 477-A were in respect of distinct offences and could not be tried together according to S. 233, Criminal P. C., it was open to the Magistrate to proceed with the trial of the charge under S. 408, Penal Code, in C. C. No. 143 of 1953 and to separately proceed with the trial of the other charges under S. 477-A in C. C. No. 308 of 1953. This argument overlooks the fact that after charges are framed by the Magistrate, the enquiry is transformed into a trial and that it is impossible in the words of Govinda Menon J. in — 'In re Velayudha Mudali (A)':

"to wipe off or obliterate a charge already framed without an acquittal or with the culmination of the charge in a conviction."

There is no distinction in principle between the decision in — 'In re Velayudha Mudali (A)' and the present case. In — 'In re, Velayudha Mudali (A)' the Magistrate was not competent to try some of the offences as they were cognizable by a Court of Session, while in the present case, the Magistrate was not competent to try them as they related to two distinct and separate offences. If according to the learned Public Prosecutor there was no withdrawal within the meaning of S. 494, Criminal P. C., what happened to the charge under Section 477-A, Penal Code? Even if the charge was eliminated or omitted under S. 277, Criminal P. C., it would, in law, amount to an acquittal and he cannot be tried over again for the same offence having regard to the clear terms of S. 403 (1), Criminal P. C.

Clause (2) of S. 403 has no application to a case of this description. The decision of Walsh J. in — 'Thangappa Nadar v. Neethimanicka Nadar', 1934 Mad WN 1094 (B) has no bearing as charges under Ss. 477-A and 409, Penal Code, were not framed together as in this case.

Proceedings under S. 477-A were started at first and the learned Judge held that it did not bar proceedings being taken under S. 409 after conviction under S. 477-A, Penal Code, as the facts constituting the two offences were different and distinct.

(8) The learned Advocate for the petitioner raised several other legal contentions, but it is unnecessary for me to discuss them as the conviction has to be set aside on the first point itself.

(9) In the result, the Criminal Revision Petition is allowed and the conviction and sentence imposed by the Addl. Ist Class Magistrate, Narasaraopet, and confirmed on appeal by the Sessions Judge, Guntur, are set aside.

(10) Before concluding the judgment, I only wish to point out that it is regrettable that both the Courts below erred in not referring to and following the direct decision of Govinda Menon J., referred to 'supra', even though I understand from the learned Advocate for the petitioner who appeared in the Courts below that this decision was cited before them. It may be, as pointed out by me in — 'Venkayya v. Seshayya', AIR 1954 Andhra 29 (C) and the unreported decision in — 'Subba Reddi v. Govinda Reddi', Second Appeal No. 574 of 1950, D/- 10-9-1954 (Andhra) (D) that this High Court which was inaugurated in July 1954, is not bound to blindly follow all the decisions of the Madras High Court and is entitled to examine the soundness or the correctness of those decisions in proper and appropriate cases.

(11) I also pointed out therein that those decisions are entitled to the greatest respect and weight. But those observations ought not to be understood as implying that the Subordinate Courts in the State are entitled to ignore the direct decisions of the Madras High Court or to capriciously prefer the decisions of the other High Courts to the decisions of the Madras High Court. The Subordinate Courts in the State are primarily bound to follow the decisions of this Court. If there are no decisions of this Court directly governing the case, they ought to follow the decisions of the Madras High Court as they have been previously doing in preference to the decisions of other High Courts. It is only when there are no decisions of this Court or the Madras High Court dealing with the point, they are free to follow the decision of other High Courts. The petitioner is set at liberty and bail bonds cancelled. Revision allowed.

D.H.Z. Revision allowed.

(S) A.I.R. 1955 ANDHRA 36 (Vol. 42, C.N. 16)

CHANDRA REDDY J. (31-8-1954)

Roman Catholic Mission Depressed Tenants Co-operative Society and others, Appellants v. Nayudu Kotayya and others, Respondents.

Appeal No. 108 of 1950, against decree of Sub. J., Guntur, D/- 30-8-1949.

(a) Civil P. C. (1908), S. 2(12), O. 20, R. 12 — Mesne profits — Liability of lessor.

The basis of calculation of mesne profits payable by a landlord or lessor is the rent actually received by him unless it could be established that with due diligence he could have obtained a higher rent. There is no basis for holding the lessor a trespasser and make him liable jointly along with the tenants for profits on the calculattion of what the tenants got out of the land. Case law Relied on. (Para 6)

Anno: Civil P. C., O. 20, R. 12 N. 5.

(b) Civil P. C. (1908), S. 2(12), O. 20, R. 12 — Mesne profits — Liability of tenants of trespasser.

The position of a tenant, who was let into possession by a person whose title to the property was recognised by the plaintiff though ultimately it turned out not to be well founded, cannot be regarded as that of a trespasser for purposes of mesne profits. In such a case the tenants cannot be viewed as trespassers from the time of their lease. It is only after the title of the plaintiffs to the suit lands has been accepted, that their possession should be regarded as wrongful. The doctrine of 'relation back' can have no application to a case where the title of the plaintiffs was not recognised on the date of the lease. AIR 1929 PC 300, Foll. (Paras 11, 13, 14)

Anno: Civil P. C., O. 20, R. 12 N. 5.

(c) Civil P. C. (1908), S. 35 — By whom costs are to be paid.

In spite of the Landlord-Government having recognised the title of the plaintiffs, the tenants would not allow the plaintiffs to take peaceful possession of suit lands. The tenants disputed the right and title of the plaintiffs to the lands in question. They also asserted their right to continue in possession of the lands. They did not admit the claim of the plaintiffs to the suit lands even after the filing of the suit. Thus it was the attitude of the tenants that was responsible for the plaintiffs filing the suit for recovery of possession of the suit property and also for mesne profits, and they had to prove their case even in respect of their title to the suit properties.

Held that the tenants were liable to pay the costs to the plaintiffs in respect of the relief for possession of the properties. (Para 16)

Anno: Civil P. C., S. 35 N. 5, 7, 9.

CASES REFERRED: Paras

(A) (V16) AIR 1929 PC 300: 57 Cal 1 (PC) 6, 13, 14

(B) (V21) AIR 1934 Cal 503: 151 Ind Cas 922 6

(C) (V18) AIR 1931 Cal 802: 135 Ind Cas 876 6

(D) (V27) AIR 1940 Mad 913: 1940-2 Mad LJ 611 6

(E) (V5) AIR 1918 PC 118: 45 Ind App 284 (PC) 14

P. J. Ratnam, V. T. Rangaswamy Iyengar and K. Kalyanasundaram, for Appellants; M. S. Ramachandra Rao and M. Krishna Rao, for Respondents.

JUDGMENT: This appeal is filed by defendants 2 to 4 in O. S. No. 29 of 1948 on the file of the Subordinate Judge's Court of Guntur. It relates only to costs and mesne profits.

(2) The suit was instituted against the Provincial Government of Madras, represented by the District Collector, and the tenants, defe

dants 2 to 4 for possession of suit properties for mesne profits, past and future. The basis of the suit was that the suit properties of an extent of about 12 acres, belonged to the plaintiffs. They are lanka lands, which were submerged under the Krishna river several years back but reappeared in or about the year 1943. They adjoin the lands belonging to the 1st defendant. Under a mistaken impression that these and some other lanka lands were part of the Government lankas, the 1st defendant included them in a lease granted by him to defendants 2 to 4 on 7-9-1944, for a period of three years. Subsequently, the plaintiffs, with a view to have the title to the suit properties ascertained, requested the Government to have a survey of these lands ordered. This request was complied with and the survey disclosed that the suit lands before immersion were the properties of the plaintiffs. Therefore, by his proceedings, dated 25-2-1947, the Collector, Guntur, directed that these lands should not be included in the lease for the next period.

In pursuance of this communication the plaintiffs tried to obtain peaceful possession of these lands from defendants 2 to 4 but failed even after the expiry of the lease, owing to the obstructive attitude of defendants 2 to 4. This obliged the plaintiffs to file the suit for the reliefs mentioned above. The 1st defendant's plea was that the suit lands belonged to the plaintiffs, that he had no objection to their taking possession of the same, that the lessees, though liable to vacate it by 30-6-1947 the date of the expiry of the lease, wilfully and unauthorisedly occupied the same in contravention of terms of the lease, and that, therefore, the 1st defendant was not responsible for the consequences of the unauthorised occupation of defendants 2 to 4 and that in those circumstances no liability could be fastened on him either with regard to mesne profits (except as to actual proportionate rental received by him on the suit lands) or costs.

The real contesting defendants to the suit were defendants 2 to 4. They resisted the suit denying the right of the plaintiffs to the lands in question. They also disputed their liability to pay mesne profits on the ground that the lands were leased out to them and "they were tenants holding over with the bona fide belief that fresh leases would be granted to them for a further period of three years."

(3) The trial Court decreed the suit in toto with costs against all the defendants. Mesne profits were awarded at the rate of Rs. 50/- per acre as claimed by the plaintiffs, making all the defendants jointly and severally liable in respect thereof. Defendants 2 to 4 have preferred this appeal confining it to mesne profits and costs as already mentioned, and impleading the State of Madras as one of the respondents.

(4) The first question that falls for decision in this appeal is whether the plaintiffs are entitled to mesne profits against one or the other of the defendants and if so, for what period and at what rate. It may be remarked at the outset that the learned Judge had not considered the question of the liability of the defendants to pay mesne profits. Nor is the discussion relating to the quantum of damages satisfactory. He failed to consider the evidence for the defendants and the admissions of the plaintiffs' witnesses in that behalf. However, it is unnecessary to devote any discussion to this aspect of the matter in the view I have taken of the liability to pay mesne profits.

(5) The right of the plaintiffs to claim mesne profits depends upon whether the possession of the defendants was wrongful from its inception, that is, from the date of the lease. So far as the 1st defendant is concerned, he can be regarded as being in wrongful possession in the sense that he was taking the rent from the other defendants though he was not entitled to do so. The 1st defendant cannot, therefore, retain the rent, which is not legitimately his, and has to disgorge himself of it. In fact, the 1st defendant offered to pay the plaintiffs the proportionate rent received.

(6) But there is no basis for holding the 1st defendant a trespasser and make him liable jointly along with the other defendants for profits on the calculation of what the defendants 2 to 4 got out of the land. There is authority for this proposition in — 'Gurudas Kundu v. Hemendra Kumar Roy', AIR 1929 PC 300 (A). Even the definition of "mesne profits" contained in S. 2, Cl. (12) cannot lend any support to the view taken by the lower Court so far as the Government (lessor) is concerned. The measure of damages in this respect can only be profits received by the 1st defendant or which might have been received by it with due diligence. There is no evidence in this case that with the exercise of due diligence, more rent could have been received.

There are a number of rulings of the Courts in India which have taken the view that the basis of calculation of mesne profits payable by a landlord or lessor is the rent actually received by him unless it could be established that with due diligence he could have obtained a higher rent. See — 'Kiran Chandra v. Erfan Karikar', AIR 1934 Cal 503 (B) and — 'Bhupendra Narain Sinha v. Rajeswar Prosad', AIR 1931 Cal 802 (C). This is also the opinion expressed by the Madras High Court in — 'Venkatarayulu Naidu v. Raghunadha Rao', AIR 1940 Mad 913 (D). It follows that assuming the tenants are liable to pay mesne profits on the basis of what they got out of the land or could have obtained with due diligence, the measure of damages so far as the landlord is concerned (in this case the first defendant) is only the rent which he has actually received or would have got with the exercise of due diligence. The result is that the decree for mesne profits against this defendant will be restricted to a sum of Rs. 60 per year being the rent actually received in respect of the suit lands.

(7) Now coming to the case of defendants 2 to 4 the claim for mesne profits has to be disallowed. It looks to me that it is difficult to look upon them as trespassers. They were inducted into possession by the 1st defendant as lessees in the year 1944, just a year after the reformation of the lankas. Before going to the citations, it is useful to refer to the recitals in the plaint which form the basis of the suit.

In paragraph 3(b) of the plaint, it is alleged as follows:

"Under a mistaken impression that the suit land and some other lanka lands nearby belonged to the Government, the latter leased out the same on 7-9-1944 to the second defendant-Society for a period of three years. By its communication dated 25-6-1946 the 1st defendant informed the plaintiffs and others that no patta lands were included in the lanka lease granted to the second defendant-Society. The said communication was made in the honest belief that really no portion of the plaintiffs' land was wrongfully leased out by the 1st defendant to the second defendant. But as plaintiffs pointed out to the first defendant the mistake under which the parties were acting, the first defendant directed a check-up to be made by the survey authorities. The said check-up resulted in the first defendant realising that an extent of 19 acres 10 cents of S. No. 1/6-B and some other lands in the vicinity was wrongly included in the lease in favour of the second defendant."

(8) The grievance of the plaintiffs, as disclosed in the next paragraph, is that in spite of the orders of the authorities concerned and their efforts to obtain peaceful possession of the suit lands, defendants 2 to 4 would not allow them to do so. On these averments it looks to me that it is difficult to lay a foundation for the claim of mesne profits at Rs. 50/-. That apart, there does not seem to be any legal basis for regarding the defendants 2 to 4 as trespassers and their possession as wrongful.

In this context, it cannot be overlooked that the suit lankas having been submerged several years back, reappeared only in the year 1943. At the time of the lease the title of the plaintiffs to these lands was not established. It is pointed out to me that the survey of 1931 did not disclose the right of the plaintiffs to these lands. It was urged that even in the petitions submitted by the plaintiffs in the years 1945 and 1946 there were only requests to the Government to undertake a survey so as to decide the title to these suit lands, and it is only the later survey that led to the recognition of the plaintiffs' title to these lands. At the time of the lease it was thought by all the parties concerned that the legal title to the lands existed in the Government.

(9) Mr. Ramachandra Rao, Counsel for the respondents, maintained that this last factor is immaterial. According to him the possession of defendants 2 to 4 is wrongful from the inception on the theory of "relation back". The foundation for this argument is a passage in the "Law of Torts" by S. Ramaswamy Iyer (4th Edn.), at p. 100:

"The doctrine of trespass by 'relation back' carries this presumption to its farthest limit. Where an owner who had been kept out of possession enters upon his land, his possession relates back to the date at which his legal right to enter first accrued and he can maintain trespass and recover damages or 'mesne profits' as from that date."

Again at page 105, the Author says:

"The plaintiff need not prove that it was wilful or negligent, much less that it was attended with any force, violence or damages."

(10) Reliance is placed on a similar passage in Clerk and Lindsell on "Torts" (10th Edn.) at page 507:

"Trespass being an invasion of a legal right is independent of intention or negligence. It is no defence that the trespass was unintentional, provided the physical act of entry was voluntary; as where a person strays off a foot-path in the dark, or where, the boundary between the plaintiff's and the defendant's land being ill-defined, the defendant in moving his own grass by mistake moves some of the plaintiff's, but if the act be involuntary it is otherwise."

Regarding the doctrine of 'relation back' the following passage occurs at page 514 of the same book:

"In the early periods of history of our law, might seems to some extent to have been confounded with right and actual possession to have been more highly favoured than property or the legal right to possession. Where at the time of the commission of any trespass upon land the owner happened to be out of possession, either by reason of his having been wrongfully ousted or by reason of his having neglected to enter into possession upon the accrual of his title, he seems to have been without remedy for such trespass. In the course of time, however, the injustice of not extending to the right of possession the remedies which were allowed to bare possession came to be recognised, and a legal fiction was introduced whereby the party having the right to possession was, upon entry, deemed to have been in possession from the date when his right of entry accrued."

(11) These doctrines can have no application to a case like the present where the title of the plaintiffs was not recognised on the date of the lease. On the other hand it was thought by all the parties concerned having regard to the juxtaposition of the suit lands to the property of the Government when they reappeared in the Krishna river the legal title thereto vested in the 1st defendant. That apart even in England, Courts did not give effect to this doctrine as appears from the passage in Clerk and Lindsell on "Torts" at page 515:

"The Courts, however, did not go to the whole length of treating the right to possession as per se equivalent to possession; they still required that a plaintiff who seeks to recover damages for a trespass committed while he was out of possession should, before action brought go through the form of entry, or which is equivalent, of making a formal claim."

(12) On the basis of this passage, the plaintiffs before they could succeed in their claim for mesne profits should prove that they made a formal claim. In this case what transpires from the plaint is that the plaintiffs called upon the defendants to surrender possession of the suit lands only after a communication was received from the District Collector in February 1947.

(13) Support is derived for the view that defendants 2 to 4 should not be treated as trespassers from the pronouncement of the Privy Council in — 'Gurudas Kundu Chaudhari v. Hemandra Kumar Roy (A)' already referred to. There, in an appeal against the judgment of the High Court of Calcutta, the Judicial Committee had

to decide whether the plaintiffs were entitled to mesne profits up to the date of the delivery of possession of land to them and whether the lessors were liable jointly and severally with the lessee, who was in actual possession of the land, for mesne profits based on the produce value of the land, or were merely liable in respect of the rent they had received from the patnidar. That case also related to a dispute regarding the properties that once disappeared in the Ganges and reappeared after several years. Those lands adjoined those of the Government and the latter assumed them to be an accretion to their property and put some tenants upon it. After some time one of the three families to whom originally these properties belonged namely the Kundu family applied to the Collector for recognition of his title to the property and this claim was recognised by the Government. They continued the lessee who was already inducted into possession by the Government.

After a while the other two families, who had title to these properties, raised an action for possession of their share in those lands and for mesne profits, impleading members of the Kundu family, which was originally recognised by the Government as the owner of the whole property, the tenant etc. The suit was decreed with mesne profits against the defendants, the amount of mesne profits to be ascertained in execution. In execution of the decree the two questions mentioned above were raised. The Calcutta High Court found both the issues in favour of the plaintiffs. On appeal, by the lessor, the Kundu family, the Privy Council reversed the decision of the High Court on the question of joint liability in the view that the decree for mesne profits could not be regarded as a proper joint and several decree and that it should be construed 'applicando singula singulis'.

In dealing with the argument of Mr. Upjohn, that:

> "the judgment was against them, and it was against them upon the theory that these people were all trespassers; not only were the Kundu defendants trespassers but Srish (being a tenant) was a trespasser. He was put in by the Kundus; the Kundus had no real right, and therefore he had not a right. Accordingly, as the decree was for joint and several liability, you may take the mesne profits upon the calculation of what Srish got out of the land, and get decree against all the others for that amount",

their Lordships remarked that they had a great difficulty in looking upon Srish as a trespasser, or for that matter, in one sense, even the Kundus as trespassers, because they were in possession of the land and on the only legal title to it which existed, namely, the lease from the Government.

They further observed that the Kundus were in wrongful possession only in the sense that they were taking the whole profits while they were entitled to a portion thereof. It is clear from these observations that the position of a tenant who was let into possession by a person whose title to the property was recognised, though ultimately it turned out not to be well founded, could not be regarded as that of a trespasser for purposes of mesne profits.

(14) Mr. Ramachandra Rao urged that these observations should not be taken too literally, for two reasons, first that the question of measure of damages payable by the tenant was not before their Lordships, and secondly, that the Privy Council had recognised the principle that an alienee from a widow was liable to pay mesne profits from the date of the death of the widow and not from the time when the alienation came to be adjudicated to be not binding on the reversion. As regards the first part of the argument, suffice it to say that the remarks were quite relevant as a contention was put forward that as both the tenant as well as the landlord were trespassers and as there was a joint and several liability, mesne profits had to be calculated on the basis of what the tenant got out of the land. Coming to the decisions which have laid down that in a suit by a reversioner to recover possession of properties from an alienee from a widow on the ground that the alienation is not binding on the reversioner, the reversioner is entitled to mesne profits from the time of the death of the widow, they are not quite appropriate in this context. That principle has not been extended to an alienation by a father or the guardian of a minor.

Dealing with the latter kind of cases, the Judicial Committee observed in — 'Banwari Lal v. Mahesh', AIR 1918 PC 118 (E), that the defendants were to be deemed to be lawfully in possession until the sales were set aside and they were not accountable for mesne profits. The analogy between those cases and cases like the present one is more appropriate. It is unnecessary for me to pursue this point any further, in the light of the observations of the Privy Council in — 'Gurudas Kundu Chaudhari v. Hemendra Kumar Roy (A)' extracted above. My conclusion is that defendants 2 to 4 could not be viewed as trespassers from the time of their lease. It is only after the title of the plaintiffs to the suit lands has been accepted, that their possession should be regarded as wrongful, that is, after 25-2-1947, and they will be liable to pay mesne profits from that date. This was at the fag-end of the fasli and there is no evidence to show that any profits were derived by these defendants after that period from the land.

Further, it does not appear that the appellants had any notice of the recognision of the title of the plaintiffs. So far as the record goes it is only after the suit notice was issued that these appellants came to know about it. Thus the appellants are not liable to pay any mesne profits to the plaintiffs as they have already paid to the first defendant. The plaintiffs will get from the 1st defendant the rent which he received from the defendants 2 to 4. The decree will be modified accordingly.

(15) The second point for decision in this appeal is whether the decree for costs against the appellants, as well as as the 1st defendant is correct. In this appeal it is argued by Mr. Rathnam for the appellants that they are not liable for costs because they were let into possession as lessees by the 1st defendant. There is no substance in this contention. It is true that they were the lessees under the 1st defendant, but in spite of the first defendant having recognised the

title of the plaintiffs, the appellants, would not allow the plaintiffs to take peaceful possession of suit lands. It is recited in paragraph 4 of the plaint that the efforts to obtain peaceful possession of the said extent of land from second defendant failed even after the expiry of lease on 30-6-1947. This statement is not contradicted in the written statement. On the other hand the appellants disputed the right and title of the plaintiffs to the lands in question. They also asserted their right to continue in possession of the lands.

Thus the appellants did not admit the claim of the plaintiffs to the suit lands even after the filing of the suit. On their written statement, issues had to be raised, namely,

"whether the plaintiffs are entitled to the suit property and whether they have been in possession of the same within 12 years prior to the suit", and "whether the defendants are entitled to be in possession of the land".

(16) Thus the suit was contested by defendants 2 to 4 even on the question of title of the plaintiffs to the suit lands. They also set up their right to continue in possession of this property. It is the attitude of the defendants 2 to 4, that was responsible for the plaintiffs filing the suit for recovery of possession of the suit property and also for mesne profits, and they had to prove their case even in respect of their title to the suit properties. The appellants are, therefore, liable to pay costs to the plaintiffs in respect of the relief for possession of the properties. No doubt, they are not liable to pay costs of the suit lands as regards the mesne profits. As I have already stated, they cannot be called upon to pay mesne profits. So they are liable to pay proportionate costs in the trial Court. The decree will be modified to that extent so far as the appellants are concerned.

(17) As regards the first defendant, there can be no decree for costs as against him for this reason: In February 1947 itself a communication was sent to the plaintiffs recognising their title to the suit property. In the written statement the 1st defendant admitted the right and title of the plaintiffs to the properties and said that he had no objection to possession being given to them. As already remarked, it was only the attitude of the defendants 2 to 4 that resulted in the filing of the suit for recovery of possession. The 1st defendant is, therefore, not liable to pay any costs with regard to the claim for possession. The decree for costs against this defendant is set aside and the costs payable to the plaintiffs will be paid only by the appellants. In this Court each party will bear his or their own costs as they have succeeded in part and failed in part.

D.H.Z. Order accordingly.

(S) A.I.R. 1955 ANDHRA 40 (Vol. 42, C.N. 17)

UMAMAHESWARAM J. (19-10-1954)

Pyda Venkatanarayana and another, Petitioners v. Thota Ramaswamy and others, Respondents.

Civil Revn. Petn. No. 1231 of 1954.

(a) Constitution of India, Art. 227 — Power of superintendence — Election dispute — Transfer of — Deputy Registrar present at election in his administrative capacity — Decision of dispute by him in his judicial capacity — Propriety of — Bias — Refusal to transfer dispute to another Tribunal on ground of delay — Interference by High Court.

A Deputy Registrar of Co-operative Societies was present at an election of the directors of a co-operative Bank in his administrative capacity. Dispute regarding that election was referred to his decision in his judicial capacity. A party to the dispute applied to the Deputy Registrar for transfer of that dispute to some other Deputy Registrar, as the former was to be a witness at the enquiry in regard to that dispute. The application was dismissed on the ground that the transfer would delay the decision of the dispute. Against this order the party applied under Art. 227 of the Constitution of India.

Held that (i) the Deputy Registrar being the sole judge of fact and law, it was not only prudent but expedient in the in the sound administration of law, that he should have transferred it to another Deputy Registrar so as to enable the parties to cite and examine him as a witness. 5 Cal WN 864; 20 Suth WR (Cr) 76 and 36 Mad 168 Ref. to. (Para 5)

(ii) that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done and that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. If the Deputy Registrar was present at the election meeting, and if he was aware of all the incidents that took place then, it was impossible for him to forget or dissociate himself from those facts and disabuse his mind of the impressions formed by him and decide the case on the evidence adduced before him. Though the Deputy Registrar might not be under any legal disqualification to decide the dispute, it was proper and desirable that he should not function as a Judge in deciding the election dispute. AIR 1953 Mad 709 — (1877) 2 QBD 558 — 3 Ind App 259 (PC) and 1924-1 KB 256 Ref. to. (Para 5)

(iii) that it was not for the Deputy Registrar to say that he was not a necessary witness. He might be summoned and examined as a witness like any other individual to speak to the facts within his knowledge. Observations of Stephen J. in — 'Queen v. Ferrant', (1883) 20 QBD 58 at p. 62 considered. (Para 6)

(iv) that it was an eminently fit and appropriate case in which the power of superintendence should be exercised by the High Court and the election petition transferred to another Deputy Registrar for disposal, not only for the purpose of meting out justice between the parties, but also for making it appear that justice was also meted out. (Paras 6, 9)

(v) that the ground of delay in speedy disposal should not stand in the way of a transfer

of a case, where it is necessary in the interests of justice to transfer the case. (Para 7)

Anno: Const. of India, Art. 227 N. 3, 3a, 11; Cr. P. C., S. 526 N. 5, 8;. S. 556 N. 7; C. P. C., S. 24 N. 13.

(b) Constitution of India, Arts. 226 and 227 — Scope — Dismissal of writ petition if bar to maintainability of application under Art. 227.

The scope of Art. 227 is entirely distinct and different from Art. 226. Art. 227 confers upon the High Court a power of supervision over all judicial matters decided by any Court or Tribunal within the State. Hence, the dismissal of a writ petition under Art. 226 cannot operate as a bar to the maintainability of an application under Art. 227. AIR 1953 Mad 362 and AIR 1954 SC 215 Followed. (Para 9)

Anno: Const. of India, Art. 226 N. 12; Art. 227 N. 7.

CASES REFERRED: Paras

(A) ('54) Writ Petn. No. 529 of 1954 (Andhra) 2, 3, 7
(B) (V40) AIR 1953 Mad 709: 1953-1 Mad LJ 533 5
(C) (1877) 2 QBD 558: 46 LJ QB 781 5
(D) ('77) 3 Ind App 259: 26 Suth WR 55 (PC) 5
(E) ('01) 5 Cal WN 864 5
(F) ('73)20 Suth WR Cr 76 5
(G) ('13) 36 Mad 168: 17 Ind Cas 353 5
(H) (1924) 1924-1 KB 256: 93 LJ KB 129 5
(I) (1888) 20 QBD 58: 6
(J) (1954) 3 WLR 415 6
(K) (1914) 1914-1 KB 603: 83 LJ KB 528 8
(L) (V40) AIR 1953 Mad 362: 1953 Cri LJ 636 9
(M) (41) AIR 1954 SC 215: 1954 SCR 565 (SC) 9

R. Venkatasubba Rao, P. Venkateswara Rao and K. Raghava Rao, for Petitioners; P. Somasundaram and K. Mangachari, for Respondents.

ORDER: This petition in filed against the order passed by the Deputy Registrar of Co-operative Societies, Kakinada dated 23-8-1954 in A. R. G. No. 70/53-54 under Art. 227 of the Constitution. On 20-8-1954, the 1st petitioner herein filed an application before the Deputy Registrar of Co-operative Societies, Kakinada, that the proceedings in A. R. G. No. 70/53-54 might be transferred to another Deputy Registrar on the ground that he is a material witness and has to be examined as to what took place on the date of the election of the directors held on 22-7-1953. The Deputy Registrar by his order dated 23-8-1954 dismissed the application holding that the application was not bona fide. He further observed that

"in the interests of quick disposal, regard being had to several circumstances explained above and in the interests of equity, justice and good conscience, and regard being had to the fact that the object of filing a dispute before the Deputy Registrar is to assure speedy disposal, I consider that any further delay in the disposal cannot be allowed."

(2) In the application filed by the petitioners on 6-8-1954 for transfer of the case to the file of another Deputy Registrar and for the examination of the Deputy Registrar as a witness, it was alleged that he was present throughout the election meeting, that he was aware as to what took place at the time and that, as the main questions to be decided in the election petition related to what transpired at the election meeting, he ought not to hear the election petition. It was also stated that as the Deputy Registrar was a material witness who had to be examined as to what happened at the election meeting, he ought not to act as a judge in respect of the dispute between the parties.

The Deputy Registrar by his order dated 6-8-1954 rejected the application for transfer without giving any reasons and dismissed the application for his examination as a witness in the following words: "Not necessary". Under Art. 226, of the Constitution, 'Writ Petn. No. 529 of 1954 (Andhra) (A)', was filed before this Court and the following order was made by the learned Chief Justice on 16-8-1954:

"This is an application for issuing a writ of certiorari to quash the order of the Deputy Registrar of Co-operative Societies refusing to transfer the case now pending before him to some other competent Deputy Registrar. The petitioners' case is that the Deputy Registrar is an important witness in the proceedings now before him inasmuch as he was present throughout the election and he was informed of that fact at an early stage of the proceedings. If that was a fact, I do not believe that responsible Officer like a Deputy Registrar would himself conduct the proceedings ignoring the request. If it was a fact, it is left to the good sense of the Officer to transfer the case to another Deputy Registrar, so that the petitioners may be in a position to examine him before the latter. But this application cannot be sustained either as a writ of Certiorari or as a writ mandamus. The application is dismissed."

(3) On 20-8-1954, the petitioner once again applied to the Deputy Registrar to transfer the case to another Deputy Registrar relying on the observations made by the learned Chief Justice in 'W. P. No. 529 of 1954 (Andhra) (A)'. As already stated, the Deputy Registrar dismissed the application on 23-8-54 primarily on the ground that the transfer would involve further delay.

(4) It is not disputed that the Deputy Registrar was present at the election meeting. In his letter B. O. A. R. G. 70/53-54 addressed to the Additional Joint Registrar of Co-operative Societies he wrote as follows:

"The election of the Board of Directors of the Kakinada Co-operative Central Bank was conducted by the General Body held on 22-7-53. I attended the General Body Meeting on that day. While the meeting went on from 2 p. m. till 4-30 a. m., I remained till 2 a. m.".

The issues of fact that have to be determined in the election petition relate to what took place at the election meeting at which the Deputy Registrar was present and issues 4 to 7 are in the following terms:

"4. Whether there was undue influence over the voters either by the President, Directors, or Subordinates of the Bank?

5. Whether the objection regarding the method and procedure of recording votes from illiterate members is valid as raised by the petitioners, and whether the mode of preparation of ballot papers noting names of candidates of one group after another, is calculated to lead the voter to a particular type of voting alone?

6. (a) Whether Sri Y. Tammayya was denied of his franchise as a society delegate?

(b) Whether the issue of a ballot paper to Sri Madisetti Tatayya, the representative of the Aratlakatta Field Labourers' Co-operative Society for a second time, is in order, and whether it was counted as a valid vote?

7. Whether the meeting was convened late & whether the delay was utilised for canvassing and influencing the voters as alleged in petition?"

(5) So, the first question that falls to be determined is, whether the Deputy Registrar who was present at the meeting and had personal knowledge as to what took place, is entitled to, or should be permitted to try this election dispute between the parties. As pointed out by Rajamannar, C. J., in — 'Visakapatnam Co-operative Motor Transport Ltd. v. Bangaru Raju', AIR 1953 Mad 709 (B), there are two well-established principles of law and they are as follows:

"One of the great principles of civilised jurisprudence which is a part of the law in Britain and which has been adopted in this country, is that no man shall be a judge in his own cause. Closely allied to this principle is the other salutary principle that it is of fundamental importance that justice should not only be done but manifestly and undoubtedly seem to be done".

In 'Sergeant v. Dale', (1877) 2 QBD 558 (C), Lush J., in dealing with the question whether a Bishop acting in a judicial capacity is disqualified from trying a case by reason of his right of patronage to the two benefices, enunciated the principle in the following forcible terms:

"One important object, at all events, is to clear away everything which might engender suspicion and distrust of the Tribunal, and so to promote the feelings of confidence in the administration of justice which is so essential to social order and security".

It has been authoritatively laid down by the Privy Council in — Horpurshad v. Sheo Dyal', 3 Ind App 259 (PC) (D), that

"it ought to be known and their Lordships wish it to be distinctly understood, that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts"

and the learned Advocate for the respondent cannot and does not dispute this proposition. What he contends is that the Deputy Registrar must be left to his good sense and knowledge of law and presume (sic) that he would not import his personal knowledge of facts as to what took place at the election meeting, but woud strictly act on the evidence on record and that there is no legal disqualification preventing him from proceeding with the election petition. I do not agree. When the Deputy Registrar is the sole judge of fact and law, it is not only prudent but expedient in the sound administration of law, that he should transfer it to another Deputy Registrar so as to enable the parties to cite and examine him as a witness.

That was the view taken by the Calcutta High Court in — 'Gya Singh v. Mahomed Soliman', 5 Cal WN 864 (E), in transferring the case from the file of the Sub-Divisional Magistrate holding that "the Sub-Divisional Magistrate could hardly disabuse his mind of the impression that was formed at the time of the examination".

Phear J. 'in re Hurro Chunder Paul', 20 Suth WR Cr 76 (F), in discussing the law as to what a Judge, who is a material witness in a case, should do, observed as follows:

"It has been held by this Court, and is accordant with the general principles which govern the conduct of an English Court of Criminal Justice, that while a person is not necessarily disqualified from presiding as a Judge or acting as a Juryman upon an inquiry into or investigation of facts, because he may have been himself a witness of some of the facts which are the subject of the inquiry or investigation, if he does do so, he, so far from being under any such obligation as that which the Deputy Magistrate seems to have referred to, is bound to state to the prisoner or other person concerned or to make known to him so far as he can, what are the facts which he himself observed to which he himself can bear testimony. It is quite erroneous, in our opinion, to suppose on the contrary, as the Deputy Magistrate appears to have supposed, that he was bound to keep out of sight altogether the part which he had played in the matter and to pretend (we cannot use any other word than that) that he knew nothing about the facts excepting so much as the witness has told him in court. It is always dangerous for any man in whose right conduct others are concerned to set up and endeavour to carry out a fiction such as this ..... The awkwardness of a criminal Judge being the principle witness in the case which he has to try is, no doubt, most apparent; this however, is reason for his declining to try the case not for his endeavouring to assume an unreal character".

In — 'Lakshmayya v. Rajah Varadaraja Appa', 36 Mad 168 at p. 184 (G). Sadasiva Iyer J. laid down the following rule:

"I think the only practical rule which can be laid down in those cases is that if a Judge knows of his own knowledge as an individual observer of a past relevant concrete private incident and that fact cannot be subjected to occular proof at the time of trial (such as a person's colour, resemblance of features, appearance, behaviour, chemical experiments of the present condition of the object) and if the truth of such incident is contested between the parties, he should mention his private knowledge of such incident to the parties and he should refuse to be the Judge in that case, unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge. That the Judge was competent to give evidence in the witness box

and to subject himself to cross-examination and then to decide the case was the old rule, but this has been discountenanced for obvious reasons in modern times and, in my opinion, should not be allowed."

The above cases merely lay down or reiterate the same principle which Lord Howart C. J., stated in — 'Rex v. Sussex Justices; Ex Parte Macarthy', 1924-1 KB 256 at p. 259 (H), that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" and "that nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice". If the Deputy Registrar was present at the election meeting, and if he was aware of all the incidents that took place then, it is impossible for him to forget or dissociate himself from those facts and disabuse his mind of the impressions formed by him and decide the case on the evidence adduced before him.

He wrote to the additional Joint Registrar of Co-operative Societies by his letter dated 10-9-1953 about his presence and sought his advice as to whether he might proceed with the hearing of the election petition. The last sentence in the letter was, whether he might presume that nothing prevented him from hearing the dispute, though he was present at the meeting. The note that was made on the letter was that the Deputy Registrar was present at the General Body meeting in his administrative capacity as Deputy Registrar and that he would decide the dispute in a judicial capacity and that the Deputy Registrar might be told that his presumption was correct. In accordance with the note, a reply was sent to him that "the presumption made in your letter cited is correct".

In the order dated 23-8-1954 the Deputy Registrar states, in more than one place, that the question as to "whether he should even entertain and hear the petition weighed in the Deputy Registrar's mind, even at the time of entertaining the petition". Nowhere in the order does he categorically state that he was not aware of the facts or the incidents that took place at the election meeting or that he has no personal knowledge of any of them. If so, he ought to have informed the higher authorities that it was not fair or proper that he should decide the case, and the higher authorities ought to have transferred the election petition to another Deputy Registrar. The distinction drawn in the note that his presence at the election meeting was in an administrative capacity and that did not prevent him from deciding the dispute in a judicial capacity, appears to my mind, to be without substance and absolutely erroneous. Though the Deputy Registrar might not be under any legal disqualification to decide the dispute. I have no doubt that, in the circumstances stated above and for the reasons already mentioned, it is proper and desirable that he should not function as a Judge in deciding the election dispute.

(6) The learned Advocate for the respondent relied on the decision in — 'Queen v. Ferrant', (1888) 20 QBD 58 at p. 62 (I). Stephen J. discussed the legal principles as to how far bias disqualifies Magistrates and Judges in deciding cases and held, on the particular facts, that merely because Ferrant J. suggested a settlement and advised the complainant not to go into a criminal court, no bias was made out and that he was consequently not disqualified from hearing the case. In the course of his judgment, he observed as follows:

> "Then it is said that he is to be a witness at the hearing before the Magistrate. That may be a ground on which he may decide not to sit, but this is a matter for him to consider, not for us. It might cause great mischief if we were to hold as a matter of law that, because a Magistrate or a Judge is likely to be called as a witness, he is bound not to sit. Such a doctrine might cause great inconvenience, as, for instance, if a Judge of Assize were subpoenaed just before the trial, the effect might be to necessitate a postponement to the next Assizes and it would be in the power of either party by serving a subpoena, to prevent any particular Judge or Magistrate from sitting. It would be a serious thing to lay down a rule which might have such an application".

Relying on these observations, the learned counsel for the respondent contended that the order passed by the Deputy Registrar, dismissing the application for his examination as a witness as being unnecessary, amounted to the Deputy Registrar deciding that he was not a necessary witness. I do not agree with the observations of Stephen J., that it is entirely within the discretion of the Judge or Magistrate to decide, whether he should be a witness and whether he should sit and dispose of the case. There is no legal bar preventing the examination of a Judge or Magistrate as a witness, apart from what is contained in S. 121, Indian Evidence Act. The Deputy Registrar who was present at election meeting, like any other individual, might be summoned and examined as a witness to speak to the facts within his knowledge. It is not for him to say that he is not a necessary witness. His decision is not final.

As I felt that the observations of Stephen J. extracted above were not correct but rather wide, I requested the Advocates appearing for the petitioner and respondent to investigate whether those observations have ever been referred to with approval in later cases, or by leading text book writers, and I am informed that, though in dealing with the question of bias, the decision in — ' Queen v. Farrant', (I), is referred to, the observations are nowhere followed or approved.

In 'Regina v. Gamborne Justices', 1954-3 WLR 415 at p. 422 (J), all the decisions bearing on the question of bias are reviewed and discussed by Slade J. and in deciding this case, I am fully alive to the note of warning sounded by him in the penultimate paragraph in the following terms:

> "While indorsing and fully maintaining the integrity of the principle reasserted by Lord Howart, this Court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

I hold, on the particular facts, that not only for the purpose of meeting out justice between the parties, but also for making it appear that justice is also meted out, the case should be transferred to the file of another Deputy Registrar.

(7) The next question that has to be considered is whether the Deputy Registrar was justified in dismissing the application on the ground that the transfer would involve delay in the disposal of the election petition. While Courts and judicial bodies should hear the parties or their advocates and quickly dispose of cases and clear arrears, the speed or quickness ought not to be at the expense of doing justice. While I am strongly of opinion that justice delayed might, in some cases, amount to denial of justice, I am equally clear that disposal mania to solve arrears in haste would undermine the sound administration of law and justice. The slogan of speedy disposal ought not to result in a denial of a fair and proper hearing. If I am right in my view, that the Deputy Registrar who had personal knowledge of the events that took place at the election meeting ought not to hear the case, and should be examined as a witness, to ascertain the truth, "the ground of delay or speedy disposal" should not oppress him or stand in the way of the case being transferred to the file of another Deputy Registrar. The main ground on which he dismissed the application, namely that the objection to his hearing the case was not taken at an earlier stage and that the disposal of the case would be delayed, is, in my opinion, entirely erroneous.

I am assuming, for the purpose of my decision, that the petitioner did not raise this objection, till he filed the application on 6-8-1954. A perusal of the B diary, however, does not disclose that the petitioner was wholly responsible for the delay in the hearing of the election petition. I do not agree with the Deputy Registrar that the application is not a bona fide one or that it is merely a ruse or device to prolong the hearing of the election petition. The remarks that the petitioner desires to continue in office by delaying the proceedings, assume that there is no substance in his defence and are, in my opinion, not well founded. In passing, I may observe that the effect of not transferring the case in spite of the objection being taken on 6-8-1954, has resulted in a further delay of over two months in the disposal of the election petition, and it could have been avoided, if the observations of the Chief Justice in Writ Petn. No. 529 of 1954 (Andhra) (A) were duly heeded or given effect to by the Deputy Registrar.

(8) The next contention that was urged by the learned Counsel for the respondent was that I should infer that the petitioner waived his objection to the hearing of the case, by the Deputy Registrar in spite of his having personal knowledge of the several facts arising for decision in the election petition. Reference was made to the decision in — 'The King v. Williams; Ex Parte Phillips', 1914-1 KB 608 (K). On the facts of the case, I do not agree with the learned Counsel that the petitioner waived his right or, by his conduct, precluded himself from putting forward that objection. Even assuming that he did not raise that objection till the petitioner finished the examination of the witnesses, and raised it only on 6-8-1954, in my opinion, it does not amount to impliedly authorising the Deputy Registrar to hear the case. His application for transfer and for examination of the Deputy Registrar as a witness clearly indicates his state of mind. So, there is no substance in the objection relating to waiver.

(9) It was faintly argued that as the application under Art. 226 for the issue of a writ was dismissed, an application under Art. 227 of the Constitution ought not to be entertained. The scope of Art. 227 is entirely distinct and different from Art. 226. Article 227 confers upon the High Court a power of supervision over all judicial matters decided by any Court or Tribunal within the State. In — 'In re Annamalai Mudaliar', AIR 1953 Mad 362 (L), Ramaswamy J. has discussed the scope and applicability of Art. 227 of the Constitution in dealing with an award passed by the Deputy Registrar of Co-operative Societies, Thiruvannamalai. Recently in — 'Waryam Singh v. Amarnath', AIR 1954 SC 215 (M), the Supreme Court had to consider the powers of the High Court under Art. 227. Following those decisions, I hold that this is an eminently fit and appropriate case in which the power of superintendence should be exercised by this Court and the election petition transferred to another Deputy Registrar for disposal.

(10) The learned Advocate for the respondent insisted that I should direct the petitioner to examine the Deputy Registrar as a witness on his behalf. The learned Counsel for the petitioner stated that his client had no objection to examine him and that the suggestion that the application was only a device to delay the proceedings was not correct. In my opinion, the proper course appears to be to direct the examination of the Deputy Registrar as a Court witness and not as a witness on behalf of the petitioner or the respondent.

(11) In the result, I set aside the order of the Deputy Registrar and direct A. R. G. No. 70/53-54 to be transferred to the file of any other Deputy Registrar and that the election petition should be heard and disposed of as expeditiously as possible. I also direct that each party should bear his own costs, in the circumstances of the case.

K.S.B. Order accordingly.

(S) A.I.R. 1955 ANDHRA 44 (Vol. 42, C.N. 18)

CHANDRA REDDY J. (20-9-1954)

In re, Manikonda Satyanarayana, Petitioner.

Criminal Revn. Case No. 607 of 1954 and Case Referred No: 38 of 1954, from Dist. Magistrate (Judicial) of West Godavary at Elure, in his letter, D/- 6-7-1954.

Criminal P. C. (1898), S. 346(2) — Trial must be de novo.

A Magistrate acting under S. 346(2) has to try the case from the beginning and he cannot act on the evidence already recorded, prior to the transfer of the case. (Para 3)

Anno: Cr. P. C., S. 346 N. 5 Pt. 4.

CASES REFERRED: Paras

(A) (V10) AIR 1923 Mad 32: 16 Mad LW 697: 23 Cri LJ 748 3

(B) (V10) AIR 1923 Mad 327: 24 Cri LJ 413 3

(C) (V39) AIR 1952 All 657: 1952 Cri LJ 1112 3

(D) (V25) AIR 1938 Cal 415: 39 Cri LJ 606 3

Public Prosecutor, for the State.

ORDER: This is a reference by the District Magistrate of West Godavari under the following circumstances. A charge sheet was filed against one Manikonda Satyanarayana by the Sub-Inspector of Railway Police, Rajamundry under S. 235, para (2) and S. 239, Indian Penal Code, before the Stationary Sub-Magistrate, Kovvur. The Stationary Sub-Magistrate took the case on file as a P. R. case and enquired into it. Finding that the evidence did not disclose an offence under S. 235(2), Indian Penal Code, he submitted the proceeding to the Sub-Divisional Magistrate, Kovvur under S. 346(1), Criminal P. C. The Sub-Divisional Magistrate acted on the evidence already recorded and framed a charge instead of having a de novo trial.

(2) It is pointed out by the District Magistrate that this procedure is unwarranted and that a Magistrate acting under sub-s. (2) of S. 346, Criminal P. C., has to try the case from the beginning. It looks to me that the procedure adopted by the Sub-Divisional Magistrate is illegal. When sub-s. (2) speaks of the Magistrate trying the case himself, it means that the Magistrate should try it from the beginning. The general rule is that a Magistrate who tries a case should try it from the beginning, and the only exception to it is the one engrafted in S. 350, Criminal P. C. Since S. 350, Criminal P. C., has no application to this case, as the Magistrate is trying a case, transferred to him under S. 346(2), Criminal P. C., he has to try the case de novo.

(3) There is abundant authority for this position. 'In re, Ummar Hajee', AIR 1923 Mad 32 (A), a Bench of the Madras High Court remarked that exhibition of witnesses' deposition in the previous trial, without actually examining them de novo was irregular and the consent of the accused did not cure it. This ruling was followed by Krishnan J. — 'In re, Chinna Venku Naidu', AIR 1923 Mad 327 (B) of the same Court who applied the principle to proceedings under S. 346, Criminal P. C., and held that it was not competent for a Magistrate acting under sub-s. (2) to S. 346, Criminal P. C. to hear arguments on the evidence taken by the Magistrate who transferred the case under S. 346, Cl. 1.

This view is shared by the Allahabad High Court in — 'Panna Lal v. State', AIR 1952 All 657 (C). To the same effect is the decision of the Calcutta High Court in — 'Sashti Gopal v. Haridas Bagdi', AIR 1938 Cal 415 (D). It is unnecessary to multiply citation. Suffice it to say that a Magistrate acting under S. 346(2) has to try the case from the beginning and he cannot act on the evidence already recorded, prior to the transfer of the case. The proceedings adopted by the Sub-Divisional Magistrate is not one prescribed by the Code. The proceedings are, therefore, quashed and he is directed to hold the trial 'de novo'. The reference is answered accordingly.

V.R.B. Answer accordingly.

(S) A.I.R. 1955 ANDHRA 45 (Vol. 42, C.N. 19)

CHANDRA REDDY J. (15-9-1954)

Korupulu Appalanaidu and another, Petitioners v. Vakaramamurthy and others, Respondents.

Criminal Misc. Petn. No. 732 of 1954.

(a) Criminal P. C. (1898), S. 520 — Power of appellate Court to pass order under S. 517 in appeal from conviction.

Where an appellate Court acquits the accused of the offence of theft then a direction given by it for return of the property to the accused who is acquitted and found to be the owner of the property alleged to be stolen in consequential to the order of acquittal. A Court of appeal can pass under S. 423(1)(d) an order of the nature contemplated under S. 520 and no separate appeal is necessary against the order under S. 517 to enable a Court of Appeal to pass such orders as may be just and also consequential to the order of acquittal. (Para 4)

Anno: Cr. P. C., S. 520 N. 1 Pt. 1.

(b) Criminal P. C. (1898), S. 517 — Property subject of theft sold — Power of Court to pass order under S. 517. AIR 1953 All 199, Dissented from.

Reading S. 517 and the Explanation to it together it is manifest that a Court has got power to make an order under S. 517 not only in respect of the property either in Court or in possession of the parties concerned, but the money equivalent thereof when it is sold. The explanation is of very wide import and enables the Court to pass an order in respect of either money obtained by sale thereof or other property exchanged for the property originally in deposit or under control of the party. AIR 1934 Cal 454, Relied on; AIR 1930 All 35, Disting.; AIR 1953 All 199, Dissent from. (Para 5)

Anno: Cr. P. C., S. 517 N. 19, 20 and 25.

(c) Criminal P. C. (1898), S. 520 — Notice.

Whatever may be said in a case where an order is passed under S. 520 long after the disposal of the appeal, there is no necessity to issue a notice when the order of disposal of property is consequent upon acquittal on the finding that the properties belonged to the accused and especially to a person to whom properties were delivered improperly or illegally. AIR 1923 Mad 324, Rel. on. 35 Bom 253, Disting. (Para 9)

Anno: Cr. P. C., S. 520 N. 9.

CASES REFERRED: Paras

(A) (V17) AIR 1930 All 35: 31 Cri LJ 6 5

(B) (V40) AIR 1953 All 199: 1953 Cri LJ 576 5

(C) (V21) AIR 1934 Cal 454: 35 Cri LJ 886 6

(D) (V8) AIR 1921 Cal 30: 22 Cri LJ 213 (SB) 6

(E) (V10) AIR 1923 Pat 84: 23 Cri LJ 110 7

(F) (V10) AIR 1923 Mad 324: 46 Mad 162: 24 Cri LJ 162 8, 9

(G) ('11) 35 Bom 253: 12 Cri LJ 169 9

Adivi Rama Rao, for Petitioners; Public Prosecutor, for the State; S. Suryaprakasam, for Respondents.

ORDER: This is a revision petition against an order of the District Magistrate directing the return of 23 bundles of jute or the value thereof to respondents 1 to 4 under the following circumstances.

(2) On a report by the two petitioners, the S. H. O. Vizianagaram, charge-sheeted the respondents for an offence under S. 379, Penal Code. The case against the respondents was that they stole 23 bundles of jute which the two petitioners soaked in a tank known as 'Juvvi' tank. The defence was that the jute bundles did not belong to the complainant but were the property of the accused (respondents). The Sub-Magistrate who tried the case accepted the prosecution version, rejected the defence and convicted them under S. 379 and sentenced them to a fine of Rs. 25/- each. An appeal was filed before the District Magistrate, Vishakapatnam against the conviction. Subsequently the trial Magistrate passed an order under S. 517, Criminal P. C., directing the return of the jute to the complainant.

Next day, the accused filed an application before the trial Court to vacate this order bringing to the notice of the Court that an appeal had been filed against the conviction and sentence and that no order could be passed pending disposal thereof. The Magistrate cancelled his previous order. Later on the appellate Magistrate set aside the conviction and sentence passed on the accused, and also directed that the jute bundles should be recovered from P. Ws. 1 and 2 (petitioners herein) and returned to the accused and that if the jute was not available for any reason their value which was fixed at Rs. 500/- should be recovered from the petitioners, kept in Court till revision time was over and then paid to the accused.

(3) The respondents sought to enforce this order of the appellate Magistrate before the Sub-Magistrate who originally tried the case. On notice, the petitioners raised an objection that the Court had no jurisdiction to pass any order as the properties were already disposed of. As this objection was disallowed, the present revision petition is filed. In support of this, Mr. Rama Rao has put forward three contentions:

(i) It was not competent for the District Magistrate to set aside the order passed originally by the Magistrate under S. 517, Cr. P. C., when no separate appeal has been filed against that order by the accused.

(ii) Since the property was delivered to the petitioners without any bond as required under S. 517(4), Criminal P. C., and as it was sold away and therefore not within the process of Court, the appellate Court had no jurisdiction to pass any order under S. 520, Criminal P. C., as to the disposal of the property.

(iii) Since no notice was issued to the petitioners before passing an order directing redelivery of the jute to the accused it is illegal and unenforceable.

(4) To the first contention, S. 423(1)(d) read with S. 520, Criminal P. C., in my opinion, furnishes a complete answer. It cannot be disputed that a direction by the appellate Court for return of the property to the accused who was acquitted and found to be the owner of the jute is not consequential to the order of acquittal. The conviction was based by the trial Magistrate on the finding that the property belonged to the complainant, and was stolen by the accused. When this is reversed and the conclusion is reached that the jute really belonged to the accused and not to the complainant, it is proper order to direct the return of the articles to the real owner and is consequential or incidental to the order of acquittal within the meaning of S. 423(1)(d), Criminal P. C. In my opinion, a court of appeal can pass under S. 423(1)(d) an order of the nature contemplated under S. 520 and no separate appeal is necessary against the order under S. 517, Criminal P. C., to enable a Court of appeal to pass such orders as may be just and also consequential to the order of acquittal.

(5) As regards the second contention, which consists of two parts, reliance was placed by Mr. Rama Rao on two decisions of Allahabad High Court namely, — 'Bansi Dhar v. Brij Basilal', AIR 1930 All 35 (A), — 'Bishambhar Rai v. State', AIR 1953 All 199 (B), I do not think that — 'Bansi Dhar v. Brij Basilal (A)' really helps the petitioners. That case proceeded on the footing that the house which was the subject-matter of the petition to the High Court was not the property in respect of which the offence was committed and, therefore, S. 517, Criminal P. C., was inapplicable.

But the other decision in — 'Bishambhar Rai v. State (B)' supports the argument of Mr. Rama Rao to a great extent. There while discharging an accused person charged with an offence of theft of camels the Magistrate directed delivery of the camels to the complainant. Against that order the accused preferred an appeal which was dismissed. The matter was carried in revision to the High Court and the High Court rejected the revision petition expressing the opinion that the 'sine qua non' of an order under S. 517, Criminal P. C., is the existence of property either in the custody of Court or in the possession of any party to the litigation amenable to the jurisdiction of the Court. If the property has been disposed of and is not available to Court and if the money value is not in the custody of the Court no order could be passed under S. 517, Criminal P. C., and the only remedy for the aggrieved party is to file a suit in a civil Court. With great respect to the learned Judge, I cannot accept the reasoning in support of this decision.

Section 517 enables a Court to pass an order not only in respect of property which is produced before it or in its custody but property regarding which any offence appears to have been committed. It means that it is not essential that the property should be in Court. Such property includes, by virtue of the explanation, the money equivalent of it. The explanation to S. 517 runs thus:

"In this section, the term 'property' includes in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise."

Reading the section and the Explanation together it is manifest that a Court has got power to make an order under S. 517, Criminal P. C., not only in respect of the property either in Court or in possession of the parties concerned, but the money equivalent thereof when it is sold. The explanation is of very wide import and enables the Court to pass an order in respect of either money obtained by sale thereof or other property exchanged for the property originally in deposit or under control of the party. There can, therefore, be no warrant for the restriction read into S. 517, Criminal P. C., in — 'Bishambhar Rai v. State (B)'.

(6) My view gains support from a ruling of the Calcutta High Court in — 'Nagendranath v. Emperor', AIR 1934 Cal 454 (C). The following passage therein is pertinent.

"In support of this rule Mr. Mukerjee has contended that the criminal court is not powerless in circumstances such as these to give an aggrieved party the remedy which he stands in need of. He has drawn our attention to the decision of the Special Bench of the Court in the case of — 'Pigot v. Ali Mahomed Mandal', AIR 1921 Cal 30 (D) and to the terms of S. 517, Criminal P. C., as amended in 1923 and has argued that even though some of the logs have been used up and the rest sold to others, it is open to the criminal court to compel the opposite parties to produce such properties as may be capable of production and also to produce the money equivalent of such properties as may be incapable of production. Without disputing for a moment the power which a criminal court has got in this respect we think it will be highly inconvenient on the part of the Court now to launch upon an enquiry as to what happened to the logs, how much has been used up by the opposite parties in constructing their buildings and how much has been sold away and for what price."

It is clear from this passage that when the property which was originally in the possession of one of the parties to the litigation is converted into money or exchanged for some other thing appropriate orders could be passed under S. 517, Criminal P. C. In my opinion, the Court retains jurisdiction to pass orders for the disposal of property, which has been converted either into money or into some other property and the fact that the property was disposed of does not take away the jurisdiction of the Court to pass appropriate orders in that behalf.

(7) In support of the contention that when once articles were delivered to one of the parties in pursuance of an order under S. 517, Criminal P. C., there is no jurisdiction to pass an order calling upon the party to redeliver the same to another person though he might be found to be the owner, — 'Jhumak Singh v. Tota Mahto', AIR 1923 Pat 84 (E) was cited. I cannot say whether that ruling is applicable to the present one and was correctly decided or not, because it is not known how the question arose there and under what circumstances that decision was given. All that appears is that before the parties came to Court, the police had already delivered the properties to one of the parties. That case does not therefore render much assistance.

(8) If the contention of Mr. Rama Rao should be accepted in this behalf, S. 520 becomes otiose. His argument comes to this: that when once a trial Court passes an order under S. 517 and the property is delivered to one of the parties, an appellate court cannot give any direction for the redelivery of that property to the real owner. Such an argument overlooks S. 520 which clearly confers a power upon an appellate court to vary or modify or set aside orders passed under S. 517, Criminal P. C. There is no provision in the Code which limits the powers of the Court in the manner under S. 520. Apart from the clear provisions of Ss. 520 and 423(1)(d), Criminal P. C., there is also authority for this position in — 'Arunachela Thevan v. Vellachami Thevan', AIR 1923 Mad 324 (F).

(9) Now coming to the argument based upon want of notice to the petitioner, Mr. Rama Rao calls in aid a decision of the Bombay High Court in — 'In re, Lakshman Rangu', 35 Bom 253 (G). Justice Chandavarkar who delivered the judgment of the Bench expressed the opinion that S. 520, Criminal P. C., did not confer jurisdiction on District Magistrate when once an appeal has been filed in the Sessions Court against his order to give directions as regards the property involved in the case and that at any rate notice should be issued to all the parties concerned before passing an order therein. It is seen that that was not a case of consequential order. It was an order passed by the trial Court after an appeal was filed against the conviction and sentence and when the matter was before the appellate court and thus an independent proceeding. But here the order passed by the appellate Court is one that followed upon the order of acquittal. So that judgment does not furnish any analogy.

In — 'Arunachala Thevan v. Vellachami Thevan (F)' Justice Krishnan expressed the opinion that there is no rule of law that says that such notice is absolutely necessary. Whatever may be said in a case where an order is passed under S. 520, Criminal P. C., long after the disposal of the appeal, I do not think there is any necessity to issue a notice when the order is consequent upon acquittal on the finding that the properties belonged to the accused and especially to a person to whom properties were delivered improperly or illegally. In this case, the Magistrate in violation of the terms of sub-s. (3) directed delivery of the jute to the complainant notwithstanding the fact that an appeal was filed against his judgment and it was pending. There was, therefore, no valid order entitling the petitioners to keep the properties with them. There-

fore, the argument based uon want of notice has to be repelled. In the result, the petition is dismissed.

V.S.B. Revision dismissed.

(S) **A.I.R. 1955 ANDHRA 48 (Vol. 42, C.N. 20)**

CHANDRA REDDY J. (21-9-1954)

In re Valluru Narayana Reddy and others, Petitioners.

Criminal Revn. Case No. 502 and Criminal Revn. Petn. No. 467 of 1954, against order of Sub-Divisional Magistrate, Cuddappah, D/- 11-5-54.

Criminal P. C. (1898), Ss. 346, 437 — Powers of Magistrate.

Where the Magistrate has discharged the accused for an offence under S. 307, Penal Code, and submitted the records to the Sub-Divisional Magistrate as he felt that the offences disclosed by the evidence of the prosecution witnesses were of a first class nature triable by a First Class Magistrate, all that the Sub-divisional Magistrate can do is to try the case as transferred to him. If the parties concerned think that the order of discharge requires to be revised, they can move under S. 437. If the order of discharge passed by the Magistrate who originally tried it in respect of an offence under S. 307, Penal Code, is not reversed under S. 437, Criminal P. C., the Sub-Divisional Magistrate while trying the case under S. 346(2), Criminal P. C., cannot convert the case into a preliminary register case in respect of the same offence which in effect amounts to setting aside the order of discharge. AIR 1953 Mad 801 (FB), Rel. on. (Paras 3, 4)

Anno: Criminal P. C., S. 346 N. 3; S. 437 N. 5.

CASE REFERRED: Para

(A) (V40) AIR 1953 Mad 801: ILR (1953) Mad 691: 1953 Cri LJ 1470 (FB) 3

S. Obul Reddi, for P. Basi Reddy and P. S. Ramchandra Reddy, for Petitioners; Public Prosecutor, for the State.

ORDER: This is a petition in revision against the order of the Sub-Divisional Magistrate, Cuddappah, who, while acting under S. 346(2), Criminal P. C., decided to proceed with the case as a preliminary register case. The circumstances giving rise to this case are these:

(2) A charge sheet was filed before the Stationary Sub-Magistrate, Pulivendla, against 14 persons under Ss. 147, 148, 324, 326 and 307, Penal Code, read with S. 149, Penal Code, and S. 19(f), Arms Act. The accused are said to have formed themselves into an unlawful assembly with the common object of attacking and killing the members of the opposite side, some of them armed with unlicensed guns and others with stones, and in prosecution of this common object, caused some pallet injuries to some members of the prosecution party.

The Magistrate thought that the material on record did not warrant a trial for an offence under S. 307, Penal Code, that the evidence pointed only to offences some of which are of a first class nature and that therefore they are triable only by a Magistrate of the first class. In that view he discharged the accused for an offence under S. 307, Penal Code, and submitted the records under S. 346 (1), Criminal P. C., to the Sub-Divisional Magistrate for trial of other offences. The Sub-Divisional Magistrate disagreed with the view of the Sub-Magistrate as to the effect of the evidence, and came to the conclusion that the facts spoken to by the prosecution disclosed an offence under S. 307, Penal Code. He therefore began to proceed with the case as a preliminary register case for an offence under S. 307, Penal Code.

(3) In this revision case, the procedure adopted by the Sub-Divisional Magistrate is complained against. It is argued that a Magistrate acting under S. 346 (2), Criminal P. C., has no jurisdiction to try the accused for an offence in respect of which they have been discharged. The order of discharge could be set aside only under S. 437, Criminal P. C., and so long as the discharge remains in force, it was not competent for the Sub-Divisional Magistrate to convert the Calendar Case into a Preliminary Enquiry case for an offence under S. 307, Penal Code. The grievance of the petitioners seems to be a legitimate one. In this case, the Magistrate has discharged the petitioners for an offence under S. 307, Penal Code, and submitted the records to the Sub-Divisional Magistrate as he felt that the offences disclosed by the evidence of the prosecution witnesses were of a first class nature triable by a First Class Magistrate. All that the Sub-Divisional Magistrate could do was to try the case as transferred to him. If the parties concerned thought that the order of discharge required to be revised, they could have moved under S. 437, Criminal P. C., any of the Courts mentioned therein.

That such a revision could be entertained against an order of discharge similar to the one passed in this case is clear from a Full Bench decision of the Madras High Court in — 'Nalla Baligadu, In re', AIR 1953 Mad 801 (FB) (A), to which I was a party. It was held there, that an order, which said that no prima facie case was made out against an accused, for offences triable exclusively by the Court of Sessions and therefore he should be discharged of those offences and the evidence disclosed only lesser offences not triable exclusively by a Magistrate amounted to an order of discharge within the meaning of S. 253, and could be revised under S. 437, Criminal P. C., notwithstanding the case against the accused for lesser offences was still pending.

(4) If the order of discharge passed by the Magistrate that originally tried it in respect of an offence under S. 307, Penal Code, is not reversed under S. 437, Criminal P. C., the Sub-Divisional Magistrate while trying the case under S. 346(2), Criminal P. C., cannot convert the case into a preliminary register case in respect of the same offence which in effect amounts to setting aside the order of discharge. As it is not competent for this Magistrate to do so, he is directed to try the case as a calendar case as it was transferred to him by the Stationary Sub-Magistrate, Pulivendla. The revision petition is therefore allowed.

D.H.Z. Revision allowed.

(S) A.I.R. 1955 ANDHRA 49 (Vol. 42, C.N. 21)

UMAMAHESWARAM J. (10-9-1954)

Dodda Subbareddi, Defendant-Appellant v. Gunturu Govindareddi, Plaintiff-Respondent.

Second Appeal No. 574 of 1950, against decree of Sub. J., Tenali, in Appeal Suit No. 115 of 1949.

(a) Hindu Law — Alienation — Widow — Gift to daughter — Grandson by another daughter attesting deed — Nature of estate taken by donee —Suit by grandson as reversioner for recovery of gifted property after opening of succession — Estoppel.

K, a Hindu widow, executed a 'dakhal-deed' in respect of certain lands in favour of her daughter S. The plaintiff who was K's grandson from another daughter was living with K at the time of the execution of 'dakhal-deed' and the stamp paper for the deed was also purchased in his name. The palintiff attested the deed and was an identifying witness at the time of its registration. The relevant terms of the deed were as follows: "As the property, soon after the death of your father, passed into your possession towards (your) share and as there was no public document, you required me to execute a 'dakhal-deed' (conveyance deed). Therefore, you shall henceforth be paying Government cist etc., from now onwards and enjoy the property from now onwards from son to grandson with powers of sale, gift, mortgage, and exchange. Neither myself nor my successors will question neither you nor your heirs. When you demand I am prepared to relinquish the patta, in my name and transfer it to your name. If in respect of this Dakhal-deed any dispute etc., arise from gnatis, samantas and others, I shall see that this Dakhal-deed is given effect to." After the death of S when succession opened, the plaintiff as the next reversioner brought a suit for possession of the land against the defendant who claimed through a donee from S.

Held that (i) the facts of the case did not warrant the conclusion that the plaintiff positively and definitely announced his intention that the donee should take an absolute estate in the suit property or that he agreed to his grandmother K conveying an absolute estate to her daughter so as to enure beyond her life-time and bind the estate. As the alienation was not effected for legal necessity, or benefit to the estate, the alienee was not entitled to an absolute estate. Viewed as a gift, not having been executed for purposes sanctioned by Hindu Law, it would not impart an absolute title to the donee. There was no indication in the document that the widow K wanted to enlarge the estate of her daughter. The words that S might enjoy the property from son to grandson with powers of sale, gift, mortgage and exchange did not per se establish that she intended to convey an absolute estate to her daughter.

A transferee of a widow's estate is certainly entitled to continue in possession during the life-time of the widow unless other contingencies like re-marriage, adoption, etc., take place. The interest conveyed to the transferee is not only transmissible to his heirs-at-law but may also be sold, mortgaged, exchanged or gifted during the life-time of the widow. Even assuming that the plaintiff, by attesting the document was fully aware of all its terms, it did not amount to an unequivocal announcement of his intention to hold the deed good and that he would not recover the property from the donee or his successors after the death of the widow. Hence, the plaintiff was not estopped from recovering the suit property. AIR 1945 Mad 492, Foll. Case Law Discussed. (Paras 10, 12)

(ii) A presumptive reversioner who assents to the alienation of the widow without receiving any consideration is not bound by the alienation apart from the doctrine of estoppel or election. There is no legal basis for the third doctrine of ratification based on equity. AIR 1918 PC 196, Discussed. (Paras 20, 24)

(b) T. P. Act (1882), S. 6 — Spes successionis — Interest of a reversioner — (Hindu Law — Reversioner — Nature of interest).

A Hindu reversioner has no interest in praesenti in the property in the hands of a widow during her life-time. His right is only a spes successionis or a mere chance of succession within the meaning of S. 6 of the Transfer of Property Act. It is not a vested interest but only an interest expectant on the death of a limited heir. It cannot, therefore, be sold, mortgaged or assigned nor can it be relinquished. Such a transfer, if effected, would be a nullity. (Para 20)

Anno: T. P. Act, S. 6, N. 4.

(c) Constitution of India, Art. 141 — Privy Council decisions — Present authority of — (Precedents).

After India was constituted into a Sovereign Democratic Republic, the Courts in India are not bound by the decisions of the Privy Council and are free to consider the question on its own merits. (Para 25)

Anno: Const. of India, Art. 141, N. 8.

(d) Precedents — Full Bench decision of Madras High Court — Not binding on Andhra High Court — (Civil P. C. (1908), Pre.).

The Andhra High Court which was inaugurated in July, 1954, is not bound by the Full Bench of the Madras High Court or other High Courts and is at liberty to examine the question in the light of well-established legal principles and arrive at a proper conclusion. (Para 25)

Anno: C. P. C., Pre. N. 15.

(e) Precedents — Practice — Duty of Bench and Bar.

Practice of the subordinate judiciary in not referring to the decisions which are binding upon them condemned. (Para 27)

It is the bounden duty of the members of the Bar and the Judges who administer the law, to keep themselves informed of the march and progress of law, i. e., statutory and case-

law. If every illiterate man is presumed to know law and ignorance of law is no excuse, it is all the more important that those who are concerned in the administration of law, namely the members of the Bar and the Judges, should read the Law Reports regularly and be aware not only of the latest reports but also decisions of the Supreme Court and the High Courts. (Para 27)

CASES REFERRED: Paras

(A) (V16) AIR 1929 Mad 502: 52 Mad 556 (FB) 4, 8, 9, 10, 19, 21, 27
(B) (V5) AIR 1918 PC 196: 42 Mad 523 (PC) 9, 13, 18, 21, 22, 24
(C) (V10) AIR 1923 All 387: 45 All 339 (FB) 10, 18
(D) (V14) AIR 1927 Bom 260: 51 Bom 475 (FB) 10, 19
(E) (V32) AIR 1945 Mad 492: ILR (1946) Mad 276 11
(F) (V16) AIR 1929 Oudh 185: 4 Luck 622 12, 21
(G) ('07) 34 Cal 329: 34 Ind App 87 (PC) 16
(H) ('97) 24 Ind App 164: 25 Cal 1 (PC) 16
(I) (V14) AIR 1927 PC 227: 52 Bom 1 (PC) 20, 21
(J) (V39) AIR 1952 SC 145: 1952 SCR 478 (SC) 21
(K) (V26) AIR 1939 Oudh 145: 14 Luck 595 21
(L) (1735) White & Tudor 9th Ed. p. 373 21
(M) (V41) AIR 1954 SC 505: 67 Mad LW 776 (SC) 21
(N) ('13) 40 Cal 721: 19 Ind Cas 273 (FB) 21
(O) (V41) AIR 1954 SC 379: 67 MLW 515 (SC) 24
(P) (V30) AIR 1943 PC 196: 70 Ind App 232 (PC) 24

Konda Kotayya, for Appellant; G. Chandrasekhara Sastri, for Respondent.

JUDGMENT: Defendant is the appellant. The respondent herein filed O. S. No. 230 of 1948 on the file of the District Munsif's Court of Tenali for recovery of possession of the suit property on the ground that it belonged to his maternal-grand-father, Bhavanam Venkata Reddy and after the death of his last daughter Bhusamma, he succeeded to the property as the next reversioner.

(2) The defendant contended that the suit property was gifted to Subbamma, one of the daughters of Venkata Reddy by her mother, Konamma, as per the oral directions of her father, Venkata Reddy, that there was a family arrangement under which Subbamma's absolute rights in the suit properties were recognised and that, in any event, the plaintiff who brought about and attested the Dakhal deed dated 14-10-1906 Ex. B-7 executed by Konamma in favour of Subbamma was estopped from challenging the validity of the Dakhal deed. The defendant claimed as the donee, under Exhibit B-8 from Bakki Reddy who claimed title from Subbamma under a settlement deed executed by her on 3-4-1930 and marked as Exhibit B-9.

(3) Both the courts below concurrently found that the defendant did not establish the family arrangement as well as the oral gift set up by them. On the question of estoppel, the District Munsif held in paragraph 22 of his judgment that it was impossible to hold that the plaintiff was estopped from questioning Subbamma's absolute title to the suit land. He also observed that

> "the defendant's learned Pleader too has not gone to the length of contending that the bar of estoppel can be raised against the plaintiff based on his connection with the original of Ex. B-7 alone."

Though no specific ground of appeal was raised by the defendant in regard to estoppel in his Memorandum of Appeal, filed before the Subordinate Judge of Tenali, the Subordinate Judge raised the question of estoppel as the 4th point for consideration and disposed it of in paragraph 8 in a single sentence that he was not able to see how plaintiff was estopped on account of his being a party attestor in the gift deed Exhibit B-7.

(4) The defendant has filed the Second Appeal and the main point urged by his advocate was that the plea of estoppel ought to have been found in his favour on the strength of the Full Bench decision in — 'Ramakotayya v. Vira Raghavayya', AIR 1929 Mad 502 (A). For that purpose, he relied upon the following facts found in his favour by both the courts below:

> "(1) The plaintiff, the daughter's son of Konamma was living with her at the time of execution of the Dakhal Deed Ex. B. 7. (2) The stamp papers for Ex. B. 7 were purchased in his name. (3) He attested the document Ex. B. 7 and was an identifying witness at the time of its registration.

(5) The simple question that arises for consideration is whether these admitted facts are sufficient to found an estoppel and debar the plaintiff from recovering possession of the suit property when succession opened on the death of the last daughter, Bhusamma on 16-10-1945. The Dakhal deed executed by Konamma in favour of her daughter Subbamma, runs as follows:

> "Dakhal deed (conveyance deed) in respect of Seri Wet land worth Rs. 300/- executed on 14-10-1906. Dakhal deed executed in favour of Appi Reddi's wife Subbamma by Bhavanam Venkatareddi's wife Konamma."

> "As the property, soon after the death of your father, passed into your possession towards (your) share and as there was no public document you required me to execute a Dakhal deed (conveyance deed). Therefore, you shall henceforth be paying Government cist etc. from now onward and enjoy the property from son to grandson with powers of sale, gift, mortgage, and exchange. Neither myself nor my successors will question neither you nor your heirs. When you demand, I am prepared to relinquish the Patta in my name and transfer it to your name. If in respect of this Dakhal deed any disputes etc. arise from Gnatis, Samantas and others I shall see that this Dakhal deed is given effect to."

(6) Though the Courts below described the document dated 14-10-1906 as a deed of gift, it is styled as a Dakhal deed. It sets out that after the death of her father, Venkata Reddy, it fell to her share and had been in her possession

and enjoyment though the Patta stood in the name of her mother Konamma and others.

(7) As Subbamma did not have any public document to evidence her title and wanted a Dakhal deed to be executed in her favour, the mother executed Exhibit B. 7. It provided that thereafter Subbamma alone should pay Government cist and enjoy the property from son to grandson with powers of sale, gift, mortgage and exchange and that neither she nor her heirs would question the transaction. To this document, the plaintiff who had no immediate right in the property but only a Spes Successionis was an attestor. Does his conduct in purchasing the stamp papers in his own name, being an attestor of the document and an identifying witness before the Registrar estop him from challenging the validity of the document and recovering possession, when succession opened and the estate vested in him as the nearest reversioner?

(8) The learned Advocate for the appellant invited my attention to the Full Bench decision in —'Ramakotayya v. Veeraraghavayya', (A) as also the passage in Mulla's "Hindu Law" 11th Edition page 207 and Mayne's "Hindu Law" at pages 792 and 793 respectively, which are as follows:

"A reversioner, whether a male or female, who consents to an alienation by a widow or other limited heir made without legal necessity, or to an invalid surrender and transferees from him are precluded from disputing the validity of the alienation, though he may have received no consideration for his consent. It is immaterial that the alienation is by way of gift.

The reversioner, whether male or female, consenting to or joining in an alienation by the widow or other limited owner, even before reversion has fallen into possession must be taken to elect to hold the transaction valid and cannot afterwards challenge it and it is immaterial whether the consenting reversioner receives consideration or not and whether the alienation is for value or is in form or in substance a gift."

(9) In — 'Ramakotayya v. Veeraraghavayya', (A) the widow Seethamma executed a gift deed on 2-10-1918, in respect of some of the properties that came to her from her husband in favour of her own brother on 19-10-1918. The plaintiff, the presumptive reversioner, executed a document completely relinquishing all his rights as prospective reversioner and giving full consent to the transaction of 2-10-1918. Coutts-Trotter C. J. in delivering the Judgment of the Full Bench held that the doctrine of estoppel did not apply, as no representation of fact was made by the plaintiff to the widow's brother and the donee did not act on the faith of that representation and was not damnified. The next ground based on the doctrine of election was also repelled as no benefit of any kind was received by the plaintiff.

At page 504, following the Allahabad and Bombay High Courts, he held that a third case exists, namely where although no one has been damnified so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring himself within the meaning of the strict doctrine of election, he has nevertheless positively and definitely chosen to announce his intention and in fact agreed to abide by the act of the widow. The Full Benches of the Allahabad and Bombay High Courts have decided that he can do so even while he only occupies the character of presumptive reversioner. We agree with the Allahabad and Bombay Courts in thinking that if he takes such a step he is personally debarred from resiling from it afterwards. Indeed it is so obviously desirable that the Courts in India should speak with one voice on a matter of such constant recurrence as this that we should not dissent from those decisions, unless we were convinced that they were contrary to the decision of the Privy Council in — 'Rangaswamy Goundan v. Nachiappa Goundan', AIR 1918 P. C. 196 (B).

(10) In my opinion, the facts of this case do not warrant the conclusion that the plaintiff positively and definitely announced his intention that the donee Subbamma should take an absolute estate in the suit property or that he agreed to his grand-mother Konamma conveying an absolute estate to her daughter, so as to enure beyond her lifetime and bind the estate. The recitals of Ex. B. 7 clearly show that after the death of Venkata Reddy, Subbamma was in possession of the suit property and the Dakhal deed was executed as she required a public document to evidence her possession. It does not show that Konamma intended to convey a larger or higher estate than she possessed, viz., a widow's estate. As the alienation was not effected for legal necessity or benefit to the estate, the alienee was not entitled to an absolute estate.

Viewed as a gift, not having been executed for purposes sanctioned by Hindu Law it would not impart an absolute title to the donee. There is no indication in the document that the widow Konamma wanted to enlarge the estate of her daughter. The words that Subbamma might enjoy the property from son to grandson with powers of sale, gift, mortgage and exchange do not per se establish that she intended to convey an absolute estate to her daughter. A transferee of a widow's estate is certainly entitled to continue in possession during the lifetime of the widow unless other contingencies like re-marriage, adoption etc., take place. The interest conveyed to the transferee is not only transmissible to his heirs-at-law, but may also be sold, mortgaged, exchanged or gifted during the lifetime of the widow. Even assuming that the plaintiff by attesting the document was fully aware of all its terms, it does not, in my opinion, amount to an unequivocal announcement of his intention to hold the deed good and that he would not recover the property from the donee, or his successors after the death of the widow.

Apart from the attestation, there is no document in the present case, as in — 'Ramakotayya v. Veera Raghavayya', (A) under which the plaintiff relinquished his interest in the suit property and consented to the widow conveying an absolute estate to the transferee. In the decision of the Allahabad High Court reported in — 'Fateh Singh v. Thakur Rukmini Rawanji', AIR 1923 All 387 (FB) (C) the presumptive reversioner executed a deed of relinquishment in the properties gifted by the

widow in favour of tutelary deity of the family on 19-4-1905. It was held that by reason of the execution of that document, dated 12-5-1905, Fateh Singh was bound

"Whether his action be spoken of as a ratification of the transfer or as an election to hold good the deed of 19-4-1905."

In — 'Akkawa Ramachandrappa v. Sayad Khan Mithekhan', AIR 1927 Bom 260 (D) the presumptive reversioner joined the widow in the execution of the deed & it was held that it amounted to a clear election to hold the transaction as valid. In the present case, as already pointed out by me, the plaintiff did not execute any document in favour of the donee.

(11) The decision in — 'Veerayya v. Bapayya', AIR 1945 Mad 492 (E) is more akin to the facts of the present case.

(12) The terms of the Dakhal deed which were construed in that case are similar to the terms of Ex. B. 7. The words that the transferee should enjoy the property with rights of gift, exchange and sale from son to grandson and so on in succession, are also to be found in that document. The only difference is that in that document, Butchayya made arrangements to the effect that the widow should enjoy during her life time and a vested remainder was created in a half in favour of his daughter Subbamma and in the other half to his grand-daughter Venkatasubbamma. Patanjali Sastri J. in delivering the Judgment of the Bench held at page 494 that the Dakhal deed did not purport, proprio vigore, to transfer any absolute interest in the properties to the donees and that the Full Bench decisions of the Madras, Bombay and Allahabad High Courts did not govern the case. I adopt the reasoning of that decision and hold that the plaintiff is entitled to recover the suit property. In this connection, I may also refer to the decision in — 'Bindeswari Singh v. Har Narain Singh', AIR 1929 Oudh 185 (FB) (F) which closely resembles this case.

(13) I have carefully perused the Full Bench decisions of Allahabad, Bombay and Madras High Courts, but I am still unable to understand on what legal basis the presumptive reversioner who assented to the alienation of the widow without receiving any consideration, is bound by the alienation, apart from the doctrine of estoppel or election. All the Full Bench Judgments rest on the interpretation of a passage in Lord Dunedin's Judgment in AIR 1918 PC 196 (B). The question that arose for consideration in the Privy Council case was whether a prospective reversioner who took a mortgage of a portion of a property from an alienee, in whose favour the property was transferred by a widow, was estopped from disputing the validity of the alienation on the death of the widow. Lord Dunedin summarised the result of the consideration of the decided cases in the following terms:

"(1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances, the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender, not device to divide the estate with the reversioner.

(2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one."

(14) At pp. 201-202, in discussing the character of the deed executed by Marakammal in favour of Ramaswamy Goundan, he held:

"Being a deed of gift, it cannot possibly be held to be evidence of alienation for value; or purposes of necessity. It follows, therefore, that the deed taken by itself cannot stand."

(15) Dealing with the question of estoppel, at page 202 he observed:

"How can it be said that the plaintiff by any act of his, led the respondents to think that something was true and then to act on that belief? ..... Here the plaintiff never consented to the deed nor is his claim traced through Ramaswamy even in the matter of 'descent'".

(16) On the question of ratification, the following observations were made:

"No doubt there is another view which is not estoppel, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract; it is only voidable. — 'Bijoy Gopal Mukerji v. Krishna Mahishi Debi', 34 Cal 329 (G). Now in all cases of voidable contracts, there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner after he became in titulo to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right of complaint. This may be spoken of though scarcely, accurately as ratification. In some cases it has been expressed as an election to hold the deed good. — 'Modhu Sudan Singh v. Rooke', 24 Ind App. 164 (PC) (H)

But it is well settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The present plaintiff raised these proceedings immediately after his title was confirmed.

Of course something might be done before that time which amounted to an actual election to hold the deed good. In that view what was done

here? The learned Appeal Judges dismiss as inadequate the fact of the purchase of the two small pieces of ground. But they attach great weight to the taking of the mortgage. Here they have made a slip as to the facts. The mortgage did not consist, as they think, of only the share of the mitta which had come through the deed of gift. It consisted also of two-fourteenths of the mitta which had come to the mortgagors in right of their own succession. The value of this share was more than the sum secured by it. Now at the time of the mortgage, the plaintiff did not know whether he would ever be such a reversioner in fact as he would give him a practical interest to quarrel with the deed of gift. Why should he not take all that the mortgagors could give or propose to give? To hold that by so doing he barred himself from asserting his own title to part of what was mortgaged, seems to their Lordships a quite unwarranted proposition".

(17) Before proceeding to discuss the Full Bench decisions, I wish to observe that in the present case, there is no act on the part of the plaintiff which would amount to an actual election to hold the deed good. The observations of Lord Dunedin, in the last paragraph quoted above, are equally applicable to this case, as the

> "plaintiff herein who attested the gift deed did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift".

To hold that by mere attestation he debarred himself from asserting his own title to the suit property would be, in my opinion, "a quite unwarrantable proposition" adopting the language of Lord Dunedin.

(18) To construe the passage at p. 202

> "Of course something might be done even before that time which amounted to an actual election to hold the deed good",

as a Vedic text or a statutory provision and to hold that the reversioner who has only a Spes Successionis and no present or immediate interest in the property alienated is bound by his consent, even though it may not amount to estoppel or election is, in my opinion, not legally justifiable. To sustain the alienation, on principles of public morality, justice, equity or good conscience, is only to add to or misinterpret and strain the observations of Lord Dunedin. In AIR 1923 All 387 (FB) (C), the majority opinion was based on ratification or election. But according to Lord Dunedin in AIR 1918 PC 196 (B), those principles would mainly apply to a reversioner who

> "after he became in titulo to reduce the estate to possession and in view of the alienation did something which showed that he treated the alienation as good".

Walsh J. based his judgment on still wider grounds and observed:

> "It does not matter whether it is called an estoppel, an election or an equitable bar; we have to give effect to the acts and intentions of parties as evidenced by their conduct, unless prevented by some statute, or by some rule of law or equity".

(19) In AIR 1927 Bom 260 (D), the Full Bench held that the conduct of the reversioner in joining the widow in executing the deed of alienation amounted to a clear election to hold the transaction as valid. In AIR 1929 Mad 502 (A), Coutts-Trotter, Chief Justice, found it difficult to rest his opinion either on the doctrine of estoppel or on the doctrine of election. For the sake of uniformity, however, he preferred to follow the Full Bench decisions of Allahabad, and Bombay High Courts and evolved a third doctrine or formulae on grounds of equity and expressed himself as follows:

> "Where although no one has been damnified, so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring itself within the meaning of the strict doctrine of election, he has nevertheless positively and definitely chosen to announce his intention and in fact agreed to abide by the act of the widow".

(20) With great respect, I am unable to persuade myself that there is any legal basis for this third doctrine or formulae based on equity. It is established beyond doubt that during the lifetime of the widow, the reversioner has no interest in praesenti in the suit property. Her right is only Spes Successionis or a mere chance of succession, within the meaning of section 6 of the Transfer of Property Act. It is not a vested interest, but only an interest expectant on the death of a limited heir. It cannot, therefore, be sold, mortgaged or assigned, nor can it be relinquished. That a transfer of a Spes Successionis is a nullity, and has no effect in law, has been repeatedly laid down by their Lordships of the Privy Council — vide Mulla's "Hindu Law" 11th edition page 169. If so, how can his conduct before succession opens debar him from suing for recovery of possession, unless it be on the basis of election or estoppel?

In —'Ram Gowda Anna Gowda v. Bhau Saheb', AIR 1927 PC 227 (I), Lord Sinha discussed this question and the observations at page 229 explain the basis of the rule as follows:

> "The three deeds appear thus to be inseparably connected together and in that view, Anna Gowda not only consented to the sale to Shiv Gowda and the gift to Bassappa, but these dispositions formed parts of the same transaction by which he himself acquired a part of the estate.
>
> It was argued that Anna Gowda's contingent interest as a remote reversioner could not be validly sold by him, as it was a mere Spes Successionis and an agreement to sell such an interest would also be void in law. It is not necessary to consider that question, because he did not in fact either sell or agree to sell his reversionary right. It is settled law that an alienation by a widow in excess of her powers is not altogether void, but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding. If some persons other than Anna Gowda had been at

the death of Tayava the nearest heir of her husband, it might have been open to him to question all or any of the three deeds, but Anna Gowda himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it. Nor is it other than a most notable circumstance that he did not, after Tayava's death essay to do so".

(21) It was by the application of the doctrine of election that Lord Sinha held that Anna Gowda was bound. This decision was followed by the Supreme Court in — 'Dhiyan Singh v. Jugal Kishore', AIR 1952 SC 145 (J). In this connection I may refer to the decision in AIR 1929 Oudh 185 (F), which in my opinion correctly sets out the law and the effect of the Privy Council in AIR 1918 PC 196 (B), (vide also 'Debi Dayal v. Radhakrishna', AIR 1939 Oudh 145 (K).) The consent of the reversioner does not validate the alienation and does not operate proprio vigore, but is only of evidentiary value.

Even in the passage at page 202 in AIR 1918 PC 196 (B), the actual expression used by Lord Dunedin is, whether the conduct of the presumptive reversioner amounted to an actual election to hold the deed good. What amounts to election is clearly laid down by Coutts-Trotter C. J. in AIR 1929 Mad 502 (A), by referring to the leading case of — 'Streatfield v. Streatfield', (1735) White and Tudor, 9th Edn., page 373 (L). Lord Sinha also reiterates the same principle in AIR 1927 PC 227 (I). So I think there is no warrant or justification in placing a wider construction on the passage of Lord Dunedin and importing equitable principles and enunciating a third doctrine as is sought to be done by the Full Bench decisions of the Allahabad, Bombay and Madras High Courts already referred to.

The observations in the recent decision of the Supreme Court in —'Kali Shanker Das v. Dhevendranath', AIR 1954 SC 505 (M), throw great light on this question. At page 509, Mukerjee J. held that

"consent of the reversioner may raise a presumption that the transaction was for legal necessity or that the mortgagee had acted therein after proper and bona fide enquiry and has satisfied himself as to the existence of such necessity — vide 'Debi Prasad v. Golap Bhagat', 40 Cal 721 at p. 782 (FB) (N). But this presumption is rebuttable and it is open to the actual reversioner to establish that there was in fact no legal necessity and there has been no proper and bona fide enquiry by the mortgagee".

(22) In column 2 of page 509, referring to AIR 1918 PC 196 (B), he further observed:

"It was held that the words referred to above should not be construed to lay down the proposition that such consent on the part of the father would operate proprio vigore and would be binding on the sons. This proposition, their Lordships observed was opposed both to principle and authority it being a settled doctrine of Hindu Law that nobody has a vested right so long as the widow is alive and the eventual reversioner does not claim through any one who went before him. As the sons of Ramnarain claim as heirs of Haripada and not of their father, the admissions, if any, made by the latter could not in any way bind them."

(23) At pp. 509-510, the nature of the widow's estate & the effects of transfer made by the widow is discussed. It was ultimately held that as the mortgage did not establish legal necessity, or that he made any bona fide enquiries the mortgage was valid and binding. I must, however, point out that the question as to whether the consenting presumptive reversioner would have been bound or not, did not arise and was not discussed by the Supreme Court.

(24) To sum up, my conclusions are as follows:

(1) The observations of Lord Dunedin in AIR 1918 PC 196 (B) do not warrant the construction based upon it by the Full Benches of Allahabad, Bombay and Madras High Courts and no third doctrine based on equity can be spelt out of those observations.

(2) If the observations of Lord Dunedin are susceptible of that construction as laid down by the Full Benches, I wish to respectfully differ from them. In — 'Shrinivas Krishna Rao Kango v. Narain Devji Kango', AIR 1954 SC 379 (O) at pp. 381-382; Venkatarama Iyer J. discussing the Privy Council decision in — 'Anant Bhikappa v. Shankar Ramchandra', AIR 1943 PC 196 (P) observed as follows:

"As it was an authority binding on the Indian Courts, they could not refuse to follow it and were obliged to discover a distinction. This court, however, is not hampered by any such limitation, and is free to consider the question on its own merits".

(25) Adopting those observations, I hold that after India was constituted into a Sovereign Democratic Republic, the Courts in India are not bound by the decisions of the Privy Council and are free to consider the question on its own merits. The Andhra High Court which was inaugurated in July 1954 is not bound by the Full Bench of the Madras High Court or other High Courts and is at liberty to examine the question in the light of well-established legal principles and arrive at a proper conclusion. So, in my opinion, a presumtive reversioner who gave his consent to a gift made by a widow without receiving any consideration whatsoever is entitled to recover the property so gifter when he succeeds to the estate on the death of the widow. The appellant in this case is only a donee from a donee from Subbamma who claims title under Ex. B. 7. There are, therefore, no equitable considerations applicable to the facts of the present case which compel me to uphold the title of the appellant.

(26) Before concluding the Judgment, I wish to make the following observations.

(27) This case has caused me a great deal of vacillation in view of the large body of authority referred to supra. I am really surprised that the Courts below summarily dealt with the question of estoppel and regarded the matter so simple that they did not even refer to the decision of the Privy Council or the Full Benches of the Allaha-

bad, Bombay and Madras High Courts or even the passages from the leading Text books. I wish to condemn the practice of the Subordinate Judiciary in not referring to the decisions which are binding upon them. By a casual reference to the leading text books, the courts below should have discovered that the Full Bench case in AIR 1929 Mad 502 (A) has at least an important bearing in deciding the question of estoppel. It is the bounden duty of the members of the bar and the Judges who administer the law to keep themselves informed of the march and progress of law, i.e., statutory and case law. If every illiterate man is presumed to know law and ignorance of law is no excuse, it is all the more important that those who are concerned in the administration of law, namely the members of the Bar and the Judges should read the Law Reports regularly and be aware not only of the latest reports, but also decisions of the Supreme Court and the High Courts.

I strongly feel that the courts below erred in overlooking or not referring to the Full Bench decisions of the Madras High Court. Feeling doubtful as to whether the members of the bar did not discharge their duty properly, I asked the counsel for the appellant as to whether the notes made by the lawyers who appeared in the courts below made reference to the Full Bench decisions. I felt happy to note that the notes did contain references to those decisions of the Full Benches. If those decisions were referred to during the course of the arguments in the courts below, it was incumbent upon them to have referred to those decisions and distinguished or followed them. Not to refer to those decisions or not to meet the arguments addressed before them is not an honest or proper way of disposal of cases.

(28) In the result, the Second Appeal fails and is dismissed with costs. So far as the Memo of Cross Objections are concerned, I see no reason to interfere with the exercise of discretion with regard to costs. Leave granted.

K.S.B. Appeal dismissed.

A.I.R. 1955 ANDHRA 55 (Vol. 42, C.N. 22)

CHANDRA REDDY J. (27-8-1954)

Prakasa Reddi and others, Petitioners v. Jonnala Pitchireddi and another, Respondents.

Criminal Revn. No. 605 of 1954 and Cri. Revn. Petn. No. 565 of 1954, to revise order of Addl. First Class Magistrate No. 1, Guntur, D/- 6-7-1954.

(a) Criminal P. C. (1898), Ss. 439, 423 (1) (c) and (d), 145, 107, 110 — Scope — Power of High Court to remit matter — Extent of — AIR 1942 Oudh 416 dissented from.

Clauses (c) and (d) of S. 423 are of wide import and include a power to remit the matter to the lower court after setting aside the order passed either under S. 107 or S. 110 or S. 145, Criminal P. C., and also includes power to order further inquiry. (Paras 10, 13)

In a revision against the order of a Magistrate passed under S. 145, the High Court thought that a portion in the Magistrate's order was unintelligible. It therefore set aside the order and directed the Magistrate to rehear the case and give a definite and distinct finding on the point of possession. When the matter went back to the Magistrate one party contended that the High Court ordered a de novo enquiry while the other party contended that the direction was only to rehear the argument and re-write the judgment. The Magistrate accepted the latter interpretation and expressed the opinion that there was no necessity to allow parties to adduce evidence afresh. On revision against that order,

Held that the High Court wanted the Magistrate to re-hear the case in the sense that he could allow the parties to let in further evidence and decide the question of possession or dispossession on a consideration of the whole evidence including that which was already on record; AIR 1942 Oudh 416, dissented from; Case law discussed. (Para 17)

Anno: Cr. P .C., S. 423 N. 39; S. 439 N. 25; S. 145 N. 61.

(b) Interpretation of statutes — Harmonious construction — (Civil P. C. (1908), Pre.).

It is well established canon of interpretation of a statute that effect should be given to every part of the statute. (Para 6)

Anno: C. P. C., Pre. N. 7.

CASES REFERRED: Paras

(A) ('05) 33 Cal 8: 3 Cri LJ 243 5
(B) ('11) 39 Cal 167: 12 IC 297 (FB) 5
(C) (V20) AIR 1933 Rang 288: 11 Rang 361: 35 Cri LJ 1 (FB) 5
(D) (V29) AIR 1942 Oudh 416: 43 Cri LJ 729 6, 7
(E) (V16) AIR 1929 Lah 28 (1): 30 Cri LJ 491 7
(F) (V21) AIR 1934 Mad 202 (1): 34 Cri LJ 947 8
(G) (V9) AIR 1922 Cal 382 (1): 49 Cal 187: 22 Cri LJ 499 9, 12, 13
(H) (V10) AIR 1923 Mad 142: 45 MLJ 56: 23 Cri LJ 670 9, 12, 13
(I) (V29) AIR 1942 Lah 84: 43 Cr LJ 564 10
(J) (V13) AIR 1926 All 403: 27 Cri LJ 945 10
(K) (V41) AIR 1954 Mad 771: (1954) 1 MLJ 478: 1954 Cri LJ 1231 14
(L) ('39) 40 Cri LJ 32 16

P. Basi Reddy, for Petitioners; A. V. Krishna Rao, K. Narasimha Rao and G. T. Raghavayya, for 1st Respondent. Public Prosecutor, for the State.

ORDER: This is an off-shoot of an order passed by Mr. Justice Somasundaram of the Madras High Court on 5-5-1954 in Criminal Revision Case No. 442 of 1953. In order to appreciate the respective contentions of the parties, it is useful to trace the background of this litigation.

The first respondent purchased properties including those involved in this Revision case under three registered sale deeds of the year 1952, and obtained possession thereof from the vendors. In November 1952, he moved the Additional Sub Magistrate, Guntur, under S. 144, Criminal P. C., for an order preventing the petitioners herein from trespassing on his lands with allegations that while he was away at Madras the present

petitioners trespassed on his land on 9-11-1952, and cut away the crops on a portion of the land and that they were attempting to remove the crops on the remaining portion of the land and prevent him from harvesting the crops belonging to him.

On 29-4-1954, orders were passed under S. 144(1) restraining the present petitioners from interfering with the possession of the land of the first respondent. Meanwhile, proceedings under S. 145, Criminal P. C. were initiated before the Additional First Class Magistrate, Guntur, who passed a preliminary order in December 1952. It may be stated that the order under S. 144 (1) was vacated. After hearing the parties and receiving the evidence adduced by them and considering the effect of the evidence, the Magistrate passed an order declaring the possession of the first respondent herein, but in the last paragraph of the order, the learned Magistrate observad as follows:

"I am not concerned with the possession of the land prior to 1951. I am concerned with the possession of the land on 9-12-1952 (i.e., the date of the order under S. 145 (1), Criminal P. C.) or within two months next before 9-12-1952".

The present petitioners carried the matter in revision to the High Court and when it came up before Justice Somasundaram, the learned Judge remarked that the last sentence quoted above was unintelligible. It is useful to extract that part of the order of the learned Judge which has given rise to this Revision Petition:

"The latter part of the sentence I am unable to understand unless the two months' period is to be taken into consideration in connection with dispossession. Whether the petitioner in the lower court was dispossessed within that period prior to 9-12-1952, it is not quite clear. Obviously, the Magistrate had in his mind the allegation in the petition of that statement in the police report, that the respondents in the lower court trespassed on the land on 9-11-1952 and continued to be in possession up to the date of the preliminary order. In that case, the proper finding should have been that the respondents dispossessed the petitioner in the lower court on 9-11-1952, which was within two months prior to 9-12-1952, and therefore, the petitioner in the lower court should be declared to be in possession and the respondents should be asked to deliver possession of the property. But the order does not make it quite clear. It is therefore necessary to set aside this order. I direct the case to be reheard by the same Magistrate or some other Magistrate to be appointed by the District Magistrate who should give a definite and distinct finding as to whether the petitioner in the lower court was dispossessed on 9-11-1952, or whether he was not dispossessed at all. If he was not dispossessed and continued to be in possession then there should be a finding that not only on 9-12-1952, but also prior to it he was in possession".

(2) When the matter went back to the Magistrate, it was contended on behalf of the present petitioners that the learned Judge ordered a de novo enquiry and therefore the Magistrate should begin the inquiry under S. 145, Criminal P. C., afresh. On the other hand, it is urged on behalf of the present 1st respondent that the direction of the learned Judge was only to re-hear the arguments and to re-write the judgment. This argument advanced on behalf of the 1st respondent found favour with the Magistrate who expressed the opinion that the order of Justice Somasundaram meant only re-hearing of arguments on the evidence already on record and there was no necessity to allow the parties to adduce evidence afresh. It is this order of the Magistrate that is under revision. The same contentions as in the lower Court are repeated before me in this Revision Petition.

(3) The first question, therefore, that arises for consideration is as to the powers of the High Court in exercise of its jurisdiction under S. 439 to order a rehearing or a further enquiry. While it is contended by Mr. Basi Reddy, the learned Counsel for the petitioner, that the powers of the High Court in regard to re-hearing or an enquiry afresh are unfettered, the position taken by Raghavayya, counsel for the 1st respondent, is that the High Court has no power at all to remit the matter to the lower Court for any purpose and if any such power existed it could only be to direct a re-hearing of the arguments based on the evidence already recorded and to re-write the order. I will now proceed to consider which of the two views is correct.

(4) Under S. 439, Criminal P. C., the High Court in its discretion could exercise any of the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428 or on a Court by S. 338. Here we are only concerned with S. 423 (1), Criminal P. C. Clauses (a) and (b) to S. 423 (1) relate to appeals from orders of acquittal or from conviction. We are therefore (not?) concerned with these two clauses in this enquiry. The relevant clauses are (c) and (d) which are in the following terms:

"(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper."

According to Mr. Raghavayya, a combined reading of these two clauses does not confer power on the High Court firstly to send back the matter to the trial Court or, at any rate, to direct a fresh enquiry. The learned counsel contends that cl. (d) does not enlarge the powers conferred by Cl. (c) and it merely enables the High Court to pass incidental orders such as a direction as to cancellation of bail-bonds when an appellant is directed to be set at liberty or when the sentence of fine is set aside, ordering a refund of the fine if already paid. I do not think it is possible to give such a restricted meaning to Cl. (d).

(5) Mr. Raghavayya based his arguments on some decided cases. In — 'Dayanath Talukdar v. Emperor', 33 Cal 8 (A), a Bench of the Calcutta High Court ruled that there was no power in a District Magistrate sitting as an appellate Court and hearing the appeal against an order under S. 110, Criminal P. C., to order further enquiry after setting aside the order of the lower Court. It may be mentioned that beyond merely

making the statement there is no discussion at all in the case nor is a reference to S. 423 (1) (c) or (d) made. Therefore, this ruling cannot be relied on as an authority for the proposition put forward by Raghavayya.

In — 'Mehi Singh v. Mangal Khandu', 39 Cal 157 (FB) (B), a Full Bench of the Calcutta High Court expressed the opinion that an appellate Court had no power to order compensation under S. 250, Criminal P. C. The learned Judge stated that consequential or incidental orders must fall under one or other of two heads, which were mentioned in the judgment. It may be mentioned that Chief Justice Jenkins did not sign the judgment as the reasoning of the Judges did not appeal to him. This case also came in for considerable criticism at the hands of the Rangoon High Court in — 'Ma Mya Khin v. Maung Po Htwa', AIR 1933 Rang 288 (FB) (C).

The question there was whether an order under S. 148 (3), Criminal P. C., was one incidental to an order for possession under S. 145. In that context the Full Bench ruling of the Calcutta High Court referred to above was noticed and Chief Justice Page who delivered the leading judgment remarked that he was unable to appreciate the reasoning upon which that part of the judgment was based.

Agreeing with the learned Judges of the Rangoon High Court in — 'Ma Mya Khin v. Po Htwa (C)' and with great respect to the majority of the Judges in — 'Mehi Singh v. Mangal Khandu (B)', I find it difficult to appreciate the reasoning of the learned Judges to hold that the order awarding compensation is not either a consequential or incidental order within the meaning of S. 423 (1) (d). Be that as it may, I do not think that that ruling can be of any assistance to the determination of the question before us.

(6) There are two rulings, one of Lahore and another of Oudh, which bear out the proposition of Mr. Raghavayya. In — 'Abdulla Sheik v. Emperor', AIR 1942 Oudh 416 (D), Bennet, J., ruled that since the principle of autrefois acquit is not applicable to proceedings under S. 107, Criminal P. C., it was not competent to an appellate Court to order a re-trial after setting aside an order under S. 107, Criminal P. C. The learned Judge thought that as S. 403, Criminal P. C., does not bar the initiation of fresh proceedings under S. 107, Criminal P. C., S. 423 (1) (d) should not be regarded as having conferred power on the appellate Court to order re-trial in such proceedings.

I must express my respectful disagreement with this view of the learned Judge. It may be that the principles underlying S. 403 are not applicable to proceedings like those under Ss. 145, 107, 110 and therefore there is no bar to the institution of fresh proceedings. If that is the sole criterion, in several instances, no useful purpose is served by carrying the matter in revision to the High Court. If the proceedings are to be initiated once again, it will involve the parties in considerable expense and time and it will be waste of judicial time. It should not be thought that the Legislature was unaware of all this.

Further, the interpretation placed by the learned Judge ignores Cl. (d) and gives effect only to Cl. (c). If the power of the High Court is only to set aside the order, that would only be in exercise of the power under Cl. (c) and does not give any meaning to Cl. (d), and renders the latter clause nugatory. It is the well-established canon of interpretation of a statute that effect should be given to every part of the statute. If the argument of the learned Judge is to be accepted, no meaning is given to Cl. (d). I do not think the intendment of this clause is the one indicated by Mr. Raghavayya.

(7) Reliance was also placed by Mr. Raghavayya on the decision of a single Judge of the Lahore High Court in — 'Chandan v. Emperor', AIR 1929 Lah 28 (1) (E), where the opinion was expressed by a single Bench of that Court that under S. 423 (1) (c) there is no power conferred on an appellate Court to order re-trial or re-hearing of proceedings except in a case where an order of acquittal or conviction is set aside within the meaning of Cls. (a) and (b) to S. 423 (1). Apart from this case having been overruled by a Bench of the same Court, my criticism with reference to — 'Abdulla Sheik v. Emperor (D)' applies equally to this case.

(8) My view that the powers conferred by S. 423 (1) (c) and (d) are wide and enable the High Court to remit the matter to the lower Court gains support from decided cases. In — 'In re Nagappa Reddy', AIR 1934 Mad 202 (1) (F), Burn J., held that under S. 423 (1) (c) and (d), an appellate Court has power to send back the matter to the trial Court. I am only referring to this case for the purpose of saying that the power to send back the matter to the trial Court for whatever purpose it may be exists in the Court. In fact, this decision is relied on by Mr. Raghavayya, for other purposes and I will refer to it presently.

(9) In — 'Bhuban Chandra v. Nibaran Chandra', AIR 1922 Cal 382 (1) (G), a Bench of the Calcutta High Court which was dissatisfied with the stereo-typed order of the Magistrate that he had heard the learned pleaders and considered oral and documentary evidence in the light of arguments addressed to the Court, set aside the final order made by the Magistrate and directed that the case be re-opened at the point reached on the date on which the judgment was delivered and that after hearing the parties afresh and after recording the statement of reasons for his decision, the Magistrate will dispose of the matter in accordance with law. I will have to refer to it again in another connection. In — 'Subba Gounden, P. v. S. Subbayya Goundan', AIR 1923 Mad 142 (H), where a Magistrate who held an enquiry under S. 145 declared that one of the parties was entitled to possession until evicted in due course of law observing:

> "The 7th counter petitioner is declared to be put in possession of the land described hereunder. Fill up the schedule accordingly."

Justice Venkata Subba Rao set aside that order and directed the Magistrate to re-hear the parties after recording a statement of reasons for his decision and dispose of the matter in accordance with law. These three decisions are relied on by Mr. Raghavayya for his proposition that at any rate the High Court has got only limited powers

in ordering a re-hearing of the petition under S. 145, Criminal P. C. I have referred to these rulings only for a limited purpose, namely that the High Court has power in the exercise of its revisional jurisdiction to send back the matter to the lower Court after setting aside an order.

(10) There are two Bench decisions of the Lahore and Allahabad High Courts — 'Subeg Singh v. Emperor', AIR 1942 Lah 84 (I) and — 'Bhagwat Singh v. Emperor', AIR 1926 All 403 (J), which have construed these two clauses i.e., Cls. (c) and (d) to S. 423 (1). The view taken in both these cases is that the High Court in its revisional jurisdiction under S. 439, Criminal P. C., has ample powers to order a de novo enquiry after setting aside the order passed under Ss. 107 and 110, Criminal P. C. Although the learned Judges were not dealing with a case arising under S. 145, the principle is the same. I must express my respectful accord with the view taken by the learned Judges though I am unable to appreciate a part of the reasoning therein which is based on the principle autrefois acquit. My conclusion reached on a consideration of the relevant provision of S. 423 and the decided cases is that Cls. (c) and (d) are of wide import and include a power to remit the matter to the lower Court after setting aside the order passed either under S. 107 or S. 110 or S. 145, Criminal P. C.

(11) This leads me to the point whether the power is of a limited nature as observed by Burn J., in — 'Nagappa Reddy In re (F)'. With great respect to the learned Judge, I am unable to agree with the opinion expressed by him. For one thing, there is no discussion at all on this question. The learned Judge merely observed that the appellate Court should not order a de novo enquiry. No reason is given in support of this conclusion. According to him, all that the appellate Court could do is to direct the Magistrate to re-hear the parties and write a proper order in the light of the observations of the learned Sessions Judge. With respect, I fail to see how this restricted power could be inferred from the provisions of Cls. (c) and (d) to S. 423 (1). Either there is a power in the High Court to send back the matter to the trial Court or no power. If a power exists to send it back to the trial Court, what is the basis for reading a restriction into the language of Cls. (c) and (d)?

(12) In fact except this decision, no other ruling has been brought to my notice which has taken the view that the High Court has a limited power in sending back the matter after setting aside an order under the provisions of S. 107 and proceedings of allied nature or under S. 145. Neither — 'Bhuban Chandra v. Nibaran Chandra (G)' nor — 'Subba Goundan P. v. S. Subba Goundan (H)' lends any colour to the argument of Mr. Raghavayya on this aspect of the matter nor support the view of Justice Burn. The learned Judges in either of the two cases have not expressed the opinion that the powers of the High Court are limited in the manner indicated by Justice Burn.

(13) In the circumstances of cases before them they indicated the procedure to be followed by the Magistrate. In fact, the expression "re-open" in — 'Bhuban Chandra v. Nibaran Chandra (G)' and "re-hear the parties" in — 'Subba Goundan, P. v. S. Subbayya Goundan (H)', are significant. In my opinion they point to the conclusion that the powers under S. 439 which are co-extensive with those in S. 423 (1) (c) and (d) are wide enough to include the order of a further enquiry.

(14) In — 'In re N. Sakkarai Kannu Pillai', AIR 1954 Mad 771 (K), Somasundaram J. while considering the powers of a Court under S. 520, Criminal P. C., stated that he could only pass an order either modifying or altering or annulling the order passed under S. 517 and make further orders that may be just which include the confirmation of the order also, because it has not all the powers given to a Court of appeal under S. 423, Criminal P. C. No doubt, the jurisdiction of the appellate Court under S. 423 (1) (c) and (d) is not defined by the learned Judge and those observations only indicate that the powers under Cls. (c) and (d) of S. 423 (1) are so wide powers that the learned Judge could have given the directions which have given rise to this Criminal Revision Case.

(15) The hollowness of the contention as to the limited nature of the powers conferred on the High Court by S. 423 (1) will be exposed if we bear in mind a case where a Magistrate under S. 145, Criminal P. C., passed an order on receiving statements, but without giving opportunities to the parties to let in evidence. Suppose this matter is made the subject of a revision case and the High Court sets it aside as it does not conform to the procedure prescribed under S. 145, Criminal P. C. If I have to accept the contention of Mr. Raghavayya the High Court after setting aside the order is left helpless to direct the Magistrate to hold a further inquiry. No useful purpose will be served by this Court directing the Magistrate to re-hear the arguments and re-write the order as neither side has let in any evidence, and no satisfactory conclusion can be reached as to the possession of either party. I do not think that such anomalous position would have been contemplated by the Legislature.

(16) In fact such a case arose for consideration before Justice Lakshmana Rao in — 'Bogam Pedda Giddasahe v. Bogum Achigadu', 40 Cri LJ 32 (L), where one side had no opportunity of letting in evidence in support of the claim that he was in possession of the property. The learned Judge after setting aside the order of the Magistrate under S. 145 ordered the Magistrate to enquire again into the case after giving the petitioners an opportunity to file a statement. No doubt, there is no discussion of the powers of the appellate Court to do it, but that could only be on the assumption that a power to do the thing done by the learned Judge did exist in the High Court under S. 439, Criminal P. C. To hold otherwise, would lead to results not contemplated by the Legislature.

(17) I should now proceed to consider the scope of the order of the learned Judge. On the one hand, it is urged by Mr. Basi Reddi that the intendment of the order was that there should be an enquiry afresh, while Mr. Raghavayya submits that the learned Judge would have only intended that the Magistrate should re-write the order and nothing more than that. I am afraid

both sides have taken an extreme position. It looks to me that the Judge wanted that parties should have opportunity to let in any evidence which the parties might want so as to clear up the position as to whether it was a case of possession that was put forward by the 1st respondent herein or one of dispossession. If all that was meant, by the Judge was, re-writing the order, he would not have directed a re-hearing of the same. At the same time, it is difficult to think that he had ordered a de novo enquiry as urged for the petitioner. He would not have intended that all the evidence taken on earlier occasion should be wiped out, thus rendering the time and expense of the parties useless. On a careful reading of the order my conclusion is that the learned Judge wanted the Magistrate to rehear the case in the sense that he could allow the parties to let in further evidence and decide the question of possession or dispossession on a consideration of the whole evidence including that which was already on record. In this view of mine, I direct the Magistrate to permit the parties to let in such additional evidence as they may desire to adduce and decide the matter on the evidence already on record and on the evidence to be placed before him hereafter.

(18) Direction issued accordingly.

H.G.P. Order accordingly.

A.I.R. 1955 ANDHRA 59 (Vol. 42, C.N. 23)

SUBBA RAO C. J. (29-10-1954)

In re Khalandar Saheb, Petitioner (Accused).

Cri. Revn. No 385 of 1954 and Cri. Revn. Petn. No. 357 of 1954 to revise order of Sessions Court, Anantapur Division, D/- 17-3-1954.

(a) Criminal P. C. (1898), S. 439 — Interference with findings of facts.

In a criminal revision, it is not permissible to canvass the findings of facts arrived at by the Courts below. (Para 2)

Anno: Criminal P. C., S. 439, N. 15, Pt. 1.

(b) Penal Code (1860), S. 361 — Out of keeping of lawful guardian.

The word "keeping" cannot be interpreted in a narrow sense. It is not the physical presence in the precincts of the father's house that matters, but whether the daughter was in fact under his guardianship. Whether she left the house as the result of a pre-arranged plan between her and the accused, or, whether she went to answer calls of nature, it cannot make any difference, for, in the former case, the accused by being a party to the arrangement takes her from her father's custody, and, in the latter case, her leaving her father's house for answering calls of nature cannot obviously make her any the less under the keeping of her father. AIR 1949 All 710, Distinguished. (Para 6)

Anno: Penal Code, S. 361, N. 2.

(c) Penal Code (1860), S. 361 — "Takes or entices".

There is an essential distinction between the two words 'take' and 'entice'. The mental attitude of the minor is not of relevance in the case of taking. The word 'take' means to cause to go, to escort or to get into possession. When the accused takes the minor with him, whether she is willing or not, the act of taking is complete and the condition is satisfied. The word "entice" involves an idea of inducement by exciting hope or desire in the other. One does not entice another unless the latter attempted to do a thing which she or he would not otherwise do. So when the accused takes the girl along with him, he is 'taking' her out of the father's custody within the meaning of the section. (Para 9)

Anno: Penal Code, S. 361, N. 1.

(d) Penal Code (1860), S. 366 — "Seduced to illicit intercourse" — AIR 1932 All 409, Dissent. from.

The word 'seduced' can be used in two senses, one wider and the other narrower. In the narrower sense, it may connote the first lapse from the path of virtue. In the wider sense, it includes every device or persuasion, every word or act, which induced a girl to submit to illicit intercourse. Indeed, every illicit intercourse must be preceded by some overture on the part of the male. Though the words "seduction" and "illicit intercourse" are distinct, more emphasis should be laid on the words "illicit intercourse" rather than on the word "seduction". Therefore the word "seduced" should be understood in a wider sense of inducing a girl to carnal connection at any time or any occasion. AIR 1932 All 409, Dissented from. (Paras 10, 14)

Anno: Penal Code, S. 366, N. 5.

(e) Penal Code (1860), S. 366 — "Seduced to illicit intercourse".

Any act on the part of a person to lead a woman astray from the path of rectitude is seduction and if it is followed by intercourse, it will be seduction for illicit intercourse. (Para 11)

Anno: Penal Code, S. 366, N. 5.

CASES REFERRED: Paras

(A) (V36) AIR 1949 All 710: 51 CriLJ 29 7
(B) (V37) AIR 1950 Cal 406: 51 Cri LJ 1486 7
(C) (1910) 1910-1 KB 818: 79 LJ KB 505 11, 14
(D) (V19) AIR 1932 All 409: 33 Cri LJ 669 12
(E) (V22) AIR 1935 Bom 189: 59 Bom 652 13
(F) (V31) AIR 1944 Bom 159: 45 Cri LJ 750 13
(G) (V17) AIR 1930 Mad 980: 32 Cri LJ 357 14

C. Kondiah and K. Venkataramaiah, for Petitioner; Public Prosecutor, for the State.

ORDER: The accused has been convicted by the Assistant Sessions Judge of Anantapur under S. 366, Penal Code, and sentenced to simple imprisonment for two years. On appeal, the Sessions Judge of Anantapur confirmed both the conviction and the sentence. The accused has preferred this Criminal Revision Petition against the judgment of the Sessions Judge.

(2) In a criminal revision, it is not permissible to canvass the findings of facts arrived at by the Courts below. The facts found may, there-

fore, be accepted and briefly stated. The accused is a young Muslim. He was a country doctor and was treating the wife and daughter of one Venkayya, a resident of the village of Kanekal. During his visit to Venkayya's house, he had become intimate with his daughter Venkayamma aged 15 or 16. On or about 7-8-1952, when she had gone out to answer calls of nature, by the side of the house of the accused, he caught hold of her and had a forced sexual intercourse with her. On 10-8-1952 when she again went by the side of his house for the same purpose, he persuaded her to go along with him and took her to Malyam village, and from there to Kowkuntla via Gollapuram, where he kept her in his uncle's house until she was restored back to the father through the good offices of that uncle on 12-8-1952. On those facts, both the courts found that the accused was guilty of an offence under S. 366, Penal Code.

(3) Mr. Kondaiah, the learned Advocate for the petitioner, contended that there is no clear or convincing evidence to establish that the girl is below 18 years and that, in any view, on the facts found, no case under S. 366, Penal Code, has been made out. The relevant provisions of Ss. 366 and 361, Penal Code, may be read:

"Section 366: Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation, as defined in this Code or of abuse of authority or any other method of compulsion, induce any woman to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person, shall also be punishable as aforesaid".

"Section 361: Whoever takes or entices any minor under sixteen years of age, if a male, or under eighteen years of age, if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship".

(4) The material parts of the provisions applicable to the facts found and stated above, lay down that a person, who kidnaps a female under 18 years of age to seduce her to illicit intercourse commits an offence under S. 366, Penal Code. Under S. 361, kidnapping as defined is a substantial offence and the offence under S. 366 is an aggravated form of that offence. The aggravated offence consists of three ingredients (i) kidnapping, (ii) seducing, (iii) to illicit intercourse.

It is therefore necessary to appreciate the connotation of the three ingredients and to ascertain whether the facts of the case are covered by them. As I have already stated, the offence of kidnapping a minor is defined by S. 361, Penal Code. The three conditions for the application of that section are (i) the victim must be a minor girl under 18 years of age, (ii) taking her or enticing her by the accused and (iii) such taking or enticing is out of the keeping of the lawful guardian. The first question therefore is whether Venkamma was a minor under 18 years at the time of the alleged offence.

(5) P. W. 1, Venkayya, proves his daughter's age as 12 at the time of the offence. P. W. 2, the girl, spoke to the same effect. The Lady Doctor P. W. 8, testified that, at the time of her examination of the girl, she was aged about 14 years. Exhibit P. 4 is the medical certificate given by her. The Assistant Sessions Judge who examined her in court, was of the view that she was a bit undersized and that she would not be more than 16 or 17 years of age at the time she was examined. On that evidence, the learned Assistant Sessions Judge held that the girl could not have been more than 15 or 16 years old at the time of the alleged offence.

On appeal, the learned Sessions Judge accepted the evidence of the doctor and the father and held that she could not have been more than 14 years of age at the time of the medical examination in August 1952. The learned counsel argued that another opportunity should be given to him to prove the age of the girl on the ground that the accused has now obtained a birth extract of the girl. I do not think I am justified to give at this stage another opportunity to the accused. If he was sincere in his attempts he could have produced the necessary evidence in either of the two courts below. The finding of the courts below is one of fact and there are no grounds for interference in revision.

(6) That the girl's father is her lawful guardian admits of no doubt. Can it be said that she was not in his keeping when the accused took her with him? It is argued that, at the point of time she was taken by the accused, she was not in the keeping of her father inasmuch as she left his house. The word "keeping" cannot be interpreted in such a narrow sense, for such an interpretation would frustrate the object of the section itself. It is not the physical presence in the precincts of the father's house that matters, but whether she was in fact under his guardianship. Whether she left the house as the result of a pre-arranged plan between her and the accused, or, whether she went to answer calls of nature, it cannot make any difference, for, in the former case, the accused by being a party to the arrangement took her from her father's custody, and in the latter case, her leaving her father's house for answering calls of nature cannot obviously make her any the less under the keeping of her father.

(7) Reliance is placed upon the decision of — Mushtaq Ahmad J. in — 'Nura v. Rex', AIR 1949 All 710 (A) wherein the learned Judge observed that where a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another, who treats her with kindness, he cannot be held guilty under Section 361, Penal Code. This decision cannot help the accused for, on the facts of that case, it was found that the girl went out of the protection of her parents of

her own accord and thereafter went with the accused. In — Deba Prosad Bose v. The King', AIR 1950 Cal 406 (B) the learned Judges held that, where a girl left her house on account of the previous arrangement with the accused and met him in a garden from where he took her, the accused's action amounted to taking her away from the keeping of her lawful guardian. At p. 408, the learned Judges observed:

"The mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping. If, however, it is proved that a minor had abandoned her guardian with no intention of returning back, she cannot, therefore, be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by a minor girl depends on the facts of each particular case ....

When under this arrangement she was leaving the protection of her father, even if it be with the intention of not returning again, that will not be sufficient to put an end to the ties of guardianship. The importance and significance of the previous arrangement between the girl and the accused must not be overlooked. We have to consider the surrounding circumstances under which the incident took place and then come to a conclusion whether the girl would have left the father's house had it not been for the previous arrangement with and the readiness of the accused to take her away, though not from the doorsteps of the father's house, but from some distance".

(8) In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency namely whether she went out to answer calls of nature, or whether she went to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and thereafter, the accused took her with him.

(9) It is next to be considered whether the accused took the minor or enticed her to go with him. It is contended that the accused did not take her or entice her, but she voluntarily went with him. There is an essential distinction between the two words "take" and "entice". The mental attitude of the minor is not of relevance in the case of taking. The word "take" means to cause to go to escort or to get into possession. When the accused took the minor with him, whether she was willing or not, the act of taking was complete and the condition was satisfied. The word "entice" involves an idea of inducement by exciting hope or desire in the other. One does not entice another unless the latter attempted to do a thing which she or he would not otherwise do. The juxtaposition of these two words makes it clear that the act of taking is complete when the accused takes her with him or accompanies her in the ordinary sense of the term, irrespective of her mental attitude. So, it is clear that, when the accused took the girl along with him, he was "taking" her out of the father's custody within the meaning of the section.

(10) Coming to the aggravated form of the offence, the question is whether the minor was kidnapped in order that she may be seduced to illicit intercourse. That the object of taking the girl was for illicit intercourse cannot be doubted. Illicit intercourse is intercourse between a man and a woman who are not married. But, it is argued that the word "seduce" in the section is used in the sense of enticing a girl to part with her virtue for the first time and that, as the girl admitted that the accused had carnal knowledge of her even earlier, he could not thereafter seduce her to illcit intercourse.

There is a conflict of view on the interpretation of the word "seduced" in the section. The Dictionary meaning of the word "seduce" is to lead astray, to entice, to corrupt or to induce a woman to perform an act of unchastity with oneself. The word can be used in two senses, one wider and the other narrower. In the narrower sense, it may connote the first lapse from the path of virtue. In the wider sense, it includes every device or persuasion, every word or act, which induced a girl to submit to illicit intercourse. Indeed, every illicit intercourse must be preceded by some overture on the part of the male.

After the surrender of chastity for the first time, a girl may lead a life of rectitude. Can it be said that further acts of device or inducement to draw her from the path of rectitude are not acts of seduction? If such a narrow meaning is given, the salutary provisions of Section 361 should be confined only to the first lapse on the part of an innocent girl from the conditions of purity and leave her to the mercy of unscrupulous persons. Therefore, though the words "seduction" and "illicit intercourse" are distinct, more emphasis should be laid on the words "illicit intercourse" rather than on the word "seduction".

(11) Any act on the part of a person to lead a woman astray from the path of rectitude is seduction and if it is followed by intercourse, it will be seduction for illicit intercourse. The Court of Criminal Appeal in — 'Rex v. Frederick Moon', (1910) 1 KB 818 (C) defined the word "seduction" found in Section 17 of the Children Act, 1908. Under that section, it is provided that if any person having the custody, charge or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he should be guilty of misdemeanour. Seduction under that section is a substantial offence and seduction for illicit intercourse is an aggravated form of it.

Lawrence J. held having regard to the scope of the section and the purpose behind it, that seduction in that Act has its ordinary sense of inducing a girl to part with her virtue for the first time. The learned Judge himself realised that the word has two meanings and that, in the wider sense, it also means inducing a girl to have carnal connection at any time or/on any occasion. I do not think that the meaning attributed to the word, having regard to the scope of that Act, can be applied to a case under S. 361, I. P. C.

(12) Boys and Young JJ. in — 'Baijnath v. Emperor', AIR 1932 All 409 (D) confirmed the

scope of that word to its narrower meaning. The reason for their conclusion is found in the following observation:

"The important question is whether the term "seduced to" can properly be applied only to that which leads to the first act of illicit intercourse, or whether it can be properly applied to that which precedes each subsequent acts of illicit intercourse. The Oxford Dictionary defines "seduction" in this connection as "to induce a woman to surrender her chastity' which suggests at the outset that the term "seduction" can only apply properly to the first act of illicit intercourse, for once that act has been completed, the girl has surrendered her chastity. We would, therefore, hold that the term "seduction" can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man".

(13) For the reasons already given by me, I regret my inability to confine the word to its narrow meanings. Instead the Oxford Dictionary itself gives meanings which are wide enough to take in the larger connotation. Divatia J. in — ' Lakshman Bala v. Emperor', AIR 1935 Bom 189 (E) rejects this narrow interpretation. After pointing out the conflict of decisions, the learned Judge observed at p. 190:

"In my opinion, the term "seduce" is used in this section in the general sense of enticing or tempting, not in the limited sense of committing the first act of illicit intercourse. The substantial offence in the section is the act of kidnapping or abduction and the intention or knowledge that the girl may be forced or seduced to illicit intercourse raises it to an aggravated form of the main offence of kidnapping or abduction and punishable with greater severity.

I do not think that the Legislature had in mind while enacting this section that it was only when a girl was kidnapped with the intention or knowledge that she should surrender her chastity for the first time, that kidnapping would become a more serious offence, while an act of kidnapping a girl even though avowedly for the purpose of having illicit intercourse with her would only amount to the simple offence of kidnapping, if there was previous intimacy with the girl. I think the material words in the section are "illicit intercourse" rather than "forced or seduced". It is the illicit nature of the intercourse for which the kidnapping or abduction takes place that constitutes the aggravation of the offence and not the priority in point of time of such intercourse".

With great respect I agree with the aforesaid observations. The same High Court in — Emperor v. Ayubkhan Mirsultan', AIR 1944 Bom 159 (F) expressed a similar view. The learned Judge stated at p. 159:

"The girl's consent might always be revoked, and if it were revoked, force or a further seduction would be essential before an act of illicit intercourse could take place, and even if it were not revoked, it is difficult to see how the act of illicit intercourse could take place without at least some overture, however slight, being made by the male person, which overture, however, slight could properly be called a seduction to illicit intercourse".

I express my full accord with this view.

(14) Much to the same effect is the decision of the Madras High Court in — Suppiah v. Emperor', AIR 1930 Mad 980 (G). When the decision of — 'Rex v. Frederick Moon (C)', was cited, the learned Judge Pandalai J. distinguished that decision on the ground that in that case, the substantial offence was kidnapping or abduction. It is not necessary to multiply cases. But it may be stated that the majority view is inclined to give a wider connotation, to the word "seduced". I would, therefore, hold on a consideration of the wording of Section 361 and in the light of the decisions cited, that the word "seduced" should be understood in a wider sense of inducing a girl to carnal connection at any time or any occasion. If so understood, it will follow that the accused in the instant case, took her from lawful custody in order to seduce her to illicit intercourse and therefore committed an offence under S. 361, I. P. C.

(15) I cannot leave this case without observing that on the facts found, the punishment meted out to the accused is very lenient. When a person leads astray an innocent girl who is a minor, and takes her away from lawful custody and thereby ruins the life of that girl, and brings infamy into the family, he deserves a more deterrent punishment. But both the Courts gave lenient punishment and as the prosecution did not ask for enhancement of sentence, I do not think this is a fit case for interference, 'suo motu' by me.

(16) The Criminal Revision Petition is dismissed.

V.R.B. Revision dismissed.

(S) A.I.R. 1955 ANDHRA 62 (Vol. 42, C.N. 24)

SUBBA RAO C. J. (19-10-1954)

K. Rangaraju and others, Appellants v. Illapavaluri Sitaramayya, Respondent.

S. A. No. 740 of 1950, against decree of Sub. J., Guntur, in Appeal Suit No. 250 of 1948.

Transfer of Property Act (1882), S. 108 (h), (i) and (o) — Trees of spontaneous growth — Rights in — (Tenancy Laws — Madras Estates Land Act (1 of 1908), S. 12).

The general and accepted principle is that the trees on a land belong to the owner. They are part of the land and the right to cut and sell them is incidental to the proprietorship of the land. This general principle is subject to the law of fixtures. Under the Roman Law, a tenant is entitled to remove all fixtures, which he has attached to the leasehold property, whereas under English Law, whatever is fixed to the soil subject to some exceptions becomes part of it.

Under S. 108, T. P. Act, which practically embodies the principles of Roman law in subss. (h), (i) and (o), the lessee must not fell

timber or pull down buildings unless the timber has been planted or the building has been erected by the lessee and he must leave the property in the state in which he received it. (Para 12)

Thus there is no provision enabling a tenant to remove trees of spontaneous growth in his lease-hold property. The principles embodied in the T. P. Act are founded on reason and equity and, therefore, they are also applied to analogous cases which are not governed by the express provisions of other Acts, or regulated by custom. It follows that unless there is an established practice or statutory rule, trees of spontaneous growth on a land belong to the owner. (Para 13)

Held that though the tank bed is an estate, it is not a ryoti land and is not governed by the provisions of S. 12, Madras Estates Land Act, and in the absence of custom or a contract enabling a tenant to cut trees of spontaneous growth, they belong to the land-holder and the tenant has no right to cut or remove them. Case law referred. (Para 13)

Anno: T. P. Act, S. 108 (h) N. 2; S. 108 (o) N. 4.

CASES REFERRED: Paras

(A) ('67) 11 Moo Ind App 295 (PC) 5, 8
(B) (V34) AIR 1947 Cal 159: ILR (1946) 2 Cal 157 5
(C) ('98) 24 Mad 47: 10 Mad LJ 321 (FB) 6a, 9
(D) ('10) 33 Mad 253: 5 Ind Cas 437 8
(E) (V3) AIR 1916 Mad 939: 29 Mad LJ 314 8
(F) (V23) AIR 1936 Mad 919: 71 Mad LJ 749 10

M. S. Ramachandra Rao and M. S. Krishna Rao, for Appellants; P. Satyanarayana Raju, for M. Seshachalapathi, for Respondent.

JUDGMENT: The question in this Second Appeal is whether trees of spontaneous growth on lease-hold property belong to the land-holder or the tenant.

(2) The facts that give rise to the aforesaid question may be stated. The plaintiff is the owner of the suit land which is a tank bed in an estate. He leased it for a period of five years to defendants 1 and 2 under a deed, dated 22-8-1939, for grazing purposes. During the period of tenancy, there was spontaneous growth of babul trees on the land. Nine of them were cut by the defendants shortly before the filing of the suit. The question is who is the owner of the trees, whether it is the land-holder or the tenant?

(3) Both the Courts found that the said babul trees were of spontaneous growth during the period of the tenancy and that the ownership of the said trees is in the land-holder. On these findings a decree for an injunction was granted restraining the defendants from cutting the babul trees and also for the recovery of the fuel of the trees cut by them. The defendants preferred the above Second Appeal.

(4) The short question in the appeal is whether the land-holder or the tenant is the owner of the trees of spontaneous growth during the period of the tenancy. At the outset, some ground may be cleared to enable me to focus on the point raised. Though the land is situated in an estate, tank bed is excluded from the definition of 'ryoti land' under S. 3 (16), Madras Estates Land Act, and therefore the provisions of S. 12 of that Act regulating the ownership of the trees, do not apply. There is also no evidence, much less a finding, that the tenure is otherwise regulated by a contract between the parties or custom obtaining in the locality. Therefore, this is a simple case of conflicting rights between a land-holder and a tenant not governed by any statute or custom.

(5) In Woodfall on "Landlord and Tenant" 25th Edn., the following statement of law is found at page 810:

> "The property in trees is vested in the owner of the inheritance of the land upon which they grow, for the property in trees, or of that which is likely to become timber, is in the landlord."

In — 'Ruttonji Edulji Shet v. The Collector of Tanna', 11 Moo Ind App 295 (A) the Judicial Committee held that trees upon the land were part of the lands and the right to cut down and sell them was incidental to the proprietorship of the land. But, in the case of fixtures, there is a divergence of views between Roman Civil Law and English Law. Under the Roman Civil Law, a tenant was entitled to remove all fixtures which he had attached to the lease-hold property, where it could be effected without material injury to the property. Under English Law, whatever is affixed to the soil becomes part of it, the rule being relaxed only in respect of certain kinds of tenants' fixtures and not generally. See — 'Ballygunge Bank Ltd., Calcutta v. Income-tax Commissioner of Bengal', AIR 1947 Cal 159 (B).

(6) Section 108, Cls. (h), (i) and (o) embodied the Roman Law in preference to English Law. They read :

> "Section 108(h) : The lessee may even after the determination of the lease remove at any time while he is in possession of the property leased but not afterwards all things which he has attached to the earth, provided he leaves the property in the state in which he received it.
>
> (1)(a) When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines and to the free ingress and egress to gather and carry them.
>
> (b) The lessee may use the property and its products if any as a person of ordinary prudence would use them if they were his own. But he must not use, or permit another to use the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor or work mines or quarries not open when the lease was granted or commit any other act which is destructive or permanently injurious thereto."

(6a) The effect of a combined reading of the above provisions is summarised by a Full Bench of the Madras High Court in — 'Vasudeva Nambudripad v. Valia Chathu Achan', 24 Mad 47 (FB) (C), as follows :

> "Under the Transfer of Property Act, then, a lessee may, during the continuance of the lease

(S) A.I.R. 1955 ANDHRA 65 (Vol. 42, C.N. 25)

SUBBA RAO C. J. AND

SATYANARAYANA RAJU J. (19-11-1954)

Mohammad Ghouse, Petitioner v. State of Andhra.

Writ Petn. No. 342 of 1954.

Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules (1953), R. 4(2) — Madras Civil Services (Disciplinary Proceedings Tribunal) Rules (1948), R. 1 — Scope — Suspension of Subordinate Judge by Registrar, Madras High Court — Validity — (Constitution of India, Arts. 227, 234, 235 and 309).

In attempting to draft the Andhra Civil Services (Disciplinary) Rules artistically, some unintended and unexpected confusion was introduced but no conscious departure from the Madras Rules was intended. (Para 5)

Though ordinarily a proviso shall be read as a proviso to the rule to which it is added, having regard to the emphatic words "shall not be referred to the Tribunal" used in the proviso to R. 4(2) of Andhra Rules and also having due regard to the history and the object of the rule and the necessity to avoid anomalies and conflict with the provisions of the Constitution, the proviso should be read disjunctively and the said proviso held to be a proviso for both the sub-rules of R. 4 of the Andhra Rules. (Para 5)

If the said proviso should be read only as a proviso to sub-r. (2) with the result that the High Court has no power to make an enquiry in the exercise of its disciplinary jurisdiction over Subordinate Courts, the question arises whether such a rule would conflict with the provisions of the Constitution. (Para 6)

The substance of articles 227, 233, 234, 235 and 309 may be stated thus: The High Court has the power of control and superintendence over all Courts within the State. The Governor has the power to appoint, post and promote District Judges in consultation with the High Court and in the case of direct recruitment on its recommendation. He has similar power of appointment in the case of persons other than District Judges in consultation with the High Court and the State Public Service Commission. The posting and promotion of Judges other than District Judges is vested in the High Court. In the exercise of its power of control, the High Court shall exercise its power in accordance with the conditions of service prescribed under law. The Legislature may make rules regulating the recruitment and conditions of service of persons appointed to any public office. Till then the Governor is empowered to make rules regulating the recruitment and conditions of service of persons appointed. (Para 7)

A combined reading of the provisions would, therefore, indicate that the general control and superintendence of courts conferred on a High Court is restricted in specified directions.

The words "Conditions of service" in Art. 235 should be given a limited meaning, which would reconcile both parts of the article. The clue is found in the word 'deal' in Art. 235. That word is more appropriate to the procedure prescribed than to the power conferred or exercised. The power is exercised in the manner prescribed by the conditions of service. The procedure cannot obviously affect the power of control but it can only regulate the manner of its exercise. So construed a reasonable reconciliation can be effected between the two parts of the article. To illustrate, the High Court has control and superintendence over subordinate courts. This power necessarily implies that the High Court can take disciplinary action against Subordinate Judges in appropriate cases. The control will certainly be ineffective if the authority exercising the control cannot take disciplinary action against a person under its control. To put it in other words, a superior authority cannot control the actions of a subordinate if he cannot take disciplinary action against him. The "conditions of service" in Art. 235 can only mean the condition regulating the exercise of the power of control.

A condition of service, therefore providing in effect and substance that the High Court shall not have power to take disciplinary action either in exercise of its power of superintendence under Art. 227 or under the power of control under Art. 235, is constitutionally invalid. (Para 8)

Therefore the suspension of the subordinate Judge by the Registrar of the Madras High Court in its disciplinary jurisdiction was valid and it could not be contended that the High Court had no power to continue disciplinary proceedings against the subordinate Judge after the Andhra Civil Service (Disciplinary Proceedings Tribunal) Rules came into force on the 1st day of October 1953 and that the said power was vested only in the Tribunal for disciplinary proceedings. (Para 3)

CASE REFERRED: Para

(A) (V36) AIR 1949 PC 112: 50 Cri LJ 383 8

M. K. Nambiar, Asker Ali and N. Rajeswar Rao, for Petitioner; Advocate General (D. Narasaraju), for the State.

SUBBA RAO C. J.:

This is an application under Art. 226 of the Constitution of India for a Writ of Certiorari to quash the order issued by the Registrar, High Court of Madras, and given effect to by the State of Andhra, placing the petitioner under suspension from the date of the receipt of the order.

(2) The petitioner, Mohammed Ghouse, entered the Madras Judicial Service as a District Munsif in the year 1935 and was promoted to the Office of the Subordinate Judge in September 1949. On the formation of the Andhra State on 1-10-1953, he became a member of the Andhra State Judicial Service. The High Court of Madras took disciplinary proceedings against the petitioner on a charge of bribery. A Judge of the High Court was specially appointed to enquire into the allegations. The learned Judge conducted the enquiry at Vijayawada on 14-9-1953 and 15-9-1953 and continued the enquiry on 17-9-1953 and 18-9-1953 at Rajamundry and subsequently on 20-10-1953 at

Madras. After the enquiry, the High Court issued an order placing the petitioner under suspension. The order was duly served on the petitioner on 30-1-1954. The petitioner seeks to get the order quashed on various grounds given in the petition.

(3) Mr. Nambiar, learned counsel for the petitioner, contended that the High Court has no power to continue disciplinary proceedings against the petitioner after the Andhra Civil Service (Disciplinary Proceedings Tribunal) Rules (hereinafter referred to as the Andhra Rules) came into force on 1-10-1953, and that, thereafter, the said power was vested only in the Tribunal for disciplinary proceedings. The learned Advocate General replied by stating that the said rules were neither intended nor had the effect of removing the pre-existing jurisdiction from the High Court and transferring it to the Tribunal and that, even if that was the effect, it would be ultra vires of the rule-making power of the Government.

(4) The first question, therefore, is whether the Andhra Rules made any departure from those obtaining in Madras. The Madras and the Andhra Rules may be placed in juxtaposition to appreciate the difference between the two sets of rules.

MADRAS CIVIL SERVICES (DISCIPLINARY PROCEEDINGS TRIBUNAL) RULES, 1948 1st January 1949	ANDHRA CIVIL SERVICES (DISCIPLINARY PROCEEDINGS TRIBUNAL) RULES, 1953, Kurnool, 22nd October 1953.
In exercise of the powers conferred by S. 241 (1) (b) and 2(b) of the Government of India Act, 1935, and of all other powers hereunto enabling, His Excellency The Governor of Madras hereby makes the following Rules:	In exercise of the powers conferred by the Proviso to Art. 309 of the Constitution of India the Governor of the Andhra State hereby makes the following rules.
RULES	RULES
1(a) These rules may be called the Madras Civil Services (Disciplinary Proceedings Tribunal) Rules, 1948.	1(a) These rules may be called the Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules, 1953.
(b) They shall come into force on 1st January 1949.	(b) They shall be deemed to have come into force on the 1st October 1953.
(c) They shall apply to all Government servants under the administrative control of the Government.	(c) They shall apply to all Officers under the rule-making control of the State Government.
4. The Government may, subject to the provisions of rule 5, refer to the Tribunal—	4. (1) The Government shall, subject to the provisions of rule 5, refer the following cases to the Tribunal namely;
(a) Cases relating to Government servants on a monthly salary of Rs. 150/- and above, in respect of matters involving corruption on the part of such Government servants in the discharge of their official duties;	(a) Cases relating to Government servants on a monthly salary of Rs. 150/- and above in respect of matters involving corruption on the part of such Government servants in the discharge of their official duties; and
(b) all appeals to the Government from Government servants against disciplinary orders passed by heads of departments and other competent authorities on charges of corruption; and	(b) All appeals or petitions to the Government against orders passed on charges of corruption and all disciplinary cases in which Government propose to revise original orders passed on such chares.
(c) any other case or class of cases which the Government consider, should be dealt with by the Tribunal.	Provided that it shall not be necessary to consult the Tribunal;
Provided that cases arising in the Judicial department and against Government servants in the subordinate ranks of the Police forces of the rank of Sub-Inspector and below shall not be referred to the Tribunal.	(i) in any case in which the Tribunal has, at any previous stage, given advice in regard to the order to be passed and no fresh question has thereafter arisen for determination or,
	(ii) where the Government propose to pass orders rejecting such appeal or petition.
	(2) The Government may, subject to the provisions of rule 5, also refer to the Tribunal any other case or class of case which they consider, should be dealt with by the Tribunal;
	Provided that the following cases shall not be referred to the Tribunal namely;
	(i) cases arising in the Judicial Department;
	(ii) cases arising against the Government servants in the subordinate ranks of the Police forces of the rank of Sub Inspector and below, unless the cases are against them together with Officers of higher ranks.

(5) It will be seen from the above said rules that R. 4 of the Madras Rules is divided into two sub-rr. 4(1) and 4(2) in the Andhra Rules. Clause (c) of R. 4 of the former is, with some modifications, enacted as sub-rule (2) in the latter. In the Andhra Rules two new provisos are added to Rule 4(1)(a) and (b). The proviso to Rule 4 (c) of the Madras Rules is added as a proviso, with some verbal changes, to Rule 4(2) of the Andhra Rules.

Relying upon the changes made, it was contended by the learned counsel for the petitioner that, while under R. 4 of the Madras Rules read with its proviso the jurisdiction of the Tribunal to decide cases arising in the Judicial Department is excluded, under R. 4(1) of the Andhra Rules by reason of the deletion of that proviso from R. 4(1) that jurisdiction is conferred on the Tribunal. He would further contend that the proviso to R. 4(2) of the Andhra Rules having been designedly excluded from R. 4(1) and added to Rule 4(2), it cannot be construed as a proviso to R. 4(1) whereas the Advocate General would say that the Andhra Rules did not make any conscious departure from the Madras Rules and that the ambiguity, if any, that crept into the new Rules would disappear if the entire scheme of the rules and the wording used is looked at from the correct perspective.

After carefully going through the two sets of rules, we should think that, in attempting to draft the rules artistically, some unintended and unexpected confusion was introduced. But we are satisfied that no conscious departure from the Madras Rules was intended. The two provisos added to R. 4(1) of the Andhra Rules would be inappropriate to cl. (2), for the provisos enabling Government not to refer to the Tribunal cases covered by R. 4(1) in the circumstances mentioned in the provisos would be unnecessary under cl. (2), for under the said clause, it is in the discretion of the Government to refer "any other case or class of cases" to the Tribunal. So cl. (c) of R. 4 of the Madras Rules was enacted as cl. (2). But, in so doing, the proviso to cl. (c) of the Madras Rules should have been added also as a further proviso to R. 4(1) of the Andhra Rules. Instead, the framers added the said proviso only after R. 4(2). As the said proviso was intended to govern the entire rule instead of repeating it under the two sub-rules separately, it was added as a proviso after sub-r. (2). If it is construed only as a proviso to cl. (2), it would lead to the anomaly of an enquiry of a Sub-Inspector getting a salary of Rs. 150/- being conducted by a Tribunal and one getting less by his superior Officer.

It is obvious that no such distinction was intended between Sub-Inspector getting different scales of salary. Further, such a construction would come into conflict with the provisions of Arts. 227 and 235 of the Constitution of India, whereunder the control and superintendence of all Courts is vested in the High Courts. Though ordinarily a proviso shall be read as a proviso to the rule to which it is added, having regard to the emphatic words "shall not be referred to the Tribunal" used in the proviso and also having due regard to the history and the object of the rules and the necessity to avoid anomalies and conflict with the provisions of the Constitution, we are prepared to read the proviso disjunctively and hold that the said proviso is a proviso for both the sub-rules of R. 4 of the Andhra Rules.

(6) If the said proviso should be read only as a proviso to sub-r. (2) with the result that the High Court has no power to make an enquiry in the exercise of its disciplinary jurisdiction over Subordinate Courts, the question arises whether such a rule would conflict with the provisions of the Constitution.

The relevant provisions of the Constitution may now be read:

"Article 227:

Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

Article 233:

Appointments of persons to be, and the posting and promotion of District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

Article 234:

Appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

Article 235:

The control over District Courts and Courts subordinate thereto including the posting & promotion of, and the grant of leave to, persons belonigng to the judicial service of a State and holding any post inferior to the post of District Judge shall be vested in the High Court but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of the service prescribed under such law.

Article 309:

Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union and for the Governor or Rajpramukh of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State

to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act."

(7) The substance of the above articles may be stated thus: The High Court has the power of control and superintendence over all Courts within the State. The Governor has the power to appoint, post and promote District Judges in consultation with the High Court and in the case of direct recruitment on its recommendation. He has similar power of appointment in the case of persons other than District Judges in consultation with the High Court and the State Public Service Commission. The posting and promotion of Judges other than District Judges is vested in the High Court.

In the exercise of its power of control, the High Court shall exercise its power in accordance with the conditions of service prescribed under law. The Legislature may make rules regulating the recruitment and conditions of service of persons appointed to any public office. Till then, the Governor is empowered to make rules regulating the recruitment and conditions of service of persons appointed.

(8) A combined reading of the provisions would, therefore, indicate that the general control and superintendence of courts conferred on a High Court is restricted in specified directions.

It was, therefore, contended, relying on Art. 235 of the Constitution, that the said power of control of the High Court over subordinate courts is subject to the condition of service prescribed by the Governor or the Legislature as the case may be.

The question, therefore, is what is the meaning to be given to the words "conditions of service" in Art. 235. Should they be given a wide connotation which would exhaust the content of the power of control, or, should it be given a limited meaning so as to reconcile it with the power of control?

The Judicial Committee in — 'North West Frontier Province v. Suraj Narain', AIR 1949 PC 112 (A) expressed the view that the words "conditions of service" would take in circumstances under which an employer is entitled to terminate the services of an employee. A rule providing that a Government servant can only be removed after a disciplinary enquiry by a Tribunal may in a general sense be also a condition of service. So too, a rule that a judicial officer shall be under the supervision or control of a person other than a High Court. It will be equally a condition of service if a rule is framed that a judicial Officer other than a District Judge is not liable to be posted, transferred or promoted except by the Government. Indeed every condition regulating the appointment, salary, pension, promotion, removal, discipline and amenities of a servant would be a condition of service.

If such a wide construction is accepted, the Article itself would become nugatory and, therefore, it should be given a limited meaning. It is, therefore, necessary to give a limited meaning, which would reconcile both parts of the Article. The clue is found in the word 'deal' in Art. 235. That word is more appropriate to the procedure prescribed than to the power conferred or exercised. The power is exercised in the manner prescribed by the conditions of service. The procedure cannot obviously affect the power of control but it can only regulate the manner of its exercise. So construed, a reasonable reconciliation can be effected between the two parts of the Article.

To illustrate, the High Court has control and superintendence over subordinate courts. This power necessarily implies that the High Court can take disciplinary action against Subordinate Judges in appropriate cases. The control will certainly be ineffective if the authority exercising the control cannot take disciplinary action against a person under its control. To put it in other words, a superior authority cannot control the actions of a subordinate if he cannot take disciplinary action against him.

If the argument of the petitioner is accepted, it will mean that the High Court has control over a Subordinate Judge, but if he misbehaves, it is the Tribunal that makes an enquiry and it is the Government that removes him. This construction would in effect take away the subordinate officer from the control of the High Court. On the other hand, if it is held that in exercising control, the High Court shall follow the procedure prescribed under Art. 309, as a condition of service, it will reconcile both parts of the Article. The conditions of service may prescribe that no person can be removed or otherwise punished without due enquiry or in disregard of the principles of natural justice. If there is such a condition the High Court in exercise of control under Art. 245 should deal with the subordinate concerned in accordance with the condition.

We would, therefore, hold that "conditions of service" in Art. 235 can only mean the condition regulating the exercise of the power of control. A condition of service, therefore, providing in effect and substance that the High Court shall not have power to take disciplinary action either in exercise of its power of superintendence under Art. 227 or under the power of control under Art. 235, is constitutionally invalid.

(9) In the result, the application fails and is dismissed with costs (Rs. 200/-) (Rupees two hundred only). Petition dismissed.

R.G.D. Application dismissed.

(S) **A.I.R. 1955 ANDHRA 68 (Vol. 42, C.N. 26)**

SUBBA RAO C. J. (14-9-1954)

Seetharamayya J., Plaintiff-Appellant v. Sarva Chandrayya and others, Defendants-Respondents.

S. A. No. 145 of 1950, against decree of Dist. Court, Krishna at Masulipatam in Suit No. 344 of 1946.

(a) Hindu Law — Widow — Alienation — Reversioner — Presumptive reversioner — Election — Minority of reversioner — Principles applicable — (Evidence Act (1872), S. 115 — Election).

During the life-time of the widow, a presumptive reversioner has only a spes successionis in the estate of the last male-holder and he cannot, therefore, purport to convey the said interest or otherwise deal with it. His rights in the property would be crystallised only after succession opens. But after succession opens or even during the widow's life-time, he may elect to stand by the transaction entered into by the widow or otherwise ratify it, in which case he would be precluded from questioning transaction. In this connection, three different aspects of the principle of estoppel have to be considered: (1) that which is embodied in S. 115, Evidence Act, (2) election in the strict sense of the term, whereby the person electing takes a benefit under the transaction, and (3) ratification, i.e., agreeing to abide by the transaction. A presumptive reversioner, coming under any one of the aforesaid categories, is precluded from questioning the transaction when succession opens and when he becomes the actual reversioner.

But, if the presumptive reversioner is a minor at the time he has taken a benefit under the transaction, the principle of estoppel will be controlled by another rule governing the law of minors. A minor obviously cannot be compelled to take the benefit of a transaction which will have the effect of depriving him of his legal rights, when succession opens. But a minor can certainly, after attaining majority, ratify a transaction entered into on his behalf by the guardian. If he so ratifies the transaction entered into by his guardian and accepts the benefit thereunder, there cannot be any difference in the application of the principle of election. The effect would be the same. It is as if he was a major at the time the transaction was effected and the benefit was conferred on him. What he could not do at the time of the transaction must be deemed to have been done by him by his act of ratification. It may be that on attaining majority he has the option to disown the transaction and discharge the benefit or to accept it and adopt it as his own. Whether, after attaining majority, the quondam minor accepted the benefit or disowned is a question to be decided on the facts of each case. Case law Relied on. (Para 17)

Held, on the facts of this case that the minor reversioner ratified the transaction after attaining majority. (Para 18)

Anno: Evidence Act, S. 115 N. 25.

(b) Hindu law — Alienation — Necessity — Proof — Lapse of time.

When an alienation 50 years old is sought to be set aside after all the parties connected with the transaction passed away, it is not possible to adduce direct evidence in support of the said transaction; nor is it right on the part of Courts to insist upon such evidence. AIR 1916 PC 110, Rel. on. (Para 19)

CASES REFERRED: Paras

(A) (V5) AIR 1918 PC 196: 42 Mad 523 (PC) 7, 10
(B) ('07) 34 IA 87: 34 Cal 329 (PC) 7
(C) (V14) AIR 1927 PC 227: 52 Bom 1 (PC) 8
(D) (V16) AIR 1929 Mad 502: 52 Mad 556 (FB) 9
(E) 1 White and Tuder 373 9
(F) (V4) AIR 1917 PC 95: 45 Cal 590 (PC) 12
(G) (V20) AIR 1933 Mad 637: 65 MLJ 282 13
(H) (V23) AIR 1936 PC 304: 164 IC 340 14
(I) (V26) AIR 1939 Cal 135: 181 IC 414 16
(J) (V3) AIR 1916 PC 110: 44 Cal 186 (PC) 19

Advocate-General and N. Rama Mohan Rao, for Appellant; M. S. Ramachandra Rao and M. Krishna Rao, (for Nos. 1 and 7); N. Subramanyam and J. V. Krishna Sarma, (for Nos. 4 to 6 and 15 and 21); P. S. S. Rama Rao, (for Nos. 19 and 20), for Respondents.

JUDGMENT: This is a plaintiff's appeal against the decree and judgment of the Court of the District Judge of Krishna at Masulipatam, confirming that of the Subordinate Judge of Masulipatam in O. S. No. 31 of 1944 a suit filed by the appellant for partition and separate possession of his 1/3 share in the plaint schedule property and for mesne profits.

(2) The relevant facts may be briefly narrated. The last male-holder was one Jagarlapudi Venkappa. He died issueless in the year 1891 leaving behind him his widow Subbamma. He died possessed of 13 acres and 9 cents of land situated in three villages Nimmalur, Nimmakur and Kapavaram and three vacant sites. He had also some debts. On 3-1-1893, his widow sold the entire 13 acres 9 cents under Ex. D.1 to the 1st defendant Sarva Surayya and one Nibhanupudi Balakrishnayya for Rs. 950. Items 1 and 2 situated in the village of Nimmalur and of the extent of 6 acres 39 cents, were part of the property sold under the said document.

On 19-1-1893, she sold item 3 of the plaint schedule under Ex. D.28 to one Venkataswami for Rs. 90/-. Subsequently on 17-12-1900, she sold item 5 of the plaint schedule to one Nibhanapudi Balakrishnayya for Rs. 75/- under Ex. D.30. Subbamma died on 1-3-1942. The plaintiff and his brothers, defendants 21 and 22, are the next reversioners to the estate of Venkappa. The plaintiff filed the suit as one of the next reversioners for partition and possession of his 1/3rd share in the properties of the last male-holder after setting aside the aforesaid alienations. As the appeal is not directed against item 5 of the plaint schedule, the facts and contentions in respect thereof need not be stated.

(3) The contesting defendants, that is, the alienees and others in possession, contended that the plaintiff elected to take the benefit under the compromise that was effected in a suit filed by his father as presumptive reversioner, and, therefore, he is estopped from questioning the validity and the binding nature of the alienations under Exs. D.1 and D.28, and that the said sale deeds were executed for necessity and therefore they were binding upon the reversioners. As regards item 4 defendants 10 to 15, who were

alleged to have trespassed upon the said item, pleaded that they derived title to the said land from their ancestors. The learned Subordinate Judge upheld the contentions of the defendants and dismissed the suit. On appeal, the learned District Judge accepted the conclusions of the Subordinate Judge and confirmed his decree. Hence the appeal.

(4) I shall first take up the question whether the plaintiff is estopped from questioning the validity and the binding nature of the sale deeds Exs. D.1 and D.28. To appreciate the contentions of the parties and to furnish a satisfactory answer, it would be necessary to notice the facts relevant to that question. Ex. D.1 was executed by Subbamma on 3-1-1893, conveying 13 acres 9 cents comprising among other extents items 1 and 2 to the 1st defendant Sarva Surayya and one Nibhanapudi Balakrishnayya. Ex. D.28 dated 19-1-1893, is another sale deed executed by Subbamma conveying item 3 to Venkataswami. At the time the said sale deeds were executed, the father of the plaintiff and defendants 21 and 22 Paradeswaravadhanulu was the presumptive reversioner. On 27-2-1893, he filed O. S. No. 81 of 1893 impeaching the alienations under Exs. D.1 and D.28. The widow and the alienees filed written statements alleging that the sale deeds were executed for necessity and for other binding purposes. That suit was compromised.

Ex. D.21 dated 2-12-1893 was the compromise petition filed therein. On the basis of the compromise, the suit was dismissed. As part of the compromise, the vendees under Ex. D.1 executed a sale deed Exhibit D.2 dated 2-3-1894, conveying 3 acres 30 cents of Nimmakur lands and 2 acres 93 cents of Kapavaram land in favour of the plaintiff's father and his minor sons, plaintiff and 21st defendant represented by their father as guardian. Admittedly, the father was put in possession of the property and the family, including the plaintiff and his brothers, were enjoying the property till their father's death in 1911. At the time of the father's death, the plaintiff was 26 or 27 years old. Even after the death of the father, the plaintiff and his brothers were in possession and enjoyment of the land conveyed to to them under Exhibit D.2. The three brothers partitioned the said property, along with their joint family properties. The plaintiff sold his share to D. W. 7 under Ex. D.8 dated 29-3-1938 and to one Lakshmikantham, under Ex. D.16 dated 29-3-1938. So too, his brothers sold the land that fell to their shares under Ex. D.9 dated 7-10-1935 and under Ex. D.15 dated 17-3-1934.

(5) From the aforesaid statement of facts, it will be seen that the plaintiff, as a minor, became a joint owner of some of the property conveyed under Ex. D.1 by reason of the compromise effected in O. S. No. 81 of 1893 in the year 1894. He attained majority in or about the year 1903. Even after he attained majority, till the death of his father, in 1911, he was in joint enjoyment of the same. From 1911 to the year 1938 i.e., for a period of 27 years he continued to enjoy the benefit derived by him under the compromise. In 1938, he alienated the land that fell to his share to third parties on the basis that he was absolutely entitled to the same. The defendants successfully contended in the courts below that the plaintiff was estopped from questioning the validity of the sales under Exhibits D.1 and D.28.

(6) The learned Advocate General appearing for the plaintiff argued that the principle of election based on the theory of benefit has no application to the facts of the case as, at the time Ex. D.2 was executed, the plaintiff was a minor and his enjoyment of the property conveyed under Ex. D.2 after the death of his father was consistent with the title derived from the father, and therefore, from the said act of enjoyment, it cannot be held that he had ratified the transaction entered into during his minority by his father. He asked, with some force whether there was any duty on the part of the plaintiff to reconvey the land inherited by him from his father to the alienee with the risk of losing his reversionary rights when succession opened.

(7) Before I attempt to meet the argument advanced, it may be convenient at this stage to consider some of the cases on the subject cited at the bar. The leading case is that of the Judicial Committee in — 'Rangaswamy Goundan v. Nachiappa Goundan', AIR 1918 PC 196 (A). There a widow made an alienation of her husband's estate to a third party from whom a prospective reversioner took a mortgage of a portion of it. It was argued that when succession opened, the mortgagee-reversioner was estopped from disputing the validity of the alienation. The Judicial Committee held that he was not estopped. At page 538, their Lordships laid down the principle in clear terms as follows :

> "An alienation by a widow is not a void contract, it is only voidable — 'Bijoy Gopal Mukherji v. Krishna Mahishi Debi', 34 IA 87 (PC) (B). Now in all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If, therefore, a reversioner, after he became in titulo to reduce the estate to possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right of complaint. This may be spoken of, though scarcely accurately as ratification. In some cases, it has been expressed as an election to hold the deed good.... Of course, something might be done even before that time which amounted to an actual election to hold the deed good."

(8) The Judicial Committee again in — 'Ramgowda Annagowda v. Bhau Saheb', AIR 1927 PC 227 (PC) (C), applied this principle to a different set of facts. In that case a Hindu died in 1846 leaving a widow who survived until 1912 and a daughter. On the death of the widow Annagowda was heir to her husband's estate. In 1868 the widow had alienated nearly the whole property by three deeds executed and registered on the same day. By the first deed, she gave a property to her brother, by the second she sold half of another property to Annagowda, and by the third she sold the other half of that property to

her son-in-law. The signature of each of the deeds was attested by the two other alienees Annagowda, who survived the widow for six years, did not seek to set aside any of the alienations. After his death, his son and grandsons brought a suit to recover the whole property. The Judicial Committee held that Annagowda and his heirs were precluded from disputing the alienations. At page 229 the principle of the decision is taken in the following terms :

"It is settled law that an alienation by a widow in excess of her powers is not altogether void, but only voidable by the reversioners who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding....Annagowda himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it."

(9) The aforesaid two and similar decisions were the subject of judicial scrutiny by a Full Bench of the Madras High Court in — 'Ramakotayya v. Veeraraghavayya', AIR 1929 Mad 502 (FB) (D). There one Subbayya died in 1909 leaving a widow Seetamma and his mother Bapamma. In 1918, Seethamma executed a deed of gift in respect of some of the properties that came to her from her husband in favour of her own brother Veeraraghaviah. The gift was effected by means of a document. The plaintiff executed another document relinquishing all his rights as prospective reversioner and also purporting to give full consent to the transaction evidenced by Ex. 1.

The question raised was whether by reason of his action he was precluded from challenging the transaction when succession opened. The Full Bench held that he was so precluded. The Full Bench distinguished the two principles of election and for convenience gave them different nomenclature viz., election ratification. The first is the well-known equitable doctrine stated in the leading case of — 'Streatfield v. Streatfield', 1 White & Tuder 373 (E). It reads :

"Election is the obligation imposed upon a party by Courts of Equity to choose between two inconsistent or alternative claims or rights in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both."

(10) This presupposes that the party affected by the operation of the principle should have taken a benefit. As regards the second principle the learned Judges observed at page 503 as follows:

"But there is a third doctrine of equity, an obviously indispensable one, which has received various legal labels, sometimes being spoken of as an election and sometimes as ratification. Its most authoritative exposition for an Indian Court is to be found in the Judgment of the Board in 'AIR 1918 PC 196 (A)'."

(11) They extracted the passage, which I have already quoted. The learned Judges also dealt with the third principle of equity, which is embodied in Section 115 of the Evidence Act. The aforesaid three decisions authoritatively settled the principles governing the right of a presumptive reversioner, who has taken a benefit under or ratified a transaction entered into by a widow, to question the said transaction after succession had opened.

(12) I shall now deal with some of the cases cited at the bar in support of the contention that the broad principles laid down in the aforesaid decisions are restricted, or otherwise limited in their application to different circumstances. In — 'Amrit Narayan Singh v. Gaya Singh', AIR 1917 PC 95 (F), the Judicial Committee formulated the proposition applicable to the right of a Hindu reversioner to deal with the estate during the lifetime of the widow. There, a Hindu governed by the Mithakshara law died leaving a widow, a daughter and a daughter's son who was a minor. On the death of the widow a dispute arose with the agnates as to the daughter's right to succeed. The matter was referred to arbitration. The daughter's husband acting for his wife and their infant son entered into a compromise, the effect of which was to completely extinguish the reversionary interest of the minor in his grand-father's estate. The arbitrators adopted the compromise. The mother did not acquiesce in the compromise and indeed protested against it.

After the death of the daughter, her son brought a suit to set aside the compromise and the award. The Judicial Committee held that, until the death of the daughter, her son had no right or interest in the properties, which could be the subject of bargain and his father's action in referring to arbitration any matter connected with his reversionary right was null and void. At page 97, their Lordships stated thus :

"A Hindu reversioner has no right or interest, in praesenti in the property which the female owner holds for her life; until it vests in him on her death should he survive her, he has nothing to assign or relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise. Until then it is mere spes successionis. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajender's action therefore in referring to arbitration any matter connected with his son's reversionary interest was null and void."

(13) The legal position stated by the Judicial Committee is only a re-statement of the principle well established in Hindu Law. No question of estoppel or ratification arose in that case; nor did their Lordships purport to make any observations on that question. Nor does the decision of Curgenven and Sundaram Chetty JJ. in — 'Satyanarayana v. Venkanna', AIR 1933 Mad 637 (G), help the appellant. There a reversioner to the estate of a widow's husband had received some items of property from the widow in consideration of relinquishing his reversionary right to

the remainder. His son inherited those items, which the father had received. The question arose whether the son could question the subsequent alienation by the widow in favour of others.

The learned Judges held that he could question the transaction, as the plaintiffs did not claim through their father, who entered into the transanction but directly as reversioners to the estate of the last male holder. They further held that the circumstances that they had, after the death of their father taken by inheritance land transferred by way of gift to him could not make any difference. It does not appear from the facts of that case, that, except that they succeeded to the property, which they could not help as the heirs of their father, they ratified expressly or by necessary implication the alienation made by the widow.

(14) Strong reliance was placed by the learned Counsel for the Appellants on — 'Binda Kuer Mt. v. Lalita Prasad', AIR 1936 PC 304 (H), a decision of the Judicial Committee. The facts of that case are rather complicated. It would be enough to notice the broad facts relevant to the question now raised. One Bajrangi Lal died possessed of the plaint schedule property in the year 1861. His widow Amola Kuer died in 1916. The plaintiffs claimed declaration of their title and a decree for possession of a half share in the properties referred to in the plaint as having belonged to the said Bajrangi Lal. In 1885, when another member of the family, Bigu Lal's widow Anandi Kuer died, disputes arose between the members of the family. Ganesh, the head of the plaintiff's branch entered into a compromise with his nephew.

One of the terms of that compromise was, that on the death of Amola Kuer the entire property of Bajrangi Lal which he was in possession of, should go to Naurangi Lal and that Ganesh and heirs should have no claim thereto. To put it shortly Ganesh the head of the plaintiff's branch, relinquished all his right in Bajrangi Lal's property during the lifetime of his widow. At the time of the compromise, the right of the next reversioner of Bigu Lal lay with Jayaram of the branch of Ganesh and another member of a different branch. Though the two branches are entitled to equal shares, Jayaram of plaintiff's branch got a larger share and thus he took a benefit under the compromise.

The question is whether the plaintiffs are estopped by the acts of Ganesh, or Jayaram. Obviously, the acts of Ganesh or Jayaram could not bind the plaintiff who became entitled to the property as the heirs of Bajrangi Lal after the death of Amola Kuer in 1916. But reliance was placed on a document dated 4-3-1891, a deed of sale executed by Jayaram in favour of the plaintiffs, wherein the compromise of 1868 was referred to as explaining why Jayaram had two annas four gundas out of the 3 annas four gundas share of Bigu Lal. The question is whether by purchasing the property from Jayaram with knowledge of his title, the plaintiffs would be estopped from claiming as reversioners. The Judicial Committee held that Jayaram had title, that he could sell the property which he sold that it was an accident that he sold it to the plaintiffs instead of to a stranger and that fact was not sufficient to support the case of ratification. At page 308, the Judicial Committee made the following observations :

> "Unless the plaintiff's individual conduct makes it unjust that they should have a place among Bajrangi Lal's reversioners their legal rights should have effect. Their Lordships do not consider that the defendants have succeeded in showing that the compromise of 1868 or the actings of the plaintiffs or their kinsmen thereunder estop the plaintiffs from asserting that they are entitled as reversioners of Bajrangi Lal."

(15) This case only lays down that a reversioner can ratify the act of a widow and whether he ratified it in a particular case depends upon the facts of that case. The mere fact that he purchased the property from a presumptive reversioner, who got it under a compromise whereunder he gave up his rights to claim as a reversioner to the estate, was held not sufficient to preclude him from claiming his legal right as a reversioner.

(16) In — 'Manmatha Nath Sett v. Gobindalal Sett' AIR 1939 Cal 135 (I), a widow conveyed her interest in the estate of her deceased husband to a member of the family. The next reversioner who had concurred in the alienation, brought a suit to set aside the conveyance, but the suit was compromised and a consent decree was passed, whereby it was agreed that the reversioner should take some land and the conveyance by the widow should be accepted as valid. On the death of the reversioner, but before the death of the widow, the sons of the reversioner took possession of the land granted to their father under the compromise decree.

On the death of the widow, the sons, who were the actual reversioners, brought a suit as heirs of the last full owner to recover property alienated by the deceased widow. When it was contended that the sons were estopped from claiming as reversioners the learned Judge Lord Williams J. held that the actual reversioners were not prevented by estoppel or ratification or acquiescence or otherwise from challenging the validity of the alienation. The learned Judge also held that the mere fact of succeeding to the father's estate was not sufficient to support a case of ratification. It is unnecessary to multiply cases.

(17) The law on the subject may now be summarised. During the lifetime of the widow, a presumptive reversioner has only a spes successionis in the estate of the last male-holder and he cannot, therefore, purport to convey the said interest or otherwise deal with it. His rights in the property would be crystallised only after succession opens. But after succession opens or even during the widow's life-time he may elect to stand by the transaction entered into by the widow or otherwise ratify it, in which case he would be precluded from questioning the transaction.

In this connection, the cases have dealt with three different aspects of the principle of estoppel (1) that which is embodied in Section 115 of the

Evidence Act (2) election in the strict sense of the term, whereby the person electing takes a benefit under the transaction, and (3) ratification i.e., agreeing to abide by the transaction. A presumptive reversioner, coming under any one of the aforesaid categories, is precluded from questioning the transaction when succession opens and when he becomes the actual reversioner. So far, the law is well settled and there is no dispute.

But can there be any difference in principle if the presumptive reversioner is a minor at the time he has taken a benefit under the transaction? In such a case, the principle of estoppel will be controlled by another rule governing the law of minors. A minor obviously cannot be compelled to take the benefit of a transaction which will have the effect of depriving him of his legal rights, when succession opens. But a minor can certainly after attaining majority ratify a transaction entered into on his behalf by the guardian. If he so ratifies the transaction entered into by his guardian and accepts the benefit thereunder, there cannot be any difference in the application of the principle of election.

The effect would be the same. It is as if he was a major at the time the transaction was effected and the benefit was conferred on him. What he could not do at the time of the transaction must be deemed to have been done by him by his act of ratification. It may be that on attaining majority he has the option to disown the transaction and discharge the benefit or to accept it and adopt it as his own. Whether, after attaining majority, the quondam minor accepted the benefit or disowned is a question to be decided on the facts of each case.

To illustrate, the father of a minor, affirms a sale by a widow and takes a benefit under the transaction. The father dies before the widow. The minor attains majority. He has no doubt the option to affirm the transaction or to disown it. But is it necessary that he should in exercising his option, return the property to the widow at the risk of otherwise losing his inheritance to the last male-holder? After his father's death, he succeeds to his interest in the property, for the widow cannot question the transaction entered into by the father during her life-time. The mere act of succession to the father may not amount to ratification as the son's enjoyment is consistent with his right of inheritance to the father. But he can either expressly or by necessary implication ratify the transaction entered into by the father. But if the original transaction conferring the benefit was in favour of the minor, different considerations would arise. His enjoyment of the benefit after attaining majority may in itself be a sufficient act of ratification. Ultimately, it is a question of fact to be decided in each case.

(18) If the aforesaid principles are applied to the present case, I have no doubt that the plaintiff ratified the transaction entered into by his father on his behalf after he attained majority. As I have already stated, during the father's life time and for 27 years after his death, the plaintiff enjoyed the property as an absolute owner. After the death of the father, the three brothers, viz., the plaintiff and defendants 21 and 22 partitioned the properties covered by Ex. D-2 among themselves. The plaintiff sold his share of Nimmakur land to D. W. 7 under Ex. D-8 and to one Lakshmikantham under Ex. D-16. Similarly, the other brothers also sold their shares.

Under Exs. D-8 and D-16, the plaintiff sold the properties that fell to his share on the basis that he was the absolute owner. As the plaintiff enjoyed the properties after he attained majority absolutely for 35 years and sold the same as an absolute owner, it is unreasonable to hold that he had no knowledge of Exs. D-1, D-2 and D-28 and that he was dealing with the property only as the heir of his father, who would be entitled to enjoy the property during the life-time of the widow. I have no hesitation on the evidence to hold that the plaintiff had knowledge of Ex. D-2 and that with that knowledge he enjoyed the property as an absolute owner till he sold the same in the year 1938. He clearly ratified the transaction Ex. D-2 under which he got the benefit after he attained majority. He cannot, therefore, question the sale deeds Exs. D-1 & D-28.

(19) The next question is whether the sale deeds were executed for purposes binding on the estate. The sale deed Ex. D-1 is dated 3-1-1893. The plaintiff filed the suit for setting aside the alienation on 24-7-1944 i.e., after 51 years of the alienation. All the persons connected with the transaction are no more. Though one of the alienees was alive at the time of the trial, he was not in a position to give evidence. When a transaction 50 years old is sought to be set aside after all the parties connected with the transaction passed away it is not possible to adduce direct evidence in support of the said transaction; nor is it right on the part of courts to insist upon such evidence. The Judicial Committee in — 'Bunga Chandra Dhur Biswas v. Jagat Kishore Acharya Choudhuri', AIR 1916 PC 110 (J), had to deal with such a situation. At page 111 they laid down the following principles for guidance :

> "If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts. But as time goes by and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity.
>
> It is only necessary that a representation should have been made to the purchaser that such a necessity existed and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation and if the circumstances are such as to justify a reasonable belief, that an enquiry would have confirm-

ed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances, would be sufficient evidence to support the deed."

In Ex. D-1, the following recital is found :

"To discharge the debts contracted by my husband on khata from Malladi Nagabhushanam, to discharge the debts contracted through my sister's husband Nimmagadda Subbayya and others for the purpose of medicines etc., during the days of my husband's sickness when he stayed in my parent's house at Kondaparu, where he died, as also for his obsequies, and for my future maintenance and for the purpose of annual ceremonies I have sold the inam land of the extent of 13 acres 9 cents in the aforesaid three villages for Rs. 950/-."

(20) The evidence adduced in the case and carefully considered by the District Judge discloses the following circumstances: (i) Subbamma needed money for the treatment of her husband Venkappa during his illness, for his obsequies, for her own maintenance and for the annual ceremonies of Venkappa; (ii) in the written statement filed by the alienees in O. S. No. 81 of 1893, it was pleaded that Venkappa had contracted debts from Malladi Naghabhushanam; (iii) the consideration was not inadequate; (iv) there was no cogent evidence in regard to the actual income from the lands; and (v) the presumptive reversioners, who impugned the alienations Exs. D-1 and D-28 clearly admitted in the compromise petition that on enquiry they had come to know definitely that the suit property was sold by Subbamma for discharging the debts contracted by her husband.

The learned Judge having approached the question from the right perspective and having regard to the aforesaid circumstances, accepted the recitals in the documents as representing the correct state of affairs at the time Ex. D-1 was executed. I cannot, therefore, say that the finding is vitiated by any error of law.

(21) The next sale deed is Ex. D-8 dated 19th January 1893. That document was executed after a fortnight after Ex. D-1. Under it 192 square yards of site in the village of Nimmalur was sold for Rs. 90/- in favour of the grandfather of the 13th defendant. This transaction also is sought to be questioned after 50 years when all the parties connected with it are no more. The sale deed having been executed soon after Ex. D-1, the same circumstances must also govern this sale. The recitals in Ex. D-1 show that there were debts incurred by Subbamma's husband and by her sister's husband for meeting his medical expenses. She also borrowed for the obsequies and she required money for her maintenance. The consideration was adequate. The presumptive reversioners, who questioned it after enquiry admitted that the debts of the husband were true and that the sales were necessary for discharging those debts. On those facts, when the learned District Judge held that this sale was also for necessity I cannot say that the finding is vitiated by any error of law.

(22) Finally, it was contended that the learned Judge was wrong in dismissing the suit in respect of item 4 of plaint schedule. In the plaint, it is stated that defendants 10 to 15 unjustly trespassed into the 4th item after Subbamma's death, taking the opportunity afforded by the 4th item being adjacent to the items alienated in their favour and that the aforesaid items are in the wrongful possession of the respective defendants. Defendants 13 to 15 in their written statement stated that they were in possession of the 4th item which they got from their ancestors and predecessors in title. They denied that they trespassed into any portion of that item.

The learned Subordinate Judge held on the evidence that item 4 was a part of item 5. On appeal, the learned District Judge held that the said item is part of items 3 and 5. The learned counsel for the appellant contended that the courts have made out a new case for the defendants, for, in his written statement, they only pleaded that they got the property from their ancestors. The plaintiff has come to the court claiming that Venkappa died possessed of the 4th item. The 13th defendant has admittedly been in possession of this item. He was examined as D. W. 20. He deposed in his evidence that that item was covered by Exs. D-28 and D-30 and he was not cross-examined. Even the plaintiff in his evidence admitted that the plaint schedules were copied from Exs. D-28 and D-30. In the circumstances, the learned Judge held that this item is part of items 3 and 5. The question is one of fact and there are no grounds for interference.

(23) In the result, the Second Appeal fails and is dismissed with costs. No leave. (Costs one set).

V.B.B. Appeal dismissed.

(S) **A.I.R. 1955 ANDHRA 74 (Vol. 42, C.N. 27)**

FULL BENCH

SUBBA RAO C. J., BHIMASANKARAM AND SATYANARAYANA RAJU JJ. (17-12-1954)

In re Chunduru Venkata Subrahmanyam, Petitioner.

S. R. No. 6170 of 1954.

(a) **Civil P. C. (1908), O. 33, R. 11 (Madras) and S. 2(2)(b) — Pauper dispaupered and court-fee ordered to be paid — Dismissal of suit on its non-payment — Revision on order of dismissal is competent.**

Under O. 33, R. 11, as it exists in Madras, the Court dismisses a suit if the plaintiff fails to pay the court-fee within a prescribed time. The order is, therefore, made as the plaintiff makes a default in complying with the conditions laid down by the Court. The words "any order of dismissal for default" in S. 2(2)(b) are comprehensive enough to take in an order made under O. 33, R. 11. Section 2(2)(b) does not expressly or by necessary implication confine the scope of that clause only to a particular kind of order for default. Thus, the order under O. 33, R. 11 being one which is excluded from the definition of 'decree', no appeal lies against the order. Hence, a revi-

sion is competent. AIR 1941 Mad 836 (FB) —AIR 1952 Mad 86 (FB), Expl. Case law Ref. (Para 13)

Anno: Civil P. C., S. 2(2) N. 16 Pt. 6.

(b) Civil P. C. (1908), S. 2(2) and (14) — Appealability of order.

The appealability of an order, where no express provision is made in the Civil P. C. or in any other statute, will depend upon the question whether the said order is a decree within the meaning of the Civil P. C. (Para 7)

Anno: Civil P. C., S. 2(2) N. 2.

(c) Civil P. C. (1908), Pre. — Different words not to be interpreted in same way — (Interpretation of Statutes).

When the Civil P. C. uses different words with definite connotation, it is not open to a Court to probe into the legislative intention and give the same meaning to the different words, when there is no ambiguity. In the absence of any ambiguity, Courts are bound to give full meaning to the words used by the legislature. (Para 10)

Anno: Civil P. C., Pre. N. 7.

(d) Civil P. C. (1908), O. 33, R. 11 (Madras) and O. 7, R. 11 — Dismissal of suit and rejection of plaint — Distinction between.

A main distinction between Order 7, R. 11 and O. 33, R. 11 is apparent. In the case of an order under O. 7, R. 11, there is no provision for collecting the court-fee due to the Government for the simple reason that the plaint is treated as if it was not filed at all, whereas in the case of dispaupering, an express provision is made enabling the Court to make an order for payment of court-fee. It may be for that very reason the authors of the rule designedly used the word "dismissal" in contradistinction to the word "rejection". The Order made under O. 33, R. 11 dismissing the suit is what it purports to be. Such an order of dismissal is not an order of rejection. (Para 10)

(e) Civil P. C. (1908), S. 2(2)(b) — "Default", meaning of.

The term 'default' in S. 2(2)(b) is not limited to one of appearance only; it includes default of prosecution also. AIR 1949 All 261 —AIR 1941 Mad 836 (FB), Foll. (Para 13)

Anno: Civil P. C., S. 2(2) N. 16.

CASES REFERRED: Paras

(A) (V28) AIR 1941 Mad 836: ILR (1941) Mad 954 (FB) 1, 3, 13

(B) (V39) AIR 1952 Mad 86: ILR (1952) Mad 77 (FB) 1, 5

(C) (V22) AIR 1935 Cal 157 (1): 154 Ind Cas 820 11

(D) (V36) AIR 1949 Nag 373: ILR (1949) Nag 391 11

(E) (V41) AIR 1954 Mad 880: 1954-1 Mad LJ 544 11

(F) (V41) AIR 1954 Mad 258: 1953-2 Mad LJ 31 12

(G) (V36) AIR 1949 All 261: ILR (1949) All 391 13

A. Sambasiva Rao, for Petitioner; Govt. Pleader, for the State.

SUBBA RAO C. J.:

Rajagopala Iyengar, J. of the Madras High Court placed the papers in the above matter before the Chief Justice of that Court for constituting a Full Bench as the learned Judge felt that there was a conflict between the two Full Bench decisions in — 'Kayambu Pillai, In re', AIR 1941 Mad 836 (FB) (A) and — 'Satyanarayanacharyulu v. Ramalingam', AIR 1952 Mad 86 (FB) (B). After the constitution of the Andhra High Court, the case was transferred to this Court and the Full Bench was accordingly constituted.

(2) The petitioner filed a suit in the Court of the Subordinate Judge, Tenali, in 'forma pauperis' for recovery of possession of the plaint schedule properties and for mesne profits. The suit was valued at Rs. 9443-12-0 for purposes of court-fee and jurisdiction, and a court-fee of Rs. 682-7-0 was payable thereon. At first, an application for leave to sue in forma pauperis was granted and the suit was numbered as O. S. No. 40 of 1951. Subsequently, he was dispaupered, as it was discovered that he had sufficient means to pay court-fee. On 7-12-1952, the Subordinate Judge directed him to pay the court-fee payable on the plaint. As the petitioner did not pay the court-fee within the time given he dismissed the suit with costs. The petitioner filed the Civil Revision Petition against the decision of the Subordinate Judge. The question is whether, in the circumstances, an appeal would lie against the order of the Subordinate Judge. If an appeal would lie, the revision filed would obviously be not maintainable.

(3) At this stage, the scope of the two Full Bench decisions may conveniently be considered. The facts in, — 'In Re: Kayambu Pillai (A)' are: The petitioner there filed an appeal in forma pauperis. Subsequently, he was dispaupered and the Court directed him to pay the appropriate court-fee on the Memorandum of Appeal and also to furnish security for the costs of the respondent within a prescribed time. On failure to comply with the order of the Court, the appeal was dismissed. When an appeal was filed against that order, the Full Bench held that an order dismissing an appeal for non-compliance with an order requiring security for costs is not a 'decree' within the meaning of the word as defined in S. 2(2), Civil P. C. The learned Judges further held that an order dismissing an appeal for non-payment of the required court-fee is an order dismissing an appeal for default and is also not a 'decree' within the meaning of the definition in S. 2(2) of the Code. Leach C. J., gave two reasons for holding that the order in that case did not come under the definition of 'decree'. At p. 837 the learned Chief Justice stated as follows:

> "It (decree) does not include two kinds of orders, namely (i) an adjudication from which an appeal lies as an appeal from an order, and (ii) an order of dismissal for default. What was the order of 4-3-1938, but an order dismissing the appeal for default? The appeal had been admitted in forma pauperis, but on it becoming apparent that the appellant was not a pauper, the Court in effect said "you shall not proceed unless you pay the proper court-fee as you are no longer a pauper". The appellant failed to pay, and, therefore, entitled the

Court to dismiss the appeal for default in payment".

The other learned Judge, Venkataramana Rao J. states to the same effect at p. 838 as follows:

"The next question is whether the Order in so far as it purports to be an order of dismissal for non-compliance in regard to payment of the court-fee is a decree. I agree with my Lord that it is an order of dismissal for default within the meaning of S. 2(2), Civil P. C., and, therefore, is not a decree. The Order, though it purports to be one for non-compliance with an order for payment of the court-fee, is strictly an order for non-compliance with an order passed in consequence of an order of dispaupering made under O. 33, R. 9. The word 'default' in S. 2(2)(b), Civil P. C., in my opinion, need not be confined only to deault of appearance, but may include other defaults as well and certainly this default."

(4) A scrutiny of the reason of Leach C. J., discloses that the Full Bench held that the Order in question, being one rejecting an appeal, was not an order rejecting a plaint and, therefore, did not come within the definition of 'decree'. They further held that it would be an order of dismissal for default, which was expressly excluded from the definition of 'decree'.

(5) The other Full Bench decision — 'Satyanarayanacharyulu v. Ramalingam (B)' dealt with a different question. The learned Judges held that an order directing the payment of additional court-fee in a plaint is not open to revision by the High Court, once the order has been followed up by a further order rejecting the plaint on the ground that the additional court-fee demanded has not been paid and that the proper remedy of the aggrieved plaintiff is to appeal from the order of rejection of the plaint. The Order in that case rejecting the plaint was made under O. 7, R. 12, Civil P. C. and, therefore, it was clearly a decree within the meaning of the Civil P. C. Indeed, it was not contended before the Full Bench that no appeal lay against that Order. The only question that arose for consideration was whether after such a final order was made, a Revision was maintainable against an earlier Order directing the payment of additional court-fee and the Full Bench held that the proper remedy was to file an appeal against the final order.

(6) There is really no conflict between the views expressed by the two Full Bench decisions of the Madras High Court. The Order in the earlier Full Bench decision rejecting the appeal was not an order rejecting a plaint and, therefore, it was not a decree as defined. The Order in the later Full Bench decision was clearly an order rejecting a plaint and, therefore directly fell within the definition. Even the second ground of the decision in the earlier Full Bench, namely, that an order of dismissal pursuant to the dispaupering of an appellant is an order of dismissal for default was not in conflict with any view expressed in the later Full Bench decision. In the one, the order was made under O. 33, R. 11, Civil P. C., whereas in the other, the order was made under O. 7, R. 12, Civil P. C. The two Full Bench decisions, therefore, considered two different questions and, in my view, there was not and could not be any conflict between them.

(7) Now, I shall proceed to consider the question raised on its merits. The appealability of an order, where no express provision is made in the Civil P. C. or in any other statute, would depend upon the question whether the said order is a decree within the meaning of the Civil P. C. Section 2(2), Civil P. C. which defines a decree reads:

" 'Decree' means the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default."

(8) The definition, therefore, after defining 'decree' says that some orders are deemed to be decrees and expressly excludes other orders from the definition. It includes an order rejecting a plaint, but excludes an order of dismissal for default. The question is whether the order under consideration is an order rejecting a plaint, or an order of dismissal for default. If it is the former, an appeal would lie, and if it is the latter, a revision only is maintainable. The Civil P. C. enumerates the following kinds of orders among others: return of a plaint, rejection of a plaint, dismissal of a plaint for default and dismissal of a plaint on merits. Order 7, R. 11 says:

"The plaint shall be rejected in the following cases:

(a) where it does not disclose a cause of action;

(b) where the relief claimed is under-valued and the plaintiff on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written on paper insufficiently stamped and the plaintiff does not make good the deficiency within the time, if any, granted by the court;

(d) where the suit appears from the statement in the plaint to be barred by any law."

(9) Under R. 13, the rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Order 9, Rr. 2 and 3 prescribe the procedure for dismissing suits for default of appearance. Rules 4 and 5 enable the filing of a fresh suit. Order 33 prescribes the procedure for filing suits in forma pauperis and for recovering the court-fee due to Government in such suits. Rules 1 to 7 provide for the hearing of an application to sue in forma pauperis. Rule 8 says that if an application is granted it shall be numbered and registered and shall be deemed to be the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner. Rule 9 enables the court to dis-

pauper the plaintiff if the conditions laid down under that rule are satisfied. Rule 11, which is the material rule reads:

"Where the plaintiff fails in the suit or is dispaupered or where the suit is withdrawn or where part of the claim is abandoned or where the suit is dismissed;

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges, if any, chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fee and in the case of abandonment of part of the claim the proportionate court-fee, which would have been payable by the plaintiff if he has not been permitted to sue as a pauper.

In cases where the plaintiff is dispaupered, the court may, instead of proceeding under the previous paragraph, order the plaintiff to pay the requisite court-fee within a time to be fixed by it, and in default dismiss the suit and make an order for the payment of the court-fee as in the previous paragraph.

"Where the court finds that the suit has been instituted unreasonably or improperly by a next friend on behalf of a minor plaintiff, on a cause of action which accrued during the minority of such plaintiff, the court may order the next friend to personally pay the court-fee."

(10) Under this rule in the three contingencies mentioned therein, the court shall order the plaintiff or any person to pay the court-fee due to the Government. When the plaintiff is dispaupered, an alternative procedure is prescribed. The court may order the plaintiff to pay the court-fee within a time prescribed, and in default dismiss the suit and make an order for payment of court-fee. It will be noticed that under this rule, unlike under O. 7, R. 11, the court is empowered to dismiss the suit. There is an essential distinction and the Code maintains it throughout between the rejection of a plaint and the dismissal of a suit. The rejection of a plaint takes away the basis of the suit. It is, as it were that, no suit was filed. But, in the case of a dismissal, the existence of the suit is recognised and its termination is indicated.

Why, it may be asked that Civil P. C. used different words under similar circumstances? When the Civil P. C. used different words with definite connotation, it is not open to a Court to probe into the legislative intention and give the same meaning to the different words, when there is no ambiguity. In the absence of any ambiguity, courts are bound to give full meaning to the words used by the Legislature. But the main distinction between O. 7, R. 11 and O. 33, R. 11 is apparent. In the case of an order under O. 7, R. 11, there is no provision for collecting the court-fee due to the Government for the simple reason that the plaint would be treated as if it was not filed at all, whereas in the case of dispaupering, an express provision is made enabling the Court to make an order for payment of court-fee. It may be for that very reason the authors of the rule designedly used the word "dismissal" in contradistinction to the word "rejection". I would, therefore, hold that the order made under O. 33, R. 11 dismissing the suit is what it purports to be. I cannot say, without doing violence to the language that an order of dismissal is an order of rejection.

(11) Reliance is placed by the learned Government Pleader in support of his contention that an order of dismissal in the said provision must be construed as one of rejection, in — 'Annapurna Dassi v. Sarat Chandra', AIR 1935 Cal 157 (1) (C), Jack and Khundkar JJ., held that where a suit is dismissed because proper court-fee has not been paid within the time allowed, that amounts to rejection of the plaint under O. 7, R. 11, Cls. (b) and (c) and, therefore, there is an appeal from that order. There the order was made under O. 7, R. 11 and instead of using the word "rejected" the learned Judge by mistake used the word 'dismissed'. Indeed he had no jurisdiction to make an order of dismissal under that rule. The learned Judges, therefore, rightly construed that order as one of rejection, an order which the court could have made under the circumstances.

So too, Sarwate J., in — 'Shamrao Janrao v. Amolak Chimnira', AIR 1949 Nag 373 (D) ruled that though the suit has been dismissed for non-payment of additional court-fee demanded, that order should nevertheless amount only to a rejection of the plaint. As the court had only jurisdiction to make an order of rejection under the circumstances, the learned Judge construed the order as one of rejection. Panchapakesa Ayyar J. in — 'Bommisetty Ramayamma, In re', AIR 1954 Mad 880 (E) held that where after a petition for leave to sue as a pauper is rejected and the petitioner waits till the time granted for paying the additional court-fee expires and the plaint is rejected, he cannot afterwards file a Revision Petition against the order rejecting his petition for leave to sue as a pauper, as his remedy then is only an appeal against the decree rejecting the plaint. The question whether an appeal lies against a final order was not considered in that case as the only question raised there was whether a revision would lie against an earlier order.

(12) The decision of a Division Bench of the Madras High Court, of which I was a member, in — 'Venkatanarasimha v. Gangamma', AIR 1954 Mad 258 (F) was also relied upon. The question which now falls to be considered was neither raised nor decided in that case. The decisions cited, therefore, are not of any relevance to the question now under consideration.

(13) The next question is whether the order in this case is an order of dismissal for default within the meaning of S. 2(2)(b), Civil P. C. Order 33, R. 11 itself gives a clear indication that an order made therein is one for default, for the relevant part of the provision says that the court shall "in default dismiss the suit". The dismissal of the suit is, therefore, for default committed by the plaintiff. In — 'Tafazzul v. Shah Mohammad', AIR 1949 All 261 (G), Seth J. held that the term 'default' in S. 2(2), Civil P. C. is not limited to one of appearance only and it includes default

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 87: 1953-2 Mad LJ 310 3

(B) ('46) C. R. P. Nos. 1032 to 1034 of 1946 (Mad) 5

P. V. Chelapati Rao, for Appellants; M. S. Ramachandra Rao and M. Krishna Rao, for Respondents.

JUDGMENT: The question in this Second Appeal is whether the contract dated 14-5-1945 and 18-5-1945 for the sale of groundnut kernel are hit at by the provisions of the Oil-seeds Forward Contracts Prohibition Order 1943. The facts either admitted or found may be briefly narrated. The defendants are a firm of merchants doing business in groundnut at Nandyal under the name and style of Messrs. G. Chinna Konda Reddy & G. P. Venkata Reddi. The plaintiff is the East Asiatic Company (India) Limited, Madras. The defendants entered into two contracts with the plaintiff on 14-5-1945 and on 18-5-1945 for the sale of groundnut kernel. The first contract was for the sale of 318 bags of groundnut kernel. The second contract also was for the sale of 318 bags of groundnut kernel. By the dates of the contracts the groundnut crop was fully harvested and was in the market. It is also in evidence that at the time the suit contracts were made, there was considerable difficulty in securing wagon accommodation. Because of that fact, in regard to the first contract, it was agreed that the delivery was to be completed from the 14th of May and before 30-6-1945. In respect of the second contract, delivery was agreed to be made from the 18th of May and before 30-6-1945. The defendants failed to supply 16 bags of kernel under the first contract and the entire quantity under the second contract. The suit was filed by the plaintiff for recovery of damages from the defendants.

(2) The defendants, inter alia, contended that the suit contracts were void being forward contracts under the provisions of the Oil-Seeds Forward Contracts Prohibition Order, 1943. They also pleaded that the Provincial Government of Madras imposed a ban on the export of groundnut kernel to places outside the Madras Presidency and therefore the contracts became impossible of performance. Both the Courts negatived the said plea, and gave a decree to the plaintiff. The defendants preferred the above appeal.

(3) Before me, the learned counsel for the appellants raised two contentions which his clients have unsuccessfully pleaded before the lower Courts. The first question is whether the contracts were void under the Oil-Seeds Forward Contracts Prohibition Order 1943. A forward contract is defined in Cl. (ii) of S. 2 of the said Order. It says:

> "Forward contract means a contract for the delivery of oil-seeds at some future date."

Rajamannar C. J. in — 'Hanumanthiah v. Thimmiah', AIR 1954 Mad 87 (A) explained the words "at some future time" to mean "at some time in future". In that case, the contracts were entered into on 18-8-1945 and on 19-8-1945 and delivery in respect of these two contracts were to be made in December 1945 and in December 1945 or January 1946 respectively. It was, therefore, obvious that under the said two contracts, delivery was agreed to be made only at some time in future. Can it be said in the present case that delivery was agreed to be made at some time in future? The groundnut crop was fully harvested and was in the market. There was difficulty in securing wagon accommodation. Under the contracts, the parties clearly contemplated delivery on the dates of the contracts. If the defendants insisted upon delivering the groundnut on 14-5-1945 and on 18-5-1945 the plaintiff could not have legally refused them. Reasonable time was given to complete delivery of the entire goods only because of the transport difficulties.

(4) It was contended that, as the defendants were permitted and had a right to deliver the goods at a future date, the contracts were forward contracts. But to be a forward contract, the parties must agree to deliver the goods at a future date. Under the present contracts the parties contemplated delivery of goods on the dates of the contracts. The parties did not agree for the delivery of the goods at a future date. They agreed for delivery immediately, though extension of time was given for the convenience of the defendants to get over the transport difficulties.

(5) The learned counsel for the appellants relied upon an unreported judgment of Govindarajachari J. in — 'C. R. P. Nos. 1032 to 1034 of 1946 (Mad) (B). There the contract was dated 31-1-1945 in respect of the sale of groundnut kernel and the due date of delivery was given as before the end of January. The learned Judge held that if delivery under the contract can be given and is permitted to be given under its stipulations on a date later than the date on which the contract is entered into, it would be a forward contract within the meaning of that Order. But it will be seen from the facts of that case, that unlike in the present case, the parties did not contemplate delivery on the date of the contract itself. This decision, therefore, does not govern the present case. I would, therefore, hold agreeing with the Court below that the suit contracts were not forward contracts and therefore they were valid and enforceable.

(6) There is no force in the second contention for the contracts themselves specifically provided for the contingency of the Government imposing a ban on the export of groundnut kernel. Clause 10 says:

> "Under no circumstances including prohibition of export from any particular district or native or foreign territory can sellers claim impossibility of performance of this contract."

In view of that specific term, this argument has not been pressed.

(7) In the result, the appeal fails and is dismissed with costs.

K.S.B. Appeal dismissed.

(S) A.I.R. 1955 ANDHRA 81 (Vol. 42, C.N. 30)

SUBBA RAO C. J. (15-9-1954)

Mallayya and another, Appellants v. Talari Tippanna and others, Respondents.

Second Appeal No. 1360 of 1950, against decree of Dist. Court, Bellary, in A. S. No. 86 of 1948.

Civil P. C. (1908), S. 11 — Partition suit.

When the defendant in a partition suit, who is in the position of a plaintiff, specifically raises the question and gets a decision against him, he is certainly precluded from filing another suit on the same cause of action. But in a partition suit, though the defendants have got the option to ask for relief for a decree for possession by dividing their share of properties by metes and bounds and obtain the same, they are not bound to do so. When they did not exercise their option to ask for partition of their share, the decree in the earlier suit would not be a bar to the maintainability of the subsequent action by them for partition. Thus where the relief was given only to the plaintiff and where the rights of the defendants were only declared but no executable decree was passed in their favour a separate suit would lie at their instance for separate possession of their share. AIR 1942 Mad 364 — AIR 1947 Mad 170, Rel. on. AIR 1918 Mad 751, Distinguished. (Para 2)

Anno: C. P. C., S. 11 N. 36, 37.

CASES REFERRED: Paras

(A) (V5) AIR 1918 Mad 751: 1917 Mad WN 327 2

(B) (V34) AIR 1947 Mad 170: 1946-2 Mad LJ 321 2

(C) (V29) AIR 1942 Mad 364: 1942-1 Mad LJ 219 2

K. Srinivasan, S. Krishnaswamy, N. Suryanarayana and G. Suryanarayana, for Appellants; A. Bhujanga Rao, for Respondents.

JUDGMENT: The only question in the second appeal is whether O. S. No. 172 of 1947 filed by the appellants in the Court of the District Munsif of Bellary is maintainable in view of a prior decision in O. S. No. 108 of 1935, a suit between the same parties.

(2) The facts relevant to the question raised may be briefly narrated. The plaintiffs and defendants 1 to 8 were the joint owners of the plaint schedule property. Two of the co-owners Lingappa and Mangamma, filed O. S. No. 108 of 1935 on the file of the District Munsif's Court of Bellary, for recovery of possession of their one-sixth share in the plaint schedule property. To that suit, Mandavaliah, the predecessor-in-interest of the second plaintiff in this suit, was added as the second defendant and Mallayya, the first plaintiff herein, was added as the fifth defendant in the other suit. The other sharers were also added as defendants. 9th defendant in this suit is the son of the 11th defendant in O. S. No. 108 of 1935. 10th defendant in this suit is the brother of the 12th defendant in that suit, and the 11th defendant in this suit figured as the 13th defendant in the earlier suit. They were added as parties claiming title to a share in the joint property. On 15-6-1937, the learned District Munsif held that the plaintiff (in O. S. No. 108 of 1935) was entitled to a decree for recovery of possession of one-sixth share in the suit land with mesne profits.

Pursuant to that judgment, preliminary decree was made; in due course, a final decree was passed. The final decree reads:

"This court doth order and decree that the plaintiffs be and (are hereby) entitled to recover possession of share "A" marked in the plan hereto attached, i.e., in Survey No. 116 mentioned in the schedule hereunder; that as regards mesne profits, past and future, and suit costs up-to-date of the preliminary decree passed in this suit on 15-6-1937 shall stand and that the defendants do pay plaintiffs the sum of Rs. 12-9-0 for their costs of this final decree."

It is apparent from the decree that no relief was given in favour of any of the other defendants. To enable the Court to pass the decree, the Commissioner divided the properties in the manner shown in the plan attached to the decree. The present suit is filed by the successor-in-interest of the second defendant in the other suit (2nd plaintiff) and by the fifth defendant in that suit (1st plaintiff) for partition and possession of their share in the plaint schedule property. The learned District Judge dismissed the suit on the ground that the present relief should have been asked by the plaintiffs in the other suit, & that the cause of action was one and the same in both the suits. Hence the above second appeal. The question is whether the present plaintiffs who are defendants in the earlier suit, ought to have asked for a decree for possession by dividing their share of properties by metes and bounds.

In a partition suit, though the defendants have got the option to ask for such a relief and obtain the same, they are not bound to do so. When they did not exercise their option to ask for partition of their share, I do not see how the decree in the earlier suit would be a bar to the maintainability of the present action. Mr. Bhujanga Rao, the learned counsel for defendants, strongly relied on the decision in — 'Sethurama Saheb v. Chotta Raja Sahib', AIR 1918 Mad 751 (A). There the plaintiff filed an earlier suit for partition of the family properties and obtained a decree therein. Subsequently, he filed another suit for partition of properties omitted in the earlier suit. The learned Judges held that the second suit was not maintainable. In so holding, they observed that the cause of action for partition was one and the same and once it had merged into a preliminary decree and final decree, a second suit for partition would not lie. I do not see how that case has any bearing on the question to be decided in the present case. There a party who filed a suit for partition and obtained a decree, attempted to file another suit on the same cause of action. The Court rightly held that the cause of action was one and the same, and therefore the second suit was not maintainable.

Reliance is also placed on the decision in — 'Ramamani v. Basavayya', AIR 1947 Mad 170 (B). That decision only re-stated the well-settled principle that in a partition, the sharers are both the plaintiffs and the defendants and each defendant is also in the position of plaintiff.

Somayya J. held that when one of the defendants, in fact, applies for a decree in respect of his share, and the alienees are arrayed as co-defendants, the decision operates as res judicata, and cannot again be re-opened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee defendants. The proposition laid down is self-evident. When the defendant, who is in the position of a plaintiff, specifically raises the question and gets a decision against him, he is certainly precluded from filing another suit on the same cause of action.

Another decision of Somayya J. in — 'Naha Haji v. Veeran', AIR 1942 Mad 364 (C) is more in point. There, a decree in a partition suit contained a clause which ran thus:

"That the remaining sharers other than plaintiff shall be put in possession of their respective shares on paying the necessary court-fee."

But advantage was not taken of that conditional relief. When another suit was filed, it was contended that the proper remedy was by way of execution of the partition decree and that S. 47, Civil P. C., was a bar to that suit.

In dealing with this contention, the learned Judge observed at page 365 of the report as follows:

"Therefore, it is an option given to the defendant in a partition action, to pay the court-fee on the entire properties allotted to him if they wish to execute the decree. But if he does not, the allotment of certain properties to him under the partition decree stands. His rights are declared by that document and there is no reason why in such a case a separate suit ought not to be entertained. It is possible that a decree may be passed in favour of the defendant without any condition, particularly as regards the payment of court-fees. If the decree allots certain properties to the parties, and directs each party to be in possession of the properties allotted to him under the decree, then it might be a decree which is executable by each and S. 47 may bar a separate suit by a defendant, who could execute the decree unconditionally, but to bring about that result, it seems to me, you must have an unconditional decree giving the defendant a right to execute the decree to get the properties allotted to him."

The aforesaid two paragraphs bring out the distinction between the two classes of cases. Where the relief was given only to the plaintiff and where the rights of the defendants were only declared but no executable decree was passed in their favour, this decision is an authority for the position that a separate suit would lie at their instance for separate possession of their share. I respectfully follow the reasoning and the conclusion of the learned Judge.

(3) In the result, the appeal is allowed and the decree of the lower appellate Court is set aside. The matter is remanded to the District Judge, Kurnool, for fresh disposal in accordance with law. Costs will abide the result. The appellant will have a refund of the court-fee paid by him.

D.H.Z. Appeal allowed.

A.I.R. 1955 ANDHRA 82 (Vol. 42, C.N. 31)

CHANDRA REDDY J. (16-9-1954)

In re Venkatasuryanarasimha Rao, Accused-Petitioner.

Criminal Revn. Case No. 210 of 1954 and Criminal Revn. Petn. No. 193 of 1954, from order of Addl. Dist. Magistrate, East Godavari, Kakinada, D/- 28-12-1953.

(a) Penal Code (1860), Ss. 464, 465 — Essential ingredients — 'By whom or by whose authority he knows that it was not made.'

Under S. 464 what is essential is that the accused person must make a document with the intention of making it to be believed that it was signed by or by the authority of someone else, while he knows that it was not so made or authorised by that person. (Para 3)

Where the accused did not make the bills purporting to be made by or authorised by some person although his intention in issuing the bills may be fraudulent and he may be punishable for some other offence, no offence under S. 465 can be said to have been committed. 12 Mad 114, Relied on. (Para 3)

Anno: Penal Code, S. 464 N. 5; S. 465 N. 1.

(b) Penal Code (1860), S. 201 — Offence in respect of which evidence is removed must have been committed.

Where the charge against the accused was that he caused disappearance of the evidence of the offence of forgery, and the charge failed, the ingredients essential to constitute an offence under S. 201, are lacking and the accused can be rightly discharged. (Para 4)

Anno: Penal Code, S. 201 N. 2.

CASE REFERRED: Para

(A) ('89) 12 Mad 114: 1 Weir 539 3

N. Bapiraju for V. T. Rangaswamy Iyengar and C. Rajagopalan, for Petitioner; Public Prosecutor, for the State.

ORDER: In this petition, the petitioner seeks a revision of the order of the Additional District Magistrate directing a further enquiry. The petitioner was charged under Ss. 465 and 201, Indian Penal Code, before the Joint Magistrate, Rajamundry. The case against him was that he issued several bills in the names of fictitious persons to cover up the sales and rendered himself liable under S. 465, Indian Penal Code. It was also said that, to further cover up the fictitious bills, he attempted to destroy the bills by setting fire to them.

The Joint Magistrate, while finding on the evidence on record, that the accused did issue receipts in the names of persons who did not exist and that he later attempted to burn the original bills came to the conclusion that the offences committed by the accused did not amount to one under S. 465 or under S. 201, Indian Penal Code. According to the Magistrate, the bills issued by the petitioner did not amount to false documents within the meaning of S. 464, Indian Penal Code.

As the second charge was that he tried to destroy the evidence of the offence of forgery, an offence punishable under S. 201, Indian Penal

Code, and as no offence of forgery was committed, the second charge also was unsustainable. In this view of the matter he discharged the accused.

(2) On revision by the State, the Additional District Magistrate set aside that order and ordered further enquiry. The reasons given by him as regards the first charge was unintelligible. The learned District Magistrate also thought that the offence of causing disappearance of evidence is a separate and distinct offence and requires investigation, as the petitioner sought to destroy evidence of the offence of forgery. It is against this order that the present revision petition is filed.

(3) In this petition, the view of the Additional District Magistrate regarding both the charges is canvassed. The first question for consideration is, whether an offence under S. 465 has been committed. It is true that the evidence established that bills were issued by the petitioner in the names of fictitious persons. But the question is, do they amount to false documents within the meaning of S. 464, Indian Penal Code? An offence under S. 465, Indian Penal Code, is committed only if a person makes a false document for purposes mentioned in S. 464, Indian Penal Code.

"A person is said to make a false document :

First : Who dishonestly or fraudulently makes, signs, seals or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document, was made, signed, sealed or executed by or by the authority of a person, by whom or by whose authority he knows that it was not made, signed, sealed or executed, or at a time at which he knows that it was not made, signed, sealed or executed; or

Secondly : Who, without lawful authority, dishonestly or fraudulently by cancellation or otherwise, alters a document in any materiai part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly : Who, dishonestly or fraudulently causes any person to sign, seal, execute or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not know the contents of the document or the nature of the alteration."

Clauses (2) and (3) are not relevant for the purpose of this inquiry. Under S. 464, Indian Penal Code, what is essential is that the accused person must make a document with the intention of making it to be believed that it was signed by or by the authority of someone else, while he knows that it was not so made or authorised by that person. In this case the accused did not make the bills purporting to be made by or authorised by some person. The intention in issuing the bills may be fraudulent and he may be punishable for some other offence. But to bring it within the four corners of this section, the false document must be created with a view to make it appear that it was made by some other person who the accused knows, did not make it, see — 'Queen Empress v. Kunju Nair', 12 Mad 114 (A). It follows that no offence under S. 465, Indian Penal Code, has been committed.

(4) Coming now to the offence under S. 201, Indian Penal Code, as the charge against him is that he caused disappearance of the evidence of the offence of forgery, and as the first charge fails, the ingredients essential to constitute an offence under S. 201, Indian Penal Code are lacking. It follows that the petition was rightly discharged by the Joint Magistrate and the Additional District Magistrate ought not to have set aside that order.

Before concluding I want to mention about something which requires investigation. In the order of the Joint Magistrate, it is stated:

"The Additional Public Prosecutor himself admitted in court that if no charge under S. 465 lies, then this also automatically fails as the accused is said to have caused the disappearance of evidence for the main charge under S. 465, Indian Penal Code."

But, in the order of the District Magistrate, it is remarked :

"It is also said that the Additional Public Prosecutor admitted such a position while it is denied by the Additional Public Prosecutor in this Court."

(5) It is true that the concession of the Additional Public Prosecutor is absolutely immaterial on a question of law, but, whether he made such a concession or not, is material in this case, while the Joint Magistrate says that such a concession was made, the District Magistrate denies Additional Public Prosecutor having made such a statement. The District and Sessions Judge, Rajamundry, will enquire into this matter and submit a report within a month.

H.G.P. Order accordingly.

A.I.R. 1955 ANDHRA 83 (Vol. 42, C.N. 32)

CHANDRA REDDY J. (20-8-1954)

Agnihothram Vijaya Sarathi Acharya representing himself and all the residents of "French Loge", Petitioner v. Masulipatam Municipal Council represented by its Executive Authority, Respondent.

Civil Revn. Petn. No. 373 of 1953, from order of Sub. J., Masulipatam, D/- 10-2-1953.

Court-fees Act (1870), Sch. II, Art. 17(iii), (vi); Arts. 17(A)(i), 17B (Mad) — Suit for relief that Municipality has no right to collect taxes.

What was recited in the plaint was that the Masulipatam Municipality had no right to collect taxes from the residents of French Loge. There was no dispute with regard to the title to any of the properties situated in the locality. The Municipality had not forwarded any claim to any of the properties therein. They only wanted to collect some taxes from the residents of French Loge in

respect of the properties owned by them in that locality.

Held that the market value of all the properties in the French Loge had absolutely no bearing on the question of court-fee payable on the plaint. It is only in cases where there is any dispute as to the right or title to any property that Art. 17-A(i) can be invoked and can have no application in a case where only the right of the Municipality to exercise jurisdiction over the locality is questioned. The only question being whether the Municipal Council could exercise jurisdiction over this area and collect property tax from the people living there and this right was incapable of being valued in terms of money the suit was rightly valued under Art. 17B. AIR 1954 Mad 284, AIR 1954 Mad 262, AIR 1955 Mad 212, Rel. on. (Paras 4, 5)

Anno: C. F. Act, Sch. II, Art. 17(iii) N. 1; Art. 17(vi) N. 1; Art. 17A (Mad) N. 1.

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 284: ILR (1954) Mad 32 6

(B) (V41) AIR 1954 Mad 262: ILR (1954) Mad 34 7

(C) (V42) AIR 1955 Mad 212: 1954-1 Mad LJ 279 7

M. S. Ramachandra Rao and M. Krishna Rao, for Petitioner; D. L. Narasimha Raju, for the Govt. Pleader (P. Satyanarayana Raju), on notice; P. Satyanarayana Raju and D. L. Narasimha Raju, for Respondent.

ORDER: The plaintiff is the petitioner herein. He filed a representative suit for a declaration that the defendant Municipality of Masulipatam had no jurisdiction over French Loge in which he resides, for the reason that the order passed by the State Government vesting French Loge in the Masulipatam Municipality was void in that it did not follow the mandatory provisions of S. 4, District Municipalities Act. According to the plaint in the absence of a valid order vesting French Loge in the Municipality, it had no right to collect taxes from the residents of French Loge. French Loge belongs to the French Government and it was handed over to the Government of India after the attainment of independence on 6-10-1947.

This enabled the Provincial Government to vest this part of the erstwhile French possession in Masulipatam Municipality. But before they could do so, certain procedure has to be followed as prescribed in S. 4, District Municipalities Act. The suit is filed by the plaintiff in the Subordinate Judge's Court of Masulipatam on behalf of the residents of French Loge challenging the validity of the vesting order and the right of the Municipality to collect taxes from him and the other persons of the French Loge.

(2) The plaintiff values the suit under Art. 17-B of the Second Schedule to the Court-fees Act and paid a court-fee of Rs. 100/-. On an objection taken by the office the Subordinate Judge directed the plaintiff to pay an additional court-fee of Rs. 400/- being of the opinion that the case was governed by Art. 17-A(i) of the II Schedule.

(3) The question for consideration is whether it is Art. 17A(i) or 17-B that governs this case.

(4) Article 17-B as amended in Madras, prescribes a court-fee of Rs. 100/- for a plaint filed in a District Court or Subordinate Judge's Court, where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act. This Article would cover this case if it is found that it is not possible to assess the money value of the subject-matter of the suit. What is recited in the plaint is that the Municipality had no right to collect taxes from the residents of French Loge. There is no dispute with regard to the title to any of the properties situated in the locality, as erroneously assumed by the lower Court.

The Municipality has not forwarded any claim to any of the properties therein. They only wanted to collect some taxes from the residents of French Loge in respect of the properties owned by them in that locality. Therefore, the market value of all the properties in the French Loge has absolutely no bearing on the question of court-fee payable on the plaint. It is only in cases where there is any dispute as to the right or title to any property that Art. 17-A(i) could be invoked and can have no application in a case like this where only the right of the Municipality to exercise jurisdiction over this locality is questioned.

(5) The dispute in the suit does not involve any title to the property nor interference with possession and enjoyment thereof, the only question as already stated, being whether the Municipal Council could exercise jurisdiction over this area and collect property-tax from the people living there and this right is incapable of being valued in terms of money.

(6) A similar question arose in the High Court of Madras in — 'Venkateswara Rao v. Municipal Council, Masulipatam', AIR 1954 Mad 284 (A). There the suit was filed against this very Municipality for a declaration that the resolution passed by it and all that was done in pursuance thereof were illegal, ultra vires and void. There was also a prayer for injunction restraining the Municipal Council from acting any further in pursuance of that resolution. It was valued under Art. 17-B, Court-fees Act, and a fixed court-fee of Rs. 100/- was paid. The Subordinate Judge held that the court-fee should be assessed under Art. 17A(i) of Schedule II. This order was revised by Rajamannar, Chief Justice, who took the view that, this case was governed by Art. 17-B. The facts are 'ad idem' with the present case.

(7) There is another decision of the same Chief Justice in — 'Thirugnana Sambhandham Pandara Sannadhigal v. State of Madras', AIR 1954 Mad 262 (B). This embodies the same principle. In the second case the declaration sought was that a particular village was not an estate within the meaning of the Estates Land Act and that Madras Act 30 of 1947 was not applicable to that village. The learned Judge expressed the opinion that that case also fell under Art. 17-B. The view taken by Krishnaswamy Nayudu J. in — 'Marimuthu Nadar v. Tuticorin Municipality', AIR 1955 Mad 212 (C) accords with these two

rulings. I express my respectful agreement with the principle adumbrated in these three cases and hold that the suit was rightly valued under Art. 17-B and court-fee paid is sufficient. It follows that the order of the Appellate Court calling upon the appellant to pay additional court-fee is not right and should be set aside.

(8) The Civil Revision Petition is allowed. No order as to costs.

D.H.Z. Revision allowed.

(S) A.I.R. 1955 ANDHRA 85 (Vol. 42, C.N. 33)

SATYANARAYANA RAJU J. (16-12-1954)

Muragani Ramalingam, Petitioner v. Kondapalli Gurumurthy Reddy, Respondent.

Civil Misc. Petn. No. 8377 of 1954.

Constitution of India, Arts. 227, 228 — Rent Controller — Transfer of proceedings.

Articles 227 and 228 occur in juxtaposition indicating thereby that they are not intended to serve the same purpose. Article 227 cannot comprehend a power which is specifically embodied in Art. 228. When an application for transfer is made, it must come only under Art. 228, and that article makes no mention of Tribunals, though Tribunals are specifically referred to in Art. 227. The power of superintendence conferred by Art. 227, it is no doubt true, is both judicial and administrative. But it does not comprehend a power to withdraw to the file of the High Court, a case pending before a Statutory tribunal. The House Rent Controller is not a Court. Hence the High Court has no power under Arts. 227 and 228 of the Constitution of India to transfer an application filed under the Madras Buildings (Lease and Rent Control) Act from the file of the Rent Controller to the High Court. Case law discussed. (Paras 1, 11)

Anno: Const. of India, Art. 227 N. 3, 3a; Art. 228 N. 7.

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 215: 1954 SCJ 290 (SC) 6

(B) (V38) AIR 1951 Hyd 50: 52 Cri LJ 273 (FB) 6

(C) (V38) AIR 1951 Hyd 82: 52 Cri LJ 703 6, 7

(D) (V42) AIR 1955 Mad 287: 1954-2 Mad LJ 473 8

(E) (V40) AIR 1953 Mad 362: 1953 Cri LJ 636 9

(F) (V41) AIR 1954 Mad 573: 1954-1 Mad LJ 165 10

P. Srinivasalu, for K. Ramachandra Rao, for Petitioner; P. Ramachandra Reddy, for Respondent.

ORDER: This petition raises an important question as to the power of the High Court under Arts. 227 and 228, Constitution of India to transfer an application filed under the Madras Buildings (Lease and Rent Control) Act from the file of the Rent Controller to the High Court.

(2) The second respondent before the Rent Controller is the petitioner in this petition. The respondent in the present petition filed B. A. P. No. 3 of 1953 on the file of the Rent Controller, Gudivada, under S. 4, Madras Buildings (Lease and Rent Control) Act, 1949, on 11-2-1953 for the fixation of fair rent. On 24-3-1953, the petitioner herein filed his counter. The petition was enquired into. The respondent's counsel concluded his arguments on 27-10-1954. On that day, the respondent (Petitioner herein) filed an application under O. 27-A, Civil P. C. before the House Rent Controller. That petition is pending. On 29-10-1954 the present petition has been filed in this Court.

(3) It is alleged by the petitioner that the respondent's petition is not maintainable, that S. 4, Madras Buildings (Lease and Rent Control) Act, 1949, violates the fundamental rights of every citizen guaranteed under Art. 19 of the Constitution, that the said section places restrictions that are not reasonable and are not justified in public interest; that the Madras Buildings (Lease and Rent Control) Act and in particular S. 4 of the said Act is ultra vires the powers of the Legislature. It is further submitted that on the formation of the Andhra State, the Madras Buildings (Lease and Rent Control) Act has ceased to be in force in the Andhra State and the Rent Controller has no jurisdiction to proceed with a petition under S. 4. It is, therefore, prayed that the High Court may withdraw the proceedings in B. A. P. No. 3 of 1953 on the file of the Rent Controller, Gudivada to the file of the High Court.

(4) The respondent filed a counter, wherein it is alleged that he has been declared to be a tenant entitled to the benefit of the Rent Control Act, not merely by the Subordinate Judge's Court but also by the High Court of Madras in C. M. A. Nos. 87 and 88 of 1953; that the application for the withdrawal of the proceedings is belated, that the questions touching the constitutional validity of the Madras Buildings (Lease and Rent Control) Act have not been raised so far before the House Rent Controller; that such questions are foreign to the scope of these proceedings and that this petition has been filed mala fide with the motive of putting off the determination of the fair rent.

(5) The relevant articles of the Constitution of India may be extracted:

"227 (1): Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the Officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the Sheriff and all clerks and Officers of such courts and to attorneys, advocates and pleaders practising therein:

Provided that any rules made, forms prescribed or tables settled under Cl. (2) or Cl. (3) shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this Article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

228: If the High Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution, the determination of which is necessary for the disposal of the case, it shall withdraw the case and may—

(a) either dispose of the case itself; or

(b) determine the said question of law and return the case to the court from which the case has been so withdrawn, together with a copy of its judgment on such question and the said court shall on receipt thereof proceed to dispose of the case in conformity with such judgment."

(6) Article 228 makes it obligatory on the High Court to withdraw from the subordinate courts all cases which involve a substantial question of law as to the interpretation of the Constitution. The object of the article is to make the High Court the sole interpreter of the Constitution in the State and to deny the subordinate Courts a right to interpret the Constitution. One of the essential conditions for the application of Art. 228 is that a case must be pending in a court subordinate to the High Court. The learned counsel for the petitioner has conceded before me that the House Rent Controller is not a court in view of the decisions of the Supreme Court in — 'Waryam Singh v. Amarnath', AIR 1954 SC 215 (A), wherein their Lordships of the Supreme Court have laid down that the Rent Controller and the District Judge exercising jurisdiction under the East Punjab Urban Rent Restriction Act are not courts. But he contended that the power of transfer is implicit in the power of superintendence given to the High Court over all courts and Tribunals throughout the territories in relation to which it exercises jurisdiction.

He relied upon two decisions of the Hyderabad High Court: — 'Mohamed Abdul Raoof v. State of Hyderabad', AIR 1951 Hyd 50 (FB) (B) and — 'Mohammed Baquar v. State of Hyderabad', AIR 1951 Hyd 82 (C). In — 'Mohamed Abdul Raoof v. State of Hyderabad (B)' the High Court had to deal with applications for transfer by the accused, who were being prosecuted with 10 others in the Court of the Special Tribunal No. IV, Hyderabad, for offences of criminal conspiracy, promoting class hatred, robbery, dacoity etc. The applications were filed under S. 495, Hyderabad Criminal Procedure Code corresponding to S. 526 of the Indian Criminal Procedure Code. But some of the applicants had also invoked the provisions of Arts. 226 and 227, Constitution of India in support of their applications for transfer. The Full Bench of the Hyderabad High Court held that Art. 227 of the Constitution is applicable to the Court of the Special Tribunal and the powers of superintendence conferred on the High Court are sufficiently wide to include the principles laid down in S. 494, Hyderabad Criminal Procedure Code and to empower them to deal with the transfer applications. In that view, they held that it was unnecessary to give any finding as to the applicability of S. 494 or of Art. 226 of the Constitution.

(7) In — 'Mohamed Baquar v. State of Hyderabad (C)', a Bench of the Hyderabad High Court was dealing with an application for transfer of a case before the Special Judge at Warrangal constituted under the Special Judges Regulation. On behalf of the State of Hyderabad an objection was raised that the High Court had no jurisdiction to transfer cases triable by the Special Judges to another Court. Mohamad Ahmed Ansari and Srinivasachari JJ. took the view that the word "Superintendence" used in Art. 227 of the Constitution cannot be confined to mere matters of administrative control but confers judicial powers also on the High Court. The learned Judges pointed out that the mention of the word "Tribunal" in the said articles goes to show that the Constitutent Assembly intended to confer on the High Courts powers of Superintendence, not only over Tribunals or courts as are subject to its appellate jurisdiction, but also on those whose decisions are not subject to appeal before the High Courts.

They said:

"If we were to place a narrow interpretation on the word 'superintendence' as covering matters of administration only, it would follow that the High Court will have administrative control over these tribunals, but not judicial, and that appears to us to be hardly the intention of the framers of the Constitution. We are, therefore, of opinion that the word 'superintendence' used in Art. 227 in the Indian Constitution is wide enough to cover matters of judicial nature also, and if this High Court thinks as proper to exercise its power of revision or transfer that can be done notwithstanding the restrictive provisions contained in the laws passed by the State for the jurisdiction conferred on this court by the Constitution Act cannot be controlled by State Legislature".

(8) 'In Re: Tirupuliswamy Naidu', AIR 1955 Mad 287 (D), Satyanarayana Rao J. and Rajagopalan J., held that the jurisdiction vested in the High Court under Art. 227 of the Constitution is a revisional jurisdiction and hence no Letters Patent Appeal is competent from an order passed by a Judge of the High Court in exercise of such a jurisdiction. The question as to whether the High Court has power to direct a transfer under Art. 227 did not fall for consideration in this decision.

(9) 'In Re: Annamalai Mudaliar', AIR 1953 Mad 362 (E), Ramaswamy J., held that all agencies whether courts or not, performing the duty of deciding disputed questions of right between parties on behalf of and under the sanction of the State and in accordance with State-made laws are placed under the administrative and judicial control of the High Court and that the High Court has got revisional jurisdiction under Art. 227 by way of superintendence over the judicial work of a duly constituted tribunal, like the Deputy Registrar under the Co-operative Societies Act. He further held that the word 'superintendence' includes power to guide and to direct subordinate courts and tribunals to carry out orders of the High Court.

(10) 'In re: Gangalakurthi Pattisan', AIR 1954 Mad 573 (F), Rajamannar C. J., and Venkatarama Iyer J., had to consider the scope and effect of Art. 227, Constitution of India. The learned Judges considered the provisions of S. 15 of the Charter Act of 1861 and S. 107, Government of India Act, 1915 and Sec. 224, Government of India Act, 1935, in relation to Art. 227 of the Constitution. But in these two decisions there was no need for the learned Judges of the Madras High Court to consider as to whether the High Court has power under Art. 227 to transfer a petition which is pending on the file of a tribunal to the High Court. Section 107, Government of India Act, 1915 is almost a reproduction of S. 15 of the Charter Act of 1861. Section 224, Government of India Act, 1935 provided for the superintendence of the High Court over all courts for the time being subject to its appellate jurisdiction. Section 225 provides for transfer of certain cases for trial to the High Court.

That section ran thus:

"225-(1). If on an application made in accordance with the provisions of this section a High Court is satisfied that a case pending in an inferior court being a case which the High Court has power to transfer to itself for trial, involves or is likely to involve the question of the validity of any Dominion or Provincial Act, it shall exercise that power".

Article 227 of the Constitution corresponds to S. 224, Government of India Act 1935 with certain changes and Art. 228 of the Constitution corresponds to S. 225, Government of India Act 1935 with certain changes. Order 27-A, Civil P. C., which has been inserted by S. 2, Code of Civil Procedure (Amendment Act) Act 23 of 1942 (as subsequently adopted and amended) provides for notice to the Advocate General where, in any suit, it appears to the Court that any such question as is referred to in Cl. 1 of Art. 132 read with Art. 147 of the Constitution is involved.

Rule 2 of Order 27-A also provides that the court may at any stage of the proceedings order that the Central Government or a State Government shall be added as a defendant in any suit involving any such question as is referred to in Cl. 1 of Art. 132 read with Art. 147 of the Constitution.

(11) Articles 227 and 228 occur in juxtaposition indicating thereby that they are not intended to serve the same purpose. Article 228 of the Constitution expressly confers power on the High Court to transfer a case pending in a court subordinate to it, which involves a substantial question of law as to the interpretation of the Constitution, while Art. 227 provides that every High Court will have power of superintendence over all courts and tribunals in relation to which it exercises jurisdiction. Article 227 cannot comprehend a power which is specifically embodied in Art. 228. When an application for transfer is made, it must come only under Art. 228, and that article makes no mention of Tribunals, though Tribunals are specifically referred to in Art. 227. If the framers of the Constitution intended to confer upon the High Court a power to transfer a matter pending before a Tribunal involving a substantial question of law as to the interpretation of the Constitution, nothing could have been more easy than to add the words "or Tribunal" in Art. 228. In the two decisions of the Hyderabad High Court referred to above, this point has not been considered. The power of superintendence conferred by Art. 227, it is no doubt true, is both judicial and administrative. But, I find it difficult to hold that it comprehends a power to withdraw to the file of the High Court, a case pending before a Statutory tribunal.

(12) In the above view, I do not think this application can be granted. It is, therefore, dismissed.

D.H.Z. Petition dismissed.

(S) A.I.R. 1955 ANDHRA 87 (Vol. 42, C.N. 34)

FULL BENCH

SUBBA RAO C. J., BHIMASANKARAM AND SATYANARAYANA RAJU JJ. (6-12-1954)

M. Subbarayudu and others, Accused-Petitioners v. The State, Respondent.

Criminal Revn. Case No. 603 of 1954, and Criminal Revn. Petn. No. 563 of 1954, to revise the order of Dist. Magistrate, Gooty, D/- 24-6-54.

(a) Precedents — Decisions of Madras High Court delivered prior to 5-7-1954 how far binding on Andhra High Court — Courts of co-ordinate jurisdiction, meaning of — (Civil P. C. (1908), Pre.) — 1954-2 Mad LJ (Andhra) 195: (S) AIR 1955 Andhra 49, Overruled.

Per Full Bench: The binding nature of the precedents of one Court on another depends upon the fact whether such Courts are Courts of co-ordinate jurisdiction or not. Co-ordinate jurisdiction does not connote the same idea as concurrent jurisdiction or simultaneous jurisdiction. The connotation of the word "co-ordination" is not the same as that of the words "concurrence or simultaneity". Simultaneity or co-existence is not a necessary ingredient of co-ordination. Co-ordination is more comprehensive and takes in successive acts of the same status or level. It would not be inappropriate to call a successor Court a Court of co-ordinate jurisdiction with its predecessor, if their jurisdictions at the point of time they exercised it are similar to or co-extensive with each other. (Para 12)

The test to ascertain whether two High Courts are of co-ordinate jurisdiction or not, is whether the two Courts are of equal rank and status or of equal authority and exercise similar jurisdiction. (Para 16)

The Andhra High Court is in a real sense an offshoot of the Madras High Court exercising the same jurisdiction and administering the same laws, which the Madras High Court had exercised before 5-7-1954, in the territories included in the Andhra State. To use a convenient terminology, the Andhra High Court may be treated as one succeeding to the High Court of Madras and exer-

cising all the powers and administering the same law which the Madras High Court exercised in the territories comprised in the Andhra State. The Andhra High Court and the Madras High Court prior to 5-7-1954 are therefore Courts of co-ordinate jurisdiction. Even if the two High Courts are deemed to be not Courts of co-ordinate jurisdiction the Andhra High Court shall follow the Madras decisions on the principle of 'stare decisis' in the same manner that the Madras High Court follows its own decisions and subject to the same limitations. 1954-2 Mad LJ (Andhra) 195: (S) AIR 1955 Andhra 49, Overruled; Case law ref.

(Paras 7, 16, 17, 18, 21, 33)

Per Bhima Sankaram J.: "Where territories under the jurisdiction of one High Court are divided into two, each to be under the jurisdiction of a separate High Court, it seems to me that the principle underlying the rule of precedents requires the continuity of case-law to be maintained, because there is no reason at all why the certainty of the law should be affected. The Andhra High Court is, in one sense, new of course, but its jurisdiction is a jurisdiction which was once subject to one High Court and until 5-7-1954, governed by the case-law as laid down by that High Court. A Court should be reluctant to favour innovations unless they are indispensable." (Para 31)

"There may be cases where decisions rendered by the Madras High Court before 5-7-1954, may be overruled by the Madras High Court itself, but in such cases where it is brought to the notice of this Court that the earlier decisions have been departed from, in Madras, this Court will re-consider them in the light of the subsequent rulings."

(Para 33)

Anno: Civil P. C., Pre. N. 15.

(b) Andhra State Act (1953), S. 53 and Part II — Scope and effect — Madras High Court decisions if become binding on Andhra High Court.

Section 53, Andhra State Act (30 of 1953) cannot have the effect of making the decisions of the Madras High Court binding on the Andhra High Court. Part II of the Act provides for the formation of the Andhra State and the transfer of territory from Madras to Mysore. A combined reading of the two provisions can only mean that the change of territories provided for by Part II of the Act will not make any change in the law obtaining in that territory before the change till otherwise provided by a competent Legislature. If there was a law obtaining in the Andhra area before the constitution of the Andhra State to the effect that the Madras High Court decisions would be binding on the Andhra High Court, this provision can legitimately be invoked. But obviously there could not have been any such law for the simple reason that there was no High Court of Andhra in existence prior to its Constitution. (Para 26)

(c) Precedents — Procedure to be followed by Andhra High Court in dealing with decisions of Madras High Court prior to 5-7-1954 laid down — (Civil P. C. (1908), Pre.)

A single Judge is bound by a decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Bench decision on the ground that some observations of Supreme Court made in a different context might indicate a different line of reasoning. A divisional Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction; but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and confusion that otherwise would prevail. AIR 1953 Mad 351, Rel. on. (Para 28)

Even a single Judge shall not differ from a judgment of another Judge of the same Court. If he does not agree, the proper course for him is to refer the case to a Bench of two Judges. If this procedure is followed from the beginning, there will not be any confusion created by conflict of decisions. The public will know their rights and the subordinate Courts will be in a position to administer the settled law without any difficulty. In the interests of the smooth and efficient judicial administration of the State the Andhra High Court will in future follow strictly the aforesaid procedure without any deviation. (Para 28)

Anno: Civil P. C., Pre. N. 15.

(d) Criminal P. C. (1898), Ss. 209 and 437 — Order under S. 209 — Stage at which superior court can interfere.

When a Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such persons to be tried before himself, the revisional powers under S. 437 can be exercised even before the conclusion of the trial before such Magistrate. AIR 1953 Mad 801 (FB), Foll.

(Paras 3, 29, 35)

Anno: AIR Com. Criminal P. C., S. 437 N. 1; 1954 Mitra: S. 437 (Topic of N. 1 extra in AIR Com.)

CASES REFERRED: Paras

(A) (V40) AIR 1953 Mad 801: ILR (1953) Mad 691: 1953 Cri LJ 1470 (FB) 3, 35

(B) (V42) (S) AIR 1955 Andhra 49: 1954 ALT (HCR) 163 3, 30

(C) (1944) 1944-2 All ER 293: 1944 KB 718 9, 13, 27

(D) (V14) AIR 1927 Rang 4: 4 Rang 313 (FB) 9, 12, 14

(E) (V40) AIR 1953 Trav-C 283: ILR (1953) Trav-C 206 10, 31

(F) (V39) AIR 1952 Madh B 171: ILR (1952) Madh B 1 (FB) 11, 14, 31

(G) (V41) AIR 1954 SC 245: 1954 SCR 786 (SC) 12, 15
(H) (1880) 13 Ch D 639: 49 LJ Ch 209 13
(I) (V12) AIR 1925 Lah 341: 6 Lah 87 14
(J) (V7) AIR 1920 Lah 321 (1): 1 Lah 25 14
(K) (V16) AIR 1929 Lah 174: 118 Ind Cas 434 14
(L) (1950) 1950-2 All ER 170: (1950) 2 KB 368 22, 33
(M) (V40) AIR 1953 Mad 351: 1953-1 Mad LJ 49 28

O. Chinnappa Reddy and C. Padmanabha Reddy, for Petitioners; Public Prosecutor, for the State; Advocate-General, Amicus Curiae, C. Kondaih, for Complainant.

SUBBA RAO C. J.:

This Full Bench has been constituted to decide a fundamental question, which is arising every day, namely, whether and to what extent the Andhra High Court is bound by the decisions of the Madras High Court delivered before 5-7-1954.

(2) The facts of the case that led to the reference may be briefly stated. The petitioners were the accused in P. R. C. No. 2 of 1953. The Sub-Divisional Magistrate, Dharmavaram, discharged the accused for an offence under S. 395, Penal Code, and converting the case into a Calendar case, directed the accused to be tried for the other offences with which they were charged. In revision, the District Magistrate, Gooty, set aside that Order under Ss. 435 and 436, Criminal P. C. and directed the Sub-Divisional Magistrate to commit the accused to the Court of Session to take their trial for all the offences with which they were charged. The accused have filed this Criminal Revision Petition against that Order.

(3) In revision, the main question raised was whether under S. 209 (i), Criminal P. C., when a Magistrate finds that there are not sufficient grounds for committing the accused for trial and directs such persons to be tried before himself, the revisional powers under S. 437 can be exercised even before the conclusion of the trial before such Magistrate. Chandra Reddy J., who admitted the revision directed the same to be posted before a Division Bench as it was represented to him that a Full Bench decision of the Madras High Court covering the point required re-consideration. The Revision Petition was accordingly posted before a Division Bench. The respondent relied upon the Full Bench decision of the Madras High Court in — 'Nalla Baligadu In re', AIR 1953 Mad 801 (FB) (A), wherein it was ruled that the powers under S. 437, Criminal P. C. can be exercised even before the conclusion of the trial before the Magistrate. If the Full Bench decision of the Madras High Court was binding on this Court, it would follow that the Revision Petition was liable to be dismissed.

In the circumstances, the learned Counsel for the petitioners contended that the Andhra High Court would not be bound by the decisions of the Madras High Court. Reliance was placed upon the decision of our learned brother Umamaheswaram, in — 'Subba Reddi v. Govinda Reddi', (S) AIR 1955 Andhra 49 (B), wherein the learned Judge observed that the Andhra High Court, which was inaugurated in July 1954 is not bound by the decisions of the Full Bench of the Madras High Court, or other High Courts and is at liberty to examine the question in the light of well established legal principles and arrive at a proper conclusion. As this question is arising very often in this Court, the Division Bench thought that the said question should be decided finally and authoritatively by a Full Bench. Hence, the Revision Petition was directed to be posted before a Full Bench.

(4) The argument of Mr. Chinnappa Reddy, the learned counsel for the petitioner may be put thus: The binding nature of the decision of one Court over another depends upon the fact whether both the Courts are Courts of co-ordinate jurisdiction. If so, on a principle of judicial comity, the decision of one Court is binding on another. The Andhra High Court and the Madras High Court are not Courts of co-ordinate jurisdiction, for, the idea of co-ordination implies a concurrent and simultaneous jurisdiction. Whatever may be said about the decisions of the composite High Court between 1-10-1953 and 5-7-1954, the decisions prior to 1-10-1953 are not decisions of a Court of co-ordinate jurisdiction. In any view, the said principle has no application to criminal cases. The Advocate General who appeared as amicus curiae at our request, conceded that the High Courts of Andhra and Madras are not Courts of co-ordinate jurisdiction, but argued that on the principle of stare decisis the decisions of the Madras High Court prior to 5-7-1954 should be followed by this High Court. The learned Public Prosecutor, who appeared for the State, further contended that the provisions of the Andhra State Act (30 of 1953) would indicate that the law of the Madras High Court which term is wide enough to include Judge-made law, is also binding on the Andhra High Court.

(5) We shall first trace the history of the Constitution of the Andhra High Court to discover, if possible, any principle regulating the binding nature of the decisions of the Madras High Court. The Madras High Court, before Independence, was constituted by Letters Patent and was governed by the various Acts passed from time to time by the Parliament of England. When India became a Dominion by virtue of the Indian Independence Act of 1947 which took effect on 15-8-1947, there was no change in the constitution of the High Court. When India became a Republic, the jurisdiction and powers of the Madras High Court were regulated by the Constitution of India, which came into force on 26-1-1950. The former High Courts were continued in respect of the respective States. Under Art. 225, subject to the provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by the Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court was declared to be the same as immediately before the commencement of the Constitution. In some

directions, additional powers were also conferred.

(6) The Parliament, by passing Act 30 of 1953, constituted the Andhra State, which came into effect on 1-10-1953. Under S. 28 of the said Act, it was provided that there shall be a separate High Court for the State of Andhra from the 1st day of January 1956 or such an earlier date as may be appointed under sub-s. (2). Section 40 of the Act provided that the jurisdiction of the High Court of Madras shall extend to the State of Andhra and the said High Court shall, in relation to the territories of that State, continue to have such jurisdiction as it had immediately before the appointed day. By virtue of the said provision, the High Court of Madras continued to have such jurisdiction over the area comprised in the Andhra State.

Under sub-s. (2) of S. 28, the President notified 5-7-1954 as the date for the inauguration of the High Court of Andhra and the Andhra High Court was duly constituted on that date. Section 30 provides that the said High Court of Andhra shall have, in respect of the territories for the time being included in the State of Andhra, all such original, appellate and other jurisdiction as, under the law, in force immediately before the prescribed day, is exercisable in respect of the said territories, or any part thereof by the High Court at Madras. Section 53 which prescribes in respect of the said territories, the territorial extent of the laws, says that the provisions of Part II which deal with the formation of the Andhra State, shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to the State of Madras shall, until otherwise provided by a competent Legislature or other competent authority, continue to have the same meaning.

Section 32 prescribes that the law in force immediately before the prescribed day with respect to practice and procedure in the High Court at Madras, shall with necessary modifications, apply in relation to the High Court of Andhra. It also lays down that the rules or orders which are in force immediately before the prescribed day with respect to practice and procedure in the High Court at Madras shall, until varied or revoked by rules or orders made by the High Court of Andhra, apply with the necessary modifications in relation to practice and procedure in the High Court of Andhra as if made by that Court.

(7) It will therefore be seen that, in effect and substance, the territorial jurisdiction of the composite Madras High Court was split up from 5-7-1954 and the Madras and the Andhra High Courts have the same jurisdiction subject to some exceptions with which we are not concerned now, over the area comprised in the two different States. The composite High Court, which was His Majesty's Court, before the Constitution, became one governed by the Constitution. For a short period, the same High Court exercised jurisdiction over the two States. After 5-7-1954, two different Courts came into existence. The same procedure governing the Madras High Court continued to govern the Andhra High Court till it was modified in accordance with law. The splitting up of territorial jurisdiction had not the effect of changing the law obtaining in the respective territories. The Andhra High Court is, therefore, in a real sense an offshoot of the Madras High Court exercising the same jurisdiction and administering the same laws, which the Madras High Court had exercised before 5-7-1954 in the territories included in the Andhra State. To use a convenient terminology, the Andhra High Court may be treated as one succeeding to the High Court of Madras and exercising all the powers and administering the same law which the Madras High Court exercised in the territories comprised in the Andhra State.

(8) It may be convenient at this state to notice the case law and the passages from the text-books cited at the bar on the Law of Precedents. The English Law on the subject has been succinctly summarised in 18 Halsbury's Laws of England page 210, para. 535:

> "It may be laid down as a general rule that that part alone of a decision of a Court of Law is binding upon Courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined."

The principle, underlying the aforesaid proposition, has been clearly stated by Odgers in his Book "In the Common Law", 3rd Edition, Vol. I, pages 64-65 as follows:

> "There is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity among Judges. In the same way, there is no common law or a statutory rule to oblige a court to bow to its own decisions; it does so on the ground of judicial comity. This so-called comity has, however, been formulated into rules which, though unwritten, are habitually followed by our Courts."

(9) The scope of the rule was elucidated by the Court of Appeal in — 'Young v. Bristol Aeroplane Co.', 1944-2 All ER 293 (C). The question there was whether the Court of Appeal was not bound by its own earlier decisions. Lord Greene, M. R., exhaustively considered the question and came to the following conclusion:

> "On a careful examination of the whole matter, we have come to the clear conclusion that this Court is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise (i) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The Court is not bound to follow a decision of its own if it is satisfied that that decision was given per incuriam."

The statement of law is clear but the decision does not define what are Courts of co-ordinate jurisdiction. The question whether the Rangoon High Court in exercise of its ordinary original and appellate jurisdiction was not bound by the reports of decisions of the Chief Court of Lower Burma was raised and decided by the Full Bench of the Rangoon High Court in — 'Ma Mya v. Ma Thein', AIR 1927 Rang 4 (D). The Full Bench, Cunliffe J. dissenting, held that the High Court was not bound by the said reports. The decision turned upon the question whether the Chief Court of Lower Burma, which was replaced by the High Court, which had territorial jurisdiction not only in respect of lower Burma but also upper Burma, was a Court of co-ordinate jurisdiction. Rutledge C. J. held that

"to decide whether the decisions of the late Chief Court are binding upon this Court, we must decide whether it is a Court of co-ordinate jurisdiction."

(10) A Division Bench of the Travancore-Cochin High Court in — 'Unni Kunchu Moideen v. Subramonia Iyer', AIR 1953 Trav-C 283 (E) had to consider whether the decisions of the former Travancore and Cochin High Courts were binding on the post-Constitution High Courts of Travancore-Cochin. The Full Bench disposed of the question with the observation that it had been repeatedly told by that Court that decisions of the former Travancore and Cochin High Courts were only of persuasive value for them and that those decisions did not bind them. That decision was obviously based upon the assumption that the former State High Courts, whose jurisdiction extended only over parts of the present State, were not Courts of co-ordinate jurisdiction with the present High Court. Neither of the former Courts had jurisdiction over the entire area of the present Travancore-Cochin State.

(11) So too, a Full Bench of the Madhya Bharat High Court in — 'Chandulal v. Babulal', AIR 1952 Madh B 171 (F) held that the Madhya Bharat High Court could not be looked upon as successor to Indore High Court or any High Court of any covenanting State and, therefore, the High Courts of the former covenanting States could not be regarded as Courts of co-ordinate jurisdiction. In that view, they held that the judgments of those Courts were not binding on the High Court.

(12) The Supreme Court in — 'State of Bihar v. Abdul Majid', AIR 1954 SC 245 (G), held that the Supreme Court of India was in no way bound by the decisions given by the former Federal Court of India or by the Privy Council. There is no discussion but the conclusion may be sustained on the basis that, in the view of the Supreme Court, neither the Privy Council nor the Federal Court were Courts of co-ordinate jurisdiction with the Supreme Court. It is, therefore, manifest that the binding nature of the precedents of one Court on another depends upon the fact whether such Courts are Courts of co-ordinate jurisdiction or not.

This leads us to a more difficult question, viz., what are Courts of co-ordinate jurisdiction? The learned counsel for the petitioners contended that courts of co-ordinate jurisdiction are those, which exercise simultaneous jurisdiction over the same area, or in respect of the same subject-matter. The learned Advocate General on the other hand, equated the words "co-ordinate jurisdiction" with the word "concurrent jurisdiction". Though the decisions already cited may afford illustration, they do not definitely define the term "co-ordinate jurisdiction". In my view, co-ordinate jurisdiction does not connote the same idea as concurrent jurisdiction or simultaneous jurisdiction.

Concurrent jurisdiction is defined in Wharton's Law Lexicon to mean the jurisdiction of several different tribunals, both authorised to deal with the same subject-matter at the choice of the suitor. But no definition is given of co-ordinate jurisdiction in any of the Law Dictionaries. In Chamber's Twentith Century Dictionary (Mid-Century Version), the meaning of the word "co-ordinate" is given as "of the same order or rank". Roget in "Thesauras of English Words and Phrases" gives that word under the heading "comparative quantity." According to the author, it connotes an idea of sameness of quantity or degree.

It is, therefore, clear that the connotation of the word "co-ordination" is not the same as that of the words concurrence or simultaneity. Simultaneity or co-existence is not a necessary ingredient of co-ordination. Co-ordination is more comprehensive and takes in successive acts of the same status or level. It would not be inappropriate to call a successor Court a Court of co-ordinate jurisdiction, with its predecessor if their jurisdictions at the point of time they exercised it are similar to or co-extensive with each other. The cases cited at the Bar amply show that the said word was understood in the wider sense indicated by me. If it was not used in the sense indicated by me, the entire discussion of Rutledge C J., in AIR 1927 Rang 4 (D) would be unnecessary ,for the Rangoon High Court could have disposed of the matter on the basis that the successor High Court could not be a Court of co-ordinate jurisdiction with its predecessor the Chief Court of Lower Burma. But, on the other hand, the learned Chief Justice assumed that they would be Courts of co-ordinate jurisdiction if the other tests laid down by him were satisfied. At pp. 4-5, the learned Judge laid down the following tests:

"To decide whether the decisions of the late Chief Court are binding upon this Court we must decide, whether it is a Court of co-ordinate jurisdiction. Admittedly, it is not so in respect of territorial jurisdiction, as the Chief Court's jurisdiction was confined to Lower Burma, while the High Court's jurisdiction extends to Upper Burma as well. In origin, the Chief Court was the creation of the Indian Legislature, and it was not a Court of Record. The High Court by its Letters Patent is the creation of the King Emperor and is declared to be a Court of Record. It is in fact the King's Court which the Chief Court never was. Its jurisdiction in certain respects such as contempt and mandamus is greater than that of the Chief Court. I am, therefore, of opinion that the Chief Court cannot be held to be a

Court of co-ordinate jurisdiction with the High Court."

(13) If the tests laid down by the learned Judge were satisfied, he would have certainly held that the Chief Court of Lower Burma was a Court of co-ordinate jurisdiction with the High Court. Though Lord Greene, M. R., in (1944) 2 All ER 293 (C) was only considering the question of the binding nature of the earlier decisions of the Court of Appeal on the same Court or a Division of that Court, the learned Judge did not expressly or by necessary implication indicate that a predecessor Court could not be a Court of co-ordinate jurisdiction with its successor or vice versa. When the decision of — 'Mills v. Jennings', (1880) 13 Ch D 639 (H) was cited, Lord Greene pointed out that in that case, Cotton L. J., justified his dissent from an earlier decision of the old Court of Appeal in Chancery on the ground that it was not uncommon to reconsider decisions given by the old Court of appeal in Chancery. That passage is relied upon in support of the argument that the simultaneous exercise of jurisdiction by two Courts is a necessary condition for the application of the doctrine of co-ordinate jurisdiction. I do not think that the learned Lord meant to make any such distinction. He only pointed out the practice followed by the Court of Appeal in dealing with the earlier decisions of the old Court of Appeal in Chancery. Nor can the decision of the Division Bench of the Travancore-Cochin High Court be legitimately invoked by the learned Counsel for the petitioners in support of his contention. There, if I may say so, the learned Judge rightly assumed that the High Courts of Travancore and Cochin, which exercised only jurisdiction over small areas were not Courts of co-ordinate jurisdiction with the High Court of Travancore-Cochin. This was not on the principle that the earlier Courts were not exercising jurisdiction simultaneously with the present High Court, but because of the fact that their jurisdiction was not co-extensive with that of the present High Court.

(14) In AIR 1952 Madh B 171 (FB) (F), Chaturvedi J., who delivered the judgment, based his conclusion on the following principle:

"It is true that these smaller units had integrated to form the new Madhya Bharat State; but it is not true that the High Courts of covenanting States had also integrated to form the present Madhya Bharat High Court. In fact the High Courts in covenanting States were altogether abolished and an independent High Court with power and stability and fresh outlook had come into existence. Consequently High Courts of former covenanting States cannot be regarded of equal rank with the present Madhya Bharat High Court."

"It is not a case where a High Court had succeeded either a Chief Court or a Court of Judicial Commissioner and so the ratio decidendi in — 'AIR 1927 Rang 4 (D), — 'Gurbhaj v. Lachhman', AIR 1925 Lah 341 (I); — 'Sherkhan v. Muzaffar Khan', AIR 1920 Lah 321 (1) (J) and — 'Lachhman Singh v. Naman', AIR 1929 Lah 174 (K) cannot be made applicable to the case before us. The relation between the Court of Appeal and the Court of Exchequer chamber in England is also not in any way genuinely applicable to the relation of Madhya Bharat High Court and the former High Court of Indore State."

It will be seen from the abovesaid observations that the learned Judge did not equate a Court of co-ordinate jurisdiction with that of simultaneous jurisdiction. Indeed he applied the test whether the former High Court could be regarded as of equal rank with the present Madhya Bharat High Court. He also distinguished the decisions, which recognised successor Courts as Courts of co-ordinate jurisdiction with its predecessor as inapplicable as, in his view, the Madhya Bharat High Court was not a successor to the earlier Courts of the covenanting States.

(15) The decision of the Supreme Court in — 'AIR 1954 SC 245 (G)' is not of much help in the present case for neither His Majesty deciding a case on the advice of the Privy Council nor the Federal Court entrusted only with a limited jurisdiction could be considered to be Courts of co-ordinate jurisdiction with that of the present Supreme Court of India.

(16) The question, therefore, is whether the Madras High Court is a Court of co-ordinate jurisdiction with the Andhra High Court. As aforesaid, the Andhra High Court in effect and substance succeeded to the entire jurisdiction exercised by the Madras High Court within the territories comprised in the Andhra State. At first, the Madras High Court exercised jurisdiction over the entire composite State. After the constitution of the Andhra High Court the composite High Court exercised jurisdiction over the territories of the two States. After the inauguration of the Andhra High Court, the jurisdiction was split up and two High Courts are now exercising jurisdiction separately over the two States. The jurisdiction exercised by the Madras High Court over the composite State till 1-10-1953 and over the two States from 1-10-1953 to 5-7-1954 was co-extensive with the present jurisdiction exercised by the Andhra High Court in all respects except in regard to territorial jurisdiction. The content of the jurisdiction exercised by the Madras High Court and the present Andhra High Court is the same, though the area over which the said jurisdiction is exercised is now limited in the case of both the Courts. If the Andhra High Court is not a Court of co-ordinate jurisdiction, it could reasonably be argued that the present Madras High Court is also not a Court of co-ordinate jurisdiction with its predecessor, the composite High Court, or, at any rate with the Madras High Court before the Constitution. I would, therefore, apply the following test to ascertain whether the two High Courts are of co-ordinate jurisdiction or not, viz.,

"Whether the two Courts are of equal rank and status or of equal authority and exercised similar jurisdiction."

(17) Applying the test, I have no hesitation to hold that the Madras High Court and the Andhra High Court are Courts of co-ordinate jurisdiction.

(18) Even if they are not Courts of co-ordinate jurisdiction, in my view, the principle of Stare decisis may usefully be invoked in public interests. In Broome's Legal Maxims, p. 103, 9th edition, the said doctrine was stated as follows:

"It is then an established rule to abide by former precedents stare decisis, where the same points come again in litigation, as well to keep the scale of Justice steady and not liable to waver with every new Judge's opinion, as also because the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments; he being sworn to determine not according to his own private judgment, but according to the known laws of the land — not delegated to pronounce a new law, but to maintain the old "Jus dicere et non jus dare".

(19) In Salmond's Jurisprudence, 10th Edition, p. 183, the principle was further elaborated in the following manner:

"It does not follow that a principle once established should be reversed simply because it is not as perfect and rational as it ought to be. It is often more important that the law should be certain than that it should be ideally perfect. These two requirements are to a great extent inconsistent with each other, and we must often choose between them. Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development and the evils of the uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it; important contracts may have been made on the strength of it; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may, therefore, imperatively require that the decision, though founded in error, shall stand inviolate none the less "Communis error facit jus". "It is better", said Lord Eldon, that "the law should be certain than that every Judge shall speculate upon improvements in it".

(20) There is no reason why the aforesaid salutary principle should not be followed in the case of decisions delivered by the Madras High Court when the Andhra area was under its jurisdiction. During that period, titles were settled transactions took place, settlements made, agreements entered into, wills executed and expectations raised on the basis of the decisions of the Madras High Court. If the Andhra High Court is now free to start from scratch, it would be introducing confusion in the law of the land and disturbing titles acquired. It would also become a fruitful source of litigation. Further the Madras High Court has had long and well-established traditions and was presided over by some of the Distinguished Judges of our land. This High Court would do well in its own interests and that of the Public to continue the great and abiding traditions laid down by the Madras High Court for generations and to be inspired by its noble examples.

(21) The learned counsel for the petitioners contended that this legal position could lead to the anomaly of this High Court being bound by a judgment of a Division Bench of the Madras High Court though reversed by a Full Bench of that Court after 5-7-1954. I do not think the difficulty pointed out is insurmountable. The Division Bench of the Andhra High Court in the said contingency, if they agree with the Full Bench, would be at liberty to refer the question to a Full Bench of the Andhra High Court. I would, therefore, hold that even if the two High Courts are deemed to be not Courts of co-ordinate jurisdiction, this High Court shall follow the Madras decisions in the same manner that the Madras High Court follows its own decisions and subject to the same limitations.

(22) Even so, the learned Counsel for the petitioners contended that the principle of stare decisis is not applicable where the liberty of the subject is concerned and, in support of his contention, reliance is placed upon — 'R v. Taylor', (1950) 2 All ER 170 (L) Lord Goddard C. J., at p. 172 observed:

"In civil matters it is essential in order to preserve the rule of stare decisis that that should be so, but this Court has to deal with the liberty of the subject and if, on reconsideration, in the opinion of a full court the law has been either misapplied or misunderstood and a man has been sentenced for an offence, it will be the duty of the Court to consider whether he has been properly convicted. The practice observed in civil cases ought not to be applied in such a case".

(23) It is not necessary to express my final opinion on this question as I have held that the Andhra High Court and the Madras High Court prior to 5-7-1954 are Courts of co-ordinate jurisdiction.

(24) It then remains to consider the argument of the learned Public Prosecutor that S. 53 of the Andhra State Act (Act 30 of 1953) would have the effect of making the decisions of the Madras High Court binding on the Andhra High Court.

(25) Section 53 reads:

"The provision of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies, and territorial differences in any such law to the State of Madras or of Mysore, shall until otherwise provided by a competent Legislature or other competent authority, continue to have the same meaning".

(26) Part II of the Act provides for the formation of the Andhra State and the transfer of territory from Madras to Mysore. A combined reading of the two provisions can only mean that the change of territories provided for by Part II of the Act will not make any change in the law obtaining in that territory before the change, till otherwise provided by a competent Legislature. If there was a law obtaining in the Andhra area before the Constitution of the Andhra State to the effect that the Madras High Court decisions would be binding on the Andhra High Court, this

provision can legitimately be involved. But obviously there could not have been any such law, for the simple reason that there was no High Court of Andhra in existence prior to its constitution. On this simple ground, this contention should be negatived.

(27) I shall now consider the procedure to be followed by this High Court in dealing with decisions of the Madras High Court prior to 5-7-1954. The general principle is that this High Court shall follow the decisions of the Madras High Court prior to the said date in the same manner in which the Madras High Court would follow its own decisions. The conditions when a Court can differ from a Court of co-ordinate jurisdiction have been succinctly stated by Lord Greene M. R., in 1944-2 All ER 293 (C) in a passage already referred to.

(28) That summary was given in considering the question whether the Court of Appeal was bound to follow its previous decisions. In the course of the judgment, Lord Greene M. R., pointed out that, for the application of that principle, there could not be a distinction between a Full Court or a Division of that Court. It does not purport to deal with the rules to be followed to solve the conflict that may arise between the various Divisions of the same Court or between individual Judges thereof. As a Judge of the Madras High Court, I dealt with that question in — 'K. C. Nambiar v. State of Madras', AIR 1953 Mad 351 (M). There, after considering the English and Indian decisions on the subject, I said:

> "I am not therefore prepared on the English Authorities cited and on the arguments advanced, to depart from the well recognised practice and the salutary conventions established in this Court.
>
> If I did, I would be introducing only confusion and uncertainty and put the subordinate judiciary in a very unenviable position. I would, therefore, unreservedly follow the procedure obtaining in our Court which is supported by principle and found satisfactory in practice. A single Judge is bound by a decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Bench decision, as I am asked to do on the ground that some observation of the Supreme Court made in a different context might indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction, but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and conclusion that otherwise would prevail".

I do not see any reason why the aforesaid practice obtaining in the Madras High Court shall not be followed in this High Court. To the aforesaid statement, I would add that even a single Judge shall not differ from the judgment of another Judge of the same Court. If he does not agree, the proper course for him is to refer the case to a Bench of two Judges. If this procedure is followed from the beginning, there will not be any confusion created by conflict of decisions. The public will know their rights and the Subordinate Courts will be in a position to administer the settled law without any difficulty. I hope and trust that in the interests of the smooth and efficient judicial administration of the State, this High Court will in future follow strictly the aforesaid procedure without any deviation.

(29) As the Full Bench Decision of the Madras High Court covers the exact point raised in the present case, we follow it and dismiss the revision petition.

BHIMASANKARAM J.:

(30) I am of the same opinion, but I would like to add a few words of my own particularly because my learned brother Umamaheswaram J., has taken the opposite view (Vide (S) AIR 1955 Andhra 49 (B)). I propose to approach the consideration of the matter by propounding two questions (1) Is there a rule of law, statutory or otherwise, which makes it obligatory on this Court to follow the precedents in question? (2) Even if there is no such rule, and this Court can elect to follow them or not — what should be our choice — to be bound or to be free?

(31) I prefer to rest my decision primarily on my answer to the second question. To start with, the territory over which the Andhra High Court exercises jurisdiction is part of the territory over which the composite Madras High Court exercised jurisdiction. There is no doubt that, if the Madras High Court had continued to exercise jurisdiction, the precedents of the Madras High Court would have been enforced over the whole of this territory. Should the mere constitution of a new High Court make any difference to the Judge-made law that ought to prevail here? Now, for instance, it is well known that quite a large body of the rules of the Hindu Law as administered in India is Judge-made. Why should we rouse apprehension in the minds of the citizens of the Andhra State that those rules so long held to obtain in this part of India are subject to reconsideration and possibly to reversal, all because a new High Court has been ushered into existence? Lawyers and the litigant public alike will be perplexed and confused. The security of titles to property based on the law as previously understood will be needlessly imperilled. The very idea that what has been recognised to be well-established law will be re-examined by this Court will, I entertain no doubt, be a prolific source of undesirable and speculative litigation. Indeed, it seems to me, the whole object of the rule of stare decisis will be defeated. I think it is our clear duty to do everything to avoid that result.

There is nothing in the genesis of our Courts which gives us a free hand to deal with the earlier law as laid down by the Madras High Court. There may be cases where the constitution of a new Court involves the welding of two or more jurisdictions each previously under a different Court. In such a case, regions govern-

ed by different judge-made rules of law are brought together for the first time and a new Court administering justice over the new jurisdiction cannot properly hold itself bound by the precedents established in one or other of the earlier jurisdictions without making an invidious distinction and without upsetting one set of precedents or other. That, to my mind, is the case with the Travancore and Cochin High Court. It would not be in accordance with the reasonable expectations of the citizens of that new State that the new Court should follow either the Travancore or the Cochin Judge-made law. The decision therefore, in AIR 1953 Trav-C 283 (E) seems to me unexceptionable.

Again, where small territorial units are integrated to form a new State, and a new and independent High Court is established with jurisdiction over the whole State without reference to the jurisdiction of the previous local Courts as is the case with Madhya Bharat, according to the Chief Justice of that Court, the new Court may have no precedents of a parent Court to follow, or would have to apply the precedents of a former Court with a narrower territorial jurisdiction to a very wider and an entirely new jurisdiction. In such cases, the Court cannot help starting with a clean slate. In breaking new ground therefore, it would not be disappointing any natural expectations on the part of the people as to established rules of law. The view taken in AIR 1952 Madh-B 171 (FB) (F) may with respect be considered right.

On the other hand, where territories under the jurisdiction of one High Court are divided into two, each to be under the jurisdiction of a separate High Court, it seems to me that the principle underlying the rule of precedents requires the continuity of case-law to be maintained, because there is no reason at all why the certainty of the law should be affected. The Andhra High Court is, in one sense, new of course but its jurisdiction is a jurisdiction which was once subject to one High Court and until 5-7-1954 governed by the case law as laid down by that High Court. A Court should be reluctant to favour innovations unless they are indispensable. Precedents are followed in the words of Blackstone.

"as well to keep the scales of justice steady and not liable to waver with a new Judge's opinion as also because.....What before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments".

(32) Those reasons point to the need for conformity and operate with equal force now after the creation of the Andhra High Court as they did before. "It is better that the law should be certain than that Judges should be free to speculate upon improvements in it" to use the words of Lord Eldon. Reference has been made in the course of argument to the Supreme Court. It seems to me that the position of the Supreme Court in relation to the earlier Federal Court and the Judicial Committee of the Privy Council is quite different from the position of the Andhra High Court in relation to the composite Madras High Court. The Supreme Court is the creation of the Constitution of India, brought into existence by the solemn resolution of the people to constitute India into a Sovereign Democratic Republic. It does not inherit its power, authority or jurisdiction from any other Court. If it respects the authority of the decisions of Courts prior to its own establishment, it does so of its own volition because they embody rules of law of long standing and not because it is bound by any anterior authority. Indeed, one might venture to state that it would have savoured of constitutional impropriety for the highest court of an independent nation to bow to the decision of a foreign Tribunal.

Even the Federal Court of India was not in relation to the Supreme Court a Court of coordinate or similar jurisdiction. If the Supreme Court felt itself bound by the decisions of the Federal Court, it would be following precedents of a Court with a narrower and very limited jurisdiction and constituted under a different authority; indeed, a foreign authority — the Parliament of England. That analogy has no application to the relationship between the composite High Court and this Court. It seems to me, therefore, that there are absolutely no reasons whatsoever why the wholesome rule "to stand by matters decided and not to stir up points set at rest" should not apply to our High Court so far as the decisions of the Madras High Court before 5-7-1954 are concerned. No section of the litigant public can complain if we are following established rule, since there is no part of our territorial jurisdiction which was not under the old Madras High Court.

(33) As regards the first question which I raised, I am content to adopt the reasoning of My Lord the Chief Justice. I respectfully agree with him that this Court is a Court of co-ordinate jurisdiction in relation to the old Madras High Court. There is one minor point to which reference must however be made. The learned Counsel for the petitioner pointed out that there may be cases where decisions rendered by Madras High Court before 5-7-1954 may be overruled by the Madras High Court itself, but which in the above view may none the less be binding on the Andhra High Court. I see no difficulty, however. In such cases, where it is brought to the notice of this Court that the earlier decisions have been departed from in Madras this Court will re-consider them in the light of the subsequent rulings. Mr. Chinnappa Reddy has also referred to the decision in (1950) 2 All ER 170 (L). He would have it that the law of precedents is not to be applied in criminal matters with the same strictness as in civil matters and relies on the following passage in that judgment:

"In civil matters, it is essential to preserve the rule of stare decisis that that should be so, but this Court has to deal with the liberty of the subject and if, on reconsideration, in the opinion of a full court, the law has been either misapplied or misunderstood and a man has been sentenced for an offence, it will be the duty of the Court to consider whether he has been properly convicted. The practice obsery-

ed in civil cases ought not to be applied in such a case".

(34) As I understand, this passage, it does not mean that Courts are all equally governed by precedents in criminal cases as in civil matters. All that it says is that a Court will not allow a wrong decision in a criminal case to stand on the ground of stare decisis if, on further consideration by a fuller court, it appears that the law has been misapplied or misunderstood. In civil matters, on the other hand, even a wrong decision is not set aside except "for the best and most urgent reasons". The liberty of the subject being one of the strongest of reasons always, a wrong decision relating to it should not be allowed to stand.

(35) For these reasons, I agree that the Full Bench decision of the Madras High Court in AIR 1953 Mad 801 (A) should be followed and Criminal Revision 603/54 dismissed.

(36) SATYANARAYANA RAJU J.: I agree with My Lord, the Chief Justice.

K.S.B. Revision dismissed.

(S) **A.I.R. 1955 ANDHRA 96 (Vol. 42, C.N. 35)**

CHANDRA REDDY J. (10-11-1954)

In re Venkatasubba Reddy and others, Petitioners.

Criminal Revision Case No. 733 of 1954 and Criminal Revn. Petn. No. 685 of 1954, from Order of ex officio First Class Magistrate, Madanapalle, D/- 24-8-1954.

Criminal P. C. (1898), S. 117 (3)—Interim security bonds — When to be executed — Order of security before starting of enquiry — Validity — 1934 Mad WN 1353, Dissented from.

Under Section 117 (3), Criminal P. C., it is only after the parties appear in Court and the Magistrate proceeds to inquire into the matter if he finds any necessity to do so, he can direct execution of interim bonds. It is not permissible for the Magistrate to call upon the persons concerned to execute interim bonds even before the inquiry starts, and as a part of the order under S. 112, Criminal P. C. Again it is also necessary under S. 117 (3), Criminal P. C., that the Magistrate should give reasons in support of the order directing them to execute interim bonds. Cri. Rev. Case No. 470 of 1953 (Mad) Relied on; 1934 Mad WN 1353, Dissented from. (Paras 3, 4)

Anno: Criminal P. C., S. 117 N. 6.

CASES REFERRED: Paras

(A) ('53) Criminal Revn. Case No. 470 of 1953 (Mad) 4

(B) ('34) 1934 Mad WN 1353 4

A. Bhujanga Rao, for Petitioners; S. Malakonda Reddi, for the Public Prosecutor, for the State.

ORDER: The petitioners in this case seek to have the order passed by the Sub-Divisional Magistrate (Executive), Madanapalle, under S. 117(3), Criminal P. C., revised.

(2) On information laid before him by the Police, that the petitioners were likely to commit a breach of the peace, and disturb the public tranquillity, and also do wrongful acts which might occasion a breach of the peace, or public tranquillity, the Magistrate issued an order under S. 112, Criminal P. C. As a part of it, he also directed the petitioners to execute interim bonds as he considered that immediate measures were necessary for the prevention of the breach of the peace or public tranquillity. It is this order that is under revision.

(3) It is urged by Mr. Bhujanga Rao in support of this Revision Case that a Magistrate issuing an order under S. 112, Criminal P. C., cannot pass an order under S. 117(3), Criminal P. C., before the enquiry starts, under sub-s. (1) of S. 117, Criminal P. C. There is substance in this contention. Under S. 112, Criminal P. C., the Magistrate has to issue notice to the persons concerned setting forth the substance of information received, the amount of the bond to be executed, the term for which it is to be enforced and the number, character and class of sureties required. The procedure to be followed in holding the enquiry is laid down under S. 117, Criminal P. C. Section 117 (3), Criminal P. C., contemplates a direction for executing interim bonds pending the completion of the inquiry if the Magistrate considers it necessary to do so in the interests of peace and order. It looks to me that under this section it is only after the parties appear in court and the Magistrate proceeds to inquire into the matter he finds the necessity to do so, he could take action in that behalf, I do not think it is permissible for the Magistrate to call upon the persons concerned to execute interim bonds even before the inquiry starts, and as a part of the order under S. 112, Criminal P. C. Again it is also necessary under S. 117(3), Criminal P. C., that the Magistrate should give reasons in support of the order directing them to execute interim bonds. In this case, the Magistrate has not adduced any reasons for his action. So another requirement of the section has also not been complied with.

(4) This view of mine gains support from a judgment of Somasundaram J. in Criminal Revision Case No. 470 of 1953 (Mad) (A). In—'Ranganadha Mudaliar v. Emperor', 1934 Mad WN 1353 (B), Burn J. observed that he was not prepared to say that a Magistrate cannot in any case pass an order under S. 117(3), Criminal P. C., before the inquiry begins, though in that particular case he thought that the order sought to be revised was unsupportable. With deference to the learned Judge, I feel that S. 117(3), Criminal P. C., cannot be invoked before the parties appeared before the Magistrate as required under S. 112, Criminal P. C., and the enquiry starts.

(5) It follows that the order calling upon the petitioners to execute interim bonds is unsustainable, and it is set aside. But this does not preclude the Magistrate from requiring the parties to execute bonds, if the necessity for such a course is revealed after the inquiry begins.

(6) Order set aside.

D.R.R. Petition allowed.

(S) A.I.R. 1955 ANDHRA 97 (Vol. 42, C.N. 36)

SUBBA RAO C. J. (21-10-1954)

Chinta Lakshminarasayya and others, Appellants v. Laghuvarapu Papayya, Respondent.

Second Appeal No. 1888 of 1950, against decree of Sub. J., Narasaraopet, in A. S. No. 92 of 1949.

Hindu Law — Alienation — Mother succeeding to son's estate — Mother's power to alienate estate to discharge husband's and son's debts — AIR 1921 All 163, Dissented from.

An heir succeeding to the estate of another takes both the assets and legal liabilities of the latter. He cannot take the assets and disown liabilities. The liability of the son is a legal liability binding on the joint family estate. During the lifetime of the father, the father can alienate the son's interest also in the joint family property to discharge his debts. A creditor of the father may realise the debt from the entire estate. Even after the father's death, the entire joint family property in the hands of the son would be liable for the father's debts, provided it is not incurred for illegal and immoral purposes. If so, at the time of the son's death, his estate consists of not only his assets, but also his liabilities whatever may be the source or origin of that liability. An heir succeeding to the estate — it is immaterial whether the heir takes a limited estate or an absolute estate — takes both the assets and liabilities. It cannot therefore be contended that a mother succeeding to the estate of her son, has no power to alienate any part of her son's estate, to discharge the debts of her husband which her son was liable to pay only on the principle of pious obligation. AIR 1954 Mad 916 (FB) and AIR 1936 Lah 538 Rel. on. AIR 1953 Mad 706, Distinguished; AIR 1921 All 163, Dissented from. (Para 6)

CASES REFERRED: Paras

(A) (V29) AIR 1942 Mad 212: 1941 2 Mad LJ 862 6

(B) (V41) AIR 1954 Mad 961: 1954 2 Mad LJ 416 (FB) 6

(C) (V23) AIR 1936 Lah 558: 17 Lah 588 6, 8

(D) (V8) AIR 1921 All 163: 43 All 604 8

(E) (V40) AIR 1953 Mad 706: 1953 1 Mad LJ 304 9

P. V. Chelapathi Rao, for Appellants; M. Ramkrishna and M. Hanumantha Rao, for Respondents.

JUDGMENT: This is a plaintiffs' second appeal against the decree and judgment of the Court of the Subordinate Judge of Narasaraopet, modifying the decree of the Court of the District Munsif of Gurazala in a suit filed by the appellants for a declaration that the gift and the sale deeds executed by the second defendant in favour of the first defendant in respect of the plaint schedule property are not binding on them and for recovery of possession.

(2) The facts may be briefly stated. The plaintiffs are the brothers of one Venkatasubbaiah and were members of a joint Hindu family. There was a partition between them in the year 1932 and the plaint schedule property fell to the share of Venkatasubbaiah. During his lifetime, he adopted one Subbarao and died in 30-4-1945 intestate, leaving behind him his widow and his adopted son. Subbarao died in 1946 and his mother Seshamma, the second defendant, succeeded to his estate. On 1-5-1947 under Ex. B. 20 she made a gift of item 6 of the plaint schedule to the first defendant. On 26-8-1948 she executed Ex. B. 28 a sale, under which she conveyed items 1 to 5 to the first defendant. The plaintiffs, who are the reversioners, originally filed the suit for a declaration that the said transactions were not binding on them, but as the second defendant died pendente lite, the plaint was amended asking for possession.

(3) The first defendant contended that Venkatasubbaiah himself sold item 6 to the second defendant and that Subbarao had no title and did not die possessed of the same. In regard to the sale deed he pleaded that it was executed to discharge a mortgage executed by the second defendant, which was fully supported by consideration and binding on the estate.

(4) The learned District Munsif held that the mortgage was not supported by consideration nor was executed for legal necessity. With regard to item 6, he found that the sale deed executed by Venkatasubbaiah in favour of the second defendant was a nominal document and that the gift by her to the first defendant did not, therefore, convey any title to him. On appeal, the learned Subordinate Judge held that the sale deed executed by Venkatasubbaiah conveying item 6 to the second defendant was a real transaction supported by consideration. Though he found that the sale deed Ex. B. 26 was not binding on the reversioners, he held that the mortgage Ex. B. 5 was supported by consideration and was binding on the estate of Subbarao. In that view, he dismissed the suit in regard to item 6 but gave a decree to the plaintiffs on their paying to the first defendant a sum of Rs. 492/-, the amount due under the mortgage deed.

(5) The learned Counsel for appellants contended that the mortgage deed Ex. B. 5 was not supported by consideration and was also not executed for purposes binding on Subbarao's estate. The learned District Judge held on the evidence that the mortgage deed was executed by the second defendant in discharge of three debts incurred by Venkatasubbaiah during his lifetime and two binding debts incurred by the second defendant during the minority of Subbarao as guardian. These are the findings of fact and there are no permissible grounds for interference with them. I, therefore, accept the finding of the Court below that the mortgage was supported by consideration and that it was executed to discharge binding debts of Venkatasubbaiah and Subbarao.

(6) Even so, it is contended that a mother succeeding to the estate of her son has no power to alienate any part of her son's estate, to discharge the debts of her husband which her son was liable to pay only on the principle of pious obligation. I shall now proceed to consider the soundness of this argument. It cannot be and is not disputed that an heir succeeding to the estate of another takes both the assets and the legal liabilities of the latter. He cannot take the assets and disown liabilities. The original text of Narada as transalated in sacred books of the

East (edited by Max Muller), Vol. 33 Page 46 recognises this principle. The text reads:

> "A sonless widow, and one who has been enjoined by her dying husband (to pay his debt) must pay it. Or it must be paid by him who inherits the estate. (For) the liability for the debts goes together with the right of succession".

This passage clearly lays down the principle that a person inheriting the estate of another takes it subject to the debts of the latter. Nor does the fact that the heir is a limited owner like a widow or a mother make any difference in the matter of her liability to discharge the debt out of the estate inherited by her. In the case of a widow succeeding to her husband's interest under the Hindu Women's Rights to Property Act, Venkataramana Rao J., in — 'Saradambal v. Subbarama Iyer', AIR 1942 Mad 212 (A), held that a creditor is entitled to the same remedy against the interest of the widow accrued under the Act which he had against her husband in his lifetime. At page 213, the learned Judge observed:

> "Even in the case of a female who takes a Hindu woman's estate, the inheritance vests in her for the time being as fully as it vested in any male succeeding to the property, but only with a restricted right of alienation..... the property is taken by her subject to all the rights and liabilities which the husband would have had because it is the same interest that is conferred upon her."

If a widow takes the interest of her husband subject to his liabilities, I cannot discover any reason why a different Rule should apply in the case of a mother succeeding to her son. The mother, who takes a similar estate like a widow, also necessarily takes the property of her son subject to his liabilities. It is, therefore, contended that the son's liability to discharge his father's debt is not a legal liability, but only one arising out of pious obligation, which obligation is only personal to him and ceases with his death. To appreciate this argument, it is necessary to consider the nature and the extent of the theory of pious obligation of a son to pay his father's debts. In — 'Abdul Hameed Sait v. Provident Investment Co. Ltd.', AIR 1954 Mad 961 (B), a Full Bench of the Madras High Court, of which I was a member, incidentally considered the nature of the son's liability to discharge his father's debts. In considering that question, I made the following observations, which may usefully be extracted in this context. I said at page 974:

> "What was a pious duty on the part of the son to pay his father's debts had gradually crystallised into a legal liability of the joint estate of the father and the sons".

After considering the case law on the subject, I proceeded to state at page 975:

> "From the aforesaid discussion of the cases, the settled law on the subject may be summarised. The theory of pious obligation, which had its roots in the texts of Brihaspathi and Narada and which was originally a religious and moral duty of the son to save the soul of his father from perdition, has developed step by step till it has imposed a liability on the entire family property to meet the said obligation. Though in its origin, the son was bound to discharge the debts not only from his joint family property but also from his self-acquisitions, the later development of the law confined it only to the family assets in his hands".

It follows from the aforesaid observations that the liability of the son is a legal liability binding on the joint family estate. During the lifetime of the father, the father can alienate the son's interest also in the joint family property to discharge his debts. A creditor of the father may realise the debt from the entire estate. Even after the father's death, the entire joint family property in the hands of the son would be liable for the father's debts, provided it is not incurred for illegal and immoral purposes. If so, at the time of the son's death, his estate consists of not only his assets, but also his liabilities whatever may be the source or origin of that liability. A heir succeeding to the estate — it is immaterial whether the heir takes a limited estate or an absolute estate — takes both the assets and liabilities.

Tek Chand and Dilip Singh JJ. in — 'Mt. Mallan v. Parmatma Das', AIR 1936 Lah 558 (C), came to the same conclusion. There, a Hindu governed by the Mithakshara incurring a debt during his lifetime, died leaving a son and a widow, and the son also subsequently died leaving a widow. The learned Judges held that the property left by the son and in the hands of the widow was liable to satisfy the debt incurred by the original owner of the property. At page 559 the learned Judges observed:

> "The word 'encumbered' therefore does not in the ruling mean an 'incumbrance', in the sense of a hypotheca or charge on the property at all. It is merely used in the ordinary sense that the estate of a person who owes a debt is liable to pay it upon the decease of that person and anybody inheriting that estate takes it subject to the debt. There is no distinction at all between a personal obligation to pay a debt, which is the duty of the original debtor and the pious obligation conferred by the Hindu Law against the son of the original debtor. The piety of the obligation does not make it cease to be a personal obligation to pay a debt .....

Upon the death of the husband, if there had been no son, it is clear that the property would have been subject to the debt created by the husband and Mt. Malan's right of maintenance would not have priority over the debt. In the hands of Nand Lal, there was personal obligation on Nand Lal to pay the debt of his father Nathan Mal, and similarly when he died and Mt. Prakasho inherited his estate she took it subject to the obligation to pay the debts due from Nand Lal".

(7) I respectfully accept the observations as laying down the correct principle.

(8) Reliance is placed upon the decisions of a Division Bench of the Allahabad High Court in — 'Sheo Ram v. Sheo Ratan', AIR 1921 All 163 (D), in support of the contrary conclusion. The learned Judges there held, relying upon the text of Narada, that a mother is not bound to pay the debts which the son was liable to pay by reason of the principle of pious obligation. At page 163 the learned Judges observed:

"There is no authority which lays down that a mother is bound to pay her son's debt, and can validly alienate the estate which has come to her by inheritance from her son at his death. .....It was only the pious duty of the son to pay the debts of his father. The property was in no way encumbered. So that, even relying on this text of Narda, the appellant must fail".

The learned Judges in effect laid down that, unless the debt was charged on the estate, the mother would not be liable to pay the debt of the son. Tek Chand and Dilip Singh JJ. in — 'Mt. Mallan v. Parmatma Das', (C), which I have already referred to pointed out that the translation adopted by the Allahabad High Court of Narada's text was wrong and that the word 'encumbered' in the translation should not be understood in the sense of a charge, but only in the ordinary sense that the estate of a person who owes a debt is liable to pay it upon the decease of that person. Nor can I agree with the learned Judges that the liability of the son was not a legal liability. As I have already pointed out, though originally it was merely a pious obligation, it has now become crystallised into a legal liability of the son, though confined to joint family properties.

(9) The decision of Chandra Reddy J. in — 'Anganna Thevan v. Ayyaswamy Thevan', AIR 1953 Mad 706 (E), deals with a different point altogether. There, the learned Judge held that a mother, succeeding to the estate of her deceased son, is not competent to alienate property in order to discharge the time-barred debts of her son. In the instant case, it is not suggested that the debts were time-barred when the mortgage deed was executed. That question, therefore, does not arise in this appeal and it is not necessary to express my opinion thereon. For the aforesaid reason, I hold that the second defendant was within her rights when she executed the mortgage deed in discharge of the liabilities of her son, whose estate devolved on her.

(10) In the result, the appeal fails and is dismissed with costs. No leave.

V.R.B. Appeal dismissed.

(S) A.I.R. 1955 ANDHRA 99 (Vol. 42, C.N. 37)

SUBBA RAO C. J. AND SATYANARAYANA RAJU J. (25-11-1954)

Padmaraju Subba Raju and others, Petitioners v. Padmaraju Koneti Raju and another, Respondents.

Criminal Revn. Case No. 522, Cri. Revn. Petn. No. 487 of 1954, from order of Addl. 1st Class Magistrate (Judicial), Thirupati at Chandragiri, D/- 24-5-1954.

(a) Criminal P. C. (1898), S. 145 — Scope and object — Forcible dispossession — Question of right to possession — Period of two months, computation of —Date of preliminary order, if the date of application.

The object of S. 145 is to prevent breaches of peace pending a settlement of the rights of the parties in a civil Court. The necessary condition under the section, which confers jurisdiction on a Magistrate to make an enquiry, is that he should be satisfied from a police report, or other information that a dispute likely to cause a breach of peace exists concerning land or water and his jurisdiction to make an enquiry is confined only to the fact of actual possession of the subject of dispute. He has no jurisdiction to adjudicate upon the rights of the parties to possession, for such questions are within the exclusive jurisdiction of the civil Courts.

(Para 5)

To meet the situation of a party, who was in possession immediately before the passing of the preliminary order being dispossessed forcibly and wrongfully before that date, the Magistrate is entitled to treat such a person dispossessed as if he had been in possession on the date of the preliminary order. For the purpose of the proviso to sub-s. (4), a specific period of two months next before the date of such order is fixed for invoking the fiction embodied in the proviso. Whatever may be the intention of the legislature, the statute specifically and in express terms fixes two months under the proviso and there is no provision either expressly or by necessary implication empowering a Magistrate to invoke the fiction to cover a period extending beyond the said two months.

(Para 5)

It is not permissible to hold that the preliminary order must be deemed to have been made on the date of the filing of the petition. The fact that in some cases a strict construction of the clear provisions of a statute may cause hardship to one party or other cannot be a ground for putting a construction on a section doing violence to the language used. After all, S. 145, Criminal P. C. prescribes a summary procedure for deciding a limited question of actual possession to prevent breach of peace. The rights of the parties are not affected and they will ultimately be decided by a civil Court. To effectuate the purpose, a reasonable time was fixed for dating back the order and if any party falls unfortunately on the other side of the line, he has his remedies in a civil Court. Consequently, the first proviso to sub-s. (4) of S. 145, Criminal P. C. must be confined only to forcible and wrongful dispossession within two months next before the date of the preliminary order. Where a party is dispossessed beyond two months from the date of the preliminary order, it is not entitled to have a declaration under S. 145(6), Criminal P. C. AIR 1932 PC 165, Relied on. AIR 1951 Mad 500, Dissented from.

(Paras 6, 7, 12)

Anno: Cr. P. C., S. 145 N. 3, 46, 47.

(b) Criminal P. C. (1898), S. 145(4), Proviso 1 — Proviso applies only where dispossession is forcible.

Where a party was not forcibly and wrongfully dispossessed but the mediators, who intervened peacefully took possession to avoid conflict between the parties the first proviso to sub-s. 4 of S. 145 cannot have any applica-

tion. The proviso can be invoked only in a case where any party to a dispute has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order. (Para 13)

Anno: Cr. P. C., S. 145 N. 47.

(c) **Criminal P. C. (1898), S. 145(4) — Actual possession — Constructive possession.**

Under S. 145(1), the claims, in respect whereof a Magistrate is empowered to decide is the fact of actual possession of the subject of dispute. Sub-section (4) of S. 145, which defines the scope of the enquiry empowers the Magistrate to decide the said question without reference to the merits of the claims of the parties to a right to possess the subject of dispute. It is, therefore, clear that the question of a right to possession is foreign to the scope of the enquiry. The section itself indicates that actual possession is different from a right to possession. Whether it is immediate possession or mediate possession, the owner does not cease to be in possession of the property. But by reason of the use of the word "actual", it is necessary that the owner has not only a right to possession but he must, as a matter of fact, be in possession, whether directly or constructively.

(Paras 14, 15)

Whether it is mediate possession or immediate possession, if a person claiming to be in possession is in actual possession he is entitled to a declaration under S. 145.

(Para 16)

Where a third person is in possession and claims under one of the parties, it is that party who is in actual possession and such party is entitled to a declaration. The remedy of the other party which claims that the third party was in possession under him, lies in civil suit. AIR 1938 Mad 654, Commented: Case law ref. (Para 23)

Anno: Cr. P. C., S. 145 N. 25.

CASES REFERRED: Paras

(A) (V19) AIR 1932 PC 165: 60 Cal 1 (PC) 6
(B) (V38) AIR 1951 Mad 500: 1951 Mad WN 53: 1952 Cri LJ 126 8
(C) ('95) 22 Cal 297 8
(D) (V11) AIR 1925 Mad 324: 47 Mad 543 9
(E) (V21) AIR 1934 Lah 875: 155 Ind Cas 603 9
(F) (V2) AIR 1915 Mad 865: 38 Mad 291 9
(G) (V38) AIR 1951 Assam 161: 52 Cri LJ 1449 10
(H) (V39) AIR 1952 Orissa 26: 1952 Cri LJ 148 11
(I) (V22) AIR 1935 All 35: 57 All 488: 36 Cri LJ 102 11A
(J) (V18) AIR 1931 Nag 38: 32 Cri LJ 476 11A
(K) (V27) AIR 1940 Sind 33: 41 Cri LJ 486 11A
(L) (V16) AIR 1929 Oudh 526: 5 Luck 440: 31 Cri LJ 678 11A
(M) (V32) AIR 1945 Mad 216: 46 Cri LJ 767 11A
(N) ('48) ILR (1948) 1 Cal 150 17
(O) ('72) 18 WR Cr 11: 9 Beng LR 229 18
(P) (V36) AIR 1949 Pat 146: 27 Pat 1027: 50 Cri LJ 299 (SB) 20
(Q) (V25) AIR 1938 Mad 654: 1938-1 Mad LJ 453: 39 Cri LJ 922 21
(R) (V32) AIR 1945 Mad 255: 1945-1 Mad LJ 303: 46 Cri LJ 730 22

P. Ramachandra Reddy and M. Ramalinga Reddi, for Petitioners; R. Venkatasubba Rao and K. Raghava Rao, for Respondent No. 1; Public Prosecutor, for the State.

SUBBA RAO C. J.:

This is a Criminal Revision Petition against the order of the Additional First Class Magistrate, Thirupati, under S. 145(6), Criminal P. C., declaring that the "A" party respondent is entitled to possession of the two houses, pandal and the back yard until evicted therefrom in due course of law.

The "A" party respondent filed a petition on 7-2-1953 before the Sub-Divisional Magistrate (Executive) Chandragiri, stating that the "B" party respondents were interfering with his possession of the two houses belonging to him, which for convenience will be described as rectangular and round houses.

(2) The case of the "A" party respondent was that he was in possession of the rectangular house in his own right and that Subbamma, his elder sister, was with his permission residing in the round house and that the "B" party respondents were trying to take forcible possession from him of the said two houses. The "B" party respondents' contention was that Subbamma was the owner of the said two houses, that she sold the same to P. W. 1 on 4-11-1952 and put him in possession of the said two houses and that he was living in the round houses with his permission.

It is common case that on 7-2-1953 the rectangular house was put in the possession of the mediators peacefully and voluntarily to prevent disputes between the parties. On 7-5-1953, the Additional First Class Magistrate, Thirupati, to whom the case was transferred made a preliminary order requiring the "A" party and "B" party respondents to put in written statements of their respective claims in regard to the fact of actual possession of the subject of dispute. Both parties accordingly placed their entire evidence before the Magistrate.

On 24-5-1954, he made an order wherein he held that on 7-2-1953 the mediators took possession of the rectangular house, but prior to that the "A" party respondent was in possession and that in regard to the round house, Subbamma was in permissive possession, under A. W. 1. On those findings, he came to the conclusion that A. W. 1 was in possession of the two houses on the date of the petition and the preliminary order.

On the basis of that conclusion, he declared under S. 145(6), Criminal P. C., that the "A" party respondent was entitled to the possession of the two houses, the pandal and the backyard until evicted therefrom in due course of law. The "B" party respondents preferred the above revision.

(3) Mr. Ramachandra Reddy, learned counsel appearing for the "B" party respondents, contended that, on the findings given by the Magis-

trate, the petition filed by the "A" party respondent should have been dismissed.

In regard to the rectangular house, his contention was two-fold: (i) having held that on 7-2-1953, the mediators peacefully took possession of the said house to prevent further disputes between the parties, the Magistrate should have held that the first proviso to S. 145(4), Criminal P. C., has no application, for that could be invoked only in a case of forcible and wrongful dispossession and (ii) as the dispossession of the "A" Party respondent was admittedly more than two months next before the date of the preliminary order, the proviso would not apply. This was countered by Mr. Venkatasubba Rao appearing for the "A" party respondent by stating that the possession of the mediators was only for and on behalf of the "A" party, and, therefore, the "A" party respondent continued to be in possession upto and subsequent to the date of the preliminary order.

In regard to the round house, the argument of the learned counsel for the "B" party respondents was that the Magistrate having found that Subbamma was in actual possession purporting to be under the "B" party respondents, he was wrong in upholding the possession of the "A" party on the basis of title which question is irrelevant under S. 145, Criminal P. C. On the other hand, the learned counsel for the "A" party respondent would argue that a Magistrate under S. 145(1) has jurisdiction to decide the question of permissive possession and declare the possession of the owner.

(4) The first question turns upon the provisions of S. 145, Criminal P. C. The relevant provisions read:

"Section 145(1): Whenever a District Magistrate, Sub-Divisional Magistrate or a Magistrate of the First Class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

* * *

(4) The Magistrate shall then, without reference to the merits of the claims of any such parties to a right to possess the subject of the dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of each evidence, take such further evidence, if any, as he thinks necessary, and if possible, decide whether any and which of the parties was at the date of the order before mentioned, in such possession of the said subject.

Provided, that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

* * *

(6) If the Magistrate decides that one of the parties was or should under the first proviso to sub-s. (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbances of such possession until such eviction, and when he proceeds under the first proviso to sub-s. (4) he may restore to possession the party forcibly and wrongfully dispossessed."

(5) It is manifest from the aforesaid provisions that their object is to prevent breaches of peace pending a settlement of the rights of the parties in a civil Court. The necessary condition under the section, which confers jurisdiction on a Magistrate to make an enquiry, is that he should be satisfied from a Police report, or other information that a dispute likely to cause a breach of peace exists concerning land or water and his jurisdiction to make an enquiry is confined only to the fact of actual possession of the subject of dispute. He has no jurisdiction to adjudicate upon the rights of the parties to possession, for such questions are within the exclusive jurisdiction of the civil Courts.

To meet the situation of a party, who was in possession immediately before the passing of the preliminary order being dispossessed forcibly and wrongfully before that date, a proviso is added empowering a Magistrate to treat such a person dispossessed as if he had been in possession on the date of the preliminary order. For the purpose of this proviso, a specific period of two months next before the date of such order is fixed for invoking the fiction embodied in the proviso. Whatever may be the intention of the Legislature, the Statute specifically and in express terms fixes two months under the proviso and there is no provision either expressly or by necessary implication empowering a Magistrate to invoke the fiction to cover a period extending beyond the said two months.

(6) The first point, that arises for consideration, is whether there is any basis for the argument of the learned counsel that the preliminary order should be deemed to have been made on the date of the petition. Untrammelled by judicial decisions — for there is a clear cleavage of opinion on the question — we shall proceed to consider the scope of the section. The section does not postulate that an enquiry should be started only on a petition filed by the affected party. The jurisdiction to make an enquiry under this section depends upon the preliminary order. A preliminary order may be made by a Magistrate on a police report, or other information that a dispute likely to cause a breach of peace exists concerning land or water. Though it often happens that a Magistrate is moved by an application by the affected party, a preliminary enquiry also need not be at the instance of a particular party. The Magistrate may initiate it 'suo motu'. Even if he initiates it at the instance

of an affected party, he may drop it if he is not satisfied that the necessary conditions exist.

As the filing of a petition by an affected party is not a necessary condition for invoking the jurisdiction of the Court, to make a preliminary order, it is not permissible to hold that the preliminary order must be deemed to have been made on the date of the filing of the petition. If that was the intention of the Legislature, they would have added a proviso, as they did in other Statutes, that a preliminary order, though made at a later stage, must be deemed to have been made on the date on which the petition was filed. They could not have conceivably made such a proviso, for there would be different dates for the initiation of proceedings depending upon whether the proceedings were initiated at the instance of a third party, or started 'suo motu' by the Magistrate. Further, the contention, if accepted, would be to add another proviso to the section by the Court to the effect that the preliminary order must be deemed to have been made on the date of the filing of the petition.

In this connection the pregnant observation of the Judicial Committee in — 'Nagendranatha De v. Sures Chandra De', AIR 1932 PC 165 (A) may usefully be extracted:

"The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships think, the only safe guide".

(7) We respectfully adopt these observations. The fact that in some cases a strict construction of the clear provisions of a statute may cause hardship to one party or other cannot be a ground for putting a construction on a section doing violence to the language used. After all, S. 145, Criminal P. C. prescribes a summary procedure for deciding a limited question of actual possession to prevent breach of peace. The rights of the parties are not affected and they will ultimately be decided by a civil Court. To effectuate the purpose, a reasonable time was fixed for dating back the order and if any party falls unfortunately on the other side of the line, he has his remedies in a civil Court. We are, therefore, clearly of the opinion that the first proviso to sub-s. (4) of S. 145, Criminal P. C. must be confined only to forcible and wrongful dispossession within two months next before the date of the preliminary order.

(8) There is, as we have already indicated, a deep cleavage of judicial opinion on this question, some Courts accepting the plain meaning of the clear words used in the section and others invoking equitable doctrines in construing the words which the Legislature according to them should have done. It is not necessary to cover the entire field of judicial conflict. It would be enough to notice a few judgments representing the different views.

Govinda Menon and Basheer Ahmed Sayeed JJ., in — 'Narayana v. Kesappa', AIR 1951 Mad 500 (B) held that the two months periods contemplated in the proviso to S. 145(4) should be deemed to be from the date when the petition was presented. They mainly based their conclusion on the history of the provision and also on the legal maxim 'actus curiae neminem gravabit', which means that an act of the Court shall prejudice no man. With great respect to the learned Judges, we do not see how the history and the progress of the legislative provision is indicative of any such intention on the part of the Legislature. In the corresponding sections of the old Codes the aforesaid proviso is not to be found. See Ss. 318 of the Code of 1861, 530 of the Code of 1872 and 145 of the Code of 1882. This proviso was added in 1898. In the corresponding sections of the old Codes, there was no provision fixing the date in relation to which the Magistrate had to make the enquiry.

The Calcutta High Court in — 'Katras Jherriah Coal Co. v. Subkrista Daw and Co.', 22 Cal 297 (C) in construing S. 145, Criminal P. C. before the addition of the proviso, held that the time at which possession must be found in one party or the other must be governed by the facts of each particular case. At page 303 the learned Judges observed—

"But to hold that under such circumstances the Magistrate is precluded from enquiring into anything before the date when he recorded his own proceedings which he now tells us he ought to have done thirteen days before is, we think, to allow a person who has been acting in an unwarrantable manner to misuse the process of law to enable him to carry out his high-handed and improper scheme and this we cannot believe to have been the intention of the Legislature."

(9) It may be that, to avoid the anomaly pointed out by the Calcutta High Court, a proviso was added introducing a fiction. But, in adding the proviso, the Legislature in clear and express terms limited the operation of the fiction for only a period of two months prior to the date of the preliminary order. The fact, that the Legislature intended and even expected that Magistrates should make preliminary orders as quickly as possible is not of much relevance in considering the express provisions of the proviso. We, therefore, hold that the history of the legislation not only does not support the reasoning of the learned Judges, but also indicates that the framers of the proviso did not intend to extend the scope of the operation of the fiction beyond two months.

Nor can we agree with the learned Judges that the principle embodied in the legal maxim 'actus curiae neminem gravabit' can usefully and legitimately be invoked in the present case. That maxim recognises the equitable principle that an act of the Court shall not prejudice any man. It is founded upon justice and good sense and affords a safe and certain guide for the administration of law. The foundation for the application of the principle is that the Court is under a duty to do a particular act and it has failed to do so which caused prejudice to the other side. To apply that provision to the instant case, it must be established that the Court should make the preliminary order on the date of the petition filed under S. 145, Criminal P. C.

The provisions of S. 145, as we have indicated do not show that the proceedings under the section should be initiated only by a petition filed by the affected party. It may also be initiated 'suo motu' by the Magistrate. Nor is the date of the filing of the petition the basis for making a preliminary order under that section. It may be that, on the date when the application is filed, there is no breach of peace, but on enquiry and on the police report, a Magistrate may find a threat to the breach of peace on a subsequent date and under this section, if he is satisfied, he is bound to make a preliminary order notwithstanding the fact that at an earlier stage when he was moved, there was no likelihood of a breach of peace. The jurisdiction to make a final order does not depend on the manner in which the proceedings are initiated, but on the satisfaction of the Magistrate that a breach of peace was imminent on a particular date when he makes the preliminary order.

Further to apply the equitable principle, it would be necessary to ascertain the acts of a Court which prejudiced a party to apportion the blame between the Court and a party and to fix the period of delay attributable to the Court's act. In such an enquiry, it cannot be premised that in every case, the delay caused by the Court, if added would synchronise with the date of the application. It would be a futile enquiry. The said principle was invoked and applied to a case where a party has done all he should do under a statute and, by a mistake of Court, he was precluded from completing the act, in which case it was held that the party must be deemed to have done the act on the date on which he had done his part. This is illustrated by the case where the party made a deposit, which is a condition for getting some order and he had done all he should do in the matter but was prevented from doing so by the mistake of an officer of the Court. See — 'Gopalakrishna v. Kunjithapadham', AIR 1925 Mad 324 (D), — 'Buti Ram v. Sardar Singh', AIR 1934 Lah 875 (E), — 'Muthiah Chetty v. Suppan Servai', AIR 1915 Mad 865 (F). In these cases, by mistake of the office the party could not complete the act within the time prescribed and the Courts applied the maxim and held that he must be deemed to have completed that act within the time. Those decisions have no bearing on the question to be decided. We cannot, therefore, with great respect, agree with the views expressed by the learned Judge in the Madras decision.

(10) In — 'Tolan Kalita v. Bhuban Chandra', AIR 1951 Assam 161 (G), the Assam High Court took a different view. The learned Judges held that, on a strict construction of the section no order can be passed in favour of the party, who was dispossessed even though forcibly and wrongfully but more than two months before the date of the order and that, if the delay is caused by the act of the Court, even then the express provision contained in Cl. (4) cannot be disregarded. At page 162, the learned Judges say that the inherent powers of the Court to do justice cannot be exercised in disregard of the express provisions contained in the Code. We respectfully agree with those observations.

(11) In — 'Janama Bhoi v. Drupadi Bhoinani', AIR 1952 Orissa 26 (H), Ray C. J., considered the aforesaid Madras decision and expressly dissented from it. The learned Judge held that the time limit provided for by the statute must always be respected. At page 27 the learned Judge observed:

> "Keeping these considerations in view, the Legislature has fixed the maximum period, within which the party wrongfully dispossessed can get the benefit of the section at two months. For a Court, for whatever reason and howsoever laudable in its object, it is not permitted to legislate by reading into the proviso and extending the period of two months to any period which, according to the Court lapses due to the negligence or the dilatoriness of the Magistrate."

(11A) We respectfully accept the view expressed by the learned Chief Justice. There are also many decisions of other Courts taking the same view. See — 'Meharban Singh v. Bhola Singh', AIR 1935 All 35 (I), — 'Emperor v. Parasram', AIR 1931 Nag 38 (J), — 'Mahomed Ali v. Shamshul Haq', AIR 1940 Sind 33 (K), — 'Emperor v. Baijnath', AIR 1929 Oudh 526 (L) and — 'Arunachala Goundan v. Chinna Durai', AIR 1945 Mad 216 (M).

(12) It is not necessary to consider them in detail. We would, therefore, hold that the "A" party, having been dispossessed beyond two months from the date of the preliminary order, is not entitled to have a declaration under S. 145 (6), Criminal P. C.

(13) Further the Magistrate found in this case that the "A" party respondent was not forcibly and wrongfully dispossessed on 7-2-1953 but the mediators, who intervened peacefully took possession to avoid conflict between the parties. If so done, it follows that the first proviso to sub-section (4) of S. 145 cannot have any application to the facts of the case for the proviso can be invoked only in a case where any party to a dispute has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order. On this short ground also, the "A" party respondent must fail.

(13A) But it is contended that the possession of the mediators is possession on behalf of the "A" party and, therefore, the "A" party must be considered to have been in possession on the date when the preliminary order was made. But the mediators, who were examined, do not depose that they were holding the rectangular house on behalf of the "A" party. Their possession on the facts found in this case, cannot be held to be possession on behalf of the "A" party respondent. For the aforesaid reasons, we hold that, in regard to the rectangular house, the Order of the Magistrate is wrong.

(14) Now, coming to the round house, the finding of the Magistrate was that the round house was in the physical possession of Subbamma on the date of the preliminary order and that she was permitted to occupy it by the "A" party respondent. Subbamma claimed that the owner was B. W. 1 and that she was permitted to live in the house by B. W. 1. The question,

therefore, is whether the "A" party respondent who was not in actual possession of the round house, is entitled to have his alleged constructive possession declared under S. 145, Criminal P. C.

Under S. 145 (1), the claims, in respect whereof a Magistrate is empowered to decide is the fact of actual possession of the subject of dispute. Sub-section (4) of S. 145, which defines the scope of the enquiry empowers the Magistrate to decide the said question without reference to the merits of the claims of the parties to a right to possess the subject of dispute. It is, therefore, clear that under the section the question of a right to possession is foreign to the scope of the enquiry. If so the difficult question on which various views have been expressed is what meaning do the words "actual possession" convey.

The difficulty in defining the words led to conflicting views. The section itself indicates that actual possession is different from a right to possession. The Dictionary meaning of the word "actual" is real or existing in fact. The words, therefore, connote possession as a fact. The word possession has two meanings mediate and immediate possession. In Salmond's "Jurisprudence" the distinction between the two categories of possession has been clearly brought out. The learned author says at page 300 that:

> "The possession held by one man through another may be termed as mediate while that which is acquired or retained directly or personally may be distinguished as immediate or direct."

(15) The learned author proceeds to divide mediate possession into three kinds: (i) possession acquired by a person through some one, who holds solely on his account and claims no interest of his own; (ii) direct possession held by one person both on account of another as well as on his own; and (iii) the case in which immediate possession is in a person who claims it for himself until sometime has elapsed or some condition has been fulfilled but who acknowledges the title of another for whom he holds the thing and to whom he is prepared to deliver it when his own temporary claim has come to an end. The case of a warehouseman illustrates the first category. The case of a borrower, hirer or a tenant at will is an example of the second. Lending a chattel to another for a fixed time, delivering it as a pledge to be returned on the payment of a debt, and leasing out the property for a fixed term are examples of the third. But, in all these cases, the owner continues to be in possession of the property. Whether it is immediate possession or mediate possession, the owner does not cease to be in possession of the property.

But by reason of the use of the word "actual", it is necessary that the owner has not only a right to possession but he must, as a matter of fact, be in possession, whether directly or constructively. To illustrate, the landlord is in constructive possession of the holding in the occupation of his tenant. It is not enough that he has a right to possession but he must, as a matter of fact, be in perception of the rents as landlord. If the tenant denies his right, refuses to pay his rent and claims to attorn to another, whether the landlord has a right to possession or not, he ceases to have actual constructive possession. So too, if the owner permits another to be in possession, he may be said to be in possession through a licensee. But if the licensee denies the owner's title and claims to hold it under a third party, though the right to possession may continue to be in the real owner, he ceases to have actual possession of the property.

(16) A difficult question arises under S. 145, Criminal P. C. between different categories of disputants. There may be a dispute between two landlords, a landlord and his tenant, two tenants, two landlords holding through two different tenants and two landlords claiming to hold through a single tenant. Similar disputes may also arise between two parties when the property is in the possession of a licensee or any other person in similar capacity. In all these cases, if the aforesaid principles be borne in mind, there may not be any difficulty in giving a satisfactory answer to the question arising under S. 145, Criminal P. C. between the aforesaid different categories of persons. Whether it is mediate possession or immediate possession, if a person claiming to be in possession is in actual possession in the sense explained above, he is entitled to a declaration under S. 145.

(17) We shall now proceed to consider some of the cases cited at the Bar which throw some light on the question raised. In — 'Karnadhar Ray v. Sailendra Nath Ghose', ILR (1948) 1 Cal 150 (N), it was held that where a tenant found to be in actual possession of the land in dispute denies that he is a tenant of the party claiming through him or is in possession on behalf of such party, it is the duty of the Court to declare the tenant and not the landlord to be in possession although such tenant might have originally obtained possession by virtue of settlement from him. This was so decided because the tenant, though he was inducted into possession at an earlier stage by the rival claimant, was not holding the property, as a matter of fact, as a tenant of the other party. The other party may have a right to possession, but the factum of possession was with the tenant.

(18) In — 'Sutherland v. Crowdy', 18 WR Cr 11 (O), there is a lucid exposition of the meaning of the word "possession". At page 13, the learned Judges observed as follows:

> "The question is what is to be considered as meant in this section by possession? I think that it cannot mean only actual or bodily possession. There may be cases in which a person would properly be said to be in possession, although there was no bodily possession by him. There is a case of a servant being in possession and it may be said that when the servant is in possession, it is the possession of the master, so also if an occupier is paying rent that is the possession of the landlord to whom he pays the rent. For some purposes, the occupier has a possession; he has a possession which would enable him to bring a suit against a person who wrongfully disturbed him in his occupation; but, still, his possession is the possession of him by whose permission, either given by a lease or any other mode of letting

he holds the land and to whom he pays the rent."

(19) The aforesaid passage clearly brings out the distinction between right to possession and actual possession. It also indicates that actual possession need not be bodily possession, but can also include constructive possession if, as a matter of fact, the person is in possession through another.

(20) In — 'S. M. Yacub v. T. N. Basu', AIR 1949 Pat 146 (SB) (P), the question arose whether a proceeding under the section can be initiated in respect of mineral rights, if there be a dispute as regards possession between contending parties leading to an apprehension of a breach of peace. In dealing with the question, Meredith J., considered the scope of the section at page 149 and expressed himself in the following terms:

"Sections 145 and 146 have been so worded as to emphasise that the Magistrate is to concern himself only to actual possession. He is expressly forbidden to refer to the merits of the claims to title and obviously, therefore, if he is not allowed to find the title, he cannot draw any inference as to possession from the title. The Legislature has taken the utmost pains to prevent questions of title from creeping in to confuse the Magistrate and protract the proceedings."

(21) In — 'Ranga Razu v. Srinivasa Jagannadha Rao', AIR 1938 Mad 654 (Q), Pandranga Rao J., explained the words "actual possession" in S. 145 to mean physical possession in fact as distinguished from possession implied by law or constructive possession. We find it difficult to accept the narrow meaning given by the learned Judge to the words "actual possession". As we have already stated, possession may include not only immediate but also mediate possession. But we agree with the learned Judge that the possession, whether mediate or immediate, must be actual possession in the sense that the party claiming possession should in fact be in possession whether direct or mediate.

(22) In — 'Venugopal Mudaliar v. Neelakanta Mudaliar', AIR 1945 Mad 255 (R), Happel J., took a different view. He held that, as between rival landlords or between a landlord and a tenant, of another landlord, the ordinary rule that the tenants' actual possession is the landlord's actual possession applies and there is nothing illegal in the practice of giving a declaration in favour of such a landlord even though the tenants are not parties to the proceedings. We agree with the learned Judge that, when a landlord is in possession through a tenant by perception of rent or without any dispute from him, there is no reason why his possession should be excluded from the operation of the provisions of the section. It is not necessary to multiply cases.

(23) On a consideration of the relevant provisions of the Criminal Procedure Code and the cases cited at the Bar, we are of the view that the words "actual possession" in S. 145, Criminal P. C. exclude a right to possession but take in actual possession, whether mediate or immediate. Applying the aforesaid tests, what is the position in the instant case? Though B. W. 1 claimed that he permitted Subbamma to be in possession of the round house, the Magistrate found, as a matter of fact, that she was in physical possession on the crucial date and that she was as a matter of fact claiming under the "A" party. If the dispute was between the "A" party respondent and Subbamma who was in physical possession of the house, and denied the title of the former or the permission given by him, the Court has no alternative but to declare the possession of Subbamma. If so, would it make any difference if the "B" party respondents claimed constructive possession of the house through Subbamma who admitted their right? It may be that the "A" party respondent may file a suit in a Civil Court and by establishing his title and, the fact that he permitted Subbamma to occupy, obtain a decree. But Subbamma on the crucial date, as a matter of fact, was in possession claiming under the "B" party, the "B" party's right should be declared.

(24) The order of the Magistrate declaring the "A" party's possession is, therefore, wrong. The result is that the order of the Magistrate is liable to be set aside & we accordingly do so. But, our order will not preclude the "A" party from taking possession of the rectangular house, if the mediators willingly and voluntarily deliver it to him.

R.G.D. Petition allowed.

A.I.R. 1955 ANDHRA 105 (Vol. 42, C.N. 38)

CHANDRA REDDY J. (2-11-1954)

In re Rushingappa and another, Appellants.

Criminal Appeal No. 222 of 1954, against order of Court of Sessions, Anantapur Division in case No. 29 of 1953.

Evidence Act (1872), S. 32 (1) — Dying declarations — Evidentiary value of.

In considering the value of a dying declaration, the circumstances and the surroundings under which it is made have to be taken into consideration. When it is proved that the deceased was already given information about the names of the assailants and the manner of attack, it is not quite safe to place much reliance on the dying declaration made by such person. (Para 13)

It is hardly safe to act upon a dying declaration which is uncorroborated. It is incumbent on the court to see how far it is corroborated. AIR 1953 SC 420, Rel. on. (Para 13)

Anno: Evidence Act, S. 32 N. 9.

CASE REFERRED: Para

(A) (V40) AIR 1953 SC 420: 1953 Cri LJ 1772 13

J. V. Srinivasa Rao, for Appellants; Public Prosecutor, for the State.

JUDGMENT: This is an appeal against the judgment of the Sessions Judge of Anantapur convicting the appellants under S. 304, part 2, Penal Code, and sentencing them to rigorous imprisonment for 7 years each.

(2) The appellants and two others were charged with the murder of one Pasulodu who was no other than the brother of the first accused. Accus-

ed 1 and 4 were acquitted as their participation had not been proved beyond reasonable doubt, while accused 2 and 3 (who are the appellants) have been convicted and sentenced as stated above.

(3) The prosecution case may be briefly stated: P. W. 1, the deceased and the first accused constituted members of a joint family. The deceased and P. W. 1 migrated to Mysore State to eke out their livelihood. P. W. 1 returned to the village two years before the occurrence, while the deceased came back a few months before. The deceased and P. W. 1 made a joint demand on the first accused for division and separate possession of their shares. The first accused having refused to do so, there were incessant quarrels between the brothers and two days before the crime was committed, there was a fight between the first accused and the deceased, in the course of which the first accused received a serious injury on his hand, which disabled him from moving about for a few days. The second accused is the son of the first accused, the third accused being the father-in-law of the second accused, and the fourth accused, a nephew of the third accused.

On the night of 23-4-1953, the deceased and P. W. 1 were sleeping on the pial of their house. At about midnight, P. W. 1 heard a noise of groaning emanating from a person who was throttled. He woke up to see Pasulodu being carried by the four accused, all of them were armed with deadly weapons . Immediately, he cried out "Abba, they are carrying away my brother". Pasulodu was carried on to Pasuvula Manda (cattle-pen) behind the house of P. W. 1. P. W. 1 followed them from behind and stood at a distance of 6 or 7 yards. They threw down Pasulodu at the cattle-pen and the four accused attacked Pasulodu with the weapons which they had in their hands. They then carried the injured man to the burial ground and left him there.

Next morning the deceased was found by P. Ws. 1 to 5 and 7 there. On the advice of P. Ws. 8 and 9, P. W. 1 went to the house of the Village Munsif (P. W. 13) and brought him to the scene. A complaint Ex. P. 1 was given by P. W. 1 (though it purports to embody the dying declaration made by Pasulodu). On the basis of this, reports were sent to the authorities concerned. On receipt of these reports the police of Singanamala station arrived at the village at about 4 P. M. and started investigation. That night the injured man was sent to the Headquarters hospital at Anantapur. On the morning of the 25th, the Doctor (P. W. 12) having regard to the grave condition of Pasulodu, sent for the Magistrate (P. W. 10) who came to the hospital at about 10-55 A. M. and recorded the dying declaration (Ex. P. 4) which is in the following words:

"I live in Neelampalli. I was lying on the pial in front of my house on the night of day before yesterday. At midnight four people came and carried me ino the vanka — (1) Siddappa's son Yerri Nagappa, (2) Yerri Nagappa's son Rushingappa, (3) Sudodu alias Subayya, (4) Yerrikala Sunkanna's son Thimigadu; of these 1 and 2 are residents of my village, and 3 and 4 of Chennarayanipalli; these carried me (into) the vanka (to a distance of) 2 chains. They tied a rope to my legs. Sudodu had a battle axe, Yerri Nagappa had a hunting sickle, Rushingappa had a dagger, Thimmigadu had a hand axe. Sudodu hit my legs. Rushingadu pierced my left hand and head, four people beat me and I lost consciousness. Kapa Nagappa, Yerri Nagappa and Naganna and Peddu Lingappa saw this. For the past 15 days there is land dispute between Yerri Nagappa and myself. Hence they have beat me. Sudodu's daughter is given in marriage to Rushingappa, son of Eri Nagappa. Sudodu paternal uncle's son is Thimmigadu. I regained consciousness after day break at (about) 5 hours in the vanka. I got a statement recorded by Nagalinga Reddi. Yesterday night the polce sent me to the hospital. I have heard it read. It is correct".

Pasulodu succumbed to the injuries on the night of the 25th. The post mortem conducted on the body showed as many as twenty injuries, five of which were grievous and the rest simple. In the opinion of the Doctor the death was due to shock and haemorrhage as a result of multiple injuries.

(4) The prosecution examined P. Ws. 1 to 3 as eyewitnesses to the occurrence, P. Ws. 4, 5 and 6 to speak to the movements of the accused and P. W. 7 to prove one of the several dying declarations said to have been made by the deceased.

(5-11) His Lordship then examined the evidence of P. W. 1 to P. W. 7 and continued as follows: The plea of the accused was one of denial.

The trial court was not prepared to accept the evidence of P. Ws. 1 to 3 for the reason that the story regarding the attack in the cattle-pen seemed to be an invented one. The learned Judge has pointed out that there was no mention of this attack in any of the dying declarations or in Ex. P. 1, nor were there any marks of blood to indicate that the deceased was attacked there. There is also the reason that P. Ws. 2 and 3 could not have seen as to what was taking place near the cattle-pen for the reasons already mentioned. That apart, the evidence of these witnesses reads very artificial. The story that when P. W. 1 told P. W. 8 and others that his brother had been stabbed, they turned him out saying "why will they stab your brother?" seems to be very artificial and is unacceptable.

The learned Sessions Judge has also not placed any reliance on the evidence of P. Ws. 4 to 7. He observed that no weight could be attached to P. W. 4's evidence for the reason that he did not tell the police at the earliest opportunity that he questioned the deceased as to who were the assailants and was told by him the names of the accused. P. Ws. 5 to 7 also were not believed as there was no consistency in their versions. There is a further reason why no weight should be attached to the testimony of these four witnesses. If really they saw the deceased being carried by accused with swords, battle-axes and hand-axes, one fails to understand as to why they should have asked the deceased as to how he came by these injuries and who were the assailants. I, therefore, feel that the lower court was justified in rejecting the testimony of these witnesses.

(12) Having disbelieved the version given by the eye-witnesses, the learned Sessions Judge based

the conviction of the appellants on the dying declaration of Pasulodu embodied in Ex. P. 4. In the opinion of the learned Judge this document is entitled to a great weight as it contained a true version of the attack on him and it received corroboration. The lower court repelled the argument that Ex. P. 4 could not be acted upon for the reason that P. W. 1 had every opportunity of tutoring the deceased before making the statement to P. W. 10, observing that the injured man could not have been conscious during the time while he was being taken to the hospital, when P. W. 1 accompanied him, and it was only after he was taken to the hospital and treated, the injured man could have recovered and his mind had become clear. But the trial Judge missed the point that the previous day the accused were named to him as the assailants and that the weapons with which the attack was made on the deceased were also mentioned to him. If that were so, the statement made by the deceased to the Sub-Magistrate cannot be regarded as a spontaneous one and therefore it could not carry much weight.

There is also another factor which has to be borne in mind. Although the statement of the deceased mentioned the names of four persons as the assailants, the learned Judge was not prepared to act upon it so far as the 1st and the 4th accused were concerned. In the opinion of the learned Judge, it could not be possible for the 1st accused to have participated in the attack having received a very serious injury on his hand two days prior to the occurrence.

(13) In considering the value of a dying declaration, the circumstances and the surroundings under which it is made have to be taken into consideration. When it is proved that the deceased was already given information about the names of the assailants and the manner of attack, it is not quite safe to place much reliance on the dying declaration made by such person. The value to be attached to a dying declaration depends upon the circumstances of each case. That apart, in this case, the learned Judge has not pointed out the circumstances or pieces of evidence that tend to corroborate this dying declaration. The reasoning of the Judge in para 31 seems to indicate that he was not prepared to believe the evidence of any of the witnesses. Nowhere is there any indication as to what part of the evidence of any of these witnesses could be relied upon as serving corroboration of the dying declaration Ex. P. 4. It is hardly safe to act upon a dying declaration which is uncorroborated. It is incumbent on the Court to see how far it is corroborated. Their Lordships of the Supreme Court pointed out in — 'Ram Nath v. State of Madhya Pradesh', AIR 1953 SC 420 (A) as follows:

> "It is settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration because such a statement is not made on oath and is not subject to cross-examination and because the maker of it might be mentally and physically in a state of confusion and might well be drawing upon his imagination, while he was making the declaration".

Applying that principle to this case, it must be held that the dying declaration in this case also suffers from the infirmity of lack of corroboration apart from its not being entitled to any weight for the reason that the story was supplied to him by P. W. 1 the previous day. If the dying declaration is excluded, there is no reliable evidence upon which the accused could be convicted.

(14) In these circumstances, I hold that the prosecution has not proved its case beyond reasonable doubt against these appellants also. Their conviction is, therefore, unsustainable and ought to be set aside. The appellants will be set at liberty.

D.R.R. Appeal allowed.

(S) A.I.R. 1955 ANDHRA 107 (Vol. 42, C.N. 39)

SUBBA RAO C. J. (19-10-1954)

Municipal Council, Rajamundry, Defendant-Appellant v. Simhadri Ranganayakalu and others, Plaintiffs-Respondents.

Second Appeal No. 1778 of 1950, against decree of Sub-J., Rajamundry in Appeal Suit No. 46 of 1950.

(a) Civil P. C. (1908), O. 1, R. 9 — Necessary and proper parties — Distinction — Suit against Municipality for declaration of title — Government not necessary party — AIR 1954 Mad 479, doubted.

There is an essential distinction between a necessary party and a proper party to a suit. Necessary parties are parties necessary to the constitution of the suit and without whom no decree at all can be passed. Proper parties are those whose presence enables the Court to adjudicate more effectually and completely the questions raised in the suit. (Para 5)

Where, therefore, a person, on receipt of a notice from Municipality to remove certain portions of his house as encroachments, sues the Municipality for declaration of his title to the site and for permanent injunction restraining it from interfering with his possession and claims no relief or any title by adverse possession against the Government, the Government is not a necessary party to the suit and need not be joined. Case law referred. AIR 1954 Mad 479, doubted. (Para 11)

Anno: C. P. C., O. 1 R. 9 N. 5.

(b) Evidence Act (1872), S. 114, Ill. (e) — Presumption under — Extent of — No presumption that the act was done.

The meaning of S. 114, Illustration (e) is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's case. 32 Cal 1107 and AIR 1948 Mad 191, Rel. on. (Para 15)

It is not, therefore, permissible to presume that a statutory notice was duly issued, and served on the plaintiff in the absence of any evidence that a notice was, as a matter of fact, issued and served on him. (Para 17)

Anno: Evidence Act, S. 114 N. 29.

CASES REFERRED: Paras

(A) (V32) AIR 1945 Mad 224: 1945-1 Mad LJ 22 6

(B) (V24) AIR 1937 Mad 641: 1937-1 Mad LJ 597 7

(C) (V41) AIR 1954 Mad 479: 1953-2 Mad LJ 614 8

(D) ('05) 32 Cal 1107: 2 Cal LJ 107 15

(E) (V35) AIR 1948 Mad 191: 1947-2 Mad LJ 310 16

P. Satyanarayana Raju and V. V. Raghavan, for Appellant; G. Chandrasekhara Sastri, for Respondents.

JUDGMENT: The main question in this second appeal is whether the Government is a necessary party to the suit.

(2) The relevant facts are: The plaintiff is the owner of the property described in the plaint schedule and the house bearing Door No. 236 in the 15th Ward of the Rajamundry Municipality. His father and uncle purchased the same under a sale-deed, dated 30-6-1901, from one Kotta Manikyam. The defendant, the Municipal Council of Rajamundry, through its Commissioner, issued a notice to the plaintiff directing him to remove the pials, stone pavement and the tiled eaves of his house on the ground that they were encroachments on the public street. To avoid the execution of the threatened action, the plaintiff filed O. S. No. 40 of 1949 on the file of the Court of the District Munsif of Rajamundry, against the Municipality for a declaration of his title and for a permanent injunction restraining the Municipality from interfering with his possession.

(3) The defendant, inter alia, contended that Government was a necessary party to the suit and also the suit was barred by reason of S. 14, Madras Survey and Boundaries Act.

(4) The learned District Munsif accepted the contentions of the Municipality and dismissed the suit. On appeal, the learned Subordinate Judge rejected the pleas raised by the defendant and decreed the suit. The Appellate Court found that the plaintiff was the owner and that there was no encroachment.

(5) The first question is whether the Government is a necessary party to the suit. A number of cases has been cited at the bar in support of the respective contentions. Untrammelled by the said decisions, let me consider the legal position. There is an essential distinction between a necessary party and a proper party to a suit. Necessary parties are parties necessary to the constitution of the suit and without whom no decree at all can be passed. Proper parties are those whose presence enables the Court to adjudicate more effectually and completely the questions raised in the suit. See 'Civil Procedure Code by D. F. Mulla, 12th Edn., page 520'. Can it be said that Government is a necessary party to the suit in the aforesaid sense? The plaintiff, claiming to be the owner filed the suit against the Municipality who threatened to infringe his right. He had no grievance against any other person other than the defendant for no one interfered with his right. It is not the duty of the owner of a property to make a roaming search of all possible claimants and make them parties. His title against the defendant would be finally decided in the suit, and, on that basis, he would get an effective relief against him. If the defendant intended to raise a plea of 'JUS TERTII' it is always open to him to apply for making the third party a party to the suit. The plaintiff is not asking for any relief against the Government.

(6) In — Appala Narasamma v. Municipal Council, Vizagapatam', AIR 1945 Mad 224 (A) a Division Bench of the Madras High Court, consisting of Leach C. J., and Clark J., laid down the position in clear terms as follows:

> "The plaintiff had built a house on his own land and the Municipality was threatening to demolish it, if not removed because it imagined that it encroached on a public street. As there was no encroachment, the Municipality had no right to issue the notice and still less the right to take steps against the plaintiff. The Government was not concerned with the issue of the notice or the threat which the Municipality made. The responsibility rested entirely with the Municipality. The granting of the relief, which the plaintiff asked for in the plaint, would affect no right vested in the Government. Therefore, the Government was not a necessary party to the suit".

I respectfully agree with the observations.

(7) The judgment of Venkataramana Rao J., in — 'Krishna Swamy Naidu v. Municipal Council, Bellary', AIR 1937 Mad 641 (B), does not really touch the question now raised. There, the plaintiff claimed a declaration that he was the owner of a vacant site and that the Municipality had no right to interfere with any use he made of it and the main defence of the Municipality was that title to the site vested in the Government. The learned Judge held that in cases where the plea of 'Jus Tertii' is set up, it is generally considered desirable to make the person whose title is set up, a party to the suit to avoid multiplicity of litigation and that in cases where the interests of the public are involved and the ownership of the Government is in question, it is very desirable and sometimes quite necessary to make the Government a party to avoid multiplicity of proceedings. This decision is not an authority for the position that Government is a necessary party to all such suits and that the objection of their not being made a party to the suit is fatal to its maintainability. This is authority only for the position that, ordinarily and under certain circumstances, Government is a proper party to such suits.

(8) Strong reliance is placed by the learned Counsel for the appellant on the judgment of Ramaswamy J., in — 'Prodattur Municipal Council v. Gurnam Hanumanthu', AIR 1954 Mad 479 (C). There the suits were filed by certain residents of Proddattur against the Proddattur Municipality for a declaration of their title in respect of their lands forming the subject matter of encroachment and for an injunction against the Municipality from disturbing their possession. The suits were filed under S. 14, Madras Survey and Boundaries Act. The learned Judge after considering the various decisions cited before him, came to the conclusion that Government was a

necessary party and that the suits, without impleading Government were not maintainable. The basis of the learned Judge's judgment is found at p. 480.

"Under S. 14, Madras Survey and Boundaries Act, the plaintiff is required to join as parties all persons whom he has reason to believe to be interested in the boundary which is the subject-matter of the dispute. Therefore, inasmuch as the Municipality dealing with the street is subject to the control of the Government, the relief of declaration which the plaintiffs in these suits seek, cannot be granted without making the Government a party to the suits".

(9) But they are observations in the course of the judgment which are wider in scope and which really support the contention of the appellant.

(10) I regret my inability to accept the said observations as laying down the correct legal position.

(11) The aforesaid decisions bring out the distinction between a necessary party and a proper party to the suit. Where the plaintiff sets up his own title to the property and seeks a relief against a Municipality infringing that title, the presence of the Government is not necessary for adjudicating upon his title, or for giving a relief against the defendant, though under certain circumstances Government may be a proper party. But, where the plaintiff claims a right by adverse possession, against the owner, the Government would obviously be a necessary party for the Government is the owner of the site. In the instant case, the plaintiff claimed to be the owner and the appellate Court found on the question of title in his favour. The plaintiff did not purport to have acquired any title by adverse possession against the Government, nor did he allege that the Government interfered with his title. In such circumstances, it is manifest, that Government is not a necessary party.

(12) The next question is whether the order of the Survey authorities demarcating the alleged encroached plot as a road is binding upon the plaintiff. It would be binding on the plaintiff, if valid notices of the survey were served on him.

(13) The plaintiff raised the plea that no such notices were served on him. Exhibit B-4 dated 11-11-1913, and Exhibit B-1 dated 28-2-1928 purport to be two notices issued under the Act. They do not 'Ex facie' show that they were served on the plaintiff. There is also no evidence either oral or documentary, that the said notices or similar ones were served on the plaintiff. In such circumstances, the question arises whether the presumption laid down in Section 114, Evidence Act, can be invoked. Section 114 reads:

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case".

Illustration (e) under the said section reads as follows:

"The Court may presume that judicial and Official acts have been regularly performed".

(14) But, relying upon the section read with this illustration, it is contended that the Courts shall presume that the notices Exhibits B-4 and B-1 have been duly served on the plaintiff.

(15) Woodroffe J. has succinctly stated the scope of S. 114 (e) — 'In Narendra Lal Khan v. Jogi Hari', 32 Cal 1107 (D) as follows:

"The meaning of Section 114 (e), Evidence Act, is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done, of which there is no evidence and the proof of which is essential to the plaintiff's case".

(16) The same view has been expressed by Rajamannar J., as he then was, in — 'Murugappa Chettiar v. Tirumalai Nadar', AIR 1948 Mad 191 at p. 194 (E), the learned Judge observed:

"It is true that Illustration (e) to S. 114, Evidence Act, declares that judicial and official acts may be presumed to have been regularly performed. But it does not say that it may be presumed that any particular judicial or official act has been performed. No doubt when the only evidence is that a particular judicial or official act has been performed and there is no other evidence on record, it may be presumed that particular judicial or official act was regularly performed. But when the dispute is whether a particular judicial or official act was performed or not, I think there is nothing in law which enables a court to presume that that act was as a matter of fact performed".

(17) I agree with the observations of Woodroffe J., and Rajamannar J. in the aforesaid two decisions. If so, the question is whether, in the present case, there is any evidence to establish that a notice to the plaintiff was issued and served on him. It is not permissible to presume that a statutory notice was duly issued and served on the plaintiff in the absence of any evidence that a notice was as a matter of fact, issued and served on him. There is neither oral nor documentary evidence to show that a notice was given to the plaintiff and served on him. The question of presumption that such notice was issued in compliance with the provisions of the Act cannot therefore obviously arise. In the result I hold that the conclusion arrived at by the lower Court is correct.

(18) The appeal fails and is dismissed with costs. No leave.

D.R.R. Appeal dismissed.

A.I.R. 1955 ANDHRA 109 (Vol. 42, C.N. 40)

SATYANARAYANA RAJU J. (16-12-1954)

Viswanadhuni Venkatakondayya, Petitioner v. Election Commissioner, Kanigir and others, Respondents.

Writ Petn. No. 231 of 1954.

Madras Village Panchayats Act (10 of 1950), Ss. 13 and 12(2) — Candidate elected to Board of 21 years of age at material times — Election, if can be challenged — Electoral roll if conclu-

sive — (Representation of the People Act (1950), S. 19) — (Constitution of India, Art. 326).

Section 13, Madras Village Panchayats Act provides that no person shall be qualified for election as a member of a Panchayat unless his name appears on its electoral roll and S. 12(2) provides that every person whose name is included or who is qualified to be included in that part of the electoral roll for any territorial constituency of the Madras Legislative Assembly which relates to the village or any portion thereof, shall be entitled to be included in the electoral roll for the Panchayat and the electoral rolls for the Legislative Assembly are prepared on the basis of the provisions contained in Ss. 19 to 21, Representation of the People Act. Under S. 19 of that Act a person must not be less than 21 years of age before he can be registered. The qualifications as to age must be held by necessary intendment to be an essential requisite even in the case of a person who is qualified to vote or stand for election as a member of the Panchayat. (Para 11)

It is no doubt true that the electoral roll must be regarded as final and conclusive, except in cases where persons are prohibited from standing for election by any statute. In other words, the rule is conclusive as to the qualification of an elector, except where disqualification is expressly alleged or proved. (Para 11)

The fact that no objection was taken to the nomination of the petitioner before the Returning Officer at the time of the scrutiny will not make any difference. The Returning Officer is bound to take the entry in the electoral roll as conclusive, but it is not certainly final. It is open to the Election Commissioner on the evidence placed before him to come to the conclusion, that the candidate was not qualified at all. He having been below 21 years of age at the time of the nomination and at the time of the election and also at the time when his name was included in the electoral roll. (Para 12)

Where on a review of the evidence, the Election Commissioner came to the finding that the petitioner was below 21 years of age at all material times, the propriety of this finding of fact, which is based on an appreciation of the evidence is not open to challenge before the High Court in a petition under Art. 226, and his order setting aside the election cannot be interfered with. (Paras 11, 12)

CASE REFERRED: Para

(A) (V41) AIR 1954 SC 520: 1954-2 Mad LJ 385 (SC) 10

S. C. Venkatapathi Raju, for V. Vedanthachari, for Petitioner; Vepa P. Sarathy, for Addl. Govt. Pleader; A. Raghavaiah and P. Babulu Reddy, for Respondents (Nos. 1, 2 and 3 respectively).

ORDER: This is an application under Art. 226 of the Constitution to call for the records in O. P. No. 14 of 1953 on the file of the Election Commissioner, Kanigiri and to issue a Writ of Certiorari quashing the order therein dated 22-3-1954.

(2) At an election held on 17-3-1953 for the membership of the Panchayat Board of Kanigiri V Ward, the petitioner, respondent 2 and two others were the contestants. The petitioner was declared elected as having secured the majority of the votes polled at the election.

(3) Respondent 2 filed an election petition O. P. No. 14 of 1953 for a declaration that the election of the petitioner is null and void. The Election Petition set out various irregularities, corrupt practices and illegalities, but the important allegation made in the petition was that the petitioner did not attain the competent age to be an elector entitled to vote or stand for election and that, therefore, the petitioner's election must be set aside.

(4) The Election Commissioner, Kanigiri recorded evidence and on a consideration of the evidence adduced before him reached the conclusion that there is no satisfactory and positive evidence to show that he was born on 31-3-1931, but that on the other hand there is documentary evidence to show that the petitioner was born on 31-3-1933, and that the date of birth of the petitioner is 31-3-1933.

The Election Commissioner carefully considered the legal contentions raised before him with regard to the finality of the entries made in the electoral rolls with reference to the material provisions of the Representation of the People Act, the Local Boards Act, the Village Panchayats Act and other statutory enactments and came to the conclusion that in the absence of a prohibition which precludes him from questioning the validity or conclusiveness of the electoral rolls under the Village Panchayats Act and the rules made thereunder, respondent 2 was entitled to attack the same before the Election Commissioner. He, therefore, held that respondent 2 was entitled to raise the question that the petitioner had not the requisite age to be a voter. In the result, he set aside the election of the petitioner as null and void and directed a fresh election for the said Ward.

(5) Mr. Vedanthachari, the learned counsel for the petitioner contended that an entry made in the Elector roll is final and conclusive and the only remedy of a person aggrieved is to apply for revision of the electoral roll and subject to any revision to be made by the electoral authority, the electoral roll is final and conclusive.

(6) Here it is necessary to refer to the relevant provisions of the Constitution, the Representation of the People Act and the Village Panchayats Act.

(7) Article 326 of the Constitution runs thus:

"The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage, that is to say, every person who is a citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this Constitution or any law made by

the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

The article provides that election to the House of the People and to the Legislative Assembly of a State shall be on the basis of unqualified adult suffrage, that is to say, every citizen of India, male or female, who is not less than 21 years of age and is not otherwise disqualified under this Constitution or by any law of the appropriate legislature on the grounds specified in this article shall be entitled to be registered as a voter.

For the conditions of actual registration, we must go to the Representation of the People Act (43 of 1950) and Ss. 19 to 21 thereof provide for the conditions of registration of a person as a voter.

(8) Section 19 of the Representation of the People Act (43 of 1950) so far as is material runs thus:

'Subject to the foregoing provisions of this Part, every person who.....

(a) x x x

(b) was not less than 21 years of age on the qualifying date, shall be entitled to be registered in the electoral roll for that constituency".

On a reading of the provisions of Art. 326 of the Constitution and S. 19, Representation of the People Act, it is manifest that a person before he can be registered as a voter must NOT be less than 21 years of age on the qualifying date.

(9) Reference may also be made to the relevant provisions of the Madras Village Panchayats Act, 1950. Section 12(2) of the Madras Village Panchayats Act (10 of 1950) provides:

"Every person whose name is included or who is qualified to be included in that part of the electoral roll for any territorial constituency of the Madras Legislative Assembly which relates to the village or any portion thereof, shall be entitled to be included in the electoral roll for the Panchayat and no other person shall be entitled to be included therein.

EXPLANATION I: Where in the electoral roll of any territorial constituency of the Madras Legislative Assembly, there is no distinct part relating to the village, the following persons shall be entitled to be included in the electoral roll for the Panchayat—

(a) all persons who are entered in such roll under the registration area comprising such village and whose addresses as entered in such roll are situated in such village.

(b) all persons who are qualified to be included in such roll under the registration area aforesaid and who reside in such village".

Section 13 of the said Act provides for qualifications of candidates.

"No person shall be qualified for election as a member of a Panchayat unless his name appears on its electoral roll".

Sections 14, 15 and 16 enumerate the disqualifications.

(10) Both parties have relied upon a decision of the Supreme Court of India in — 'Durga Shankar Mehta v. Raghuraj Singh', AIR 1954 SC 520 (A).

In that case, the Supreme Court was dealing with the validity of an election for the Legislative Assembly Constituency and the question for consideration was whether that election was void under S. 100(1)(c), Representation of the People Act. Their Lordships of the Supreme Court held that the electoral roll was conclusive as to the qualification of the elector except where disqualification was expressly alleged or proved. Their Lordships considered the provisions of S. 100(2)(c) which provided that—

"subject to the provisions of sub-s. (3) if the Tribunal is of opinion....

x x x x

(c) that the result of the election has been materially affected by the improper reception or refusal of a vote or by the reception of any vote is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election or by any mistake in the use of any prescribed form, the Tribunal shall declare the election of the returned candidate to be void",

and held that a case of this description comes under sub-s. 2(c) of S. 100 and not under sub-s. (1)(c) of the section, as it really amounts to holding an election without complying with the provisions of the Constitution and that is one of the grounds specified in cl. (c) of sub-s. (2).

The learned counsel for the petitioner contends that there is no provision analogous to S. 100(2)(c) in the Village Panchayats Act or the rules made thereunder and that, therefore, the reasoning of the decision of the Supreme Court does not apply. It is true that the judgment of the Supreme Court proceeded on the construction of the provisions of S. 100 (2) (c).

(11) Section 13, Madras Village Panchayats Act which is extracted above provides that no person shall be qualified for election as a member of a Panchayat unless his name appears on its electoral roll and S. 12(2) provides that every person whose name is included or who is qualified to be included in that part of the electoral roll for any territorial constituency of the Madras Legislative Assembly which relates to the village or any portion thereof, shall be entitled to be included in the electoral roll for the panchayat and the electoral rolls for the Legislative Assembly are prepared on the basis of the provisions contained in Ss. 19 to 21, Representation of the People Act. Under S. 19 of that Act a person must not be less than 21 years of age before he can be registered. The qualifications as to age must be held by necessary intendment to be an essential requisite even in the case of a person who is qualified to vote or stand for election as a member of the Panchayat.

It is no doubt true that the electoral roll must be regarded as final and conclusive, except in

cases where persons are prohibited from standing for election by any statute. In other words, the rule is conclusive as to the qualification of an elector, except where disqualification is expressly alleged or proved. On a review of the evidence, the Election Commissioner came to the finding that the petitioner was below 21 years of age at all material times. The propriety of this finding of fact, which is based on an appreciation of the evidence is not open to challenge before this Court.

(12) The fact that no objection was taken to the nomination of the petitioner before the Returning Officer at the time of the scrutiny will not make any difference. The Returning Officer is bound to take the entry in the electoral roll as conclusive, but it is not certainly final. It is open to the Election Commissioner on the evidence placed before him to come to the conclusion, that the candidate was not qualified at all, he having been below 21 years of age at the time of the nomination and at the time of the election and also at the time when his name was included in the electoral roll. Therefore, I am of opinion that the election of the petitioner must be set aside.

In the view I have taken, no interference under Art. 226 is called for and this Writ Petition is, therefore, dismissed with costs.

R.G.D. Petition dismissed.

(S) A.I.R. 1955 ANDHRA 112 (Vol. 42, C.N. 41)

UMAMAHESWARAM J. (25-11-1954)

Gurajada Vijaya Lakshmamma, Petitioner v. Yarlagadda Padmanabham and others, Respondents.

Civil Revn. Petn. No. 1591 of 1953, to revise order of Sub-J., Masulipatam, D/- 18-8-1953.

Civil P. C. (1908), O. 21, R. 63 — Suit by decree-holder — Objector if can attack decree on ground of fraud or collusion — (Evidence Act (1872), S. 44) — AIR 1942 Cal 180 and 10 Bom 659, Dissented from — AIR 1939 Pat 430, Not foll.

Where a claim preferred under O. 21, R. 58 is upheld by the executing Court and the decree-holder files a suit under O. 21, R. 63 to set aside that order, the decree-holder has to establish that the properties sought to be attached belong to the judgment-debtor and it is certainly open to the defendant to raise all defences to non-suit the plaintiff. If the defendant is in a position to prove that the plaintiff is not at all a creditor or that the decree obtained by him was one obtained by fraud or collusion, the suit will have to fail.

(Para 3)

(Nature and scope of suit under O. 21, R. 63 discussed). 17 Mad 389, Foll. AIR 1942 Cal 180 and 10 Bom 659, Dissent. from. AIR 1939 Pat 430, Not foll.

Anno: AIR Com. C. P. C., O. 21, R. 63 N. 14; 1953 Mulla, O. 21, R. 63, P. 861 N "Order..... objection", para. 5 (Part of topic in N. 14 in AIR Com., extra).

CASES REFERRED: Paras

(A) (V11) AIR 1924 Cal 744: 51 Cal 548 4
(B) (V23) AIR 1936 Mad 971: 1937-1 Mad LJ 133 4
(C) (V16) AIR 1929 Mad 323: 56 Mad LJ 489 4
(D) ('94) 17 Mad 389 5, 6, 8, 9
(E) ('86) 10 Bom 659 5, 6, 8
(F) (V24) AIR 1937 Mad 366: 1937-1 Mad LJ 122 5
(G) (V26) AIR 1939 Pat 430: 183 Ind Cas 371 7, 8
(H) (V29) AIR 1942 Cal 180: 200 Ind Cas 392 8
(I) ('54) 1954-2 Mad LJ 707: 67 Mad LW 871 9

A. L. Narayana Rao, for Petitioner; K. Suryanarayana, for Respondents.

ORDER: This Civil Revision Petition is filed against the findings recorded by the learned Subordinate Judge of Masulipatam on additional Issues 4 and 5 in O. S. No. 61 of 1950 on his file.

(2) The plaintiff-decree-holder sought to attach the properties of the first defendant in O. S. No. 61 of 1950 (Petitioner herein) as belonging to his judgment-debtor who is the second defendant in that suit, in execution of the decree in O. S. No. 215 of 1945 (District Munsif's Court of Gudivada). The petitioner herein filed a claim petition (E. A. No. 462 of 1949) under O. 21, R. 58, Civil P. C. and her claim was allowed. The plaintiff-decree-holder consequently filed O. S. No. 61 of 1950 seeking to set aside the Order made on the claim petition. One of the pleas raised in that suit by the petitioner herein was that the debt due to the plaintiff was a bogus one and that the decree obtained by him was vitiated by fraud and collusion. On that pleading, additional issues 4 and 5 were raised. The learned Subordinate Judge held that in a suit filed under O. 21, R. 63, Civil P. C., it is not open to the defendant to attack the decree or the debt on which it is based. The present revision petition is, therefore, filed by the first defendant in O. S. No. 61 of 1950, Sub-Court, Masulipatam.

(3) From the facts stated above, it is clear that the claim preferred by the petitioner herein was upheld by the executing Court, and the decree-holder had consequently to file the suit under O. 21, R. 63, Civil P. C. In such a suit, he has to establish that the properties sought to be attached belong to the judgment-debtor and it is certainly open to the defendant to raise all defences to non-suit the plaintiff. If the defendant is in a position to prove that the plaintiff is not at all a creditor or that the decree obtained by him was one obtained by fraud or collusion, the suit will have to fail. I am not, however, concerned with the question whether the suit having been filed in a representative capacity, it is not open to the other creditors to continue the suit or not.

(4) The nature and scope of a suit under O. 21, R. 63, Civil P. C., has been well set out by George Rankin J. in — 'Najimunnessa Bibi v. Nacharad-din Sardar', AIR 1924 Cal 744 at p. 748 (A), and is in the following terms:

"The suit, if brought, is not limited by any special standard of evidence or of law. The claimant may, if necessary, thrash out his title in the fullest and most ultimate sense. But, if the title which he claims is not the ultimate full title to the

property, then, of course, he must be content to assert whatever the title claimed may be. So, too, the decree-holder may make out his debtor's title exactly as if it were a suit for possession by the judgment-debtor".

In — 'Masina Bavamma v. Yendru Papanna', AIR 1936 Mad 971 at pp. 972-973 (B), Venkataramana Rao J., held:

"When a suit is instituted under O. 21, R. 63, Civil P. C., it is not merely a continuation of the claim proceeding, but what is essentially litigated is a question of title".

Elaborating that point, the learned Judge observed as follows:

"For example, it may be the claimant in the claim proceedings would have succeeded by merely showing that he was a trespasser, but the decree-holder can establish in a suit which he filed under O. 21, R. 63, that the trespass was not of sufficient duration to confer any title in the successful claimant and the property still belonged to the judgment-debtor and that therefore he is entitled to attach the property as that of the judgment-debtor".

The learned Judge followed the observations of Wallace J., in — 'Subramanyam v. Narasimham', AIR 1929 Mad 323 (C), which runs thus:

"The claim enquiry merely settles whether the claimant is in possession of the property in his own behalf or on behalf of the judgment-debtor. But the claimant in his suit has to establish right which he claims to the property, that is, the question of title is also raised for decision. The suit is, therefore, really in part a new legal proceeding, and is not entirely restricted to the questions within the scope of the claim enquiry".

(5) The point that arises for consideration in the present case arose for decision in — 'Naranayyan v. Nageswarayyan', 17 Mad 389 (D) and it was held that it was open to the defendant to show that the decree in execution of which the property in dispute was attached was collusively obtained. The learned Judges held that such a defence would not be ordinarily available or necessary when the defendant is an utter stranger, in no way connected with the judgment-debtor, unless it may be when the decree makes the debt a charge on the property claimed or when the defendant is interested in setting up a defence — either as a reversioner or as a co-parcener interested in the property sought to be proceeded against. The learned Judges distinguished the decision of the Bombay High Court in — 'Gulibai v. Jagannath Galvankar', 10 Bom 659 (E) and held that, in their opinion, S. 283 (which corresponds to O. 21, R. 63, C. P. C. of the old Code) (Act 14 of 1882), did not introduce an exception to the rule that the defendant is bound to set up every defence available to him. It was further held that it would be unreasonable to compel the defendant to submit to a decree that might result in his eviction, and thereafter to bring a fresh suit for restoration of possession. I am of opinion that the reasoning contained in this judgment directly applies to the facts of the present case. When the decree-holder seeks to seize the petitioner's properties in execution of a decree, she is certainly entitled to raise all defences open to her. The learned counsel for the respondent contended that the scope of the decision ought to be confined only to a decree making the debt a charge on the property claimed or to reversioners or co-parceners interested in the attached property. I do not think that there is any warrant for so restricting the principle laid down by the Bench.

The decision of Varadachariar J., in — 'Methar Rowther v. Sahu Moideen Rowther', AIR 1937 Mad 366 (F) also supports that conclusion. In discussing the scope of a suit under O. 21, R. 103, Civil P. C., the learned Judge observed as follows:

"If I found that there was any substance in the issue about adverse possession or the issue which attacks the validity of the decree in the promissory note suit, I should have directed an enquiry into those issues, because I cannot agree that even such questions could have been raised in the obstruction proceedings".

So, according to the learned Judge, though objections based on adverse possession or on the validity of the decree could not be raised in execution, it was open to raise those objections in a suit under O. 21, R. 63, Civil P. C.

(6) Dealing with judgments obtained by fraud and collusion, in "A Treatise on the Law of Judgments" Vol. I, (second edition), by Henry Campbell Black, the following rule is laid down at page 293:

"However the rule may be in regard to parties and privies, it is very well settled that any third person, a stranger to the judgment, whose rights would be injuriously affected if it were allowed to stand as against him, may show, in a collateral proceeding that it was procured through the fraudulent contrivance of the debtor or the collusion of both parties, with a design to hinder or defraud him, and so have it considered and treated as void as to him. As stated in an American case:

"A Collusive Judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons. Fraud is not 'a thing that can stand, even when robed in a Judgment'."

Or, as a rule is sometimes more broadly stated, a judgment which is not founded on an actual debt or other legal liability, due or enforceable at the time of its entry, will not be upheld against the creditors of the judgment-debtor. Hence, a judgment confessed without any consideration and with fraudulent intent, may be questioned by other judgment and execution-creditors of the defendant, and as to them, the judgment and execution thereon will be vacated and set aside".

This rule applies to the present case as well. When the plaintiff (respondent herein) relies upon the decree and judgment obtained by him as against the judgment-debtor for proceeding against the properties of the petitioner herein in execution, it is also open to the petitioner under the terms of S. 44, Evidence Act, to establish that the decree sought to be executed against her was obtained by fraud or collusion. The learned counsel for the respondent relied on the decision in 10 Bom 659 (E)

The principle on which that decision was based is expressed in the following terms:

"to allow the claimant to deny the plaintiff's right to bring the suit, by impeaching the decree which the latter is seeking to execute as collusive, would be, we fear, to add to the difficulties (already very great) of judgment-creditors in enforcing their decrees, by affording additional encouragement to collusive resistance by judgment-debtors and third parties."

While the principle laid down is no doubt commendable, still in my opinion properties not belonging to the judgment-debtors should not be allowed to be proceeded against on the basis of decrees obtained by fraud or collusion. When the claim is allowed and when a suit is instituted by the decree-holder, he has to satisfy the Court that he is a creditor, that he filed the suit in a representative capacity under S. 53, Transfer of Property Act and that the property belongs to the judgment-debtor. The decree may no doubt afford 'prima facie' evidence that a debt is due to him. But that does not prevent the claimant-defendant from establishing that the debt is not true or that the decree is not valid and binding. As already stated, the decision of the Bombay High Court referred to above was rightly dissented from by the Madras High Court in 17 Mad 389 (D).

(7) The next case relied on by the learned counsel for the respondent is — 'Deoki Singh v. Raghavindra Bhagwan', AIR 1939 Pat 430 (G); there is, however, no discussion in that case of the point involved in this case and I am not prepared to follow that decision.

(8) Reliance was next placed on the decision of the Calcutta High Court in — 'Hashim Ali Khan v. Hamidi Begum', AIR 1942 Cal 180 (H). The learned Judges held that a suit under O. 21, R. 63, C. P. C. is in essence a review of the summary order passed by the executing Court on the claim and that it is merely a continuation in a different forum of the claim proceedings. Following the decisions of the Madras High Court already cited, I dissent from the view expressed in this case, as to the nature and scope of the suit under O. 21, R. 63, Civil P. C. The learned Judges preferred to follow the view in 10 Bom 659 (E) and AIR 1939 Pat 430 (G) to the view expressed by the Madras High Court in 17 Mad 389 (D). I am, however, of opinion that the rule is correctly laid down by the Bench decision of the Madras High Court in 17 Mad 389 (D) and I follow it in preference to the decisions of the Bombay, Calcutta and Patna High Courts.

(9) At the close of the argument, a decision of a single Judge of the Madras High Court in — 'Vellayya Reddiar v. Ramaswami Reddiar', 1954-2 Mad LJ 707 (I) was brought to my notice. A careful perusal of that judgment shows that none of the cases cited before me were placed before the learned Judge, who states at p. 708 of the report as follows:

"No authority was cited for the position that in a suit under O. 21, R. 63, Civil P. C., it will be open to the plaintiff to require the decree-holder to prove that the debt in respect of which he has obtained the decree is a genuine one."

I have no doubt that, if the learned Judge's attention had been drawn to the Bench decision of the Madras High Court in—'Naranayyan v. Nageswarayyan (D)', the learned Judge would have followed it and come to a different conclusion Moreover on the facts of that case there is a further difference that the suit under O. 21, R. 63, Civil P. C., was filed by the claimant and not by the decree-holder.

(10) In the result, I set aside the findings recorded by the learned Subordinate Judge on Issues 4 and 5 and allow the Civil Revision Petition. The findings on the question of jurisdiction has not been pressed before me by the petitioner, and therefore, it stands. Costs of this revision petition will be provided for in the suit. The suit will be proceeded with, in the light of the observations contained in this order.

K.S.B. Revision allowed.

A.I.R. 1955 ANDHRA 114 (Vol. 42, C.N. 42)

UMAMAHESWARAM J. (5-11-1954)

Valluri Nagachari, Petitioner v. Chittabhathina Subbamma, Respondent.

Civil Revn. Petn. No. 1439 of 1954, from Order of Subordinate J., Ongole, D/- 19-11-1951.

(a) **Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 3 (v) — Debt allotted to son's share in partition — Son is an 'assignee'.**

Where in a partition suit between a Hindu father and his two sons, a debt under a promissory note executed in favour of the father as the manager of the family is allotted to the share of a son and the note is renewed in favour of the son for a higher amount, the son should be regarded as an assignee of the father by reason of the partition decree and for the purpose of scaling down, the debt should be traced to the original note in favour of the father. AIR 1949 Mad 372, Foll. 1951-2 Mad LJ 400, Distinguished. (Para 3)

(b) **Civil P. C. (1908), S. 35 — Disallowing costs.**

Application under S. 115, Civil P. C. — Plea not taken in lower Court — Authority in favour not pointed to Court — Costs of petitioner disallowed. (Para 3)

Anno: C. P. C., S. 35, N. 5.

CASES REFERRED: Paras

(A) ('51) 1951-2 Mad LJ 400 1, 2

(B) (V36) AIR 1949 Mad 372: 1948-2 Mad LJ 463 2

(C) ('42) CRP No. 971 of 1942 (Mad) 2

C. Purnayya, for M. Ranganatha Sastry, for Petitioner; A. Raghaviah, for Respondent.

JUDGMENT: The original promissory note was executed in favour of Perareddy, the manager of the joint family consisting of himself and his two sons Seshareddy & Subba Reddy. There was a partition suit & the promissory note was allotted to the share of Sesha Reddy. The amount due under the promissory note executed in favour of Sesha Reddy was a sum of Rs. 254-11-0. The application for scaling down the decree debt was ordered by the District Munsif. He scaled down the amount to the principal amount due under the pronote executed in favour of Perireddy, i. e., Rs. 185-3-9 minus Rs. 60/- being the payment made on

4-7-1929, with interest at 6¼ per cent. per annum. On appeal, the appellate Judge following the decision of Subba Rao J., reported in — 'Hanumayya v. Nayudamma', 1951-2 Mad LJ 400 (A), held that the debt should be traced only to Ex. A-1 viz., the pronote executed in favour of Sesha Reddy and modified the order accordingly.

(2) The contention that is raised before me is that the decision in — 'Hanumayya v. Nayudamma (A)', has really no bearing on the case, and that the decision of Govindarajachari J., in — Govinda Nair v. Srinivasa Patter', AIR 1949 Mad 372 (B) applies, as there was a partition suit between Sesha Reddy and Subba Reddy, that under the partition decree the pronote was assigned to Sesha Reddy, and that he is consequently an assignee within the meaning of the definition of "creditor". I agree with the contention of Mr. Purnayya, the learned advocate for the petitioner, and hold that there was a legal assignment in favour of Sesha Reddy by reason of the partition decree. Mr. Justice Govindarajachari followed the decision in an unreported case in 'C. R. P. No. 971 of 1942, (Mad) (C)', where the partition was evidenced by a partition decree. From the facts set out in O. S. No. 54 of 1948, it is clear that there was a partition suit and must have ended in a decree.

(3) I, therefore, follow the decision of Govindarajachari J., in — 'Govinda Nair v. Srinivasa Patter (B)', and hold that, by reason of the partition decree, Sesha Reddy should be regarded as an assignee of Perareddi and that the debt should be traced to the note in favour of Perareddy. The Civil Revision Petition is, therefore, allowed, and the decree of the Subordinate Judge of Ongole set aside and the order of the District Munsif confirmed. As this point was not raised in the courts below and as the petitioner did not invite the attention of the Courts below to the decision of Govindarajachari J., I think it is fit and proper that no costs should be awarded to the petitioner. Each party will bear his own costs throughout.

(4) Revision allowed.

D.R.R. Revision allowed.

(S) A.I.R. 1955 ANDHRA 115 (Vol. 42, C.N. 43)

UMAMAHESWARAM J. (23-11-1954)

Katragadda Sreeramamma, Appellant v. Official Receiver, Guntur and another, Respondents.

A. A. O. No. 172 of 1953, against decree of Sub. J., Tenali, D/- 19-11-1952.

Provincial Insolvency Act (1920), S. 28(2) — Effect of not obtaining leave — AIR 1929 Mad 323 and AIR 1933 Mad 917, Dissented from.

It is clear from the terms of S. 28(2) that as on the making of an order of adjudication the estate vests in the receiver no suit shall be commenced except with the leave of the Court. The terms of the section are mandatory and there can be no question of any waiver of objection as to the maintainability of the suit on the part of the parties so as to nullify the effect of the section. The suit is not maintainable, unless leave of the insolvency Court is obtained prior to its institution. AIR 1937 Mad 667, Rel. on; AIR 1929 Mad 323 — AIR 1933 Mad 917, Dissented from. (Paras 2, 3)

Anno: Pro. Insol. Act, S. 28 N. 15 to 18.

CASES REFERRED: Paras

(A) (V20) AIR 1933 Mad 917: 38 Mad LW 891 2

(B) (V16) AIR 1929 Mad 323: 29 Mad LW 349 3

(C) (V24) AIR 1937 Mad 667: 1937-2 Mad LJ 223 3

B. Punyakoti Chetti, for Appellant; A. Sambasiva Rao and P. Raja Rao, for Respondents.

JUDGMENT: This is an appeal against the Order of remand passed by the Additional Subordinate Judge of Tenali. An objection was raised in the Lower Appellate Court that as leave of the Insolvency Court was not obtained under S. 28(2) of the Provincial Insolvency Act, the suit was not maintainable. The Appellate Judge permitted the objection to be taken even though it was not raised in the trial court and remanded the case, to give an opportunity to the plaintiff-appellant herein to meet that objection.

(2) The main argument addressed by Sri B. Punyakoti Chetty, the learned Advocate for the appellant is that, as the objection was not taken in the trial court, the objection must be deemed to have been waived, as held by Bardswell J. in — 'Satyamma v. Official Receiver, Masulipatam', AIR 1933 Mad 917 (A). Section 28(2), Provincial Insolvency Act is in the following terms:

"On the making of an Order of adjudication the whole of the property of the insolvent shall vest in the court or in a Receiver as hereinafter provided and shall become divisible among the creditors, and thereafter except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the Insolvency Proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

It is clear from the terms thereof that as on the making of an order of adjudication, the estate vests in the Receiver, no suit shall be commenced except with the leave of the Court. The terms of the section are mandatory, and in my opinion, there can be no question of any waiver of objection as to the maintainability of the suit on the part of the parties so as to nullify the effect of the section. Bardswell J., who took a different view, however, states at p. 919 thus:

"No definite authority has been shown as to whether there could be a waiver in such a case ....."

No decision has been cited before me in support of that proposition, excepting the decision of Bardswell J. and I do not agree with that decision, as in my view, the language of S. 28(2) is quite clear and that there can be no waiver of the mandatory requirements of that section.

(3) The learned Advocate for the appellant next drew my attention to the decision in — 'Subramanyam v. Narasimham', AIR 1929 Mad 323 (B) in support of the proposition that the absence of

leave under S. 16, Provincial Insolvency Act (Act 3 of 1907) corresponding to S. 28 of the present Act does not render the decree passed a nullity. But in — 'Dawood Mohideen Rowther v. Sahabdeen Sahib', AIR 1937 Mad 667 (C) a Bench of the Madras High Court dissented from the decision in 'Subramanyam v. Narasimham (B)' and held that on a proper construction of Ss. 28 and 29, Provincial Insolvency Act, the suit is not maintainable unless leave of the Insolvency Court is obtained prior to its institution.

(4) I follow the reasoning of the later Judgment and hold that the decision of the Lower Appellate Court is correct.

(5) In the result, the Civil Miscellaneous Appeal fails and is dismissed with costs. No leave.

D.H.Z. Appeal dismissed.

A.I.R. 1955 ANDHRA 116 (Vol. 42, C.N. 44)

SUBBA RAO C. J. AND BHIMASANKARAN J.

(20-1-1955)

Jaldu Manikyala Rao, Applicant v. Commr. of Income-tax, Madras, Respondent.

Case Referred No. 33 of 1952.

(a) **Income-tax Act (1922), S. 66 (5) — Finding on question of fact — Interference.**

Unless the finding on a question of fact is vitiated by a wrong view of the law, by consideration of inadmissible evidence or refusal to consider admissible evidence, it is not open to the High Court to substitute a finding of its own for that of the ultimate Tribunal of fact, though it might itself be inclined to come to a different conclusion on the same evidence. (Para 3)

Anno: I. T. Act, S. 66 N. 20.

(b) **Income-tax Act (1922), S. 2 (4) — Adventure in nature of trade.**

In order that any transaction may be an adventure in the nature of trade or commerce, it need not form one of a series of similar transactions. A single or isolated transaction can be an adventure of the required character. AIR 1953 Mad 166 and AIR 1944 Lah 287 (FB), Rel. on. (Para 4)

Further, the definition does not say that the particular venture or a transaction should be in the nature of trade usually carried on by the assessee. It is enough if it is in the nature of trade in general, though whether it is or is not akin to the assessee's line of business may be a factor to be taken into consideration in arriving at a finding. (Para 4)

Anno: I. T. Act, S. 2 N. 6.

(c) **Income-tax Act (1922), Ss. 2 (4) and 4 (3) (vii) — Assessee purchasing decree for sale — Amount realised in execution exceeding price paid — Difference if receipt from business or of casual and non-recurring nature.**

The assessee, a trader interested in several lines of business, purchased a share in a final mortgage decree for sale. As a result of the execution proceedings he realised a sum of money for his share of the decree. The amount so realised exceeded the price paid by him for the purchase of the decree by a sum of Rs. 89,040/-. Deducting the sum of Rs. 10,000/- for the expenses of realisation and another sum of Rs. 4,000/- which the assessee had to pay his assignors by way of interest from the above sum, the Income-tax Officer treated the balance of Rs. 75,040/- as gains or profits of an adventure or concern in the nature of trade. The assessee contended that this sum was not a receipt arising from business and but was only one of a casual and non-recurring nature coming within the exemption of S. 4 (3) (vii).

Held that the sum of Rs. 75,040 was a receipt from business and was not of a casual and non-recurring nature exempt under S. 4 3 (vii). (Paras 1, 5)

Anno: I. T. Act, S. 2 N. 6; S. 4 N. 25.

CASES REFERRED: Paras

(A) (V40) AIR 1953 Mad 166: 1952-22 ITR 379 4

(B) (V31) AIR 1944 Lah 287: 1944-12 ITR 209 (FB) 4

(C) (1927) 11 Tax Cas 538: 1927 SC 251 5

(D) (1929) 14 Tax Cas 684: 1929 SC 790 5

(E) (V22) AIR 1935 Mad 387: 8 ITC 76 (SB) 5

K. Srinivasan, P. Rama Rao and M. J. Swamy, for Applicant; The Advocate-General (Andhra), for Respondent.

BHIMASANKARAN J.:

This reference is made at the instance of the assessee and the question to be answered by us is formulated as follows:

"Whether the sum of Rs. 75,040/- is a receipt not from business but only of a casual and non-recurring nature exempt under S. 4 (3) (vii), Income-tax Act?"

(2) Having regard to the nature of the question, it is necessary to state the material facts which have a bearing on the character of the transaction leading to the receipt by the assessee of the sum in question. The assessee is a trader interested in several lines of business. He does business in timber, tiles, furniture, ironware and hardware, some in partnership with others and some entirely on his own. He also owns seagoing schooners and other boats jointly with others which are plied for transport of cargo as well as passengers. He belongs to a family of bankers and traders, he and his brothers having been described by the Appellate Assistant Commissioner of Income-tax as being the foremost business man of Masulipatam.

On 29-8-1941, by a registered deed of transfer, he purchased for a sum of Rs. 62,500/-, a 25/26th share in a final mortgage decree for sale. His assignors were one Mutha Sarvarayadu and his sons. The decree itself was for a sum of about Rs. 2,60,527/-. It is recited in the assignment deed that Sarvarayadu and his sons were in embarrassed circumstances, that they were under pressure to meet the demands of their creditors, that the execution of the decre was stayed under the provisions of the Madras Act 4 of 1938 pending an application for scaling down of the decretal debts, and that as there was no immediate prospect of realising their share of the decretal amount, they were transferring their interest in the decree

to the assessee with a direction to him to pay off their creditors.

The assessee also undertook to pay off his assignors the balance, if any, that might be still outstanding with him after the discharge of their obligation. To enable him to pay the creditors of the assignors, it appears that the assessee borrowed some moneys at interest from his brother Venkatasubba Rao and one Nagapotha Rao, both of whom are bankers and money-lenders by profession. By October 1943, the assessee had paid off all the debts he had undertaken to pay and on 29-5-1944 he paid the balance of consideration still due to the assignors. In the meanwhile, he instituted proceedings in court for the execution of the decree and brought to sale some of the mortgaged properties. As a result of the execution proceedings, the assessee realised on 14-8-1944 a sum of Rs. 1,51,540/- for his share of the decree.

The amount, so realised exceeded the price paid by him for the purchase of the decree by a sum of Rs. 89,040/. Deducting the sum of Rs. 10,000/- for the expenses of realisation and another sum of Rs. 4,000/- which the assessee had to pay his assignors by way of interest from the above sum, the Income-tax Officer treated the balance of Rs. 75,040/- as gains or profits of an adventure or concern in the nature of trade and computed it in the assessment year 1945-46 as part of the income of the assessee in the previous year ending with 31-12-1944. Before the Income-tax Authorities and the Appellate Tribunal, the assessee contended unsuccessfully that this sum is not a receipt arising from business and is only one of a casual and non-recurring nature coming within the exemption of S. 4 (3) (vii).

(3) Before we consider the contentions raised on behalf of the assessee we would like to observe that, in our view, the issue raised is essentially one of fact. Unless the finding thereon is vitiated by a wrong view of the law, by consideration of inadmissible evidence or refusal to consider admissible evidence, it is not open to us to substitute a finding of our own for that of the ultimate Tribunal of fact, though we might ourselves be inclined to come to a different conclusion on the same evidence.

(4) Three main submissions have been made before us on behalf of the assessee. It is argued in the first place that in order that any transaction may be an adventure in the nature of trade or commerce, it must form one of the series of similar transactions. On this view, no single or isolated transaction can ever be an adventure of the required character. Apart from authority, it seems to us that the very language of the enactment militates against any such interpretation. "Business" has been defined as including ".....any adventure or concern in the nature of trade, commerce or manufacture". It is common ground that tax is leviable on all receipts from business. The words "any adventure" clearly comprehend in our judgment even a single venture or an isolated transaction. There is also authority negativing the construction sought to be put upon the language by the counsel for the assessee in — 'Mrs. D. M. Alexander v. The Commissioner of Income Tax, Madras', AIR 1953 Mad 166 at p. 168 (A), where their Lordships of the Madras High Court state:

> "Even a single venture may amount to business and the profits of such a single venture may be taxable as income arising from business."

A Full Bench of the Lahore High Court expressed the same view in — 'Behari Lal Jhandumal', In re: AIR 1944 Lah 287 (B), and Muhammad Munir J., observed at page 291 of the report as follows:

> "If Mr. Kirpa Ram Bajaj's argument is that an isolated venture cannot be a venture in the nature of trade, the position is untenable because in the present state of authorities the proposition that an isolated transaction may be a venture in the nature of tarde is too well-established to admit of any doubt."

We do not think it necessary to refer to other cases cited. The other contention urged on behalf of the assessee was that this particular transaction had nothing to do with the several lines of business in which the assessee was interested and therefore it could not partake of the nature of trade. We cannot accede to this contention either. The definition does not say that the particular venture or a transaction should be in the nature of trade usually carried on by the assessee. It is enough if it is in the nature of trade in general, though as we shall show in the course of our discussion later, whether it is or is not akin to the assessee's line of business may be a factor to be taken into consideration in arriving at a finding.

(5) The third argument urged on behalf of the assessee was that the assessee had no profit motive in entering into the transaction and that he was actuated by one or both of two motives, viz., (a) to help Sarvarayadu and his sons out of their financial embarrassment and (b) to help his own brothers who had purchased the equity of redemption in two of the villages included in the mortgaged property by ensuring that the execution of the decree was confined to the other properties. It is unnecessary for us to deal with this contention because the Tribunal as well as the Income Tax Authorities refused to accept the evidence in support of this case. We may now state what, in our opinion, constitute relevant factors in arriving at a conclusion of fact on the question as to whether a particular transaction is or is not an adventure in the nature of trade or commerce and what is the nature of the thing to which the transaction relates.

Could its acquisition have been for use or enjoyment in the ordinary way? A man may buy a horse, a book or a piece of land. They may be for use or enjoyment by himself. If a man buys a decree for instance, as in this case, it is impossible to say that the subject matter of purchase is for use and enjoyment. The scale of the transaction is also a material factor. If a man goes into the market and buys an immense quantity of a metal or cotton or toilet paper as in the case of — 'Commissioners of Inland Revenue v. Livingstone', (1927) 11 Tax Cas 538 (C), it would not be natural and reasonable to suppose that the thing purchased was for personal use. The purpose, the motive or intention in entering into the transaction will also be a proper matter for consideration.

One may buy a thing merely because it is gonig cheap with the remote intention of making a profit at an opportune time. In such a case, he may not be in the phrase of Lord President Clyde 'plunging into the waters of trade' vide — 'Balgownie Land Trust Ltd. v. Commissioner of Inland Revenue', (1929) 14 Tax Cas 684 (D).

Then again the relation of a particular transaction to the ordinary business of the assessee would be a proper element to be taken into account. If it is clearly connected with the assessee's normal business, the determination of the question would, of course, be easy. It would then be manifestly stamped with the qualities of trade. Further the question may also be asked: Is the receipt arising out of the transaction in the nature of windfall, of a casual and non-recurring nature and not properly describable as arising from any business or trade? If a man draws a prize at a lottery, or makes a profitable bet or wins a prize in a Crossword Competition, as it is called, the receipt could scarcely be described as arising from any business.

Still another question which would have a bearing on the matter would be: Is it an investment i. e., is the money laid out in buying a thing expected to fetch a regular periodical return? A lawyer may buy a share certificate or a debenture in a company. There would be no presumption in such a case that the share or debenture was purchased with the sole object of re-selling at a profit. On the other hand, if a person regularly dealing in shares does so, surely it would be a piece of business. The nature of the operations involved in acquiring and disposing of a thing may also be relevant. It is true that a consideration of all these questions may not be necessary in deciding a particular case. A clear answer to one or other of the questions thus raised may be decisive in some cases. But all or some of them would have to be answered in many cases.

In the present case, what is purchased is a decree. As stated above, the very nature of the subject-matter precludes its acquisition for use or enjoyment. Of course, it is conceivable that a man may purchase a decree to accommodate the decree-holder or the Judgment-debtor, or it may be even to harass or annoy the one or the other of them, but such a motive has been ruled out in this case. The transaction cannot be described as one of speculation like a bet or buying a ticket in a lottery. It is clear case of laying out money with a view to reap a profit. This material element has been found by the Tribunal.

It is in no sense an investment because as shown above, it could not yield a regular and periodical return. That being so, we are of the opinion that there was evidence before the Tribunal on which they could arrive at the conclusion which they reached. The learned counsel for the assessee has drawn our attention, however, to a case reported in — 'Gangaraju v. Commissioner of Income Tax', AIR 1935 Mad 387 (E). It is true that the facts of that particular case are very near to the facts of the present case. But we are satisfied that their Lordships did not intend to lay down any rule of law in deciding that case. The question therefore, referred to us is answered in the negative. The assessee will pay the costs of Commissioner which we fix at Rs. 250/-.

V.R.B. Answer in negative.

(S) A.I.R. 1955 ANDHRA 118 (Vol. 42, C.N. 45)

SUBBA RAO C. J. AND
SATYANARAYANA RAJU J. (30-11-1954)

In re T. Munirathnam Reddi and another, Accused-Petitioners.

Referred Trial No. 67 of 1954 and Cr. Appeal No. 403 of 1954, referred by S. J., Chittoor Division, D/- 2-8-1954.

(a) Penal Code (1860), S. 511 — Attempt—What amounts to — Old man with intention to shoot at deceased raising gun — His son seeing that his hands were shaking, taking the gun himself and shooting the deceased — Old man is guilty under S. 511.

The crucial words in S. 511 are that the accused should have done the act towards the commission of the offence. The two illustrations appended to the section bring out the intention of the Legislature. There are three stages in the commission of a crime (i) intention to commit; (ii) preparation to commit and (iii) attempt to commit. If the attempt results in the actual commission of the offence, the crime is complete. But the Indian Penal Code makes the attempt also an offence, if the accused does any act towards the commission of the offence. The distinction between preparation and attempt may be clear in some cases, but in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction. (Para 17)

The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but he was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder. The illustrations in the section bring out such an idea clearly. The question is really one of fact depending upon the circumstances of each case. (Para 17)

The second accused pursued the deceased with a loaded gun. He was about to release the trigger but his hands were shaking. At that time his son (the 1st accused), who was young and who has had practice at shooting as a Cadet, took the gun from his father and shot the deceased:

Held that the second accused with a clear intention to shoot aimed the gun at the deceased and if he did not release the trigger it was because the 1st accused, noticing the shakiness of his hands, took it out of his hands. He did not commit the offence only because of an extraneous interruption. If the son had not taken it out of his hands, he would have shot the deceased. The 2nd accused did an act towards the commission of an offence within the meaning of S. 511, I.P.C., and, therefore,

he could be rightly convicted under that section. (Para 19)

Anno: Penal Code, S. 511 N. 2.

(b) Penal Code (1860), S. 302 — Sentence — Extenuating circumstance.

Where an accused a young man of 19 years and a college student on seeing that his mother and father were abused and insulted, by the deceased, shot at the deceased in an excited and emotional manner without any premeditation and the deceased died:

Held that the ends of justice would be served if lesser penalty of transportation for life was inflicted. (Para 20)

Anno: Penal Code, S. 302 N. 3, 4, 6.

(c) Penal Code (1860), S. 302 — Accused recommended to Borstal school—(Madras Borstal Schools Act, 1925 (5 of 1926), S. 10-A).

The accused was not a hardened criminal. He was a student of a College and was below 21 years at the time he was convicted of the offence of murder. He shot the deceased when he abused him and his father presumably when they questioned him about his conduct in insulting his mother. The act was done by a young man of good antecedents in an emotional state.

Held that S. 10-A, Borstal Schools Act was really intended to govern the case of such accused. (While sentencing the accused to transportation for life the High Court recommended his case to the Government to take action under S. 10-A and to commit him to the Borstal School for such period as they thought fit). (Para 20)

Anno: Penal Code, S. 302 N. 25.

CASES REFERRED: Paras

(A) (V19) AIR 1932 Mad 507: 1932 Mad WN 545: 33 Cri LJ 582 18
(B) ('35) 1935 Mad WN 651 18
(C) ('85) 8 Mad 5: 1 Weir 330 18
(D) (1892) 17 Cox CC 495: 1892-2 QB 83 18
(E) (1890) 17 Cox CC 104 18

P. Basi Reddy, Jayachandra Reddy and S. Obdul Reddy, for Petitioners; Public Prosecutor (D. Manikanniah), for the State.

SUBBA RAO C. J.:

The learned Sessions Judge of Chittoor Division has convicted the 1st accused under S. 302, Penal Code, and sentenced him to death. He also convicted the 2nd accused under S. 326 read with S. 511, Penal Code, and sentenced him to undergo rigorous imprisonment for two years. The two accused preferred the above appeal against their conviction and sentence.

(2) The case of the prosecution may briefly be stated. The 1st accused Munirathnam Reddi is the son of the 2nd accused, Narayana Reddi. The deceased Kuppi Reddy was Narayana Reddi's first cousin. All of them belong to Velkur village. Kuppi Reddi's wife was staying with her father in a different village and there was a proposal that Kuppi Reddi should stay with his father-in-law as illatom son-in-law, but Kuppi Reddy was not willing to do so. The 2nd accused supported the father-in-law.

This led to estrangement between the members of the two families and the accused were not on talking terms with the deceased. On the evening of 21-9-1953, Kuppi Reddy met the 2nd accused's wife in the fields and addressed her insultingly and even suggested to her that she should take the place of his wife. On the next morning Kuppi Reddy, his two brothers, P. Ws. 1 and 8 and their mother P. W. 2 went to their field. At about 8 A. M., Kuppi Reddy went to his village to bring in two more coolies. Shortly thereafter, they heard the cries of the deceased from the adjacent vanka. They saw the two accused chasing the deceased.

The 1st accused was having a bill-hook and the 2nd accused a gun. When Kuppi Reddy's mother caught her son in her arms, Kuppi Reddy pushed her stating that the accused were going to shoot him. The accused were pursuing him closely behind. The 2nd accused took aim to shoot but, as he was unsteady and fumbling, the 1st accused took the gun from his father and shot him hitting him on the left side. Thereafter, the 1st accused ejected the spent cartridge and reloading the gun with a new one left the place along with his father.

(3) In the 1st accused's statement, his version is given as follows:

After he returned to the village from the College during the vacation, he used to go to the fields often. On the morning of 22-9-1953, he went to his paddy field. When he came by the side of the river bank, he heard a noise and when he came to the bank of the river, he saw his father holding a gun and Kuppi Reddy armed with a bill-hook. He also saw Mala Kannadu and Palle Kannadu behind him armed with bill-hooks. Kuppi Reddy was uttering some vulgar terms.

Fearing that his father would shoot him, he snatched the gun from his father but the trigger accidentally went off and Kuppi Reddy, who was standing in front, received injuries. His defence, therefore, is that there was a quarrel between his father and Kuppi Reddy and that the gun went off accidentally when he attempted to snatch the gun from his father to prevent him from shooting Kuppi Reddy.

(4) The 2nd accused in his statement, would give his version in the following manner. On the morning of the 22nd, he came to the outskirts of the village as usual to hunt birds with a gun and three cartridges. When he got into the river bed, he saw Kuppi Reddy, Mala Kannadu and Palle Kannadu chopping the branches with knives. Kuppi Reddy accosted him along with Mala Kannadu and Palle Kannadu and asked him whether he would go along with him to get back his wife. When he refused he began to abuse him in vulgar language to which he remonstrated. His son suddenly came behind and snatched the gun when it went off accidentally.

(5) The learned Sessions Judge accepted the prosecution version in preference to that given by the accused and held that the prosecution has brought home the guilt to the accused.

(6) The eye-witnesses to the occurrence are P. Ws. 1, 2, 3, 5, 6, 7 and 8. P. Ws. 1, 2 and 8 are blood-relations of the deceased. P. W. 1 is the younger brother of the deceased. He speaks to

the version of the prosecution in minute detail. After the incident, he went to the Village Munsif and gave a complaint, Exhibit P-1 at 8 A. M. In that statement, which is the earliest record of the incident, this witness described the incident broadly bringing out the main features. He stated that accused 1 and 2 chased his brother from the village and that the 1st accused took a gun from his father Narayana Reddy and shot his brother dead. He also mentioned that, at the time of the shooting P. Ws. 3, 5, 6 and 7 and one Rami Reddy were present.

The only conflict between the statement made by him and his present version is that in the statement he mentioned that one Thammi Reddy also chased his brother. He did not state there that P. W. 2 and P. W. 8 were also witnesses to the occurrence. This does not 'ex facie' show that P. W. 1 also saw the shooting. But these discrepancies are not such as to detract from the veracity of this witness. As regards the presence of Thimmi Reddy at the scene of offence, in his deposition he says that he saw Thammi Reddy after his brother was shot and that he has no explanation for stating in his first report that Thammi Reddi also chased. As Thammi Reddy was also present, this witness might have thought that he was one of the pursuers.

The non-mention of P. Ws. 2 and 8 is not of much relevance, for P. W. 2 is the mother and P. W. 8 is the brother of the deceased. He only gave the names of outsiders, who witnessed the offence. The argument that P. W. 1 did not state expressly in Ex. P-1 that he witnessed the occurrence has no point, for, this witness himself gave the report describing the incident. Some minor discrepancies between the evidence he gave before the Sessions Court and that given by him before the committing Magistrate are brought out in the cross-examination but they are such as will ordinarily be found in a witness speaking to facts on two different occasions. Much is made of the difference in the shades of meaning between the words "take" and "wrest", but we do not think that any distinction was intended. The learned Sessions Judge, who had seen this witness, was impressed by his evidence and we do not discover any valid reason to take a different view of the same.

(7) P. W. 2 Mangamma, the mother corroborates the evidence of P. W. 1 on almost every material particular. She says in her evidence that Thammi Reddy met the accused on the way with a bill-hook and that he threw the bill-hook on the advice of the accused and went along with accused 1 and 2.

This explains the presence of Thammi Reddy at the scene and the reason why in Ex. P-1 his name was mentioned. She stood the test of cross-examination fairly well and, indeed nothing has been elicited in the cross-examination to shake her veracity. The non-mention of the fact that the deceased asked the wife of the 2nd accused to take the place of his wife to the police is not of any consequence, for it is unreasonable to expect a mother in sorrow to give a graphic description of every detail.

She stated in her evidence that the 1st accused took the gun from his father saying that he would shoot and go to jail. She was very near the accused and there is nothing improbable in her hearing those words. We have carefully gone through the evidence and we are very much impressed with it.

(8) P. W. 8 is another brother of the deceased. He also corroborated the evidence given by the other two witnesses. The mere fact that P. Ws. 1, 2 and 8 are close relations of the deceased is not a ground for discrediting their evidence. There cannot be any reason why these witnesses should implicate a young man, who is also their relation, if really he came to rescue the deceased and if the gun went off accidentally.

(9) P. W. 5 belongs to Velkur and he knows all the parties. On that fateful morning he was going to his jonna fields by the side of Chettivanka when he heard the cries of the deceased. He saw Kuppi Reddy running from east to west in the sandy bed and accused 1 and 2 running behind him, accused 1 carrying a bill-hook and the 2nd accused a gun. He was one of the eye-witnesses and he saw what all happened and he fully supported the version of the prosecution. It is true that there are some minor discrepancies in his evidence, but they are not really of much consequence. He saw the entire incident from about 20 yards. He is a disinterested witness and there are absolutely no reasons to discredit him.

(10) P. W. 6 is another villager and he knows all the parties. He followed P. W. 1 when he gave the report to the Village Munsif. Only a field intervenes between his field and the vanka. A suggestion was put to him, namely, that he went there after hearing the shot, but he denies it. He is another disinterested witness.

(11) P. W. 7 is the younger brother of P. W. 6. He went to the scene of offence after he heard the shot. In other respects, he too minutely described the incident. His evidence is straight-forward and there are absolutely no infirmities attaching to it. After carefully considering the account of the eye-witnesses, we have no hesitation in agreeing with the Court below that they spoke nothing but truth.

(12) P. W. 9 is the Head Clerk of Sri Venkateswara College, Tirupati, in which the 1st accused was a student. He deposed that the 1st accused was trained in the National Cadet Corps. His evidence establishes that the 1st accused knew how to use a gun. We have, therefore, no hesitation to hold that the 1st accused took the gun from his father and shot the deceased.

(13) Mr. Basi Reddi in a forceful argument advanced the theory that the wound inflicted on the body of the deceased could not have been caused if the 1st accused took a conscious aim at him. In support of his argument, he relied upon the statement made by the eye-witnesses before the Committing Magistrate to the effect that the 1st accused wrested the gun from the hands of the 2nd accused. It is said that, in the course of the wresting, the trigger must have gone off accidentally and hit the deceased.

Reliance is also placed upon the evidence of the doctor in support of this theory. The Doctor, as P. W. 4, says that the wounds Nos. 4 and 5 were exit wounds at the same level and that the deceased must have been shot within about 10 yards. In cross-examination, he further adds that

the entry and exit wounds were almost on the same level in line with the first lumber vertebra. But he concedes that it is possible that there was a slight deflection on hitting the vertebra.

The wounds found on the body were described by him as follows :

1. A circular wound 1½" in diameter (edges inverted) 4" from the umbilicus and 6" from left nipple in the anterior axillary line (vertically parallel to nipple line and a little away 1½" to 2") with a part of the intestine projecting outside the wound.
2. An abrasion 1" in diameter leftwards to the 1st wound.
3. A contusion 3" x 2" around the first wound.
4. Five perforated wounds ⅛" in diameter on the right side of the abdomen in the lumber region 3" above the right iliac crest.
5. A perforated wound 1¼" in diameter in the right arm at the level of the medial condyle in the right humerus.

(14) Relying upon these wounds and the opinion of the doctor, it is contended that when a person shoots another of about the same height from a short distance on the side of abomen, it is impossible to cause an injury which would cause wounds almost in the same level in line with the lumber vertebra.

To put it differently, the argument is that, if accused 1 shot the deceased on the side of the abdomen, the bullet could not have passed in a straight line from one side to the other but should have passed only in the direction in which the gun was placed, i.e., the wound should have been not in a straight line, but in a slanting direction. The learned advocate also made a demonstration with a gun showing that the trigger could easily be released with a slight pressure. It is true that, if the gun was used in an orthodox manner, the wound might not have been caused in the manner now found on the dead body.

Even then, there is no guarantee that the bullet would pass only in a slanting direction corresponding to the way in which the gun was held, for, there might have been a deflection of the bullet when it came into contact with the vertebra. The evidence has not made it clear that the track of the wound was also in a straight line.

But we do not think it is advisable to speculate on the basis of theoretical considerations. The 1st accused is 19 years old and the 2nd accused is 65 years old. They were pursuing the deceased. The 1st accused found his father's hand shaking. He took the gun from him and shot the deceased. The 1st accused obviously must have been in an emotional state and he could not have had an opportunity at the time to take aim as he would have done in ordinary circumstances when he would shoot an animal or bird. In the hurry, he would have taken the gun from his father and released the trigger immediately. It is not possible to say in what position he kept the gun when he released the trigger.

The fact that the witnesses stated that he aimed at the deceased cannot be taken to mean that he aimed at the deceased in the manner he would have done under ordinary circumstances. We cannot, therefore, reject the evidence of the eye-witnesses relying upon some theoretical considerations based upon the nature of the wound. We, therefore, hold that the 1st accused committed the offence of murder.

(15) The next question relates to the nature of the offence, which the 2nd accused had committed. From the eye-witnesses' account, it is obvious that the 2nd accused pursued the deceased with a loaded gun. He was about to release the trigger, but his hands were shaking. At that time his son, who is young and who has had practice at shooting as a Cadet, took the gun from his father and shot the deceased.

(16) It cannot be disputed that, on the facts, the 2nd accused had the intention to shoot the deceased. But it is said that he was hesitating to shoot the deceased when his son took the gun from him and shot the deceased.

In support of this argument, reliance is placed upon the evidence of the eye-witnesses. P.W. 1 states in his evidence that the 2nd accused aimed the gun to shoot Kuppi Reddy and, in so doing, he was unsteady and his hands were shaking. P. W. 2 also says that he was unsteady and shaking. So too, P. W. 3 uses similar words. The corresponding Telugu word for shaking and unsteadiness is "Thadabaduta". It is argued that the word means that the 2nd accused was hesitating. We cannot agree.

The word "hesitation" implies an idea of indecision, whereas the word shaking indicates the unsteadiness of the hands. In the case of hesitation, there is a mental conflict whether to do or not to do an act, but, in the case of unsteadiness, there is a determination to do the act; we cannot therefore, agree with the learned counsel that there was any hesitation on the part of the 2nd accused to shoot the deceased at the time when the 1st accused took the gun out of his hands.

The facts, therefore, are these. The 2nd accused intended to shoot the deceased. He aimed a loaded gun at him. He was about to release the trigger. As his hands were shaking the 1st accused took it from him and completed the act. The question is whether on these facts, the offence of an attempt to commit murder was committed by the 2nd accused. Mr. Obul Reddy, learned counsel for 2nd accused, would argue that the 2nd accused might have prepared to commit the offence but in law he did not attempt to commit it.

The argument turns upon the provisions of S. 511, Penal Code. It reads

> "Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment or to cause such an offence to be committed and in such attempt does not act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence for a term of transportation or imprisonment which may extend to one half of the longest term provided

for that offence, or with such fine as is provided for the offence, or with both."

The crucial words in the sections are that the accused should have done the act "towards the commission of the offence". The two illustrations appended to the section brings out the intention of the Legislature. The illustrations are

"(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore, is guilty under this section.

(b) Attempts to pick the pocket of Z by thrusting his hands into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section."

(17) There are decided cases which recognise the existence of three stages in the commission of a crime: (i) intention to commit; (ii) preparation to commit and (iii) attempt to commit. If the attempt results in the actual commission of the offence, the crime is complete. But the Indian Penal Code makes the attempt also an offence, if the accused does any act towards the commission of the offence. The distinction between preparation and attempt may be clear in some cases but, in most of the cases, the dividing line is very thin. Nonetheless, it is a real distinction.

The crucial test is whether the last act, if uninterrupted and successful, would constitute a crime. If the accused intended that the natural consequence of his act should result in death but was frustrated only by extraneous circumstances, he would be guilty of an attempt to commit the offence of murder. The illustrations in the section bring out such an idea clearly. In both the illustrations, the accused did all he could do but was frustrated from committing the offence of theft because the article was removed from the jewel-box in one case and the pocket was empty in the other case.

(18) The cases cited at the Bar only illustrate the application of the principle to the varying situations. In —'Narayanaswamy Pillai v. Emperor', AIR 1932 Mad 507 (A), the accused was held not to be guilty under S. 511, Penal Code, because though he intended to transport the opium into French territory, he was frustrated before he crossed the border. Walsh J. held that there was 'locus penetentiae' and that he might have changed his intention to smuggle the goods before he crossed the border. In — 'N. Veeriah v. Emperor', 1935 Mad WN 651 (B), Burn J. held that the accused, who was found to be making some preliminary diggings, which were necessary to remove the earth so that he would get at a stone slab fixed to a Buddhist stupa, was not guilty under S. 511, Penal Code. The learned Judge held that his act amounted to a preparation and not to attempt to commit theft.

So too, in — 'Queen Empress v. Ramakka', 8 Mad 5 (C), where a woman went to a well to commit suicide, it was held that she was not guilty under the section as she might have changed her mind and she was caught before she did anything which might be regarded as the commencement of the offence of which she is convicted. It is not necessary to express our view on the correctness of the decisions on the facts found in those cases. But they are only illustrations of the principle that, to constitute an attempt, the accused must do an act towards the commission of the offence. Where an accused had presented a loaded revolver at another person but had been prevented from discharging it by a third person, it was held that the accused intended to do that which he was prevented from doing and that there was sufficient evidence to support the conviction under S. 511, Indian Penal Code (See — 'Reg v. Duckworth', (1892) 17 Cox CC 495 (D)).

So too, where the accused aimed a revolver at the prosecutor and pulled the trigger of the revolver and the hammer fell upon a chamber which contained an empty cartridge case, it was held that the accused could be convicted of attempt to commit murder. (See — 'Reg v. Jackson', (1890) 17 Cox CC 104 (E)). In the aforesaid two cases, the accused was only frustrated from committing the offence by extraneous circumstances over which he had no control.

(19) The question is really one of fact depending upon the circumstances of each case. In the present case, the 2nd accused with a clear intention to shoot aimed the gun at the deceased and if he did not release the trigger, it was because the 1st accused, noticing the shakiness of hi hands, took it out of his hands. He did not commit the offence only because of an extraneous interruption. If the son had not taken it out of his hands, he would have shot the deceased. On the facts of the case, we hold that the 2nd accused did an act towards the commission of an offence within the meaning of S. 511, Indian Penal Code and, therefore, he was rightly convicted under that section.

(20) The next question is what is the punishment to be imposed on the accused. So far as the 2nd accused is concerned, he was sentenced to undergo rigorous imprisonment for two years. There are no grounds for interference with that sentence. So far as the 1st accused is concerned, in our view, there are some mitigating circumstances. The 2nd accused stated that he went to the outskirts of the village as usual to hunt birds. There is no reason to disbelieve this statement. The fact that he owned a gun and also possessed cartridges supports his case that he would occasionally go to shoot birds. The 1st accused, who was also a Cadet and was, therefore, interested in shooting followed his father. There is, therefore, nothing in the evidence to establish beyond reasonable doubt that the father and the son went to the fields with premeditation to kill the deceased. The mere fact that the deceased, who is after all a near relative of the 2nd accused, had used vulgar language in addressing the 2nd accused's wife would not have been a sufficient motive for the 2nd accused to kill his cousin. He would have reprimanded him or would have abused him in return. But something must have happened when they accosted the deceased on their way and questioned him about his previous conduct. He must have abused the 2nd defendant also. The 1st accused, being an young man of 19 years,

when his father and mother were insulted, in an excited and emotional mood, shot the deceased without any premeditation. In the circumstances, we think the ends of justice will be served if the lesser penalty of transportation for life is inflicted.

In this case, we are satisfied that the 1st accused is not a hardened criminal. He was a student of Sri Venkateswara College and was below 21 years at the time he was convicted of the offence. We have also found that he shot the deceased when he abused him and his father presumably when they questioned him about his conduct in insulting his mother. The act was done by an young man of good antecedents in an emotional state. In our view, S. 10-A, Borstal Schools Act is really intended to govern the case of such accused. We, therefore, while sentencing the 1st accused to transportation for life, recommend his case to the Government to take action under S. 10-A and to commit him to the Borstal School for such period as they think fit.

Conviction confirmed. Sentenced on 2nd accused confirmed. Sentence on 1st accused reduced to transportation for life and case remanded for action under Borstal Schools Act.

R.G.D. Order accordingly.

A.I.R. 1955 ANDHRA 123 (Vol. 42, C.N. 46)

SATYANARAYANA RAJU J. (15-12-1954)

Ankam Madhava Rao and others, Petitioners v. The Andhra State Government, Kurnool and others, Respondents.

Writ Petn. No. 537 of 1954.

(a) Cinematograph Act (1918), S. 9(3) — Madras Cinematograph Rules (1933) as amended by Andhra, R. 11A — Rule is ultra vires — (Madras General Clauses Act (1 of 1891), S. 7).

Rule 11-A is neither within the intendment of S. 9(3), Cinematograph Act, nor within the object of the Act as stated in the preamble. Apart from this the notification inserting the new rule was published in the Andhra Gazette on 9-9-1954. Before this date there was no publication of the draft rule as per the requirements of S. 7, Madras General Clauses Act. Objections or suggestions in respect of the draft rule were not admittedly invited at any time and the rule was for the first time published on 9-9-1954. The rule not being within the scope and intendment of S. 9(3), which empowers the State Government to make rules and the mandatory provisions of S. 7, Madras General Clauses Act, which requires previous publication and the inviting of objections to the draft rule, not having been followed the rule is ultra vires the powers of the State Government and has not been validly made. (Para 19)

If the rule is bad as a statutory rule there can be no question of either its prospective or retrospective operation. (Para 20)

(b) Cinematograph Act (1918), Ss. 5(3) and 9 (3) — 'Subject to the control of the State Government', meaning of — G. O. Ms. No. 734 dated 12-7-1954 (Andhra) — Executive instruction contained in the order — Validity.

The expression 'subject to the control of the State Government' in S. 5(3) is wide enough to empower the Government to issue appropriate instructions to the licensing authority. But it is not within the competence of the State Government to issue an executive instruction which if it were issued as a statutory rule, would be beyond their rule-making power contained in S. 9(3). (Paras 22, 23)

No doubt the amplitude of the power conferred on the State Government under S. 5(3) is wider than the rule-making power conferred on the State Government under S. 9 (3) of the Act. But whether it is a rule or an instruction, it must be within the intendment and object of the Act as set out in the preamble and in the material provisions of the Act. The object of the Act, as stated in the preamble is to make provision for regulating exhibitions by means of cinematographs and the power of control to be exercised by the State Government under S. 5(3) must be correlated to the purposes of the Act. An executive instruction, which is unrelated to the object, intendment or the purpose of the Act, cannot be issued by the State Government. (Para 23)

Held that the executive instruction and R. 11A in G. O. Ms. No. 734 dated 12-7-1954 being integral parts of the same Order it was very difficult to separate the instruction from the rule and as the rule itself was ultra vires it could not operate as a valid instruction purporting to have been issued under S. 5(3). (Para 23)

(c) Cinematograph Act (1918), S. 5(3) — Cancellation of license.

Where a license was validly issued to the petitioners under S. 5(3) of the Act by the Licensing Authority when there was no rule or executive instruction or order of the nature contained in G. O. Ms. No. 734, dated 12-7-1954.

Held that a licence validly issued could not be cancelled because of the fact that the Government chose to issue instructions at a later date. (Para 24)

CASES REFERRED: Paras

(A) ('48) A. S. No. 549 of 1948 (Mad) 3

(B) (V39) AIR 1952 Mad 528: 1952-1 Mad LJ 279 21

(C) (V39) AIR 1952 SC 16: 1952 SCR 135 (SC) 25

P. Somasundaram and P. Suryanarayana, for Petitioners; Addl. Govt. Pleader (M. Seshachelapathi), (for Nos. 1 and 2) and D. Munikannaiah, R. D. Indrasenam and M. Dwarka Nath (for No. 3), for Respondents.

ORDER: This is a petition under Art. 226 of the Constitution of India to call for the records and to issue a Writ of Certiorari quashing the Order of the Government of Andhra in G. O. R. No. 421 dated 12-8-1954.

(2) The facts which have given rise to this writ petition and which are either admitted or proved may be set out in their chronological sequence.

(3) The four petitioners in this Writ Petition and one B. M. Rao (3rd respondent) have been partners and lessees of a cinema theatre called Sri Kesari Picture Palace, Eluru, under a registered lease deed, dated 9-11-1947, executed in their favour by the owner. The lease provides for a rent of Rs. 550 per month and is to subsist for a period of ten years. The petitioners, B. M. Rao (3rd respondent) and the owner of the theatre filed O. S. No. 2 of 1948 on the file of the District Court of West Godavari, for possession of the cinema theatre. There was a decree in their favour, which was confirmed by the High Court of Madras in A. S. No. 549 of 1948 Mad (A), on its file on 20-4-1949. In pursuance of that decree, possession was taken by all the partners. It is common ground that the licence under the Cinematograph Act and the licence under the Places of Public Resort Act were previously granted in the name of 3rd respondent. In or about February 1953, there were certain differences between the petitioners and 3rd respondent.

On an application filed by the petitioners, the licence under the Places of Public Resort Act was granted to the petitioners jointly with 3rd respondent. The licence under the Cinematograph Act issued in the name of 3rd respondent was to expire on 31-5-1953. Here it may be stated that a licence is granted for one year at a time and is renewable from year to year. The 3rd respondent did not apply for the renewal of the licence. The petitioners, however, applied on 29-5-1953 for the issue of a licence in the names of all the 5 partners, that is, the petitioners and 3rd respondent. To the petitioners' application for licence, 3rd respondent filed objections on 26-6-1953, wherein he stated that the licence should not be granted in the names of the five partners and prayed that the application for licence may be dismissed. The 2nd respondent in this petition is the District Magistrate of West Godavari, who is the licensing authority under the Cinematograph Act. He gave notice to the parties and heard their counsel. He passed an Order on 3-8-1953, which is as follows:

"The petitioners four in number and the respondent are the joint lessees of Sri Kesari Picture Palace, Eluru. The licence is in the name of the respondent who is the managing proprietor while the petitioners are actually running the cinema. Now that differences arose between the respondent and the petitioners, the petitioners request that their names also be included in the licence for the smooth running of the cinema. Their names have already been included in the Places of Public Resort Act licence issued by the Municipality. Since the petitioners are the joint lessees along with the respondent and since there are differences between them and the respondent regarding the management, it is desirable that the licence be issued in the names of all the partners in the interest of the smooth running of the cinema. There is nothing in the Act and the rules framed thereunder, that licence should not be issued in the name of a body of individuals. The licence will, therefore, be granted in the name of all the five joint lessees."

(4) Pursuant to this Order a licence was granted jointly in the names of the four petitioners and 3rd respondent.

(5) The 3rd respondent filed a petition, dated 9-1-1954 before the Government of Andhra (law Department) praying that the Order of the District Magistrate may be cancelled and that the 'status quo ante' may be restored in respect of the licence. The four petitioners filed petitions on 18-3-1954, 2-3-1954, and 1-4-1954 requesting the Government to dismiss the appeal petition filed by 3rd respondent. On 2-4-1954, the Government issued a memorandum that the parties would be heard in the presence of one another and the Collector of West Godavari was directed to issue notices to the parties to appear before the Law Secretary on 15-4-1954 at 11 A.M. On that day there was an attempt at an amicable settlement which eventually proved abortive.

(6) On 12-7-1954, the Government issued G. O Ms. No. 734, which runs thus:

GOVERNMENT OF ANDHRA.
LAW (COURTS III) DEPARTMENT
G. O. MS. No. 734 dated 12th July 1954.

.....

(Cinematograph Act — Issue of licences to Cinema Theatres—instructions—issued).

ORDER: Cases have come to the notice of the Government where Collectors have renewed the licences of the Cinema Houses in favour of persons, other than the original licencees or jointly with them without the consent of the latter, or without the applicants producing a document of transfer of title or of the licence in favour of the former by the latter. This does not seem to be reasonable and indirectly involves the Government in determining the proper rights of the rival claimants which is outside the scope of the licensing orders.

Collectors are, therefore, instructed not to renew a licence in the name of a person other than the original licensee except in the following cases:

(1) Where the applicant files a valid document of title or of transfer according to the tenor of the document;
(2) Where the applicant files a consent statement of the original licensee, according to the tenor of the consent; or
(3) Where the applicant produces 'Prima Facie' proof that he is the legal successor in title of the original licensee; or an order of a Civil Court in his favour.
(4) Whenever there is transfer of title, along with the transfer, the transferee should obtain the consent in writing of the original licensee that the licence will also be transferred in the name of the transferee.

The Collectors are requested to follow the above instructions while granting licences under Cinematograph Act.

(2) The following Notification will be published in the Andhra Gazette.

NOTIFICATION

In exercise of the powers conferred by S. 9(3) Cinematograph Act 1918 (Central Act II of 1918)

the Governor of Andhra hereby makes the following amendment to the Madras Cinematograph Rules, 1933, published with late Law (General) Department Notification No. 73, dated 5-12-1933, at pages 193-198 of Part I of the Fort St. George Gazette dated 30-1-1934, as subsequently amended.

AMENDMENT

In the said Rules, after Rule 11, the following rules shall be inserted, namely;

"11-A Whenever there is a transfer of title along with the transfer, the transferee should obtain consent in writing of the original licensee, that the licence will also be transferred in the name of the transferee."

(6a) Notices were duly issued to the parties intimating that the Honourable Minister for Finance and Law would hear them and ultimately the parties were heard by the Minister on 7-8-1954. The Government passed G. O. R. No. 421 dated 12-8-1954. The said Order of the Government is as follows:

"The Order of the District Collector dated 3-8-1953 is set aside. The attention of the Collector of West Godavari is invited to G. O. Ms. No. 734, Law Department dated 12-7-1954 and he is requested to dispose of the above case according to the instructions contained in the Government Order.

(2) Sri B. Mallikharjuna Rao and Sri A. Madhva Rao and others are referred to the Collector of West Godavari for order on their petitions.

(By order of the Governor.)
Sd. B. Ch. Narayanamurty.
Secretary to Government".

(7) The present Writ Petition was filed on 19-8-1954, for the issue of a Writ of Certiorari quashing the Order of the Government in the G. O. R. above reproduced.

(8) The contentions of the petitioners' learned counsel may be put under four heads:

(1) Rule 11-A which the Government have purported to make during the pendency of the appeal petition filed by 3rd respondent is 'ultra vires.'

(2) Even if that rule were not 'ultra vires', it cannot have retrospective operation so as to affect the rights acquired by the petitioners under the Order of the licensing authority dated 3-8-1953.

(3) The Order of the Government setting aside the District Magistrate's order dated 3-8-1953, is illegal as being in excess of its powers.

(4) The Government have no power to issue instructions of the nature contained in G. O. Ms. No. 734 dated 12-7-1954.

(9) The learned Government Pleader Mr. Seshachallapathi appearing for respondents 1 and 2 contended that the Government Order of 12-7-1954, consists of two separable parts, the first part relating to the issue of instructions and the second, the draft rule; that the instructions fall within the ambit of S. 5(3), Cinematograph Act, 1918; that the said section confers a wide power on the Government to exercise control over the licensing authority and there is no warrant for circumscribing the ambit of the power of the Government; that the amplitude of the power which the Government can exercise under S. 5(3) is coterminus with the power of the licensing authority; that, in any view, the application is premature and that the petitioners cannot 'cry before they are hurt'.

(10) Mr. Hunikanaiah, appearing for 3rd respondent, supported the contentions which have been advanced on behalf of respondents 1 and 2.

(11) Before I proceed to consider the respective contentions of the parties, it is useful to set out the relevant provisions of the Cinematograph Act. The Cinematograph Act has been amended from time to time. Sections 2, 5 and 7 have been amended by Act 39 of 1949, and by Act 62 of 1949, Sections 1, 2 and 5 have been again amended and Sections 6 to 9 have been substituted. In this Judgment, reference is made to Cinematograph Act (Central Act II of 1918) as modified upto 1-1-1952.

(12) Section 4 defines licensing authority as

"The authority having power to grant licences under this Act (hereinafter referred to as the 'licensing authority') shall be the District Magistrate, or in a Presidency town the Commissioner of Police:

Provided that the State Government may, by notification in the Official Gazette, constitute for the whole or any part of a State such other authority as it may specify in the Notification to be the licensing authority for the purpose of this Act."

(13) Section 5(3) is in the following terms:

"Subject to the foregoing provisions of this section, and to the control of the State Government, the licensing authority may grant licences under this Act to such persons as he thinks fit, and on such terms and conditions and subject to such restrictions as it may determine."

(14) Section 9(3) confers power on the State Government to make rules. It is in the following terms:

"The State Government may make rules to provide for the regulation of cinematograph exhibitions for securing the public safety."

(15) Section 9(4) reads thus:

"All rules made under this Act shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act."

(16) A reference may also be made to R. 11, Cinematograph Rules. It provides:

"Every application to the licensing authority for a licence under S. 3 of the Act shall be in writing and shall be accompanied by—

x x x x

Every application for renewal of the licence shall be made one month before the expiry of the existing licence and a copy of every such application shall be sent simultaneously to the Chief Electrical Inspector direct."

(17) Reference has also been made during the course of arguments to condition No. (7) of the 'Conditions of Licence' which are set out in form "A" of the Cinematograph Rules. It runs as follows:

"The licensee shall not, without the permission of the licensing authority, assign, sub-let, or otherwise transfer the licence or the licensed premises; nor shall the licensee without permission as aforesaid allow any other person during the period of currency of the licence to exhibit films in the licensed premises."

(18) Section 7, Madras General Clauses Act, contains the provisions regulating the making of rules after previous publication. The said section provides as follows:

"(a) the authority having power to make the rules shall, before making them, publish a draft of the proposed rules;

(b) the publication shall be made in such manner as that authority deems to be sufficient, or if the condition with respect to previous publication so requires, in such manner as the Central Government or, as the case may be, the State Government prescribes:

(c) there shall be published with the draft a notice specifying a date at or after which the draft will be taken into consideration;

(d) the authority having power to make the rules, and where the rules are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules from any person with respect to the draft, before the date so specified;

(e) the publication in the Official Gazette of a rule purporting to have been made in exercise of a power to make rules after previous publication, shall be conclusive proof that the rule has been duly made."

(19) Having set out the relevant provisions of the Cinematograph Act and the provisions of S. 7, Madras General Clauses Act, I will now proceed to consider the validity of R. 11-A. That rule purports to have been framed in exercise of the powers conferred on the State Government under S. 9(3), Cinematograph Act, 1918 (Central Act II of 1918). That section empowers the State Government to make rules to provide for the regulation of cinematograph exhibitions for securing the public safety. The object of the Cinematograph Act as stated in the preamble is to make provision for regulating exhibitions by means of cinematograph. It is, therefore, relevant to consider whether R. 11-A is within the intendment of S. 9(3), Cinematograph Act. The language of S. 9(3) is clear and explicit and it empowers the State Government to make rules only to provide for the regulation of the cinematograph exhibitions for securing the public safety. I am of the view that R. 11-A is neither within the intendment of S. 9(3) nor within the object of the Act as stated in the preamble. Apart from this, the notification inserting the new rule was published in the Andhra Gazette on 9-9-1954. Before 9-9-1954, there was no publication of the draft rule as per the requirements of S. 7, Madras General Clauses Act. Objections or suggestions in respect of the draft rule were not admittedly invited at any time and the rule was for the first time published on 9-9-1954. The rule not being within the scope and intendment of S. 9(3) which empowers the State Government to make rules, and the mandatory provisions of S. 7, Madras General Clauses Act, which requires previous publication and the inviting of objections to the draft rule, not having been followed, I hold that the rule is 'ultra vires' the powers of the State Government and has not been validly made. This position has not been seriously contested before me.

(20) If R. 11-A is not valid as a statutory rule, the question as to whether it can retrospectively affect vested rights need not be considered. If a rule is bad as a statutory rule, there can be no question of either its prospective or retrospective operation.

(21) The more important question, however, is even if this rule were not followed, whether the instructions contained in the first part of the Government Order are valid and fall within the ambit of S. 5(3), Cinematograph Act, and whether they can validate the order of the Government setting aside the grants of the licence by the District Magistrate to the petitioners and to 3rd respondent. That the Government have the power to issue instructions under S. 5(3), Cinematograph Act, is beyond controversy. In — 'Vallinayagam Pillai v. State of Madras', AIR 1952 Mad 528 (B), Rajamannar C. J. and Venkatarama Ayyar J., laid down that

"Under S. 5(3), Cinematograph Act, wide power is conferred on the licensing authority to grant licences to such persons as it thinks fit and on such terms and conditions subject to such restrictions as it may determine. The licensing authority is subject to the control of the Provincial Government. It is presumably in exercise of this power of control that the instructions were issued by the Government to the licensing authorities. It is not strictly accurate to speak of these instructions as rules framed under S. 8 of the Act and so it is not necessary to deal with the contention that they go beyond the rule-making power contained in S. 8."

(22) I am in agreement with the contention of the learned Government Pleader that the expression 'subject to the control of the State Government' is wide enough to empower the Government to issue appropriate instructions to the licensing authority.

(23) But the question still remains as to whether it is within the competence of the State Government to issue an executive instruction which if it were issued as a statutory rule would be beyond their rule-making power contained in S. 9(3). The petitioners' learned counsel contended that the instruction is merely a crystallized form of the rule and has merged with the rule. On a fair reading of the Government Order, I have found it very difficult to separate the instruction from the rule. In my opinion, the instruction and the rule are integral and one cannot be separated from the other. In any view I hold that the rule itself being beyond the rule-making power of the State Government, it would not be within the competence of the State Government to issue a rule in the shape of an instruction or direction. If it were the view of the State Government that it should serve as an instruction and there was no necessity to frame a rule,

the Government need not have framed the rule. On the other hand, if the Government thought that they must frame a rule, I am not satisfied that they could issue it in the form of an instruction. Therefore, what cannot be good as a statutory rule may not be good as a direction or instruction purporting to have been issued under S. 5(3).

I am aware that the amplitude of the power conferred on the State Government under S. 5 (3) is wider than the rule-making power conferred on the State Government under S. 9(3) of the Act. But, to my mind, whether it is a rule or an instruction, it must be within the intendment and object of the Act as set out in the preamble and in the material provisions of the Act. The object of the Act, as stated in the preamble, is to make provision for regulating exhibitions by means of cinematographs and the power of control to be exercised by the State Government under S. 5(3) must be correlated to the purposes of the Act. When during the course of the arguments, I put this to the learned Government Pleader, he pointed out Condition No. 7 of the 'Conditions of Licence', which I have extracted above, as justifying the issuing of an executive instruction contained in the impugned Government Order. I am not now called upon to express my opinion as to the validity of the condition inserted in the licence (Form A). But I am satisfied that an executive instruction, which is unrelated to the object, intendment or the purpose of the Act, cannot be issued by the State Government.

(24) There is another important aspect of the matter which requires consideration. It must be remembered that the previous licence in favour of 3rd respondent expired on 31-5-1953. The 3rd respondent did not himself apply for a renewal of the licence. He preferred to keep quiet. It was the petitioners that applied for the renewal on 29-5-1953, and the licence was granted by the District Magistrate of West Godavari in favour of the petitioners and 3rd respondent for the reasons recorded by him in his order. On the date on which the District Magistrate granted the licence in favour of the petitioners there was admittedly no rule or executive instruction or order of the nature contained in the Government Order, dated 12-7-1954. In the absence of the rule or the executive instruction, it was within the competence of the District Magistrate to issue the licence in favour of the petitioners. Can it be that the executive instruction subsequently issued operates to make the order of the District Magistrate bad? Long before 12-7-1954, the petitioners had a valid licence in their favour. Can that licence be cancelled in the light of instructions subsequently issued? I am not satisfied that a licence validly issued can be cancelled because of the fact that the Government choose to issue instructions at a later date.

(25) The learned counsel for the petitioners has further contended that, in any view, the Government had no power to cancel a licence issued by the licensing authority and in support of this contention he relied upon the decision of the Supreme Court in — 'Commr. of Police, Bombay v. Gordhandas Bhanji', AIR 1952 SC 16 (B). Their Lordships of the Supreme Court held that there was no valid cancellation of the licence because the Order of cancellation communicated to the respondent was one made by the Government of Bombay and not by the Commissioner on his own authority, he having acted only as a transmitting agent. This decision turned upon the construction of the rules framed under Ss. 22 (1) (f), 1(g) and (n), City of Bombay Police Act, 1902. The Supreme Court held on a perusal of the relevant rules that the only person vested with the authority to grant or refuse a licence for the erection of a building to be used for purposes of public amusement is the Commissioner of Police, that under R. 250 he has been vested with the absolute discretion 'at any time' to cancel or suspend any licence which has been granted under the rules, but the power to do so is vested in him and not in the State Government and can only be exercised by him at 'his' discretion and that no other person or authority can do it. This decision, as I said before, turned upon a construction of the rule framed under the City of Bombay Police Act and does not, therefore, apply to the present case. About the general power of the Government to cancel a licence issued by the District Magistrate, I would prefer not to express a final opinion in this case as I had not the advantage of a full and exhaustive argument on this question.

(26) Lastly, there remains the objection taken by the learned Government Pleader that the petitioners are not entitled to any relief in this Writ Petition because it is premature. This contention is based on the language of the Order of the Government, dated 12-3-1954 given above.

From the statement of facts set out above, it is clear that the Government did purport to cancel the Order of the District Magistrate issuing the licence to the petitioners. That Order of the District Magistrate was specifically set aside by the Government. The contention on behalf of the respondents is that the Government have merely directed the District Magistrate to dispose of the case in accordance with the instructions contained in the Government Order. The first paragraph of the order in which the Government purported to set aside the Order of the District Magistrate, dated 3-8-1953, was no doubt not communicated to the petitioners. But the order of the Government specifically set aside the Order of the District Magistrate dated 3-8-1953. It cannot, therefore, be contended with reason that the petitioners should be denied relief in this Writ Petition on the ground that their application under Art. 226 is premature. What they complain of and what they seek to quash is the Order of the Government in G. O. R. No. 421, dated 12-8-1954. All the parties to the Writ Petition have concentrated their attention on the correctness of the said Order of the Government. The petitioners are certainly hurt by the said Order of the Government, and it cannot be said that their petition is premature.

(27) In the view I have taken, it follows that the Order of the Government in G. O. R. No. 421, dated 12-8-1954 must be quashed. The petitioners will have their costs which I fix at Rs. 200/-.

K.S.B. Order quashed.

A.I.R. 1955 ANDHRA 128 (Vol. 42, C.N. 47)

SUBBA RAO C. J. (13-9-1954)

Setty Satyanarayana, Plaintiff-Appellant v. Setty Kannayamma, Defendant-Respondent.

Second Appeal No. 1036 of 1950, against decree of Dist. Court, Vishakapatnam, in A. S. No. 229 of 1949.

Husband and wife — Maintenance application — Compromise — Subsequent suit by husband for restitution of conjugal rights — Effect of compromise — Dismissal of suit justified — (Criminal P. C. (1898), S. 488).

A petition for maintenance filed by the wife was compromised and under the compromise, the husband agreed to take the wife to his house and provide separate residence for her within three days from the filing of the compromise petition. Within 3 days after the petition was disposed of the husband issued a notice to the wife throwing the entire blame on her for not carrying out the terms of compromise and also filed a suit for restitution of conjugal rights which was dismissed on the ground that the husband was guilty of cruelty. In appeal, the husband contended that his conduct could not be relied on in the suit after its condonation by the compromise.

Held that it is well-settled that, after condonation, the act that could have entitled the wife to ask for separate maintenance cannot be relied upon in a suit for restitution of conjugal rights filed after the said condonation. But, if the compromise was itself a ruse to defeat wife's right of maintenance, it is not possible to rely upon that compromise as a condonation of the husband's previous acts.

(2) That the husband never intended to take her back; nor did he intend to provide her maintenance. If so, the compromise could not be in the way of the wife's right to live separately from her husband.

(3) That where a husband imputes a loathsome venereal disease to his wife, discards her and does not make any attempt to get her cured or provide for maintenance, it is a clear case of desertion on his part and such a conduct would also amount to cruelty on the part of the husband. In the circumstances, the dismissal of the suit for restitution of conjugal rights brought by the husband was justified. (Paras 2, 3)

Anno: Criminal P. C., S. 488 N. 11.

E. Venkatesam and E. L. Baghirathi Rao, for Appellant; Y. Suryanarayana and P. Subba Rao, for Respondent.

JUDGMENT: This second appeal arises out of a suit filed by the appellant for restitution of conjugal rights against his wife.

(2) The appellant is a much married man. He had two wives before he married the defendant. His first wife deserted him and his second wife died. He married the defendant as a third wife. In 1943 he deserted her and married a fourth wife with whom he is now living. The defendant filed a petition in the Magistrate's Court for maintenance, being M. C. No. 55 of 1947 on the file of the Additional First Class Magistrate's Court, Vishakapatnam. That petition was compromised and under the compromise, it was agreed that the plaintiff should take her to his house and provide separate residence for her within three days from the filing of the compromise petition on 25-9-1947. After the petition was disposed of on 29-9-1947, the plaintiff issued a notice Ex. D. 2 to the defendant throwing the entire blame on her for not carrying out the terms of compromise. It is apparent from this conduct that the plaintiff was anxious to make out a case to deprive her of her maintenance. If he was really serious and sincere in his attempt to live with her, it would not have been the conduct of such a person to issue a registered notice immediately after the expiry of three days. A repenting husband, who intended to live with his wife, would have made all attempts to persuade her to live with him. But, instead, he took advantage of the technical defect and tried to circumvent the compromise. He not only gave a registered notice to her but also filed O. S. No. 302 of 1947 for restitution of conjugal rights. Both the Courts found that the plaintiff was guilty of cruelty, and therefore he was not entitled to the relief of restitution of conjugal rights. Hence the above second appeal.

(3) The learned counsel for the appellant conceded that the finding of cruelty was one of fact and there were no grounds for questioning that finding in a second appeal. But he argued that Ex. P. 1, the compromise, amounted to a condonation on the part of the defendant of the plaintiff's previous conduct and that the learned Judge went wrong in relying upon the previous conduct in dismissing the suit. As a proposition of law, it is well-settled that, after condonation, the act that could have entitled the wife to ask for separate maintenance could not be relied upon in a suit for restitution of conjugal rights filed after the said condonation. But, if the compromise was itself a ruse to defeat her rights of maintenance, it is not possible to rely upon that compromise as a condonation of the plaintiff's previous acts. From the aforesaid narration of facts, it is manifest that the compromise petition was filed to defeat the defendant's right to maintenance. The plaintiff never intended to take her back; nor did he intend to provide her maintenance. The subsequent registered notice and the filing of the present suit are clear indications that the compromise was effected with a view to defraud the defendant. If so, the compromise could not be in the way of the defendant's right to live separately from her husband in the circumstances found by the Courts below. When a husband imputes a loathsome venereal disease to his wife, discards her and does not make any attempt to get her cured or provide for maintenance, it is a clear case of desertion on his part and such a conduct would also amount to cruelty on the part of the husband. In the circumstances, both the Courts were justified in dismissing the suit of the plaintiff for restitution of conjugal rights.

(4) The second appeal fails and is dismissed with costs. No leave.

H.G.P. Appeal dismissed.

(S) A. I. R. 1955 ANDHRA 129 (Vol. 42, C. N. 48)

CHANDRA REDDY AND
UMAMAHESWARAM JJ. (20-1-1955)

Pari Kameswara Rao and others, Petitioners v. State of Madras, represented by the Deputy Commercial Tax Officer, East Godavari, Kakinada Respondent.

Tax Revn. Cases Nos. 271, 272, 283, 333, 344, 348 and 364 of 1953, from order of Sales Tax Appellate Tribunal, Madras, D/- 9-2-1953; 30-5-1953 and 30-6-1953.

(a) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 2(h), Explanation 2 (added by Madras Act, 25 of 1947) — Explanation, if ultra vires — (Government of India Act (1935), S. 100(3) and Sch. 7, List 2, Entry 48).

A Legislature cannot pass a legislation that would be binding on a territory outside its limits. But there is no question of extra territorial jurisdiction being conferred upon the State by the new explanation. The new explanation does not seek to clothe the State with power to tax executory contracts of sale, but only with levy of tax on completed sales. Under the explanation, the existence of goods affords sufficient nexus between the transaction of sale and the taxing province. By reason of entry No. 48, therefore, the Madras Legislature was competent to enact the explanation which, therefore, is not ultra vires. AIR 1953 SC 274, Foll. (Paras 4, 11, and 23)

Anno: Govt. of India Act, S. 100 N. 1.

(b) Sales Tax — Madras General Sales Tax Act (9 of 1939), S. 2(h), Explanation 2 (added by Madras Act, 25 of 1947) — Validity — Repugnancy to provisions of Sale of Goods Act—Want of sanction required by S. 107, Govt. of India Act — (Government of India Act (1935), S. 107 and Sch. 7, List 2, Entry 48) — (Sale of Goods Act (1940), Preamble) — AIR 1952 Nag 378, Not foll.

The object of entry 48 is not to confer power on Provincial Legislatures to enact the legislation to deal with contracts of sales or sales as such. The pith and substance of this is to provide power to levy taxes on sale of goods and it does not entrench upon the province of the concurrent list and, therefore, there is no repugnancy to Sale of Goods Act. It is certainly within the legitimate sphere of the Provincial Legislature to make the laws so long as it does not travel beyond the scope of entry No. 48. The Sale of Goods Act does not prescribe a situs of sale and consequently there can be no conflict in regard to this matter between S. 2, Madras General Sales Tax Act, and the material provisions of the Sale of Goods Act. (Para 13)

To attract the applicability of S. 107, it has to be established that the impugned Act and the existing law must be in respect of the same subject-matter and both of them must be covered by one of the entries in the concurrent list and secondly, there must be repugnancy between the two provisions. If the subjects dealt with by the two enactments are different and the sources of the power of the legislature are traceable to two different lists, S. 107 cannot have any operation. It is by reason of entry No. 48 that the Madras General Sales Tax Act could be passed, whereas contracts which are dealt with in the Sale of Goods Act come under entry No. 10 of the concurrent list. The two enactments therefore deal with different subjects and in order to come within the purview of S. 107 the provincial law must be traceable to the concurrent legislative list. AIR 1953 SC 252 and AIR 1953 SC 274, Foll. AIR 1952 Nag 378, Not foll. Case Law discussed. (Paras 17, 18)

Anno: Govt. of India Act, S. 107 N. 1.

CASES REFERRED: Paras

(A) (V35) AIR 1948 PC 118: 1948-2 Mad LJ 62 (PC) 6, 22
(B) (V40) AIR 1953 SC 274: 1953-1 Mad LJ 739: 1953 Cri LJ 1105 (SC) 7, 15, 22, 23
(C) (V40) AIR 1953 SC 252: 1953-1 Mad LJ 743: 1953 SCJ 373 (SC) 10, 13, 15, 22, 23, 25
(D) (V39) AIR 1952 All 764: ILR (1953) 2 All 58 11, 21
(E) (V41) AIR 1954 SC 459: 1954 SCJ 573 (SC) 11, 21
(F) (V40) AIR 1953 Orissa 23: ILR (1952) Cut 442 11, 21
(G) (V41) AIR 1954 Mad 932: 1954-2 Mad LJ 326 13, 18, 24, 25, 27
(H) (V39) AIR 1952 Nag 378: ILR (1953) Nag 332 14, 26, 27
(I) (V34) AIR 1947 PC 72: 1947-2 Mad LJ 1 (PC) 18, 24
(J) (V37) AIR 1950 FC 59: 1950-1 Mad LJ 760:51 Cri LJ 921 (FC) 18, 24
(K) (V39) AIR 1952 Mad 198: 1951-20 ITR 546 25
(L) (V40) AIR 1953 SC 98: 1953 SCR 351 (SC) 25
(M) (V41) AIR 1954 Mad 1029: 1954-2 Mad LJ 230 25

N. Rajeswara Rao and M. S. R. Sastry and G. Chandrasekhara Sastri, for Petitioners; Govt. Pleader, for the State.

CHANDRA REDDY J.:

I agree with the conclusions reached by my learned brother that these revision cases should be dismissed. But having regard to the nature of the questions raised, I would like to give my reasons in support of it. The necessary facts are stated in his Judgment and therefore not necessary to repeat them.

(2) In these cases, the constitutionality of the explanation added to S. 2(h), Madras General Sales Tax Act (hereinafter called the Act) by Act 25 of 1947 is put in issue. The amendment came into force on 1-1-1948. Section 2(h) of the Act defines a sale with all its grammatical variations and cognate expressions as

> "every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, and includes also a transfer of property in goods involved in the execution of a worked contract, but does not

include a mortgage by hypothecation, charge or pledge".

The addition to this section which is impugned before us is in the following words:

"Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made (a) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made, or (b) in case the contract was for the sale or purchase of future goods by description then, if the goods are actually produced in this State at any time after the contract of sale, or purchase in respect thereof was made".

(3) The validity of this explanation is attacked on the grounds (1) that this is ultra vires the Madras Legislature as it is incompetent to a Provincial Legislature to enact a statute having an extra-territorial operation; (2) that this explanation is repugnant to the provisions of the Indian Sale of Goods Act, and, therefore, void to the extent of the repugnancy for want of sanction of the Governor-General as required by S. 107, Government of India Act, 1935.

(4) On the first point, the ground of attack is that this explanation seeks to confer a power upon the State to impose tax on sales taking place outside the State, which is not within the sphere of the Provincial Legislature. In my opinion, this contention cannot prevail. It is an unexceptionable proposition that a Legislature cannot pass a legislation that would be binding on a territory outside its limits. But there is no question of extra territorial jurisdiction being conferred upon the State by this new explanation. Prior to the inauguration of the Constitution, the power of the Provincial Legislature to make laws for the Province of Madras was derived from S. 100 (3), Government of India Act, 1935, which recites thus:

"Subject to the two preceding sub-sections, the Provincial Legislature has and the Federal Legislature has not power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List.")

(5) The entry in the Provincial List which enabled the Provincial Legislature to enact a legislation for levying Sales Tax is No. 48 which speaks of taxes on sales of goods and on advertisements. This item does not restrict the power of the Legislature to make legislation for imposing tax on sales taking place within the boundaries of the Province. The point for consideration is whether by reason of entry No. 48, the Legislature of the Madras Province (as it was called before) was competent to undertake this legislation.

(6) The correct approach to a problem of this kind is indicated in — 'Wallace Bros. & Co. Ltd. v. Commr. of Income-tax, Bombay', AIR 1948 PC 118 (A). One of the questions debated there was whether Ss. 3, 4, 4-A and 63, Income-tax Act, which enabled the Income-tax Authorities to include the income arising without British India to make an assessment of income-tax on incomes including those arising without British India were valid. This was answered by the Privy Council in favour of the Income-tax Department in agreement with the High Court of Bombay and the department. In dealing with the contention that the relevant sections of the Income-tax Act having an extra-territorial operation was intra vires the Central Legislature, their Lordships remarked thus:

"There is no rule of law, that the territorial limits of a subordinate Legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depend upon the proper construction of the Statute conferring those powers. No doubt, the enabling Statute has to be read against the background that only a defined territory has been committed to the charge of the Legislature. Concern by a subordinate Legislature with affairs or person outside its own territory may, therefore, suggest a querry whether the Legislature is in truth minding it own business. It does not compel the conclusion that it is not. The enabling Statute has to be fairly construed."

In another part of the Judgment, it is stated:

"The resulting general conception as to the scope of the income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income."

These passages summarise succinctly the law on the subject, which bears a close analogy to the present one.

(7) The view enunciated in this case was accepted by the Supreme Court in — 'Poppatlal Shah v. State of Madras', AIR 1953 SC 274 (B). There the right of the Madras Government to tax a sale which was completed within another province where the property in the goods passed, although the contract of sale was entered into within the former province was questioned on behalf of the assessee. It was urged that the Provincial Legislature functioning under the Government of India Act was not competent to pass an Act which was capable of operating upon sales concluded outside the Province and that, secondly, S. 2(h), Madras General Sales Tax Act, did not authorise the levy of tax in respect of a transaction of sale whereby property in the goods sold passed outside the province.

The first one was rejected, but the second one found acceptance with their Lordships. In dealing with the first one, it was stated inter alia, by Mukherjee J. (as he then was) that it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the Province, provided that there was sufficient and real territorial nexus between such transactions and the taxing province. Lower down in the Judgment, it was remarked:

"As a matter of fact the legislative practice in regard to sales tax laws adopted by the provincial legislature prior to the coming into force of the Constitution has been to authorise imposition of taxes on sales and purchases which were related in some manner with the taxing province by reason of some of the ingredients of the transaction having taken place within the province or by reason of the production or location of goods within it at the time when the transaction took place. If in the Madras Sales Tax Act the basis adopted for taxation is the location of the place of business or of the goods sold within the province of Madras, undoubtedly it would be a valid piece of legislation to which no objection on constitutional grounds could be taken. The controversy, therefore, narrows down to the short point as to what exactly has been adopted as the basis of the levy of sale tax by the Madras Legislature."

According to this extract, the crux of the problem is whether there is any real and sufficient territorial nexus between the dealing subjected to tax and the taxing province. Their Lordships also pronounced on the validity of the provisions now in these words:

"The presence of the goods within the province at the time of the contract would undoubtedly make the sale, if subsequently completed, a sale within the province by reason of the explanation added to Act 35 of 1947. But as this explanation was not in operation during the relevant period with which we are concerned, the assessment of sales tax, in our opinion, on the transactions during this period is illegal and not warranted by the provisions of the Act."

(8) It may be mentioned that the tax which found the subject matter of enquiry in that case related to a period between 1-4-1947 and 31-12-1947 and as already pointed out, the explanation now assailed came into force only on 1-1-1948.

(9) After this authoritative pronouncement, it is futile to question the vires of explanation 2 to S. 2(h), Madras General Sales Tax Act.

(10) I may also refer usefully to a passage in the Judgment of the Supreme Court in — 'State of Bombay v. United Motors (India) Ltd.', AIR 1953 SC 252 at p. 256 (C):

"In the case of sales tax, it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course such activities ultimately resulted in a concluded sale or purchase to be taxed. In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislature enacted Sales Tax laws for their respective provinces acting on the principle of territorial nexus referred to above, that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales tax legislation."

(11) The law as stated here puts the matter beyond all controversy and it is too late now to challenge the validity of this explanation. 'Budh Prakash v. Sales Tax Officer, Kanpur', AIR 1952 All 764 (D), Sales Tax Officer, Pillibhit v. Budh Prakash', AIR 1954 SC 459 (E), on appeal to the Supreme Court from the above and — 'Bharat Sabaigrass Ltd. v. Collector of Commercial Taxes, Orissa, Cuttack', AIR 1953 Orissa 23 (F), cited for the petitioners are not really in point. They deal with cases of executory contracts and forward contracts, and cannot, therefore, have any bearing upon the present enquiry. Surely, the new explanation does not seek to clothe the State with power to tax executory contracts of sale, but only with levy of tax on completed sales. The explanation has to be read with the main provision defining the sale. For these reasons the first contention of the petitioners fail.

(12) This leads me to the controversy regarding the alleged repugnancy between the impugned provisions and the relevant Sections of the Sale of Goods Act. It is stated that this explanation makes a change in the notions as obtained from the Indian Sale of Goods Act and is opposed to the completion of sale as defined in the Indian Sale of Goods Act. Under this explanation, transfer of property is deemed to have taken place in the taxing province where the goods are produced despite the property in the goods passing in another State which is the situs of sale as provided under the Sale of Goods Act.

(13) To appreciate this argument, it is necessary to refer to Entry No. 48 of the Provincial List which confers authority on the Provincial Legislature to make laws for levy of taxes on the sale of goods and on advertisements. Thus the object of this entry is not to confer power on Provincial Legislatures to enact the legislation to deal with contracts of sales or sales as such. The pith and substance of this is to provide power to levy taxes on sale of goods and it does not entrench upon the province of the concurrent list and, therefore, there is no repugnancy to Sale of Goods Act.

It is certainly within the legitimate sphere of the Provincial Legislature to make the laws so long as it does not travel beyond the scope of Entry No. 48. That the Sale of Goods Act does not prescribe a situs of sale and consequently there can be no conflict in regard to this matter between S. 2, Madras General Sales Tax Act, and the material provisions of the Indian Sale of Goods Act is apparent from a statement in the Judgment of the Chief Justice Patanjali Sastri in AIR 1953 SC 252 (C).

"Neither the Sale of Goods Act nor the Common Law relating to the sale of goods has anything to say as to what the situs of a sale is, though certain rules have been laid down for ascertaining the intention of the contracting parties as 'to when and under what conditions'

the property in the goods is to pass to the buyer. That question often raises ticklish problems for lawyers and courts, and to make the passing of title, the determining factor in the location of a sale or purchase would be to replace the old uncertainties and difficulties connected with the nexus basis with new ones".

This question directly arose in the High Court of Madras in — 'Louis Dreyfus & Co. Ltd. v. State of Madras', AIR 1954 Mad 932 (G). Satyanarayana Rao and Rajagopalan JJ., constituting the Bench ruled that there was no conflict between the 2nd explanation to S. 2(h), Madras General Sales Tax, and the provisions of the Indian Sale of Goods Act, as the latter Act does not fix the situs of sale. In support of their conclusions, the learned Judges relied on the passage in the Judgment of the Supreme Court extracted above.

(14) In support of the theory of repugnancy, the counsel for the petitioners called in aid a passage in the judgment of Hidayathullah J., in — 'Shriram Gulabdas v. Board of Revenue, M. P.', AIR 1952 Nag 378 at p. 384 (H):

"What we have stated here does not apply, however to the amended explanation for which no sanction of the Governor General was obtained. A reading of the amended explanation would show that it trenches substantially upon the existing rules embodied in the Sale of Goods Act. To change effectively those rules was not within the unconditional competence of the Provincial Legislature. They could only do so if the Bill had been assented to by the Governor General as required by Ss. 100 and 107 Government of India Act, 1935.

Admittedly the amending Act was not so assented to and consequently it fails to work any change. Further, the rules have been amended to make the transaction complete when the goods are produced in the province and not appropriated towards the contract already existing. That would be levying an excise duty from the manufacturer, because till the goods are appropriated towards the contract, the transaction of sale is not complete, and a tax purporting to be "on the sale of goods" cannot be levied because no sale has taken place. This, however, does not arise in this case, but is applicable to the other case, which for other reasons, we have decided to reject".

(15) Apart from how far these observations can have relevancy in the present context, and whether they could be reconciled to what was stated by the learned Judge earlier, they could not have much of force in the light of the rule stated by the Supreme Court in AIR 1953 SC 251 (C) and also AIR 1953 SC 274 (B). Further there is the direct decision of the Madras High Court referred to above, which is binding on us so long as it is not over-ruled. It follows that there is really no repugnancy between the present enactment and the Sale of Goods Act of the Central Legislature and the former can operate without any question of voidness.

(16) This contention can be rejected on another ground. The sanction of the Governor General is essential only in cases falling under S. 107(2), Government of India Act, 1935. Sub-section (2) of S. 107 states:

"Where a provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal Law or an existing Indian Law with respect to that matter, then, if the provincial law having been reserved for the consideration of the Governor General or for the signification of His Majesty's pleasure, has received the assent of the Governor General or of His Majesty, the Provincial law shall in that province prevail, but nevertheless the Federal Legislature may at any time enact, further legislation with respect to the same matter".

(17) In these cases admittedly the assent of the Governor General was not obtained, but this is not decisive of the matter. It remains further to consider whether the provincial law which is said to have violated S. 107 was enacted by virtue of its powers received from the concurrent list. I have already pointed out that it is by reason of entry No. 48 that the Madras General Sales Tax Act could be passed, whereas contracts which are dealt with in the Indian Sale of Goods Act come under entry No. 10 of the concurrent list. It is, therefore, seen that the two enactments deal with different subjects and in order to come within the purview of S. 107, Government of India Act, 1935, the provincial law must be traceable to the concurrent legislative list.

(18) Similar questions have been the subject matter of judicial review. It was held by the Privy Council in — 'Megh Raj v. Allah Rakhia', AIR 1947 PC 72 (I), that where the provincial law false within the powers given to the province under the provincial list and does not depend upon any of the powers provided by the concurrent list, the question of repugnancy under S. 107, Government of India Act, 1935, does not arise. The ruling of the Federal Court in — 'Lakhi Narayan Das v. Province of Bihar', AIR 1950 FC 59 (J), contains a decision which governs the present case. It was held that that to attract the applicability of S. 107, it has to be established that the impugned Act and the existing law must be in respect of the same subject matter and both of them must be covered by one of the entries in the concurrent list and secondly, there must be repugannncy between the two provisions. What follows from this is that if the subjects dealt with by the two enactments are different and the sources of the power of the legislature are traceable to two different lists, S. 107 cannot have any operation. These two authorities were followed by the Bench of the Madras High Court in AIR 1954 Mad 932 (G).

(19) It is not necessary to refer to the other decisions which state the law to the same effect. On these rulings the argument as to repugnancy cannot have any force and has to be repelled.

(20) In the circumstances, the appeals are dismissed with costs. Government Pleader's fee is fixed at Rs. 125/- in each case.

UMAMAHESWARAM J. :

(21) These revision petitions are filed under S. 12(b), Madras General Sales Tax Act, against the Orders of the Sales Tax Appellate Tribunal, Madras, and they raise difficult and interesting questions of law. The main point that arises for consideration is whether the amendment introduced by Act 25 of 1947 to the definition of "Sale" in S. 2(h), Madras General Sales Tax Act, is ultra vires of the Madras Legislature. Explanation 2 to S. 2(h) is in the following terms :

"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed for the purposes of this Act to have taken place in this Province, wherever the contract of sale or purchase might have been made

(a) if the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made, or

(b) in case the contract was for sale or purchase of future goods by description, then if the goods are actually produced in this province at any time after the contract of sale or purchase in respect thereof was made."

The validity of the explanation was attacked on the ground that no sanction of the Governor General was obtained under S. 107(2), Government of India Act, 1935 but the objection was negatived by the Sales Tax Appellate Tribunal. The grounds on which the learned Advocates for the petitioners challenged the validity are as follows : (i) that the effect of the explanation is to levy sales tax not on sale of goods but only on contracts of sale by reason of the existence of goods within the State, (ii) that this provision is repugnant to the provisions of the Sale of Goods Act, and therefore, should not prevail as the previous sanction of the Governor General was not obtained for enacting the amendment that was introduced in 1947.

Before dealing with those objections we might state that there is no dispute as regards the facts in all these Revision Petitions. The assessees who entered into contracts of sale in respect of goods within the Madras State, delivered them outside the State of Madras by taking the Railway Receipts in their own names and by collecting the moneys by drawing hundies on Banks outside the State. In T. R. C. Nos. 271 and 272 of 1953 the year of assessment was 1947-48. In T. R. C. Nos. 283 & 333 of 1953 the year of assessment was 1948-49. In T. R. C. Nos. 344, 348 and 364 of 1953, the year of assessment was 1948-50.

There is no substance in the first contention as, under the explanation no sales tax is sought to be levied on contracts of sales simpliciter. What the explanation provides is that the Madras State is entitled to collect Sales Tax if the goods are actually in the State at the time when the contract of sale or purchase is made in respect thereof . It does not levy tax on a mere executory contract which is not completed and which does not fructify in a sale involving transfer of property in the goods. Even though the contract of sale is entered into outside the State and the actual sale involving the transfer of property in goods takes place in another State, still the Madras State is entitled, by reason of the explanation, to levy tax if the goods are within the State when the contracts of sale are entered into.

This position is conceded by the learned Government pleader, and he states that no sales tax is sought to be levied by reason of the explanation on the mere contracts of sale which are unaccompanied or followed by the sale of the goods i. e., the passing of the ownership or title in these goods. The decision of the Allahabad High Court in AIR 1952 All 764 (D), confirmed by the Supreme Court. AIR 1954 SC 459 (E) has really no application to the present case. As already pointed out, the learned Government Pleader rightly conceded that the liability to be assessed to Sales Tax arises only if there is a completed sale and not when there is only an agreement to sell (which can only result in a claim for damages) and that the State Legislature cannot enlarge the definition of sale, so as to include agreements to sell and arrogate to itself, a power which is not conferred upon it by the Government of India Act, 1935. In this view, the decision in AIR 1953 Orissa 23 (F), which followed the decision in 'Budh Prakash v. Sales Tax Officer, Kanpur (D)', has equally no bearing.

(22) The next contention that prior to the Constitution it was incompetent for the Provincial Legislature to levy sales tax in respect of sales taking place outside the State is equally without force. Entry No. 48 in the Provincial Lists empowered the Provincial Legislature to levy taxes on the sale of goods and on advertisements and it does not suggest that a legislation imposing tax on sale of goods can be made only in respect of sales taking place within the boundaries of the province, Section 100(3), Government of India Act, only enacts that a law could be passed by Provincial Legislature for the purpose of the province itself as pointed by Mukherjee J., (as he then was) in AIR 1953 SC 274 (B), which is in the following terms :

"It admits of no dispute that a provincial legislature could not pass a taxation statute which would be binding on any other part of India outside the limits of the province, but it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the province provided that there was sufficient and a real territorial nexus between such transactions and the taxing province. This principle, which is based upon the decision of the Judicial Committee in AIR 1948 PC 118 (A), has been held by this court to be applicable to sales legislation in its recent decision in the 'Bombay Sales Tax Case', AIR 1953 SC 252 (C), and its propriety is beyond question".

(23) The only question that arises, therefore, is whether under the explanation there is a sufficient and a real territorial nexus between the

transaction of sale and the taxing province. A sale consists of a number of ingredients which are essential in the sense that, if any of them is missing, there is no sale. In the 'Bombay Sales Tax Case (C)', it has been pointed out that the following are some of the ingredients to constitute a sale (i) the existence of goods which form the subject matter of the sale, (ii) the bargain or contract which when executed will result in the passing of the property in the goods for a price, (iii) the payment or promise of payment of a price, (iv) delivery of the goods and (v) the passing of title.

The Madras Legislature has enacted that, if the goods forming the subject matter of the contract of sale are actually in the State when the contract of sale is made or in the case of the sale of future goods by description, if the goods are actually produced in the State at any time after the contract of sale is made the sale shall be deemed to be made within the State. We are inclined to hold that the existence of the goods affords sufficient nexus and that the legislature was competent to impose a tax in respect of such a transaction whenever the actual sales take place. The learned Advocates for the petitioners drew our attention to the passage at p. 256 in AIR 1953 SC 252 (C), which is in the following terms:

> "Whether the territorial nexus put forward as the basis of the taxing power in each case would be ascertained as sufficient was a matter of doubt not having been tested in a court of law"

and contended that the question left open in that decision falls to be determined in those cases. We might, however, point out that subsequently in 'Poppatlal Shah v. State of Madras (B)', the Supreme Court had to consider the effect of the explanation in dealing with a conviction based on S. 2(h) as it stood prior to the amendment. The observations of Mukerjee J., (as he then was) are as follows:

> "If in the Madras Sales Tax Act the basis adopted for taxation is the location of the place of business or of the goods sold, within the Province of Madras, undoubtedly it would be a valid piece of legislation to which no objection on constitutional grounds could be taken".

After referring to the various ingredients or element covered by the expression "sale of goods" Mukherjee J., (as he then was) observed at p. 277 that

> "the presence of the goods within the province at the time of the contract would undoubtedly make the sale, if subsequently completed a sale within the province by reason of the explanation added by Act 25 of 1947."

As this explanation was not in operation during the relevant period with which the Supreme Court was concerned, it was held that the assessment of Sales Tax in respect of sales concluded outside the State, was illegal and not warranted by the provisions of the unamended Act. We do not agree with the argument of the learned Advocates for the petitioners, that the observations are only obiter dicta and ought not to be followed. We follow those observations and hold that explanation to S. 2(h) was validly enacted.

(24) A more substantial contention raised on behalf of the petitioners is that the impugned provision is repugnant to the Sale of Goods Act and that under S. 107(2), Government of India Act, the sale of goods should prevail over the Sales Tax Act as the assent of the Governor General was not obtained. As already pointed out, the amendment was made, in exercise of the powers conferred by item 48 of the Provincial List and not under item 18 of the Concurrent List dealing with "contracts including partnerships, agency, contract of carriage and other special form of contract but not including contracts relating to agricultural land". As the power of the Madras Legislature is derived from item 48 of List No. 2 and not item 16 of List No. 3, we are of opinion that no question of repugnancy between the Madras Sales Tax Act and the Sale of Goods Act arises.

This principle, namely, that if the power of legislation is derived from different lists, no question of repugnancy arises, is well settled and concluded by AIR 1947 PC 72 (I) and by the Federal Court in AIR 1950 FC 59 (J). Following those decisions we hold that as the subject matter of the two enactments are entirely different, no question of repugnancy under S. 107, Government of India Act, arises and the amendment is not invalid on the ground that the assent of the Governor General was not obtained. We are supported in this conclusion by a recent decision of the Madras High Court in AIR 1954 Mad 932 (G). We respectfully follow that decision as the identical question was considered therein.

(25) In this view, it is unnecessary to consider whether the provisions of the Sale of Goods Act are, in any way, affected altered or modified by the amendment. The petitioners contended that there is a difference regarding the situs under the provisions of the Sales Tax Act and the provisions of the Sale of Goods Act and that consequently the terms of S. 107, Government of India Act, are contravened. In AIR 1953 SC 252 (C), the Supreme Court observed as follows:

> "Neither the Sale of Goods Act nor the common law relating to the sale of goods has anything to say as to what the situs of sale is, though certain rules have been laid down for ascertaining the intention of the contracting parties as to when or under what conditions the property in the goods is to pass to the buyer."

Those observations were followed by the Bench of the Madras High Court in AIR 1954 Mad 932 (G) and their Lordships held that:

> "In view of this, the argument that the provision in Explanation 2 to Sec. 2(h) of the Sales Tax Act of 1947 is repugnant to the provisions of the Sale of Goods Act, must be repelled....."

We, therefore, agree that under the Sale of Goods Act there is no provision fixing the situs

of sale. The decisions in — 'Commr. of Income-tax, Madras v. Mysore Chromite Ltd', AIR 1952 Mad 198 (K), confirmed by Supreme Court in — 'Sha Mulchand & Co. v. Jawahar Mills Ltd.', AIR 1953 SC 98 (L) and — 'State of Madras v. Mysore Lachia Shetty & Sons Ltd', AIR 1954 Mad 1029 (M), were relied on by the learned advocates for the petitioners, in support of their contention that the observations in AIR 1954 Mad 932 (G), "that there is no provision fixing the situs of sale under the Sale of Goods Act" are opposed to the conclusions of those two decisions. We are of opinion that there is no force in that contention as what was decided in those two cases was that on the particular facts, by applying the provisions of the Sale of Goods Act, the property passed outside the Indian territory.

(26) Reliance was placed on the decision in AIR 1952 Nag 378 (H), in support of the contention that the explanation offends S. 107, Government of India Act.

(27) We have already dealt with the question that there is no repugnancy and that the impugned explanation does not in any way trench upon the provisions of the Sale of Goods Act. We wish to follow the decision of the Madras High Court reported in 'Louis Dreyfus & Co. Ltd. v. State of Madras (G)', in preference to the decision in 'Shriram v. Board of Revenue (H).

(28) In view of our conclusions that the explanation is intra vires, T. R. C. Nos. 271, 272, 283 and 333 of 1953 fail. In T. R. C. Nos. 344, 348 and 364 of 1953, the Sales Tax Appellate Tribunal exempted the transactions subsequent to 26-1-1950 and the revisions relate only for the period from 1-4-1949 to 26-1-1950, and they also stand dismissed. As no revision petitions have been filed by the State for the period from 26-1-1950 to 31-3-1950, it is unnecessary for us to consider the effect of our decisions in T. R. C. Nos. 283, 284, 285, 148 and 192 of 1953.

V.R.B. Applications dismissed.

(S) A.I.R. 1955 ANDHRA 135 (Vol. 42, C. N. 49)

UMAMAHESWARAM J. (18-11-1954)

The Indian Leaf Tobacco Development Ltd., Defendant-Petitioner Vs. K. Kotayya and others, Plaintiffs-Respondents.

Civil Revn. Petn. No. 1723 of 1952, from decree of Dist. Munsif, Kanigiri, D/- 24-3-1952.

Succession Act (1925), S. 214 — Hindu widow having right to money due to her husband — Succession Certificate not necessary — (Hindu Women's Rights to Property Act (1937), S. 3(2)) — AIR 1954 Nag 243 and AIR 1953 Pat. 129, Dissent. from.

A reading of cls. (2) and (3) makes it clear that, until the widow claims partition, the family continues joint and she is entitled only to the interest which her deceased husband had. The widow is, therefore, not the owner of any specified or definite share in the property left by her husband. But the interest which is conferred on her under the Act may under cl. (3) be separated and worked out by filing a suit for partition. The expression 'devolution' used in sub-s. (3) does not lead to the conclusion that the interest taken by the widow in joint family property is by succession to the effects of a deceased person. The undivided interest of the deceased cannot be regarded as 'effects of the deceased person' so as to attract the terms of S. 214. A Hindu widow is, therefore, not bound to obtain a succession certificate under the terms of S. 214 in respect of money due to her husband and in which she has a right under S. 3 cl. (2), Hindu Women's Rights to Property Act. AIR 1944 Nag 243 and AIR 1953 Pat. 129, Dissent. from: AIR 1943 Mad 246 — AIR 1954 Mad 227 and AIR 1954 Mad 576 (FB), Foll. Case Law discussed.

(Paras 5 and 16)

Anno: Succes. Act, S. 214, N. 3; Hindu Women's Rights to Property Act. S. 3, N. 1.

CASES REFERRED: (Paras)

(A) (V28) AIR 1941 FC 72: 1941-2 Mad LJ 12 (FC) 6
(B) ('36) 63 Cal 15 8
(C) (V8) AIR 1921 Mad 168: 44 Mad 499 (FB) 8
(D) (V30) AIR 1943 Mad 246: 1942-2 Mad LJ 668 9,12
(E) (V38) AIR 1951 Bom 309: ILR (1951) Bom 442 11
(F) (V41) AIR 1954 Mad 227: 1953-2 Mad LJ 561 12, 14
(G) (V31) AIR 1944 Nag 243: ILR (1944) Nag 832 12, 14
(H) (V41) AIR 1954 Mad 576: 1954-1 Mad LJ 250 (FB) 13, 14
(I) (V40) AIR 1953 Pat 129: 31 Pat 477 14
(J) (V30) AIR 1943 All 188: ILR (1943) All 307 15
(K) (V30) AIR 1943 Mad 708: (1943) 2 Mad LJ 282 15

Adini Rama Rao, P. S. T. Sayee and G. Suryanarayana, for Petitioner; A. V. Krishna Rao, Amicus Curiae.

ORDER: This Civil Revision Petition raises an interesting question of law, as to whether a widow is bound to obtain a succession certificate under the terms of S. 214, Succession Act in respect of monies due to her husband and in which she has a right under S. 3, cl. (2), Hindu Women's Right to Property Act (Act 18 of 1937). The suit was filed by the three respondents against the petitioner company in respect of tobacco supplied by the father of respondents 1 and 2 and the husband of the 3rd respondent. Late Sreeramulu, the father of plaintiffs 1 and 2 and the husband of the 3rd plaintiff, died as a member of an undivided family consisting of himself and his two sons, plaintiffs 1 and 2, and the tobacco supplied by him to the petitioner company was admittedly joint family property. The 3rd plaintiff, the widow is entitled to an interest in this amount which is joint family property only by reason of the terms of S. 3(2) of Act 18 of 1937.

(2) The short question that arises for consideration in the Civil Revision Petition is, whether the terms of S. 214, Indian Succession Act apply to this case.

(3) Section 214 cl. (i)(a) is in the following terms: "No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof".

(4) Is the suit amount claimed by the 3rd plaintiff on behalf on her two minor sons and on her own behalf, a debt due to a person claiming on succession to be entitled to the effects of the deceased person? It is not contended that the minor sons who constitute members of an undivided family with their deceased father, Sreeramulu, are bound to obtain a succession certificate as admittedly their rights have accrued by survivorship and not by succession. The only point that was strenuously contended by Sri P. S. T. Sayee, on behalf of the petitioner, is that under Act 18 of 1937 the widow has succeeded to a 1/3 share in the suit amount and is bound to obtain a succession certificate in respect of that amount.

(5) To appreciate the correctness of this contention, it is necessary to examine the provisions of Act 18 of 1937 and the terms of S. 214, Succession Act already set out. Under the Hindu Women's Rights to Property Act as stated in the preamble the Hindu Law was amended to give better rights to women in respect of property. Section 2 specifically enacts that notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of S. 3 shall apply where a Hindu dies intestate. Section 3 cl. 1 deals with the separate property left by a Hindu governed by any other school of Hindu Law other than Dayabaga School of Hindu Law or customary law and provides that his widow would be entitled to the same share as a son. Rights are also conferred under the proviso in favour of the widow of a predeceased son. The use of the expression 'inherited' in cl. (1) does not really throw any light on the question that arises for consideration in the present case as the separate property of a Hindu always devolves by inheritance.

Clause (2) deals with the interest of the deceased in a Hindu joint family. It provides that the widow shall have in the property the same interest as the deceased himself had and cl. (3) enacts that the interest so devolving on the Hindu widow shall be the limited interest known as a Hindu Woman's Estate. It further provides that the widow shall have the same right of claiming partition as a male owner. A reading of cls. (2) and (3) make it clear that, until the widow claims partition, the family continues joint and she is entitled only to the interest which her deceased husband had. The widow is, therefore, not the owner of any specified or defined share in the property left by her husband. But the interest which is conferred on her under the Act may, under cl. (3) be separated and worked out by filing a suit for partition. So, it is not right to state that she owns a 1/3 share in the suit amount and that she is bound to obtain a succession certificate under S. 214, cl. (1), of Succession Act in respect of that amount.

(6) Section 214(1), Succession Act makes it obligatory to obtain a Succession Certificate, only on a person claiming on succession to be entitled to the effects of the deceased person. It is not right to regard the interest of Sreeramulu in the joint family property as being "the effects of a deceased person", which have passed to the widow on succession. In the Matter of the Hindu Women's Right to Property Act, 1937, AIR 1941 FC 72 (A), Sir Maurice Gwyer dealt with the meaning of the expressions "devolution", "succession" and "inheritance". At page 78, the learned Chief Justice held that succession also includes survivorship.

(7) The following extract from the Judgment makes the position clear.

"It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words "devolution" and "succession" acquired a connotation that would preclude their application to describe the operation of the rule of survivorship as above explained. Eminent text-writers and Judges have used one or the other of those terms to include the accession of right which takes place on the death of one of the members of a Mithakshara joint family. Many enactments of Parliament and of the Indian Legislature have used the words "inheritance" and Succession" in juxtaposition, justifying the inference that succession is either another category from, or a wider category than "inheritance" (See some of these enactments referred to in Ilbert's Government of India, Chapter IV, and in Mulla's Hindu Law, p. 4).

If in these enactments "succession" should be held not to include the principle of survivorship, it would be difficult to say what else that word is meant to refer to and in any other view, the continued administration of that part of the Hindu Law by the British Indian Courts could not have been provided for, because there are no other appropriate words in those provisions. Such being the position as to the meaning of those words, it is permissible to add that it is difficult to conceive of any reason why in framing lists II and III Parliament should have thought fit to take away the law of survivorship from the jurisdiction of the Indian Legislature, and there is no justification for attributing oversight either when, as above explained, the language employed may properly be held to comprehend the law of survivorship as well".

(8) Next dealing with the contention based on the restricted interpretation of the word 'succession" in the Succession Act, the learned Chief Justice proceeds to observe as follows:

"A line of cases in the High Courts dispensing with the production of a succession certificate when title to a "debt" is claimed by survivorship may seem to support the restricted interpretation of the word "succession" Ref: — 'Sheetal Chandra Datta v. Lakshimanee Dasee', 63 Cal 15 (B). But taking this class of decisions as a whole they must be understood to rest not so

much on the connotation of the word "succession" as on the meaning of the expression "effects of the deceased person" and on the reason of the rule relating to the production of a succession certificate in support of the claim to a "debt" prima facie due to a deceased person: (See Vairavan Chettiar v. Srinivasachariar AIR 1921 Mad 168 (C)".

(9) Dealing with the meaning of the expression "devolution, at page 79, he stated as follows:

"In one or two instances, eminent writers have employed language suggesting that 'devolution' may comprehend cases of survivorship, but not the word "succession" (See Mayne's Hindu Law para 270), but it is difficult to find any basis for this distinction. "Devolution" may be wider in scope than "succession" in the sense that the former is not restricted to the result of a "death", (See O. 22, R. 10, Civil P. C.,) but that is immaterial for the present purpose and, as already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of survivorship".

So, according to the learned Chief Justice, the words "succession" and "devolution" are wide enough to include the operation of the principle of survivorship and are not confined to "inheritance" simpliciter. I may, however, mention that in dealing with the restricted meaning of "succession" in the Succession Act, emphasis is also laid by the learned Chief Justice on the use of the words "effects of the deceased person" in S. 214.

(10) Turning now to the decisions bearing on this question, the decision of Mr. Justice Horwill in — 'Natarajan Chettiar v. Perumal Ammal', AIR 1943 Mad 246 (D), is directly in point. He held that it was not necessary to obtain a Succession Certificate. Having held that the widow does not obtain the right under cls. (2) and (3) by survivorship, he summed up the legal position thus:

"I do not, however, think that it follows that because the widow does not obtain her right by survivorship that she must obtain it by inheritance. The effect of S. 3 cls. (2) and (3) may be regarded as a survival of the husband's persona' in the wife, giving her the same rights as her husband had except that she can alienate property only under certain circumstances. As the widow did not inherit her right, no succession certificate is necessary".

(11) This point was elaborately considered by Bhagwati J., in delivering the Judgment of Bench of the Bombay High Court in — 'Nagappa Narayan v. Mukambe', AIR 1951 Bom 309 (E). At page 312, dealing with the argument of Mr. Murdeshwar the learned Judge held that, with utmost respect, he did not agree with the observations in Mayne's Hindu Law, 11th Edn. at page 708 and pointed out at page 313 as follows:

"The whole fallacy lies in trying to put a label on the mode of devolution of property in her favour. The Act does not use any such word as either survivorship or inheritance. The Act only says that "any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu Woman's estate". The devolution can be by survivorship or by inheritance or by any other mode which is prescribed by the very terms of the Act itself. It is not necessary to classify this in either of the two categories, viz., survivorship or inheritance, and say that if it is not survivorship, it can only be inheritance."

(12) In — 'Subba Rao v. Krishanan Prasadam', AIR 1954 Mad 227 at p. 229 (F), a Bench of the Madras High Court approved the decision of Horwill J., in — 'Natarajan Chettiar v. Perumal Ammal (D)', and observed as follows:

"We are in entire agreement with his reasoning (of Horwill J.) and with all respect we do not agree with the contrary conclusions reached in — 'Jadaobai v. Puranmal ', AIR 1944 Nag 243 (G)".

(13) A Full Bench of the Madras High Court in — 'Parappa v. Nagamma', AIR 1954 Mad 576 (H), recently considered this question and accepted the view of Horwill J. I agree with the view taken by Horwill J., and follow the decisions aforesaid and hold that the widow of Sreeramulu is not bound to obtain any succession certificate.

(14) The learned Advocate for the petitioner relied on the decision of the Nagpur High Court in — 'Jadaobai Puranmal' (G), and the Patna High Court in — 'Mst. Rajendrabati v. Mungalal', AIR 1953 Pat 129 (I). I adopt the reasons stated in 'Subbarao v. Krishna Prasadam (F), and dissent from the decisions of both the Nagpur and the Patna High Courts. In my view, the correct legal position is that stated by Horwill J., and approved later by the Bench as also the Full Bench of the Madras High Court in 'Subbarao v. Krishna Prasadam' (F), and 'Parappa v. Nagamma' (H), respectively.

(15) Before concluding the judgment, it is necessary to refer to the decision in — 'Kallian Rai v. Kashi Nath', AIR 1943 All 188 (J), wherein it was held that

"there is no automatic partition of the joint Hindu family by reason of Sub-s. (2) to S. 3 Hindu Women's Right to Property Act, but the widow can claim partition like a male owner under Sub-s. (3) to that section,"

and that

"so long as such partition has not been made, the status of a Joint Hindu family continued and the widow is capable of being represented in business transactions and in suits by the Karta of the family."

A similar view was taken in — 'Satyanarayanacharyalu v. Narasamma', AIR 1943 Mad 708 (K), by Justice Horwill. The learned Judge held that though under the Hindu Women's Rights to Property Act of 1937 the widow became entitled to a half share of the property, the son was entitled to file the suit for recovery of the entire debt and that the suit was not liable to be defeated on the ground that the mother was not joined as a party. The reasons given by the learned Judge for coming to that conclusion are that the mother and the son did not succeed to the debt as co-heirs, that the debt was due only to the joint family and that the son was the proper person to bring a suit

on behalf of the joint family, of which his mother was also a member. I respectfully follow the reasoning contained in those decisions.

(16) The expression "devolution" used in sub-s. (3) does not, for reasons stated above, lead to the conclusion that the interest taken by the widow in joint family property is by succession to the effects of a deceased person. The undivided interest of the deceased cannot be regarded as "effects of the deceased person" so as to attract the terms of S. 214, Succession Act. I am much obliged to the learned Advocate for the petitioner and to Sri A. V. Krishna Rao, whom I requested to assist me as an amicus curiae in this case for arguing the case fully.

(17) In the result, the Civil Revision Petition fails and is dismissed. No costs are awarded, as the respondent is not represented.

V.R.B. Revision dismissed.

(S) **A.I.R. 1955 ANDHRA 138 (Vol. 42, C.N. 50)**

UMAMAHESWARAM J. (2-12-1954)

Pathikonda Gopala Rao, Plaintiff-Petitioner v. Nagiri Pedda Kitamma, Defendant-Respondent.

Civil Revn. Petn. No. 2042 of 1952, from order of Dist. Munsif, Madanapalle, D/- 3-10-1952.

(a) Civil P. C. (1908), O. 6 R. 17— Amendment — Duty of Courts — Refusal on ground of delay or negligence — AIR 1950 Mad 32, Dissented from.

Courts of law should bear in mind the sacred duty of doing justice between the parties in accordance with the provisions of the Code of Civil Procedure. They do not exist for the purpose of punishing the parties. Rules of procedure are not framed to defeat justice. When the other party can be compensated by way of costs or other proper terms, the amendment ought not to be refused on the sole ground of delay or negligence. It cannot therefore be held that an amendment should not be allowed of the facts sought to be introduced by way of amendment were known to the party at the time of filing the plaint or the written statement. AIR 1935 Mad 158 Foll. AIR 1950 Mad 32, Dissented from. (Paras 4 and 5)

Anno: AIR Com. C. P. C., O. 6 R. 17 N. 2; 1953, Mulla, O. 6 R. 17 (Topic in N. 2 in AIR Com. extra.)

(b) Civil P. C. (1908), O. 6 R. 17 and S. 115— Order allowing or refusing amendment — Revison — AIR 1926 Cal 1112, Dissented from.

Interlocutory orders refusing amendment or allowing amendment should be corrected at the earliest stage in revision and not in appeal after the parties incur heavy expenses. AIR 1916 Mad 903, Foll. AIR 1926 Cal 1112, Dissented from. (Para 6)

Anno: AIR Com. C. P. C., S. 115 N. 20; 1953 Mulla, S. 115, p. 428, N. " No..... Orders" (1pt. extra in AIR Com. — 1pt extra in Mulla)

(c) Civil P. C. (1908), O. 6 R. 17 — Ground for refusing amendment — Petitioner making false statements in application.

The fact that the petitioner makes false statements in the application is no ground for refusing an amendment as a punishment for uttering lies. (Para 7)

Anno: C. P. C., O. 6 R. 17 N. 2.

CASES REFERRED: Paras

(A) (V34) AIR 1947 Mad 205: 1946-2 Mad LJ 462 2
(B) (V21) AIR 1934 Bom 178: 58 Bom 348 2
(C) (V36) AIR 1949 Mad 416: 1948-2 Mad LJ 577 2
(D) (V22) AIR 1935 Mad 158: 67 Mad LJ 921 4
(E) (V37) AIR 1950 Mad 32: 1949-2 Mad LJ 421 5
(F) (1887) 19 QBD 394: 56 LJQB 621 5
(G) (V13) AIR 1926 Cal 1112: 98 Ind Cas 751 6
(H) (V3) AIR 1916 Mad 905: 29 Mad LJ 53 6

A. Bhujanga Rao and G. Ramachandra Naidu, for petitioner; R. Subramaniam, and Ch. Sankara Rao, for Respondent.

ORDER: The civil Revision Petition is filed as against the order of the District Munsif of Madanapalle refusing to permit the amendment of the plaint in O. S. No. 139 of 1952. The suit was instituted by the plaintiff for the recovery of moneys due from the defendant on dealings. The application for amendment was filed to permit him to sue as the manager of the joint family consisting of himself and his brother and also to implead his brother as the second plaintiff. The application was opposed by the defendant on the ground that by permitting the plaintiff to sue as the joint family manager, he will lose valuable plea of limitation. The District Munsif upheld the objection of the defendant and dismissed the amendment application . This Civil Revision Petition is filed as against that order.

(2) The short point for consideration is as to whether by permitting the plaintiff to sue as the manager of the joint family a new case is introduced or the cause of action is in any way altered. The language of Or. 6 R. 17, Civil P. C., is very wide. It enacts that:

"the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

As pointed out by Chandrasekhara Ayyar J., in — 'Mokka Pillai v. Valavanda Pillai', AIR 1947 Mad 205 (A):

"There is nothing which prevents a Court, so far as I am able to see, from permitting persons suing in their individual capacity to sue as representative of a larger group, even during the stage of appeal."

In —'Madhgouda Babaji v. Halappa Halappa', AIR 1934 Bom 178 (B), it was held that :

> "in a suit brought by the manager of a joint Hindu family, the plaint need not contain a statement or indication to the effect that the plaintiff is suing as manager and that the interests of the defendant can, however, be safeguarded by bringing all the co-parceners on the record of the suit."

So, even without an amendment, it is open to the plaintiff to establish that the amount is due to the joint family and that the suit is filed by him in a representative capacity. But to avoid the technical objection raised by the defendant, the plaintiff has chosen to file the application for amendment and implead his brother as plaintiff 2. There is absolutely no change in the cause of action. No new case is sought to be put forward by reason of the amendment. The decision referred to by the District Munsif — 'Ramachandra Naidu v. Kandaswamy Mudaliar', AIR 1949 Mad 416 (C), is really in favour of the petitioner herein. The observations of the learned Judge at pp, 416-417 support that view. The observations are as follows:

> "The learned counsel for the petitioner urged that really a suit by a person like the plaintiff, who happens to be the manager of the joint family at the time he filed the suit, would be a suit filed by him as manager, whether he described himself like that or not as in the ordinary case of a Hindu family manager suing on a promissory note or even on a sale deed that no question of limitation or a fresh cause of action would arise and that the plaintiff's only intention in filing the amendment petition was to describe himself more fully and correctly and to have an issue framed regarding his being the family manager on the date of the suit and not to enlarge the scope of the claim in the suit or to defeat any limitation right accruing to the defendant. The short answer to this is that if there was nothing else intended by plaintiff by the amendment than to describe himself more fully and correctly, he can do so, even in his own deposition and I do not apprehend that the lower court will prevent him from describing himself as he pleases subject to cross-examination."

(3) But having regard to the facts of the particular case that no proper notice was issued under S. 80, Civil P. C., the learned Judge confirmed the order of the trial court dismissing the application for amendment.

(4) The learned Advocate for the petitioner relied on the decision in — 'Muthammal v. Guruswami', AIR 1935 Mad 158 (D), in support of the position that under O. 6 R. 17, Civil P. C., not only is the court given power, but is under a duty to allow all such amendments as will enable the real questions in issue to be raised provided the amendment will occasion no injury to the opposite party, except as can be sufficiently compensated for by costs or other terms to be imposed by the Order. As pointed out by the learned Judge at p. 159

> "the kind of amendment, which the decisions say, ought ordinarily not to be allowed, is that which takes away an existing right from the defendant. That is one thing, but it is a very different thing to say that no amendment should be allowed which would deprive the defendant of a bare right to raise a plea of limitation. The argument overlooks an important distinction and confuses a legal right accrued with a mere right to plead. The object of the decisions is to secure the former and not the latter right of the defendant."

I follow the reasoning of the learned Judge and hold that courts of law should bear in mind the sacred duty of doing justice between the parties in accordance with the provisions of the Code of Civil Procedure. They do not exist for the purpose of punishing the parties. Rules of procedure are not framed to defeat justice. When the other party can be compensated by way of costs or other proper terms, the amendment ought not to be refused on the sole ground of delay or negligence.

(5) The District Munsif also relied on the decision in — 'Gopalakrishnamurthy v. Sreedhara Rao', AIR 1950 Mad 32 (E), in support of the proposition that as the facts sought to be introduced by the amendment were known to the plaintiff and were not contained in the original plaint, he ought not to be permitted to amend his plaint. Having read the judgment, carefully, I think the learned Judge did not purport to lay down any such proposition. What he held was that the plaintiff ought not to be permitted to put forward a new case. On facts known to him at the time of filing the plaint. But if, the learned Judge intended to lay down that no amendment should be allowed on the basis of facts already known to a party prior to the filing of the plaint, or the written statement even though there is no change in the cause of action, I wish to respectfully dissent from his view as it is opposed to principle. In the leading case — 'Weldon v. Neal', (1887) 19 QBD 394 (F) Lopes LJ., laid down the law in very clear terms and it is as follows:

> "However negligent or careless the first omission and however late the proposed amendment, the amendment shall be allowed, if it can be allowed without injustice to the other side."

I understand that in an unreported decision of the Madras High Court, Mr. Raghava Rao J., took a similar view. The grounds on which an amendment may be refused are clearly set out in Mulla's Civil Procedure Code at p. 596 and it is not right to add another new ground, namely, that an amendment should not be allowed if the facts sought to be introduced by way of amendment were known to the party at the time of filing the plaint or the written statement.

(6) The learned Advocate for the respondent relied on the decision in — 'Lloyds Bank Limited v. Surojmull Jalar', AIR1926 Cal 1112 (G), in support of the proposition that I should not interfere with the discretion exercised by the District Munsif in refusing the amendment. The view of the Madras High Court laid down in 'Ramachandra Raju v. Venkata Subbayamma', AIR 1916 Mad 903 (H) is different & I prefer to follow the Madras view and hold that interlocutory orders refusing amendment or allowing amendment should be corrected at the earliest stage in revision and not in appeal after the parties

incur heavy expenses. I, therefore, do not propose to follow the view of the Calcutta High Court.

(7) The learned Advocate for the respondent laid great stress on the fact that the petitioner stated lies in his affidavit and that no indulgence should be shown to him. I agree with the court below that the petitioner made false statements in the application, but that is, however, no ground for refusing an amendment. I do not think that the court is justified in refusing the amendment on that sole ground as a punishment for uttering lies.

(8) In the result, I set aside the order of the court below refusing amendment. The defendant will have his costs in the amendment application, but as he opposed this Civil Revision Petition, the petitioner is entitled to have the costs of the petition.

V.R.B. Order set aside.

(S) A.I.R. 1955 ANDHRA 140 (Vol. 42, C.N. 51)

UMAMAHESWARAM J. (23-11-1954)

Mandalika Venkatasubba Rao, Plaintiff, Petitioner v. Alla Annapurnamma and others, Defendants, Respondents.

Civil Revn. Petn. No. 1506 of 1953, to revise order of Sub. J. Guntur, D/- 17-8-1953.

(a) **Court-fees Act (1870), S. 7(v) and (XI)(cc) — Suit for possession by tenant against tenant holding over — AIR 1948 Mad 409 Dissented from.**

A lessee from a landlord may, no doubt, be entitled to recover possession from a tenant holding over after the determination of tenancy; but he cannot be, in any sense, be regarded as a landlord within the meaning of cl. (xi). A suit for possession by the lessee against tenant holding over cannot therefore be valued under cl. (xi)(cc) and the Court-fee will be payable under cl. (v). AIR 1951 Bom 352 Rel. on. AIR 1948 Mad 409, Dissented from. (Para 7)

Anno: C. F. Act, S. 7(v), N. 3 P. 2; Cl. (xi) N. 2, Pt. 13a.

(b) **Court-fees Act (1870), S. 1 — Interpretation of Act — Extraneous considerations are out of place.**

In interpreting the terms of the Act, extraneous considerations, such as hardship to the parties, or that the supposed intention of legislature was different, are out of place. The terms of the Act have to be understood in their natural and ordinary sense. It is for the legislature to step in and amend the Act, if the intention is not clearly brought out or if a literal application of the terms of the Act involves hardship. (Para 3)

Anno:C. F. Act, S. 1, N. 14 Pt. 5.

CASES REFERRED: Paras

(A) (V38) AIR 1951 Bom 352: ILR (1951) Bom 385 2, 8

(B) (V35) AIR 1948 Mad 409: 1948-1 Mad LJ 338 2, 4, 8

(C) (V26) AIR 1939 Mad 360: 1939-1 Mad LJ 268 (SB) 9

(D) ('08) 31 Mad 14: 17 Mad LJ 478 9

D. Suryaprakasa Rao and A. Satyanarayana, for Petitioner; N. Chandramouli, M. Seshachalapathi and A. V. Krishna Rao, for Respondents.

ORDER— This Civil Revision Petition is filed as against the findings of the Subordinate Judge, Guntur in O. S. No. 29 of 1952 holding that the terms of S. 7 Cl. (xi)(cc) of the Court Fees Act do not apply and that the Court Fee should be paid as in a suit for possession under S. 7 Cl. (v), Court Fees Act. The suit was filed by the petitioner herein for recovery of possession of a site in Guntur town. According to the allegations in the plaint, the suit site was leased by the father of defendants 6 to 8 and the husband of defendant 9 in favour of one Koteeswara Rao the husband of defendant 1 and the father of defendants 2 to 4.

During the currency of the lease in favour of Koteeswara Rao a lease was executed in favour of Tadikonda Lakshmikantha Rao, by Sri Ayodhya Balamukhunda Doss Bavaji the father of defendants 6 to 8 and the husband of defendant 9, providing that the lease should take effect on the expiry of the earlier lease, and Lakshmikanta Rao assigned his leasehold interest in favour of the plaintiff by a registered deed of assignment dated 20-7-1946. The heirs of the original lessee did not hand over possession to the heirs of the lessor, and consequently, the suit had to be instituted by the assignee from the new lessee as against the heirs of the original lessee who were holding over.

Defendants 10 to 12 were impleaded as parties on the ground that they had instituted a suit O. S. No. 85 of 1950 on the file of the Additional Subordinate Judge's Court, Guntur, for recovery of possession from defendants 1 to 9. In para. 10, the plaintiff stated that he was seeking to enforce his rights as lessee and "in so doing is in the same position as his lessor recovering possession from the tenant." Court fee was paid in respect of the relief for recovery of vacant possession of the leased site under S. 7 Cl. (xi)(cc).

(2) Defendants 1 to 4 and 10 contended that the plaintiff was not entitled to value the suit as one between a landlord and a tenant and that the terms of S. 7(xi)(cc) did not apply. They contended that as the plaintiff sought to recover vacant possession of the suit site, the terms of S. 7(v) apply. The Subordinate Judge followed the decision in — 'Ganesh Gopal v. Moreshwar Narayan', AIR 1951 Bom 352 (A), in preference to a direct decision of the Madras High Court reported in — 'Ghulam Dastagir Saheb v. Marudai Pillai', AIR 1948 Mad 409 (B), and held that S. 7 Cl. (xi)(cc), Court-fees Act did not apply to the facts of the case.

(3) The short question for determination is as to whether the interpretation of Bell J., in regard to S. 7, cl. (xi)(cc) is correct or not. Section 7, cl. (xi)(cc) is in the following terms:

"In the following suits between landlord and tenants..... ....

o o o o o

(cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy..... .... according to the amount of rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint."

It is clear from the terms set out that the suit must be between a landlord and his tenant or a landlord and a tenant holding over after the determination of the tenancy. Clauses (a) to (c) and (d) to (f) deal only with suits between the landlord and the tenant. In interpreting the terms of the Act, extraneous consideration such as hardship to the parties or that the supposed intention of legislature was different, are out of place. The terms of the Act have to be understood within their natural and ordinary sense. It is for the Legislature to step in and amend the Act, if the intention is not clearly brought out or if a literal application of the terms of the Act involves hardships.

(4) In 'Ghulam Dastagir Saheb v. Marudai Pillai' (B), Bell J., held as follows:

"It would be in my opinion a most artificial approach to the Court Fees Act to say that a valid lessee could only exercise his undoubted rights under S. 108, T. P. Act at great cost under S. 7 cl. (v), Court Fees Act, while the landlord, if he chose to bring the same suit in ejectment, could avail himself of S. 7, cl. (xi) (cc)."

(5) The reasons given by him for coming to that conclusion are stated at p. 410 and are in the following terms:

"The new clause namely, cl. (xi) was meant to ease the position of a landlord endeavouring to obtain his rights as between himself and his tenant and of a tenant endeavouring to obtain his from the landlord and to give both a quick, easy and cheap remedy. If cl. (v) were the only one to apply it would involve very heavy Court fees. Sub-cl. (cc) of cl. (xi) was intended to enable a landlord to bring a cheap suit against a tenant guilty of holding over after the determination of his tenancy."

(6) The learned Judge then proceeds to state:

"That the word "tenant" must not be taken too literally, is to be found in numerous cases including ..... if the word "tenant" can be extended, as it has been extended by many different Courts to include a person who is not in law a tenant at all, to say that the word "landlord" may cover a lessee who under S. 106 T. P. Act has every legal right to pursue such a remedy, does not seem at all difficult."

(7) In my view, the reasons given by the learned Judge are not convincing. The words "landlord" and "tenant" should be given their normal connotation. In S. 7 cl. (xi)(cc) the Legislature has specifically provided for two classes of suits: (1) suits by landlord against a tenant and (2) suits by landlord against tenants holding over for recovery of possession. As already stated, in construing the terms of cl. (xi) the Court ought not to be guided by the object of the supposed intention of the Legislature for so enacting it. A lessee from a landlord may no doubt be entitled to recover possession from a tenant holding over after determination of the tenancy, but he cannot in any sense be regarded as a landlord within the meaning of cl. (xi).

Such a construction may no doubt lead to an anomaly, namely, the Court fee paid by a lessee would be different from that paid by the landlord in a suit filed against the tenant holding over, but it is the duty of the Court to give effect to the terms of the section. But if the Legislature had intended that the lessee from the landlord should also pay the same Court fee in a suit for recovering immoveable property from a tenant holding over according to the amount of the rent of the immoveable property to which the suit refers, it would have used appropriate words in cl. (cc) such as in suits between landlord or his lessee for the recovery of immovable property.....according to the amount of the rent of the immovable property..... presenting the plaint." In the absence of the words "or his lessees" I am not prepared to strain the language of the section or import any equitable consideration.

(8) In 'Ganesh Gopal v. Moreshwar Narayan' (A), Chagla C. J., considered the identical question and dissented from the decision in 'Ghulam Dastagir Saheb v. Marudai Pillai' (B). I agree with the view of Chagla C. J., that the terms of cl. (xi)(cc) cannot be applied to a case of this description. If the suit had been instituted by the landlord along with the new lessee and he had prayed that possession should be delivered by the tenant holding over to his new lessee, there can be no doubt that the court fee is payable only under S. 7 cl. (xi)(cc).

Similarly, if the landlord had assigned his rights to recover possession from the tenant holding over in express terms and if the assignee had sued for recovery of possession, it would also fall under S. 7 cl. (xi)(cc). From the mere fact that the landlord is bound, in law, to put the new lessee in possession, a suit by the new lessee as against the tenant holding over cannot be regarded as one instituted by the landlord or on his behalf in exercise of his rights, so as to fall within cl. (xi). The landlord might not support the new lessee, but collude with the tenant holding over and the new lessee might be constrained to seek relief both as against the landlord and the tenant holding over. In such a case, it is impossible to regard the suit as having been instituted by a landlord. So, in my opinion, it is not right to hold that the suit filed by a lessee is equivalent to a suit filed by the landlord.

(9) I, therefore, adopt the reasoning of Chagla C. J., in preference to that of Bell J., and hold that the decision of the Court below is right. In this view, it is not necessary for me to refer in detail or rely upon the decisions in — 'Suryanarayanacharyulu v. Ravi Narasimhaswami', AIR 1939 Mad 360 (SB) (C), or — 'Palaniappa Chetty v. Sithravelu', 31 Mad 14 (D), which are not directly applicable to the facts of this case.

(10) In the result, the Civil Revision Petition fails and is dismissed, but without costs. Time for

payment of Court fee till the re-opening of the Court after Christmas vacation.

V.R.B. Revision dismissed

(S) A.I.R. 1955 ANDHRA 142 (Vol. 42, C.N. 52)

SUBBA RAO C. J. AND BHIMASANKARAM J.

(19-11-1954)

Peddinti Gopalacharyulu, Appellant v. Rudra Veeranna and others, Respondents.

Letters Patent Appeals Nos. 1 and 2 of 1954, against order of Somasundaram J., Madras, in C. M. P. Nos. 10551 and 10552 of 1953, D/- 25-11-1953.

(a) Specific Relief Act (1877), S. 42 — Suit for declaration of right to remain in possession — Defendant if can be restrained from taking proceedings to recover possession — C. P. C., O. 39, Rr. 1 and 2.

A suit by the archaka of a temple for a declaration that he has a right to remain in possession of the suit lands as long as he performs archakathvam service and that he cannot during that time be evicted from those lands cannot by any stretch of language be considered to be one for restraining the defendants from committing injury of any kind. It would be inappropriate to describe the suit as one for restraining the defendants in any manner whatsoever. In such a suit therefore no injunction would be granted to the plaintiff to restrain the defendants from taking proceedings to recover possession of the lands in dispute. (Para 4)

Anno: Specific Relief Act, S. 42 N. 1, 14; Civil P. C., O. 39, R. 1 N. 3, 6.

(b) Civil P. C. (1908), S. 151 and O. 39, R. 1 — Inherent power to issue injunction apart from O. 39 — (Andhra State Act (30 of 1953), S. 30).

Inherent power vested in Courts under S. 151 cannot be involved where the procedure to be adopted in a particular case or class of cases is expressly provided for by the Code. In such matters, the Court cannot act except under the conditions specified by the express provisions. In other words, a Court cannot, under the guise of inherent power extend the scope of a provision which imposes specific limitations. The High Court has no inherent power to pass an order of interim injunction outside the scope of Order 39. Such an order cannot be passed merely because it is in accordance with equity and good conscience, when O. 39 of the Code does not apply to the facts of the case. (Paras 5, 6)

It would be desirable that the provisions of O. 39, Civil P. C., should be enlarged so as to empower the Courts to grant injunctions in proper cases. (Para 10)

Anno: Civil P. C., S. 151 N. 1, 2; O. 39, R. 1 N. 3, 22.

CASES REFERRED: Paras

(A) (V20) AIR 1933 Mad 500 (2): 56 Mad 563 7, 9

(B) (V19) AIR 1932 Mad 180: 35 Mad LW 168 7, 8

(C) (V36) AIR 1949 Mad 104: ILR (1949) Cad 316 8

(D) (V15) AIR 1928 Mad 491: 27 Mad LW 418 8

(E) (V38) AIR 1951 Mad 279: 1950-2 Mad LJ 482 9

V. Vedanthachari, T. Rangaswamy Iyengar and G. Venkatarama Sastry, for Appellant; M. Seshachalapathy, Addl. Govt. Pleader, for Respondents.

BHIMASANKARAM J.:

These two appeals under the Letters Patent are against the Order of a single Judge of the Madras High Court declining to grant a temporary injunction against the respondents restraining them from taking possession of the lands in dispute pending the disposal of A. S. Nos. 1013 and 1015 of 1953.

(2) The learned Judge took the view that, in the circumstances of these cases, no injunction could be asked for. Before we go into the question of law, it is desirable to state briefly the facts leading up to the present appeals.

(3) A. S. Nos. 1013 and 1015 of 1953 are appeals against the common judgment in O. S. Nos. 97 and 99 of 1952 on the file of the Subordinate Judge's Court of Eluru. The suits were instituted by the appellant in these appeals for a declaration of his right of occupancy in the lands in dispute in each of the suits. The appellant is the archaka of three temples, Sri Venugopalaswamy Varu, Sri Sitharamaswamy Varu and Sri Kesavaswami Varu in the village of Duvva in the West Godavari District. The suit lands admittedly belong to the deities. The appellant claims, however, that he is entitled to remain in possession of the properties as long as he performs archakathwam service and that he cannot during that time be evicted from the lands.

The respondents in the appeals, who were defendants in the Original Suits, are trustees of the temples. Their contention is that both the Melwaram and the Kudiwaram belong to the deities and that the plaintiff has no interest in the lands, but is entitled only to wages for services rendered. The suits were dismissed by the Sub-Court. A .S. Nos. 1013 and 1015 of 1953 are appeals against that decision. Pending those appeals, the present appellant filed C. M. P. Nos. 10551 and 10552 of 1953 in the High Court at Madras seeking in each case, an injunction to restrain the respondents from taking proceedings to recover possession of the lands in dispute under S. 87 of the Madras Act (19 of 51) pursuant to a certificate already obtained by them under S. 78 of Madras Act (2 of 1927).

(4) It is objected on behalf of the respondents by the learned Additional Government Pleader that this Court has no jurisdiction to issue any such injunction. The argument is that the power of the High Court to issue an injunction, like that of any court, in the moffusil, is limited by the provisions of O. 39, Rr. 1 and 2 and that those provisions are inapplicable to a case like the present.

It is necessary to extract the relevant portions of these rules in order that the argument may be appreciated:

"Rule 1: Where in any suit, it is proved by affidavit or otherwise:

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act.

Rule 2(1): In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right."

It has been conceded by Mr. Vedanthachari for the appellant that he cannot bring these cases under R. 1, but he argues that the cases come under R. 2. Alternatively, he says that this Court has inherent jurisdiction to issue an injunction in circumstances like the present, even though the case does not come within the scope of O. 39, Civil P. C.

We propose to deal in the first place with his contention that the suits in question are in substance, suits for restraining the defendants from committing injury of any kind. We are unable to accede to this argument. In our opinion, it is impossible to hold that a suit for a declaration that the plaintiff has a right of occupancy in the suit lands and that he cannot be disturbed from his possession as long as he renders Archakathwam service can by any stretch of language be considered to be one for restraining the defendants from committing injury of any kind.

It is true that the language of R. 2, O. 39, is not very artistic. We apprehend that the rule when it speaks of suits for restraining the defendants from committing a breach of contract or other injury of any kind, speak of suits for injunction restraining the defendant from doing any such act. But it is perfectly clear to us that where the relief asked for in a suit is only a declaration, it would be altogether inappropriate to describe the suit as one for restraining the defendant in any manner whatsoever. That being so, we are unhesitatingly of the view that the petitions under appeal are not maintainable under either R. 1 or R. 2 of O. 39, Civil P. C.

(5) The question still remains as to whether this Court has inherent jurisdiction to issue an injunction in the circumstances. We may premise the discussion by stating that it has been firmly settled that inherent power vested in courts under S. 151, Civil P. C. cannot be invoked where the procedure to be adopted in a particular case or class of cases is expressly provided for by the Code. In such matters, the Court cannot, act except under the conditions specified by the express provisions. In other words, a Court cannot, under the guise of inherent power extend the scope of a provision which imposes specific limitations.

(6) It is argued, however, that the powers of the High Court are not circumscribed by the Code of Civil Procedure and that, under the Letters Patent of the Madras High Court, the Madras High Court has an inherent power to issue an injunction in cases not covered by O. 39, Civil P. C. and that under S. 30, Andhra State Act (30 of 1953) this Court can also exercise that power. The Section referred to runs thus:

> "The High Court of Andhra shall have, in respect of the territories for the time being included in the State of Andhra, all such original appellate and other jurisdiction as, under the law, in force, immediately before the prescribed day, is exercisable in respect of the said territories or any part thereof by the High Court at Madras."

It is true that under this provision this Court has all such original appellate and other jurisdiction as is exercisable by the High Court at Madras under the law in force immediately before the prescribed date. We must, therefore, see whether the power now invoked comes under the original, appellate or other jurisdiction conferred on the Madras High Court under its Letters Patent. Clause 19 therein refers to the law or equity to be applied to cases coming before the High Court in the exercise of its ordinary original civil jurisdiction. Ordinary original civil jurisdiction is exercisable only as provided for by clause 11:

> "within such local limits as may from time to time be declared and prescribed by any law made by the Governor in Council and until such local limits shall be so declared and prescribed, within the limits of the local jurisdiction of the said High Court of Madras at the date of the publication of these presents, and the ordinary original civil jurisdiction of the said High Court shall not exceed beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction."

Clearly, the High Court of Andhra has not derived any original jurisdiction of this nature from the Madras High Court apart from the fact that in a case of this kind, there is no question of the exercise of ordinary original jurisdiction. Clause 20 deals with the exercise of extraordinary original civil jurisdiction, which is defined by cl. 13 as

> "power to remove and try and determine any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Madras, subject to its superintendence, when the said High Court shall think proper to do so."

Clause 20 provides that the High Court of Judicature at Madras in the exercise of the extraordinary original civil jurisdiction, shall apply in each case

> "such law or equity and rule of good conscience which would have been applied to such case by any local court having jurisdiction therein."

It is thus manifest that, even in the exercise of extraordinary original civil jurisdiction, the High Court cannot have powers beyond those of the

local Court from whose file the case might have been removed. Clause 21 which deals with the exercise of the High Court's appellate jurisdiction states that the High Court shall apply, in the course of such exercise, to each case coming before it such law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case. This again limits the jurisdiction of the High Court to that of the Subordinate Court from which an appeal is taken. The foregoing discussion leaves no doubt in our minds, that this Court has no inherent jurisdiction to issue an injunction apart from the provisions of O. 39, Rr. 1 and 2, Civil P. C.

(7) Reference may be made in this connection to some decisions of the Madras High Court bearing on the point. The leading case on the subject is the decision of a single Judge of the Madras High Court in — 'Karuppayya v. Ponnuswami', AIR 1933 Mad 500 (2) (A). In that case, a decree was passed against the petitioner therein ex parte. He then applied for the setting aside of that decree and an order was passed that it should be set aside if he gave security for the suit amount and costs within a specified time. As that order was not complied with, the application was eventually dismissed.

A Civil Revision Petition was filed against the dismissal and, pending the revision petition, the petitioner filed a Civil Miscellaneous Petition seeking an injunction restraining the respondents-plaintiffs from executing the ex parte order. Objection was taken that the High Court had no power to grant the injunction unless the case fell either under R. 1 or R. 2 of O. 39, Civil P. C., and that the case not being one such, the petition was not maintainable. The learned Judge discusses cls. 19, 20 and 21 of the Letters Patent and says:

> "It is only under Cl. 19 of the Letters Patent that a Chartered High Court can administer the law and equity that would have been applied by such High Court if the Letters Patent had not been issued, and the cases in which it can apply such law or equity are cases arising in the exercise of its ordinary original civil jurisdiction."

The learned Judge points out that the decisions on which reliance was placed before him in support of the proposition that there was an inherent power, were all decisions dealing with cases in which the High Court was acting in the exercise of its ordinary original civil jurisdiction. As regards the decision in — 'Govindarajulu Naidu v. Imperial Bank of India, Vellore', AIR 1932 Mad 180 (B) an earlier decision of a single Judge of the same court, he pointed out that the attention of the learned Judge who decided that case, had not been drawn to the provisions of the Letters Patent. It seems to us that the view taken by the learned Judge is in accordance with the language of the Letters Patent and is right.

(8) Mr. Vedanthachari, however, drew my attention to the decision in — 'Subramaniam v. Seetharama Ayyar', AIR 1949 Mad 104 (C). Even that case says that the subordinate Courts and the High Courts and the High Court sitting as an appellate court against the orders of the subordinate courts have no inherent jurisdiction to issue an injunction apart from the provisions of O. 39, Civil P. C.

It is true that their Lordships say, referring to the decisions in — 'Periakaruppan Chettiar v. Ramaswamy Chettiar', AIR 1928 Mad 491 (D) and 'Govindarajulu Naidu v. Imperial Bank of India, Vellore (B)' that it was clearly laid down therein that the extraordinary jurisdiction possessed by the High Court is not possessed by any of the subordinate Courts. In saying so, their Lordships were simply distinguishing those two cases as not being in point for the purpose of their discussion and not ruling that there was any such extraordinary jurisdiction. In any case, it is clear that the proposition which they accepted is a proposition against the present appellant as what this court is now called upon to exercise is only appellate jurisdiction.

(9) Mr. Sechachalapathy, on the other hand, drew our attention to the decision in — 'Nagabhushana Reddy v. Reddivari Narasamma', AIR 1951 Mad 279 (E). This decision affirms the view taken by Bardswell J. in AIR 1933 Mad 500 (2) (A). The head-note of this case runs thus:

> "In the exercise of the appellate jurisdiction of the High Court over moffusil proceedings, the High Court has no inherent power to pass an order of injunction outside the scope of O. 39 of the Civil Procedure Code. Such an order cannot be passed merely because it is in accordance with equity and good conscience, when O. 39 of the Code does not apply to the facts of the case."

(10) We are inclined to accept and follow the above decisions of the Madras High Court. We, therefore, do not propose to refer to the decisions of the other High Courts some of which, it seems to us, can be explained on the basis of the exercise of ordinary original civil jurisdiction while most of the others do not contain any discussion of the relevant provisions of the Letters Patent. Before parting with these cases, however, we would like to state that, in our opinion, it would be desirable that the provisions of O. 39, Civil P. C. should be enlarged so as to empower the Courts to grant injunctions in cases like the present.

If the trustees in these cases should take over possession of the lands in dispute pending the appeals and if ultimately this Court holds that the plaintiff is entitled to the declaration asked for, the present appellant will have to launch fresh litigation for recovery of possession of the suit lands, because the declaratory decrees which he may get not being executable would not be of any avail to enable him to get back possession. The Rules Committee of the High Court may deal with this suggestion.

(11) In the result, the appeals fail and are dismissed with costs. One set.

R.G.D. Appeals dismissed.

(S) AIR 1955 ANDHRA 145 (Vol. 42, C.N. 53)

SUBBA RAO C. J. AND BHIMASANKARAM J.
(12-1-1955)

Rupajee Ratanchand and another, Applicants v. The Commissioner of Income-tax, Madras, Respondent.

Case Ref. No. 40 of 1952, referred by Income-tax Appellate Tribunal, Madras Bench "A".

Income-tax Act (1922), Ss. 4(1) and 18(3-A) — "Accrue or arise" — Meaning of — Forward contracts between resident and non-resident — Loss to former if profit accruing or arising to latter in British India — Former, if bound to deduct tax.

Though there is a nice distinction in the shades of the meaning of the two words "accrue or arise", throughout the Act they have been used to convey the same idea. They may mean 'bring in as a natural result'. They cannot in the context obviously be synonymous with the word 'receipt' for S. 4 specifically provides for the receipt of the income as distinguished from the income arising or accruing in the territories. The place where the contract is concluded may afford a guide but it will not be the sole guide. The place where the acts are done under the contract or where the contract is carried out may under certain circumstances help a Court to come to a conclusion, but they are in themselves not decisive and conclusive on the question. It may also be that the place where the right to demand and recover profits accrues may be a useful indication under other circumstances. But it is apparent that no underlying test can be laid down as affording a key for solving this difficult question. In the ultimate analysis the question falls to be considered on the cumulative effect of the facts in each case. (Para 12)

The assessees who were residents of British India entered into certain speculative contracts of forward purchase and sale of certain articles with the non-residents who were pucca adatia merchants of a native State. The non-residents sent market reports to the residents showing details of the commodities and the rates. The residents choosing their opportune time gave telegraphic instructions to the non-residents to buy or sell for a particular vaida. The non-residents bought or sold as the case might be and sent telegraphic intimation of the same to the residents. By doing so, they clearly accepted the offer made by the residents. The transactions ended in a profit to the non-residents. There was no evidence that it was a term of the contract that the profits due to the non-residents should be paid in British India. The Income-tax Officer treated the residents as assessees under S. 18(7) of the Income-tax Act and required them to pay income-tax on the profits got by the non-residents.

Held (1) that the loss to the residents arising from the forward contracts was not a profit accruing or arising to the non-residents in British India within the meaning of S. 4(1). (Paras 1, 16, 17)

(2) that, therefore, the residents were not bound to deduct tax under the provisions of S. 18(3-A) on the amount paid by them to the non-residents. (Paras 1, 16, 17)

Anno: I. T. Act, S. 4 N. 6; S. 18 N. 1.

CASES REFERRED: Paras

(A) (V25) AIR 1938 PC 232: ILR (1938) Bom 752 (PC) 6, 7
(B) (1881) 8 QBD 414: 51 LJ QB 86 6
(C) (V38) AIR 1951 Mad 551: 1950-18 ITR 333 7

A Kuppuswami, for Applicants; Advocate-General and M. Kondala Rao, for Respondent.

SUBBA RAO, C. J.:

The Income Tax Appellate Tribunal referred the following two questions under S. 66(1) of the Income Tax Act to the Madras High Court, viz.,

"1. Whether the loss to the Residents arising from the forward contracts entered into by them with the Non-residents is a profit accruing or arising to the Non-resident in British India within the meaning of S. 4(1)?

2. Whether the residents are bound to deduct tax under the provisions of S. 18(3-A) on the amounts paid by them, to the non-residents?

(2) After the constitution of the Andhra High Court, the said Reference has been transferred to this Court.

(3) The facts which gave rise to the reference may be stated thus: The assessees who are residents of British India (hereinafter referred to as residents) entered into certain speculative contracts of forward purchase and sale of groundnut oil, kernel and turmeric with M/s Rupchand Chhabildass and Co., a firm at Sangli, a Native State (hereinafter referred to as non-residents). The non-residents are pucca adatia merchants of Sangli. There were 20 contracts between the resident and non-resident between 25-10-1941 and 4-8-1947. The mode of business followed by them was as follows: The non-residents would send out from time to time market reports in respect of certain commodities to the residents at Kurnool. Whenever the residents considered the quotation so sent to be favourable, they gave telegraphic instructions to the non-residents to buy or sell for a particular Vaida. The purchases and sales were effected by the non-residents at the rate prevailing at the time of the contracts.

The non-residents bought or sold as the case may be and sent telegraphic intimations to the residents, together with the rates and Vaida date. Though it is stated that the residents sent regular contracts to the non-residents for acceptance, the latter denied it and there is nothing on record to show that any such contracts were sent. The non-residents in their turn entered into similar contracts with another merchant at Sangli to purchase or sell an equal quantity at the same rate to cover the contract with the residents. The non-residents also took an advance from the residents to cover any possible losses that might occur in future, and the residents sent advances periodically whenever the initial advances sent by them were exhausted. The residents never took or gave delivery of the goods on the Vaida date. Sometimes, they even determined the contracts before the Vaida date. After the contract was determined or after the Vaida date arrived, the non-residents after settling

or determining the contract, intimated the result by means of a letter to the residents.

The transactions ended in a profit to the non-residents. Though usually the residents made payments to the non-residents by means of Demand Drafts and sometimes by hundies, there is no evidence on record to show how they were paid to the non-residents in the instant case. The net profits got by the non-residents during 1947/1948 were Rs. 2,450/-. During the assessment year 1948-49, the Income Tax Officer treated the residents as assessees under S. 18(7), Income Tax Act and required them to pay tax amounting to Rs. 795-5-0 on the said amount. The residents unsuccessfully filed an appeal against that order to the Appellate Assistant Commissioner, and a further appeal to the Income Tax Appellate Tribunal, Madras. At the instance of the residents, the Income Tax Appellate Tribunal referred the aforesaid two questions for this Court's decision.

(4) The two questions formulated above, turn upon the following provisions of the Indian Income Tax Act:

"Sec. 4(1): Subject to the provisions of this Act, the total income of any previous year of any person includes all incomes, profits and gains from whatsoever source derived, which

(a) if such person is not resident in the taxable territories during such years, accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year.

Sec. 18(3-A): Any person responsible for paying to a person not residing in the taxable territories any interest not being "Interest on Securities" or any other sum not chargeable under the provisions of this Act, shall at the time of payment, unless he is himself liable to pay any Income tax and super tax thereon as an agent, deduct Income-tax at the maximum rate and super tax at the maximum rate applicable to a company or in accordance with the provisions of sub-cl. (b) of Sub-sec. 1 of S. 17 as the case may be.

Section 18(5): Any deduction made and paid to the account of the Central Government in accordance with the provisions of this section and any sum by which a dividend has been increased under Sub-s. 2, S. 16 shall be treated as a payment of Income Tax or super tax on behalf of the person from whose income the deduction was made or of the owner of the security or of the share-holder as the case may be and credit shall be given to him therefor on the production of the certificate furnished under sub-s. 9 of S. 20 as the case may be in the assessment, if any, made for the following year under this Act.

Section 18(7): If any such person does not deduct or after deducting fails to pay the tax as required by or under this section, he and in the cases specified in Sub-section 3-D, the company of which he is the principal Officer, shall without prejudice to any other consequences, which he or it may incur, be deemed to be an assessee in default in respect of the tax."

(5) The result of the aforesaid sections may be stated thus: Section 4 defines the income of a person that can be charged to tax under S. 3. In the case of a person, who is not a resident in the taxable territories, all his income, which accrue or arise or deemed to accrue or arise to him in the taxable territories during the previous year is liable to tax. To facilitate collection, a duty is cast on a person who is a resident and is responsible for paying the said income to the non-resident to deduct the income tax on the said amount at the maximum rate payable by the non-resident. Such deduction shall be treated as payment of Income Tax or super tax on behalf of the person from whose income the deduction was made.

If such deduction is not made the default is deemed to be on the resident in respect of the tax. The basis of the aforesaid scheme is that a non-resident is chargeable to the tax on the said income, for it is the income of the non-resident and the liability of the resident is only secondary, and he will be proceeded against only in case he makes a default in making the necessary deduction. The short question, therefore, is whether the profit made by the non-resident as a result of the aforesaid speculative transactions has accrued or arisen in the taxable territories.

(6) The words "Accrue" or "Arise" have been the subject of judicial scrutiny. At the outset, therefore, it may be convenient to notice some of the leading decisions interpreting these words. The Judicial Committee reviewed the decisions on the subject and attempted to define the said words in — 'Commissioner of Income Tax, Bombay v. V. Chunilal B. Mehta', AIR 1938 PC 232 (A). The assessee there was a resident in British India and the year of assessment was the year ending with 31st March 1934. The assessee was held liable to pay tax upon the profits derived by him from contracts made for the purchase and sale of commodities in various foreign markets, Liverpool, London, New York and elsewhere outside British India. The assessee disputed the liability in respect of such profits on the ground that they were not profits accruing or arising in British India. It was a converse case to the present one. The assessee was in British India and he was assessed to pay tax on the profits derived by him from contracts made outside India. At page 238 the Judicial Committee gave its conclusion as follows:

"Their Lordships are not laying down any rule of general application to all classes of foreign transactions, or even with respect to the sale of goods. To do so would be merely impossible and wholly unwise — to use the language of Lord Esher in — 'Erichsen v. Last', (1881) 8 QBD 414 (B). They are not saying that the place of formation of the contract prevails against everything else. In some circumstances, it may be so, but other matters — acts done under the contract, for example cannot be ruled out A PRIORI. In the case before the Board, the contracts were neither framed nor carried out in British India. The High Court's conclusion that the profits accrued or arose outside British India is well founded."

(7) A Division Bench of the Madras High Court in — 'Commissioner of Income Tax, Madras v. Anamallais Timber Trust Ltd.', AIR 1951 Mad 551 (C), has also considered the scope of the said words "accrue" or "arise" in S. 4 and has not been able to arrive at better results. There the assessee

was a company incorporated in the Indian State of Cochin. During the accounting year, the assessee entered into a contract with the Supply Department of the Government of India for the supply of sized timber. There was an invitation to offer by the Supply Department and the assessees made the tender from Chalakkudi, which was accepted by the Department by written acceptance note sent from New Delhi. The timber was loaded in waggons in Chalakkudi. Under the contract, payment was to be made by the Controller of Military Accounts Poona, but no place of payment was specified in it.

The system of payment as provided under the contract was by Cheque on Government Treasury in India or a Branch of the Reserve Bank of India or Imperial Bank of India transacting Government business. The actual receipt of the money by the assessee was at the Imperial Bank of India at Trichur in the Indian State. The learned Judges held on those facts that the contract was concluded in British India, but the manufacture and sale of the goods were carried out at Chalakkudi outside British India. They came to the conclusion that the profits for the sale of timber accrued and arose to the assessee outside British India, and, therefore, they were not chargeable to Indian Income Tax. Both the learned Judges, Satyanarayana Rao and Viswanatha Sastri JJ. considered the case law on the subject in an attempt to define the words "accrue" or "arise" precisely, but expressed their inability to do so. At page 555 Satyanarayana Rao J. stated :

> "It would be impudence on my part to attempt to evolve a rule of general application relating to foreign transactions or even in respect of the same goods when eminent Judges ruled that it is unwise to do so. It would be sufficient to confine the observations to the facts before me and to decide the question in the light of the principles embodied in the decisions bearing on the point, particularly the decision in AIR 1938 PC 232 (A)."

(8) The other learned Judge Viswanatha Sastry J., observed much to the same effect at page 569 thus:

> "We have been taken through a number of decisions by the learned counsel on both sides, but it is difficult to extract from them a comprehensive principle which would serve as a guide. If we are to follow the lead given by the Judicial Committee, the wisest course is to deal with the particular facts before us and decide as best as we can, whether they are sufficient to bring the assessee within the charging section. It is difficult to formulate affirmatively a general principle with full confidence in its accuracy or legitimacy. It is a still more difficult task to reconcile all that has been said on this topic in the authorities cited."

(9) At page 554, Satyanarayana Rao J., expressed his view on the scope of the said words as follows :

> "Where were the contracts concluded and where did the income or right to receive the payment under the contracts accrue or arise? The dictionary meaning of the word "accrue" is to arise or spring as a natural growth or result to come by way of an increase. Arising means coming into existence or notice or presenting itself. The word receive is not used in the same sense as accrue and arise. The words "accrue" and "arise" do not mean actual receipt of the income, profits or gains; and they may be interpreted as conveying the idea of a present or enforceable right to receive the income, profits or gains. It is something inchoate but it is capable of being enforced or converted into money by actual receipt. The words denote a point of time anterior to the actual receipt."

(10) Viswanatha Sastri J. said at page 561 :

> "The contracts for the supply of timber in this case were, as I have held, concluded in British India. But the execution of the contracts took place wholly in Cochin State. The wrought wood was sawn and manufactured into the requisite shapes and sizes by the Assessee Company in its own Saw Mills in the Cochin State..... there is no evidence of the place where the price had to be paid by the buyer or was in fact paid. In the circumstances, it may, therefore, be presumed that the debtor would seek the creditor and pay, at least where the debtor is such respectable body as the Government. In the absence of a contract fixing the place of payment, the seller in this case, the assessee, had a right to demand the payment of the price of the goods at the place where the goods were sold and delivered, that is to say, at Chalakkudi or other places in Cochin State.....My answer is that both the manufacture and sale of the goods were carried on outside British India and the resulting profits accrued or arose outside British India and were, therefore, not chargeable to Indian Income Tax, the assessee being a non-resident."

(11) No other decision throwing further light on the question has been brought to our notice.

(12) Though there is a nice distinction in the shades of the meaning of the two words "accrue" or "arise" throughout the Act, they have been used to convey the same idea. They may mean 'bring in as a natural result'. They cannot in the context obviously be synonymous with the word receipt, for S. 4 specifically provides for the receipt of the income, as distinguished from the income arising or accruing in the territories. Therefore, it is something less than receipt and happens some times prior to the factum of receipt. In their ordinary meaning, they seem to require a place to be assigned at that at which the result of the trading operations comes whether gradually or suddenly into existence. That place may vary according to the nature of the transactions and the sources of the income.

The place where the contract is concluded may afford a guide, but it will not be the sole guide. The place where the acts are done under the contract or where the contract is carried out, may under certain circumstances help a court to come to a conclusion, but they are in themselves not decisive or conclusive on the question. It may also be that the place where the right to demand and receive profits accrues may be a useful indication under the circumstances. But it is apparent from the decided cases that no unerring test can be laid down as affording a key for solving this difficult question. In the ultimate analysis the

question falls to be considered on the cumulative effect of the facts in each case.

(13) On the facts submitted by the Tribunal, we must hold that the contract was concluded at Sangli. The learned counsel appearing for both parties proceeding on the basis that the non-residents are pucca adatia merchants and their relationship to the residents is not that of an agent. Therefore, the transaction was between two principals. The non-residents sent market reports to the residents showing details of the commodities and the rates. The residents choosing their opportune time gave telegraphic instruction to the non-residents to buy or sell for a particular Vaida. The non-residents bought or sold as the case may be and sent telegraphic intimation of the same to the residents. By doing so, they clearly accept the offer made by the residents.

(14) It is said that subsequently the non-residents sent letters asking the residents to accept the contracts but no such letters were placed before us. Whatever might be their contents, it is manifest from the aforesaid facts that the contracts were concluded at Sangli, when the non-residents bought or purchased and telegraphically intimated that fact to the residents. It is also common case that the contracting party never contemplated any purchase of goods or delivery of the same. The transactions were purely speculative in character and the profit and loss were ascertained only on the differences between the contract rate and the prevailing rate at the time the contract was closed or the due date arrived.

(15) The notional profits arose on calculating the differences in the contract rate and the market rate obtaining at Sangli, and therefore, the locus of the valuation was at Sangli. The profits accrued to the non-residents because of the result of the speculative transaction at Sangli.

(16) There is no evidence that it was a term of the contract that the profits due to the non-residents should be paid at Kurnool. There is not even any material to show that the amounts in question were received by the non-residents at Kurnool, though it appears that on some occasions the amounts were remitted by Demand Drafts on the Central Bank of India, Kurnool to Sangli. On the aforesaid facts, we have no hesitation to hold that the profits due to the non-residents did not arise or accrue in British India. If the non-residents are not liable to tax in respect of the profits of the transactions in question, it follows that the residents also are not liable under S. 18(3-A) of the Act.

(17) In the result, we answer both the questions in the negative. The respondents will pay the costs of the petition which we will fix at Rs. 250/-.

V.R.B. Answers in negative.

(S) AIR 1955 ANDHRA 148 (Vol. 42 C. N. 54)

SUBBA RAO C. J. AND BHIMASANKARAM J.

(9-1-1955)

Divakarumi Sambasiva Rao & Bros. and others, Defendants-Appellants v. Kurnala Venkatarao, Tobacco Seed Oil Firm, Plaintiffs-Respondents.

Appeal No. 234 of 1951, against decree of Sub. J., Guntur, D/- 12-1-1951.

(a) Sale of Goods Act (1930), S. 34 — Contract for sale of goods to be delivered by stated instalments.

In the case of a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, if the seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or to pay one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated. (Para 6)

Anno: Sale of Goods Act, S. 34 N. 1.

(b) Contract Act (1872), S. 73 — Sale of goods — Measure of damages — Contract entered into to supply goods to third party under sub-sale — Criterion for assessing damages.

The general principle which is embodied in S. 73 is that when there is a breach of contract, the party who suffers by the breach is entitled to recover compensation from the other party for the loss caused to him by the said breach. Where the parties knew that the agreement to purchase goods was entered into to supply to a third party under a sub-sale it is a clear case where under the terms of S. 73 itself, the party committing the breach would be liable to pay the difference between the contract rate and the sub-sale rate if the parties knew at the time of the contract that a breach thereof would result in damage. But, where there was no such knowledge, the only measure is the damage which naturally arose in the usual course of things from such breach. If there was a market at the time of the breach, the measure of damages upon a breach by the buyer is the difference between the contract price and the market price on the date of the breach. But when there was no market at the time of the breach, Courts have found difficulty in assessing the damages. In the ultimate analysis, as laid down by S. 73, in the absence of specific knowledge mentioned therein, the real value can be ascertained by finding out the damage that naturally arises in the usual course of things from the breach. (Paras 18, 19)

Anno: Contract Act, S. 73 N. 5.

CASES REFERRED :	Paras
(A) ('02) 26 Bom 744: 4 Bom LR 504	17
(B) ('09) 36 Cal 617: 2 Ind Cas 831	18

T. Lakshmiah, K. Srinivasamurthy and B. V. Rama Rao, for Appellants: Kasturi Seshagiri Rao, K. Sivaprasada Rao and D. Hanumantha Rao, for Respondents.

SUBBA RAO C. J. :

This is an appeal by the defendants against the decree and judgment of the Court of the Subordinate Judge of Guntur, in a suit for recovery of Rs. 12,354-10-0 as damages for breach of a contract dated 4-4-1948.

(2) The plaintiffs are a tobacco seed oil firm represented by their Managing Partner. On 4-4-1948, the plaintiffs entered into a contract with the defendants to purchase 25 tons of tobacco seed oil at Rs. 10 per maund deliverable at any mill, Vijiawada, before the end of June, 1948. On 7-4-1948, a sum of Rs. 1,500/- was paid to the 2nd defendant and the plaintiffs delivered 25 empty barrels to the defendants. The plaintiffs also paid two other sums of Rs. 1,500/- and Rs. 500/-. Notwithstanding the payments, the defendants did not deliver the 25 barrels of oil as stipulated in the contract. On 25-6-1948 the plaintiffs gave a registered notice to the defendants demanding compliance with the terms of the contract and informing them that they would hold them liable for damages if they made any default.

The defendants did not send the oil but replied by letter, dated 1-7-1948, to the effect that the plaintiffs had committed default. With those allegations, the plaintiffs filed a suit for recovery of damages. They claimed damages on the ground that they entered into a contract with the defendants in order to supply the said oil at the rate of Rs. 14/- per maund to Messrs. Jenson & Nicholson (India) Ltd., with whom they entered into a contract to that effect. The plaintiffs alleging that they suffered loss at the rate of Rs. 4/- per maund and deducting therefrom the transport charges from Vijiawada to Guntur, claimed the difference as damages from the defendants.

(3) The defendants, in their written statement, denied that they committed breach of the contract. They alleged that they got ready sufficient oil to deliver to the plaintiffs at their own factory towards the first consignment of 25 barrels long before the due date for performance and requested the plaintiffs to supply empty barrels, but they supplied only 25 leaky empty barrels, at defendants' Nandivelugu Oil Mill and that the plaintiffs defaulted in accepting delivery in spite of defendants' repeated requests. In short, their defence was that plaintiffs made default in carrying out the terms of the contract. They also denied that they had any knowledge of the agreement entered into by the plaintiffs with Jenson & Nicholson (India) Ltd. for the supply of tobacco seed oil at Rs. 14/- per maund. In any view, they pleaded that the claim for recovery of Rs. 3-12-0 per maund on the basis of a possible profit was not maintainable as being very remote.

(4) The learned Subordinate Judge held on the evidence that the plaintiffs were ready and willing to perform their part of the contract, that they sent 25 empty barrels to the defendants that the defendants filled only 15 barrels with oil, but utilised them to meet pressing demands from others and that they were at the crucial time not in possession of sufficient oil to keep up their contract with the plaintiffs. In short, the learned Subordinate Judge held that the defendants committed breach of contract and therefore they were liable to pay damages to the plaintiffs. As regards the measure of damages, in view of his finding that there was no market at the time of the breach of the contract, the learned Subordinate Judge gave as damages the difference between the contract rate and the rate at which plaintiffs agreed to sell the same to Messrs. Jenson and Nicholson (India) Ltd. deducting therefrom 8 annas per maund towards transport charges. In the result, he gave a decree for the recovery of a sum of Rs. 11,371-2-0 with interest, and also a sum of Rs. 400/- in case of 25 empty barrels were not delivered within the time allowed. The defendants have preferred the above appeal.

(5) Mr. Lakshmiah, the learned Counsel for the appellants, contended that the contract entered into between the parties was an instalment contract, that the defendants did not commit any breach even in regard to the 1st instalment, that even if there was such a breach in respect of the 1st instalment, the plaintiffs were not exonerated from carrying out their part of the contract in regard to the subsequent instalments and that on the evidence it was clear that the plaintiffs did not carry out their part by sending the barrels, paying the amounts and taking delivery of the goods at Vijiawada.

(6) To appreciate his argument, it is necessary to notice the terms of the agreement Exhibit A-2, dated 4th April 1948. Under Exhibit A-2, the defendants agreed to supply tobacco seed oil at Rs. 10/- per maund of 25 lbs., at Bezwada in the drums supplied by the plaintiffs. The condition relied upon reads:

> "You shall take delivery of the said oil, 25 drums at a time, pay to us 75 per cent of the value then arrived at, and pay the balance as soon as each waggon is loaded and pass is given. ..... As soon as your drums are received we shall have the oil filled therein. You shall take delivery of the said goods before the end of June."

The contention is that the 25 tons of oil were agreed to be delivered in instalments of 25 drums at a time on payment of 75 per cent of the value of the oil supplied and therefore the contract was one to supply in separate instalments and therefore a breach of contract in respect of a particular instalment would not exonerate the plaintiffs from complying strictly with the terms of the contract in regard to the other instalments. This defence was not raised in the pleadings; nor was it argued before the learned Subordinate Judge. Apart from that we cannot also agree with the construction put upon the contract by the learned counsel. It is not necessary to consider in detail the decisions cited on this aspect of the case. It will be enough if the clear and concise statement of law given in Halsbury's Laws of England, Vol. 8, 3rd Edition by Lord Simonds at page 204 is extracted:

> "Thus, in the case of a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, if the seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or to pay one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

But we cannot say on the terms of the contract Exhibit A-2 that the parties intended that the oil

should be delivered in stated instalments to be separately paid for. The entire 25 tons of oil, the subject-matter of the contract, was agreed to be supplied at a uniform rate of Rs. 10/- per maund before the end of June. The contract 'ex facie' did not divide the 25 tons into specific units with proportionate price. The contract does not fix any time for the delivery of the instalments. But for convenience of despatch and delivery 25 drums were agreed to be delivered at a time. But that in itself will not make the contract a severable one which can be enforced separately. We, therefore, cannot hold that Exhibit A-2 embodied a severable contract enforceable in different instalments. In this view, the consequential argument of the learned Counsel, namely that the breach of the first instalment would not exonerate the plaintiffs to carry out the other terms of the contract, does not arise for consideration.

(7) The next question is who committed breach of the contract? The main terms of the contract as aforesaid are: the defendants shall deliver the oil at Bezwada in the drums supplied by the plaintiffs. At the time of delivery, the plaintiffs shall pay 75 per cent of the value against 25 drums delivered at a time and pay the balance as soon as each waggon was loaded and pass was given. (His Lordship discussed the evidence, both oral and documentary, on the point and proceeded:)

(8-14) The result of the aforesaid findings is this. The plaintiffs were in a position to pay amounts against the contract; they paid Rs. 3,500/- towards the contract; they sent 25 barrels which were in a sound condition to the defendants on 23rd May 1948; though 15 barrels were filled up to meet the urgent demands, the said oil was sold to Sree Lakshmi Prasanna Rice and Oil Mill and though during the contract period the defendants had a stock of 4000 bags of tobacco seeds, most of it was pledged to others and therefore, they were not in a position to utilise the stock for manufacturing oil. From the aforesaid facts, it is manifest that the plaintiffs performed their part of the contract but the defendants not only did not send the 25 barrels but they were not in a position to perform any part of their contract and thereby committed breach of contract. Even if it was to be treated as a severable contract, we hold, in the circumstances of this case, that the defendants committed breach of the entire contract.

(15) The next question is, what is the measure of damages? The learned Subordinate Judge held on the evidence that the defendants had no knowledge of the fact that the plaintiffs had entered into a contract to supply seed oil to Messrs. Jenson & Nicholson (India) Limited at Rs. 14/- per maund and yet awarded damages representing the difference between the contract rate and the rate at which they agreed to sell to the said company deducting 8 annas per maund towards transport charges. Mr. Lakshmiah, learned counsel for the appellants, contended that the learned Subordinate Judge having held that the defendants had no knowledge of the plaintiffs' contract with Messrs. Jenson & Nicholson (India) Ltd. erred in giving as damages difference between the two rates, whereas Mr. Hanumantha Rao, learned Counsel for the respondents, argued that even if the defendants had no knowledge of the particular contract they had knowledge of the fact that the oil purchased was required by the plaintiffs for foreign export and therefore, the correct measure was the difference between the two rates. Section 73 of the Contract Act lays down the measure of damages to be awarded when there is a breach of contract. Section 73 says:

> "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> Explanation: In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

(16) The principle behind the section is that in giving the damages for breach of contract the party complaining should, so far as it is possible, be placed in the same position as he would have been in if the contract had been performed. Decided cases have evolved a "rule of market-rate" on the ground that it represents the true value of the goods to the purchaser. But when there was no actual market, Courts found difficulty in applying the "rule of market rate." To meet that contingency another supplemental rule has been evolved which was summarised in Halsbury's Laws of England, 2nd Edition, Volume 10, (Lord Hailsham) at page 123, as follows:

> "When the seller fails to deliver and there is no market, the buyer is entitled to be awarded an amount which represents the value of the goods to him at the date when delivery should have been made and a contract of sub-sale which he had entered into is evidence of such value, though the seller had no notice of such contract."

In Mayne's Treatise on Damages, 10 Edition, by F. Gahan, the same rule is stated in different words at page 172 as follows:

> "When the subject-matter of the contract is not procurable at all in the market, or not at or about the time of breach, the damages are to be taken at the value of the article at the time of breach. But the mode of estimating the value is different, for there is no market price which can be quoted. Hence cases of this sort appear to be complicated by varying elements which are really only different tests for answering the question, what was the articles worth at the time?"

At page 174, the learned author illustrates the rule in the context of a re-sale by a purchaser previous to the breach of contract. It is stated:

> "Where there has been a failure to deliver goods which are not procurable in the market, or not at or about the time of breach, the damages are to be taken at the value of the article at the time of breach. But the mode of estimating the value is different, for there is no market price which can be quoted. Hence cases of this sort appear to be complicated by varying elements which are really only different tests for answering the question, what was the articles worth at the time?" At page 174, the learned author illustrates the rule in the context of a re-sale by a purchaser previous to the breach of contract. It is stated:
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>

already been discussed, would arise for decision. In reality, however, the re-sale is an immaterial circumstance, except so far as it may go to prove what the real value was at the time of breach. Where the resale took place in the ordinary course of commerce, it would be reasonable to accept it as a test of the then value of the article. But where it was a special transaction, in which a special price was given, in consequence of the peculiar exigencies of the purchaser, no such inference could be drawn. Therefore, notice of the resale would in the former case be unnecessary, in the latter probably be useless."

In Benjamin on Sale, 7th Edition, the law on the subject has been elaborately considered having regard to the principles in decided cases and the result is stated at page 1019 in the form of propositions.

"Where the goods, at the time when the contract is made, have been sub-sold or brought for sub-sale the following rules apply:

A: Where there is a market: (1) When there is a sub-sale (whether the seller when he made the contract did or did not know of it, or of the buyer's intention to resell) the buyer must as between himself and the seller, buy the goods in the market to supply the sub-buyer and the seller is liable (in the absence of special damage) only for the difference in price, as general damages.

B. When there is no market: Where the seller at the time when he made the contract knew that the goods had been sub-sold or were brought for sub-sale, or would probably be sub-sold. (a) The buyer may buy the best substitute procurable for the goods and if the sub-buyer accept them, charge the seller the difference in price as general damages or (b) may recover as special damages the loss of his actual or anticipated profits, together with a reasonable indemnity against the buyer's liability to the sub-buyer, and costs reasonably incurred.

(1) Semble that exceptional profits of a sub-sale are not recoverable, unless the seller, when he made the contract, knew of their amount and accepted the contract with his special responsibility attached.

(2) When the seller at the time when he made the contract did not know that the goods had been sub-sold or brought for sub-sale or would probably be sub-sold—

(a) The buyer may buy the best substitute procurable and charge the seller the difference in price as general damages, as under R. B(1)(a), or

(b) may charge the seller the difference between the contract price and the value of the goods as general damages. Some evidence of such value is afforded by the sub-sale price or the price of the goods at the market nearest to the place of delivery or at a distant market added to the expense of transportation to the place of delivery, their price at the market in the place of delivery at a time other than that fixed by the contract for delivery."

(17) The abovesaid statement of law appears to meet the various situations that may arise in the assessment of damages. In — 'Jugmohandas v. Nasserwanji', 26 Bom 744 (A), as the defendant failed to deliver coal to the plaintiff on the prescribed date, the suit was filed for damages for breach of contract. On the date of the breach, there was practically no coal in the place of delivery of the description contracted for at the date at which delivery should have been given and consequently no market rate could be proved. At the hearing the plaintiffs produced a statement showing the rates at which he had during the contract period settled certain contracts for Powel Duffryn coal which he had with the Bombay Company Limited. Jenkins C. J. and Chandavarkar J., held that under the special circumstances of the case and in the absence of any evidence as to a market rate, the figures given in this statement might properly be received in evidence for the purpose of fixing the actual value of the coal at the dates of breach, thus affording a measure of the damages suffered.

Though the settlement made by the plaintiff with the Bombay Company Limited was not a re-sale they accepted that statement on the ground that it bore some analogy to the re-purchase and they held under the special circumstances of that case that the statement might be received in evidence for the purpose of enabling them to fix the actual value. It will be seen from the aforesaid judgment that it does not lay down any inflexible rule of law but only says that, having regard to the poverty of the materials the measure afforded by the repurchase might be taken into consideration in fixing the actual value of the coal on the date of the breach.

(18) In — 'Cooverjee Bhoja v. Rajendra Nath', 36 Cal 617 (B) Maclean J., pointed out that as there was no market rate for the commodity in Calcutta at the date of the breaches, the damages for those breaches was the value to the plaintiffs of the portions that ought to have been delivered on those dates at the price procurable in England less the cost of getting them there. At page 624, the learned Chief Justice restated the principle in a pithy sentence as follows:

"But if there is no market rate, the mode of estimating this value is different but comes back to the elementary principle what were the goods worth at the time?"

The law relevant to the question may be stated thus: The general principle which is embodied in S. 73 of the Contract Act is that when there is a breach of contract, the party who suffers by the breach is entitled to recover compensation from the other party for the loss caused to him by the said breach. He would be entitled to recover only such damages as would naturally arise in the usual course of things from the said breach or which the parties knew when they made the contract to be likely to result from the breach of it. Under the circumstances will a party be entitled to recover compensation for any remote and indirect loss or damage sustained by the breach?

Where the parties knew that the agreement to purchase goods was entered into to supply to a third party under a sub-sale it is a clear case where under the terms of S. 73 itself, the party committing the breach would be liable to pay the difference between the contract rate and the sub-sale

rate if the parties knew, at the time of the contract, that a breach thereof would result in damage. But where there was no such knowledge, the only measure is the damage which naturally arose in the usual course of things from such breach. If there was a market at the time of the breach the measure of damages upon a breach by the buyer is the difference between the contract price and the market price on the date of the breach. But when there was no market at the time of the breach, Courts have found difficulty in assessing the damages.

(19) Bearing in mind the general principle that the real value to the purchaser at the time of the breach should be the criterion for assessing the damages Courts have evolved some rules for guidance for assessing the real value. Whatever rule was adopted and followed, it was only to ascertain the worth of the goods at the time of the breach. Where the seller at the time when he made the contract knew that the goods had been sub-sold or were brought for sub-sale or would probably be sub-sold it was held that the buyer should buy in the market the best substitute procurable for the goods and if the sub-buyer accepted them charge the seller the difference in price. Alternatively, he might recover as special damages the loss of his actual or anticipated profits but excluding the exceptional profits of the sub-sale.

But when at the time he made the contract the seller did not know that the goods had been sub-sold or were brought for sub-sale or probably would be sub-sold the buyer might claim damages representing the difference between the contract price and the value of the goods as general damages. But to ascertain the price afforded by the sub-sale or the price of the goods at a place nearest to the place of delivery, or, the price at the market in the place of delivery at a time other than that fixed in the contract for delivery and similar cases, the appropriate prices may be relied upon with necessary subtractions or additions for ascertaining the real value at the time of the breach. These are not inflexible rules of law but are only guides to ascertain the real value at the time of the breach. In the ultimate analysis, as laid down by S. 73, in the absence of specific knowledge mentioned therein, the real value can be ascertained by finding out the damage that naturally arise in the usual course of things from the breach.

(20) Can it be said in the instant case that the learned Subordinate Judge had applied the correct measure in assessing the damages? The learned Subordinate Judge found on the evidence that the defendants were not aware that the suit firm entered into Exhibit A-2, in order to fulfil their obligations to Messrs. Jenson & Nicholson (India) Ltd. The learned counsel for the appellants did not canvass the correctness of that finding. Indeed there is no evidence on record to prove that they had such knowledge. But it was contended that the defendants must have had knowledge of the fact that the plaintiffs purchased the goods to export them to other states. Reliance is placed upon the following statement in Exhibit A-2:

"We shall deliver the said oil to you, clean, free of mud, and free of adulteration and to stand the testing by the Public Analyst."

The fact that certain specifications are made is not decisive on the question whether the defendants had knowledge that the plaintiffs intended to sub-sell the same. We cannot, therefore, hold that it has been established in this case that the defendants entered into a contract with the plaintiffs with the knowledge that the goods were required for supply under a specific contract or that they were intended to be sold to third parties.

(21) If so, the only question is whether there was a market for the oil at the time of the breach and if so how to ascertain the real value of the oil to the purchaser. (His Lordship considered the evidence on the point and concluded:) Having regard to the aforesaid circumstances, we fix the real value of the oil at the date of the breach at Rs. 11-8-0 per maund. If so, the plaintiffs could be entitled only to recover damages on 2250 maunds at Rs. 1-8-0 per maund, viz., Rs. 3375/-. The plaintiffs would, of course, be entitled to recover a sum of Rs. 3517-2-0 being the money paid by them from time to time to the defendants. They would also be entitled in addition to recover a sum of Rs. 400/- in case the 25 empty barrels are not delivered within one month from today.

(22) In the result, the decree of the lower court is accordingly modified. The parties will pay and receive proportionate costs here and in the court below.

(23) In other respects the decree of the lower court will stand.

V.R.B. Decree modified.

(S) AIR 1955 ANDHRA 152 (Vol. 42, C.N. 55)

SUBBA RAO C. J. AND BHIMASANKARAM J.

(11-1-1955)

Nooney Veeraraju, Defendant-Appellant v. Boda Venkataratnam, Plaintiff-Respondent.

Appeal No. 672 of 1950, against decree of Sub. J., Rajamundry, in O. S. No. 79 of 1949.

(a) Provincial Insolvency Act (1920), Ss. 35, 37 — Annulment of adjudication — No vesting order — Effect of — Insolvent can claim benefit of Madras Act 4 of 1938 — (Debt Laws — Madras Agriculturists' Relief Act (4 of 1938), S. 14),

Where an adjudication is annulled under S. 35 and no vesting order is made under S. 37, Provincial Insolvency Act, 1920, the property does not merely revest in the insolvent but it reverts to him. The effect of the annulment relates back to the date of adjudication and therefore the insolvent must be deemed to have had a saleable interest in that property for the purpose of being treated as an agriculturist entitled to the benefits of the Madras Agriculturists' Relief Act. AIR 1951 Mad 63 (FB) and AIR 1954 Mad 604 (FB), Foll.

(Para 3)

Anno: AIR Man., Pro. Ins. Act, S. 35 N. 5; S. 37 N. 8.

(b) Provincial Insolvency Act (1920), S. 47 — Valuation of security under — Effect of — Does not preclude him from claiming in excess of that valuation — (Civil P. C. (1908), O. 2, R. 2).

The right of secured creditor to realise the security in accordance with the terms of the

bond in his favour is not affected in any manner whatsoever by the valuation which he puts his security under S. 47, Provincial Insolvency Act. A secured creditor is clearly entitled to make a claim in respect of the whole of the amount due under the security despite the valuation made by him of his security at a lesser figure and if he limits his claim in a subsequent suit to the amount of the original valuation he is precluded under O. 2, R. 2, Civil P. C. from recovering any amount in excess of that valuation thereafter. AIR 1938 Lah 217 and AIR 1940 Nag 252, Distinguished. (Paras 5, 7)

Anno: Pro. Ins. Act, S. 47 N. 1.

CASES REFERRED:

	Paras
(A) (V41) AIR 1954 Mad 604: ILR (1954) Mad 80 (FB)	2, 3
(B) (V38) AIR 1951 Mad 63: ILR (1951) Mad 555 (FB)	3
(C) (V29) AIR 1942 Mad 402: 1942-1 Mad LJ 327	3
(D) (V25) AIR 1938 Lah 217: 178 Ind Cas 272	6
(E) (V17) AIR 1940 Nag 252: ILR (1940) Nag 512	7

G. Chandrasekhara Sastry, for Appellant; the Advocate-General (D. Narasaraju), V. V. Sastry and S. V. Kondapi, for Respondent.

BHIMASANKARAM J.:

The defendant is the appellant. The suit is rather of an unusual nature and as its maintainability is in question in this appeal, it is necessary to set out the circumstances which constitute its background. A simple mortgage bond dated 24th March 1931, securing a sum of Rs. 8,000/- in discharge of previous simple money debts was executed by the defendant for himself and as guardian of his undivided minor son, Suryanarayanamurthy. As a result of a creditor's application, the defendant was adjudged insolvent on 23rd March 1933, in I. P. No. 19 of 1931. Pending the insolvency petition, the present plaintiff filed I. A. No. 18 of 1939 on 9th February 1939, before the Official Receiver, valuing his security under S. 47, Provincial Insolvency Act at Rs. 8,500/- and proved for the balance of the money due to him under the mortgage bond as an unsecured creditor, i.e., for a sum of Rs. 11,513-11-6. During the insolvency another son was born to the defendant. Suryanarayanamurthy, the elder son, filed O. S. No. 4 of 1940 on the file of the Sub Court, Rajamundry, for partition of the joint family properties impleading besides his father and brother, the Official Receiver, the creditors of the family and alienees of some portions of the family property. The plaintiff was thus made a party thereto and an issue was raised as to whether the present plaintiff's mortgage debt was binding on the plaintiff in that suit.

At about the same time, the present plaintiff filed O. S. No. 22 of 1941 in the same court against this defendant and his sons, a suit to enforce his mortgage. In the plaint therein, he stated that the mortgage debt was not liable to be scaled down under the terms of Act 4 of 1938 against this defendant for the reason that a dividend had already been declared in the insolvency proceedings. He admitted that so far as defendants 2 and 3 in that suit (sons of the present defendant) are concerned, the amount was liable to be scaled down. He however limited the claim against all of them to the lesser amount stating that he did so without prejudice to his right "to claim the entire amount under the terms of the bond as unscaled less the suit amount as now scaled down in the insolvency of defendant 1 in consonance with the valuation of the security made by" him before the Official Receiver. The partition suit and the mortgage suit were tried together and preliminary decrees were passed in both of them. There was no appeal taken against the preliminary mortgage decree, but there was an appeal filed to the High Court of Madras against the preliminary decree in the partition suit by the plaintiff therein. One of the creditors also filed an appeal against the latter decree. The present plaintiff obtained a final mortgage decree in due course, but before the sale which took place thereunder was confirmed, the Official Receiver deposited in court the entire decretal amount and thus satisfied the decree in toto.

Meanwhile the present defendant filed I. A. No. 15 of 1942 for annulment of his adjudication. Though that application was dismissed by the Insolvency Court, the District Court, East Godavari, on appeal, directed the annulment of the adjudication on 7th October 1944, while making an order at the same time that the properties of the defendant were to continue to vest in the Official Receiver under S. 37, Provincial Insolvency Act. A revision was taken against that order of the District Judge to the High Court of Madras in C. R. P. No. 1621 of 1944. That revision petition came on for hearing a few days before the two appeals above mentioned were disposed of and the High Court while confirming the order of annulment, set aside the direction of the District Court vesting the property in the Official Receiver. On the appeals, the decree of the trial court was modified and it was declared "that the 1/3rd share of the plaintiff and the 1/3rd of defendant 1 of the debts" except the mortgage debt in favour of the present plaintiff be scaled down under the Madras Agriculturists' Relief Act and that the plaintiff and defendant 3 be liable each to the 1/3rd share of the said debts as scaled down and that defendant 1 (father) be liable for a 1/3rd share of the said debts without the statutory reduction. The decree of the High Court further provided that the Official Receiver should continue as commissioner for carrying out the directions under the decree. In the present suit, the plaintiff claims against the father the 1/3rd share of the debt due under the mortgage bond from the defendant without the statutory reduction less the amount received from the Official Receiver as stated above.

(2) Three main contentions were raised on behalf of the defendant in the court below and they are repeated here. In the first place, it is contended that the suit is barred under the provisions of O. 2, R. 2, Civil P. C. In the second place, it is urged placing reliance on — 'Subbaiah Goundan v. Ramaswami Goundan', AIR 1954 Mad 604 (A), that because of the subsequent annulment of ad-

judication the right of the defendant to claim that he is an agriculturist is not lost and that he is entitled to claim in the present suit that the mortgage bond is liable to be scaled down. Thirdly, the rate of interest is stated to be unconscionable and liable to be reduced under the Usurious Loans Act.

(3) We propose to deal with the second contention first. On the facts above stated, it is clear that the insolvent along with his sons would be an agriculturist within the meaning of the Madras Agriculturists Relief Act save for the order of adjudication and the consequential vesting of the properties in the Official Receiver. But the order of adjudication having been subsequently annulled, the question is what is the effect of the annulment as regards his claim to be treated as an agriculturist entitled to relief under that Act. This point is directly covered by an authority in favour of the appellant reported in — 'Arunachalam Chettiar v. Narayanaswami Goundar', AIR 1951 Mad 63 (B), an authority which was not available to the learned Subordinate Judge at the time of his decision in this case. That decision has ruled that where an adjudication is annulled under S. 35 and no vesting order is made under S. 37, Provincial Insolvency Act (5 of 1920) the property does not merely revest in the insolvent but it reverts to him, that the effect of the annulment relates back to the date of adjudication and that therefore the insolvent must be deemed to have had a saleable interest in that property for the purpose of being treated as an agriculturist entitled to the benefits of the Madras Agriculturists Relief Act. The view taken in the above Full Bench decision has since been affirmed in — 'Subbaiah Goundan v. Ramaswamy Goundan', (A), another Full Bench decision of the same Court.

Applying that decision to the facts of this case, it is clear that the defendant would be entitled to claim that he was an agriculturist on the material dates. But, it is argued for the respondent that it is not open to the appellant to contend that he is an agriculturist as the matter is 'Res Judicata', having been decided against him in prior proceedings between the parties. The contention is that there was a decision in the earlier suits to which reference has already been made that the defendant was not an agriculturist. It has to be noticed that the mortgagee (present plaintiff) was defendant 7 in the partition suit and respondent 7 in A. S. No. 89 of 1943, one of the two appeals taken against the judgment in the partition suit to the High Court. The 5th paragraph of the decree of the High Court runs thus:

"That the one-third share of the plaintiff and the one-third share of defendant 3 of the debts described in plaint schedule B attached to the decree of the lower court excepting the mortgage debt in favour of defendant 7 which has ripened into a decree in O. S. No. 22 of 1941 on the file of the lower court and which was already scaled down be "scaled down under S. 14 of Madras Act (4 of 1938) and that the plaintiff and defendant 3 be liable each to one-third share of the said debts as scaled down and that defendant 1 be liable for one-third share of the said debts without the statutory reduction."

This paragraph is founded on the following paragraph in the judgment:

"It only means to deal with the claim to relief under the Madras Agriculturists' Relief Act, 1938, in respect of the debts due to defendants 7 to 18. It is not disputed that the plaintiff and defendant 3 as well as their family are agriculturists within the meaning of the Act. Defendant 1 is not eligible for relief, as he was not an agriculturist at the commencement of the Act, his share in the family properties having remained vested in the Official Receiver till the annulment of his adjudication. It has been held that S. 6 of the Act is inapplicable to joint families consisting only of a person and his descendants (vide — 'Sundaram v. Subba Rao', AIR 1942 Mad 402 (C)). It follows that under S. 14 the plaintiff and defendant 3 will be liable respectively for one-third of the liabilities as scaled down under the Act, and defendant 1 will be liable for one-third of the debts without the statutory reduction."

O. S. No. 22 of 1941 mentioned above is the other suit filed by the present plaintiff in which he scaled down the debt according to the provisions of the Act stating, as has already been noticed, that he did so without prejudice to his right to claim against this defendant the entire amount under the terms of the bond. That being so, no issue was raised in that suit as between the present plaintiff and the present defendant as to whether the latter was or was not an agriculturist. In the partition suit also, there was no controversy between them as to the applicability of the Act to the suit mortgage. It is, therefore, impossible to hold that there was a decision in the previous litigation on the question now posed, namely, whether the effect of the annulment being to wipe out the insolvency altogether, the defendant is not entitled to say that the debt is liable to be scaled down under the Agriculturists' Relief Act.

It is true that in the paragraph cited above from the judgment of the High Court, there is a reference to defendant 7, but we have no doubt that it is a mistake, for, the 5th paragraph in the decree above cited makes it clear that the question did not fall to be decided in the partition suit from which that appeal arose. We are, therefore, clearly of opinion that the present defendant is entitled to the benefits of the Act and that the present suit launched on the basis that the defendant was not an agriculturist and seeking a decree against the defendant for the difference between what is payable on the basis of the Agriculturists' Relief Act and what is due independently of it, is not sustainable. The suit is therefore liable to be dismissed on the ground that nothing is due to the plaintiff because admittedly he has received whatever is due to him on the basis of the applicability of the Madras Agriculturists' Relief Act for the mortgage debt.

(3a) As the point has been argued by both sides at some length, we propose to deal also with the first of the contentions raised by the appellant. In order to appreciate the arguments, it is necessary to quote the relevant portions of O. 2, R. 2, Civil P. C., and S. 47, Provincial Insolvency Act. Order 2, R. 2, Civil P. C., in so far as it has any bearing on the present discussion, is as follows:

"(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action .....

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

(4) The material portion of S. 47, Provincial Insolvency Act runs thus:

"(3) Where a secured creditor does not either realise or relinquish his security, he shall, before being entitled to have his debt entered in the schedule, state in his proof the particulars of his security and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed.

(4) Where a security is so valued, the court may at any time before realisation redeem it on payment to the creditor of the assessed value.

(5) Where a creditor, after having valued his security, subsequently realises it, the nett amount realised shall be substituted for the amount of any valuation previously made by the creditor and shall be treated in all respects as an amended valuation made by the creditor.

(6) Where a secured creditor does not comply with the provisions of this section, he shall be excluded from all share in any dividend."

It is contended for the appellant that the valuation of his security by the creditor under sub-s. 3 of the above section does not disentitle him from filing a suit for the whole of the amount in respect of the debt and that the present suit for the whole of the amount due in respect of the debt and that the present plaintiff having limited his claim in the mortgage suit, O. S. No. 22 of 1941, to a sum of Rs. 8,133-6-0 is precluded under O. 2, R. 2, Civil P. C. from suing for the relief sought by him in the present suit. On the other hand, the learned Advocate General argues for the respondent that when a creditor has valued his security at a certain amount there is a statutory bar against his claiming any amount in excess of that valuation in a suit filed by him, to enforce the debt while the insolvency is pending.

We are unable to accept the latter contention. If the learned Advocate General is right, the nett amount realised should always only be lesser than the amount of the original valuation and in no case greater than that amount. The wording of sub-s. (5) would have been different if the intention of the legislature as expressed in the earlier sub-section was to restrict the mortgagee's right of realisation to the amount at which he valued his security. As it stands, sub-s. (5) admits of the realisation by the mortgagee of a higher as well as a lower amount than what the property was valued at under sub-s. (3). The mere valuation of security at a particular price, a price which the court may pay, if it thinks fit, to redeem the security, does not, in our opinion, compel the mortgagee to limit the relief sought for by him in a mortgage action to the assessed value of the security. If the property could be sold for a higher price than for what it was assessed at, the mortgagee is clearly entitled to the advantages of the higher price obtained and the nett amount so realised will then have to be substituted for the amount at which it was previously valued and the creditor can claim a dividend only in respect of the balance due to him after deducting the value as so amended. It may be more or it may be less.

In our judgment, the valuation by the creditor is not made, so to say, at his risk. It is only a provisional and not a final valuation. The Court may accept the valuation and offer to redeem the property on that basis, in which case the creditor may be bound to receive the sum and release the security. He can then prove for the balance as an unsecured creditor. If, on the other hand, the court does not redeem it, he is free to sue for the whole of the sum due to him and, after getting the property sold claim a dividend in respect of the balance due. If a dividend had already been paid to him on the basis of a valuation different from that for which the property is ultimately sold, the actual figure will be substituted for the provisional one and necessary adjustments will be made so as to see that dividend is paid to him only for the amount of difference between what he is entitled to and what he had realised. Rules 9 to 16 of the second schedule to the Presidency Towns Insolvency Act embody similar provisions. Rule 15 corresponds to sub-s. (5) of S. 47 of the Act under discussion. The position of a secured creditor under that Act also seems to us to be the same as under the Provincial Act.

(5) The English Law on the subject may also be usefully referred to. It is stated in Ss. 998 and 995 of the second volume of Lord Simonds' Third Edition of Halsbury's Laws of England.

"If he (secured creditor) neither realises nor surrenders his security, he must before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and he will be entitled to receive a dividend only in respect of the balance remaining after deduction of the assessed value. Again, if after valuation of a security the creditor realises it, or it is realised at the instance of the trustee, the nett amount realised is to be substituted for the valuation and treated in all respects as an amended valuation made by the creditor."

It is further stated:

"On the amendment of a valuation, the creditor must forthwith repay any dividend which he may have received in excess of that to which he would have been entitled on the amended valuation. He will be entitled to be paid out of any money, for the time being available for dividend, any dividend or share of dividend which he may have failed to receive by reason of the inaccuracy of the original valuation, before that money is made applicable to the payment of any future dividend; but he is not entitled to disturb the distribution of any dividend declared before the date of the amendment."

The above extracts make it clear that in England the right of secured creditor to realise the security in accordance with the terms of the bond in his favour is not affected in any manner whatsoever by the valuation which he puts upon his security. We can see no warrant in the language of S. 47 to support the contention that the law in India

is different. In this view, a secured creditor is clearly entitled to make a claim in respect of the whole of the amount due under the security despite the valuation made by him of his security at a lesser figure. It therefore follows that the present plaintiff was bound to have instituted his former suit not only for the amount claimed therein but for the whole of the amount as unscaled down. After obtaining a decree for sale for the whole of such amount he should have sold the property for what it fetched and thereafter if the insolvency continued he could have claimed a dividend for the balance, and if, as has happened, in the present case, the insolvency was annulled, he could have applied for a personal decree for the balance under the provisions of O. 34, R. 6, Civil P. C.

(6) No decided cases directly in point have been cited to us, but the learned Advocate General has referred to two cases in support of his argument. The first of them is — 'Haveli Shah v. Mt. Hussaina Jan', AIR 1938 Lah 217 (D). All that decision decides is that where a creditor who had a mortgage decree against the insolvent realised his security before the order of discharge is passed but had not valued his security and proved for the balance in the insolvency, the order of discharge released the insolvent from personal liability under the mortgage because that was a debt provable under the Act and under S. 44(2) of the Act an insolvent is released from all such debts. It is argued that in so far as the debt is provable in insolvency, no action could be laid 'pro tanto' to enforce the security. One cannot see how the ratio in this decision applies to the present case. There can be no doubt whatsoever that the claim against the insolvent's estate after the security has been realised is one to be made in insolvency, and if not so made, it is extinguished after an order of discharge. This case clearly does not deal with the question as to whether, when a mortgage suit is instituted, after valuation of the security, the suit should be restricted only to the amount at which the security was valued.

(7) The next decision to which reference was made is — 'Khupchand Nathmal v. Rajeshwar Shankar', AIR 1940 Nag 232 (E). This decision has ruled that where a secured creditor instead of taking any of the courses prescribed by S. 47, Provincial Insolvency Act ignores the Insolvency Court altogether and realises his security, he must be content with the proceeds and will be debarred from claiming any dividend should the proceeds prove insufficient. This again does not in our opinion, support the contention of the learned Advocate General that a court has no power to grant and the secured creditor has no right to claim a relief for more than the amount at which he has valued his security. In the view we have taken on the first two points raised on behalf of the appellant, it is not necessary for us to go into the question of the applicability of the Usurious Loans Act. The appellant is entitled to succeed on either of the points discussed above. The result, therefore, is that this appeal is allowed and the plaintiff's suit dismissed with costs throughout.

D.R.R. Appeal allowed.

(S) **A.I.R. 1955 ANDHRA 156 (Vol. 42, C.N. 56)**

SUBBA RAO C. J. AND SATYANARAYANA RAJU J. (28-1-1955)

D. Jones Shield, Petitioner v. N. Ramesam and others, Respondents.

Cri. Misc. Petn. No. 1360 of 1954.

(a) **Contempt of Courts Act (1952), S. 3 — Contempt of court — what amounts to — (Constitution of India, Art. 215).**

Courts have always found it difficult to give a comprehensive and complete definition of 'contempt of Court'. But the definition of these words given in the leading case 'Brich v. Walsh', 10 Irish Eq R. 93 has been accepted by Courts in India. There, the court gave three categories of contempt (i) contempt in respect of orders of Court, (ii) contempt by letters or pamphlets addressed to the judge who is to decide the case with the intention either by threats of flattery or bribery to influence his decisions, and (iii) constructive contempt depending upon the influence of an intention to obstruct the course of justice. (Para 8)

Anno: AIR Man., Contempt of Courts Act, S. 1 N. 3.
AIR Com., Const. of India, Art. 215 N. 3.

(b) **Contempt of Courts Act (1952), S. 3 — Contempt of subordinate courts — Powers of High Court to commit for such contempt.**

Before 1926, it was held that, in matters of contempt a High Court possesses the same jurisdiction as the old King's Bench in England had. Act 12 of 1926 expressly empowered High Courts to exercise the same jurisdiction, power and authority in respect of courts subordinate to them as they have in respect of contempts of themselves. The Constitution of India expressly saved the powers of the High Court to punish for contempt of court. The Parliament by Act 32 of 1952 repealed the earlier Acts and restated in express terms that "subject to the provisions of Sub-s. (2) every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it, as it has and exercises in respect of contempts of itself". (Para 9)

Anno: AIR Man., Cont. of Courts Act, S. 2 N. 1.

(c) **Contempt of Courts Act (1952), S. 3 — Contempt of court public officers — (Constitution of India, Art. 215).**

The High Court will take a serious view, if public officers of responsibility, act in such a manner as to obstruct the course of justice or disobey to implement the orders of court, for such acts will undermine the prestige of courts and set a bad example to the public. At the same time, the filing frivolous applications for contempt against public officers with a view to harass them is equally reprehensible and the court will give exemplary costs against such abuse of process of High Court. (Para 10)

Anno: AIR Man., Contempt of Courts Act, S. 1 N. 3.
AIR Com. Const. of India, Art. 215 N. 3.

(d) Contempt of Courts Act (1952), S. 3 — Contempt of court — Matter sub judice — Parallel enquiry by executive officer — (Constitution of India, Art. 215).

Any parallel enquiry conducted by an officer with regard to a matter which is 'sub judice' is bound to interfere with the even and ordinary course of justice. It is a cardinal principle that when a matter is pending for decision before a court of justice, nothing should be done which might disturb the free course of justice and the High Court will discountenance any attempt on the part of any executive official, however high he may be, to prejudge the merits of a case and to usurp the functions of the court which has got seisin of the case. Such a practice is fraught with immense danger. AIR 1949 Pat 222 (FB), Foll. (Paras 11, 12)

(Held that in the present case, the public officer did not conduct any parallel enquiry while the matter was sub judice). (Paras 12, 13)

Anno: AIR Man., Contempt of Courts Act, S. 1 N. 3.

AIR Com., Const. of India, Art. 215 N. 3.

(e) Contempt of Courts Act (1952), S. 3 — Questions put by court — Answers by Advocate — Not contempt of court — (Constitution of India, Art. 215).

When an Advocate bona fide answered a question put to him by the court, he would not be guilty of contempt of court. 10 Mad 28 (FB) and (1883) 11 QBD 588, Rel. on. (Para 19)

Anno: AIR Man., Contempt of Courts Act, S. 1 N. 3.

AIR Com., Const. of India, Art. 215 N. 3.

(f) Contempt of Courts Act (1952), S. 3 — Communication to Court by third person of his opinion on facts of case — (Constitution of India, Art. 215).

When a person communicates to a judge his opinion or decision on the facts of a case, which is sub judice, it constitutes contempt and his motive in so communicating is irrelevant. AIR 1954 Pepsu 91 and AIR 1939 Mad 257 (SB), Rel. on. (Para. 22)

(Held that in this case there was no communication of opinion by respondent 1 to the Court).

Anno: AIR Man., Contempt of Courts Act, S. 1 N. 3.

AIR Com., Const. of India, Art. 215 N. 3.

CASES REFERRED:

	Paras
(A) 10 Irish Eq R 93	8
(B) V36) AIR 1949 Pat 222: 50 Cri LJ 474 (FB)	11
(C) (1883) 11 QBD 588: 52 LJ QB 726	18
(D) ('87) 10 Mad 28 (FB)	18
(E) (1873) 8 QB 255: 42 LJ QB 63	18
(F) (V41) AIR 1954 Pepsu 91: 1954 Cri LJ 748	20
(G) (V26) AIR 1939 Mad 257: 40 Cri LJ 533 (SB)	21

T. V.Sarma, for Petitioner; Advocate-General and Public Prosecutor, for Respondents.

SUBBA RAO C. J.:

This is a petition under Ss. 3 and 4 of Act 32 of 1952 for committing the respondents for contempt of Court. Respondent 1 is the District Collector and District Magistrate, Guntur. Respondent 2 is the Personal Assistant to respondent 1 and Additional District Magistrate and respondent 3 is the acting Public Prosecutor, Guntur.

(2) The circumstances under which this petition was filed may be briefly stated. The petitioner is a native of Sattanepalli village and worked as a Jamedar during the war. Thereafter he worked as Taluk Surveyor for some time and had been working temporarily as clerk at Guntur or Sattane Palli in the Revenue offices. He filed a complaint for breach of trust of court properties against Sri Wahab Sahib, the then Stationary Sub Magistrate, Sattanepalli and others before the Sub Divisional Magistrate, Guntur.

It was transferred to the file of the Additional First Class Magistrate, Narasaraopet, who dismissed the same under S. 203, Criminal P. C. The petitioner preferred a Criminal Revision against the order of the Additional First Class Magistrate to the Sessions Judge, Guntur. The petitioner's case is that, pending the revision, the three respondents did some acts interfering with the course of justice and that, therefore, they are liable to be punished for contempt.

(3) In the affidavit filed in support of the petition he made the following allegations in support of his case. The Criminal Revision was posted to 13-9-1954 for hearing and the Sessions Judge gave notice to respondent 3 to assist him on the legal aspect viz., whether S. 197, Criminal P. C., was or was not a bar for the prosecution.

On the hearing date when the matter was about to be taken up, respondent 3 rose up and, with the permission of the Court, stated that the contents of the revision petition against the Sub Magistrate were false, that respondents 1 and 2 in their departmental capacity enquired into the matter and came to the conclusion that they were false, that they had intimated the said fact to the Government and that they had also intimated to him and asked him to represent the said facts to the Sessions Judge. The Sessions Judge adjourned the case to 21-9-1954 and again to 15-10-1954. The first two respondents, with the knowledge that the matter was 'sub judice', communicated the aforesaid facts to the Government and to respondent 3 and thereby prejudiced the mind of the Judge and obstructed the due course of justice.

(4) Respondent 1, in his counter, denied that he committed any act of contempt and placed before the Court the circumstances under which he communicated certain facts to the Public Prosecutor. According to him the petitioner filed a complaint before him. On that petition, he called for the records, but, as he came to know that an identical complaint was filed before the Additional First Class Magistrate, Narasaraopet and that it was dropped, he rejected it on the ground that no action was necessary as the Additional First Class Magistrate's Court had held on 13-7-1954 that it was false after a due enquiry and on merits. One Sakkumuri Sithayya and some residents of Gudipudi village filed petitions against the Sub Magistrate to the

High Court and the Government and the Board of Revenue sent them for enquiry to him. He made an enquiry into those petitions as directed by the Revenue Board and the Government directed the matter to be dropped.

Even this report was sent by him on 11-6-1954 i.e., after the Additional First Class Magistrate dismissed the complaint on 17-5-1954 and before the Criminal Revision was filed on 7-8-1954. When on 23-8-1954 the Public Prosecutor wrote to respondent 1 stating that the complainant had filed similar petitions to the Collector and to the Government and that the connected files might be made available to him for reference in opposing the Revision Petition, respondent 2 wrote back to the Public Prosecutor that the petition filed by the complainant to the Collector and the Government were not necessary and that the Public Prosecutor might oppose the Revision Petition without those records.

But as he felt that it was for the Public Prosecutor to decide that records should be used at the time of the arguments, he directed the relevant papers to be sent to the Public Prosecutor. Respondent 1 thereafter sent the records along with a letter from his Personal Assistant informing him that the disposal was a confidential one, that it was sent to him simply for his information for opposing the revision petition and that no part of it need be filed into Court.

But the Public Prosecutor sent another letter asking the Personal Assistant to state if it could be stated before the Sessions Court that the matter was enquired into by the District Collector and the Magistrate and that it was found that no action was called for. To that the Personal Assistant replied that the whole matter was confidential and that he was unable to say anything more about that and that as Public Prosecutor it was for him to decide whether or not it was necessary to mention all this in court and if the Revision Petition could not otherwise be opposed on merits with the information already available before him.

The Public Prosecutor filed a separate counter stating what actually happened in court. According to him a notice dated 9-8-54 was issued to him by the court intimating that the matter would be heard on 24-8-1954 and was received by him on 11-8-1954. After narrating the gist of the correspondence between him and respondents 1 and 2 he alleged that on 13-9-1954, the revision petition came up for hearing and the learned Sessions Judge for his own information inquired of him whether the matter was investigated into.

In reply to that question, he was obliged to state that the matter was investigated into both in the Criminal Court and also departmentally and that the Government dropped the matter. Then, the learned Sessions Judge observed that he was not bothered about the departmental enquiry and that he would hear the matter on some other day. Later on, the Criminal Revision Petition was transferred to the Additional Sessions Judge and he finally dismissed it on 5-11-1954.

(5) When the matter came before us on 25-11-1954, the learned counsel for the petitioner suggested that, in view of the conflict of versions given by the petitioner in his affidavit and that given by respondents 1 and 3 in their counters, a report might be called for from the learned Sessions Judge on what actually happened before him. He also stated from the Bar that the allegations contained in the affidavit filed by the petitioner were true to his knowledge. In the circumstances, we directed the learned Sessions Judge to submit a report on what actually happened before him.

On 6-1-55 i.e., more than one month and ten days, he sent a considered report on what actually took place before him. Though some comment was made on this long delay in sending a report, nothing turns upon it. In that report the learned Sessions Judge states the following four facts:

(i) Notice to the Public Prosecutor was ordered as is the practice in all important criminal revision petitions and not for the particular purpose of answering the point under S. 197, Cr. P. C.

(ii) He asked the Public Prosecutor whether a similar petition had been filed under S. 435, Cr. P. C. before the District Magistrate, to which a negative reply was given. A further querry was incidentally raised by him whether in view of the alleged misappropriation of case properties by a public servant, who in this case is a Sub Magistrate, any departmental action also had been taken for the recovery of the alleged missing articles. To that, the Public Prosecutor replied that a petition had been filed before the District Magistrate and found against. The Public Prosecutor gave that information in answer to his querry and that he did not do so of his own accord;

(iii) He observed substantially to the effect that he was not bothered about the departmental enquiry and would hear the matter on some other day:

(iv) When he expressed his intention to send the matter for disposal to the Additional Sessions Judge, the learned Counsel for the petitioer pressed for its retention before him, indicating thereby that he had no apprehension that the Judge was influenced by the disclosure of the result of the departmental enquiry.

(6) We have no hesitation to accept the facts given by respondents 1 and 3 in their counters as regards the circumstances and the purpose for which the relevant files were sent to the Public Prosecutor. We also accept the version given by the Sessions Judge in regard to what actually happened before him, when the case came up for disposal. We shall, therefore, proceed on the basis of the said facts whether any contempt of court was committed by the respondents or any one of them.

(7) Mr. Sarma, learned counsel for the petitioner raised before us three points in support of his contention, that the respondents committed contempt of court. (i) Respondent 1 started a parallel enquiry in regard to the subject matter of the Criminal Revision Petition pending before the Sessions Judge. (ii) The respondents 1 and 2 asked the Public Prosecutor, respondent 3, to communicate to the Judge the fact that such an enquiry was held, that respondent 1 found it to be false and that the Government accepted the report sent by him to that effect and (iii) respondent 3 in open court

unasked prominently brought those facts to the notice of the Court to prejudice his mind and to deflect the course of justice.

(8) Before we consider the arguments advanced, it will be convenient for us at this stage to notice the law on the subject briefly. Courts have always found it difficult to give a comprehensive & complete definition of 'contempt of Court'. But the definition of these words given in the leading case — 'Brich v. Walsh', 10 Irish Eq. R. 93 (A), has been accepted by Courts in India. There, the court gave three categories of contempt (i) contempt in respect of orders of Court, (ii) contempt by letters or pamphlets addressed to the Judge who is to decide the case with the intention either by threats or flattery or bribery to influence his decisions and (iii) constructive contempt depending upon inference of an intention to obstruct the course of justice.

(9) Before 1926, it was held that, in matters of contempt a High Court possesses the same jurisdiction as the old King's Bench in England had. Act 12 of 1926 expressly empowered High Courts to exercise the same jurisdiction, power and authority in respect of courts subordinate to them as they have in respect of contempts of themselves. The Constitution of India expressly saved the powers of the High Court to punish for contempt of court. The Parliament by Act 32 of 1952 repealed the earlier Acts and restated in express terms that

> "subject to the provisions of sub-s. (2) every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in resepct of contempts of courts subordinate to it, as it has and exercises in respect of contempts of itself".

(10) it is, therefore, obvious that if really the respondents are guilty of contempt of the Sessions Court this court can commit them for contempt. It may also be mentioned that this court will take a serious view, if public officers of responsibility act in such a manner as to obstruct the course of justice or disobey to implement the orders of court, for such acts will undermine the prestige of courts and set a bad example to the public. At the same time, the filing frivolous applications for contempt against public Officers with a view to harass them is equally reprehensible and the court will give exemplary costs against such abuse of process of this court.

(11) On the first point viz., that a parallel enquiry conducted by an Officer, when the same subject is 'sub judice' amounts to a contempt of court, reliance is placed upon a Full Bench decision of the Patna High Court in 'King v. Parmanand', AIR 1949 Pat 222 (B). There Narayan J., stated the principle at p. 229 as follows:—

> "..... It must be pointed out that any enquiry with regard to a matter which is 'sub judice' is bound to interfere with the even and ordinary course of justice. It is a cardinal principle that when a matter is pending for decision before a court of justice, nothing should be done which might disturb the free course of justice and this court will discountenance any attempt on the part of any executive official, however high he may be, to prejudge the merits of a case and to usurp the functions of the court which has got seisin of the case.
>
> Such a practice is fraught with immense danger and I was surprised to hear the learned Advocate contending that a parallel enquiry could be started by the Government. If we accede to the argument of the learned Advocate General that a parallel enquiry can be started we will be opening the door for contempt and impediment in the course of justice. Once the principle is accepted that the Government are free to hold a separate enquiry, it would be impossible to impose any limit as in the nature and the scope of such an enquiry."

(12) We respectfully accept the aforesaid weighty observations as laying down the correct law on the subject. But the question is whether in the present case, respondent 1 started a parallel enquiry when the Criminal Revision was pending before the Sessions Judge. From the facts already stated and accepted by us, it is manifest that respondent 1 did not conduct any parallel inquiry during the crucial period. Indeed respondent 1 did not make any enquiry on the application filed by the petitioner on 3-4-1954 and rejected it on the ground that no action was necessary as the Additional First Class Magistrate's Court had held that the complaint was false after due enquiry and on merits and that the said decision was binding on him.

Respondent 1, therefore, not only did not make any enquiry pending the criminal proceedings before the Additional First Class Magistrate, but rejected it on the ground that no action was necessary as that decision was binding upon him. This petition was rejected even before the Criminal Revision Petition was filed in the Sessions Court. This act on the part of respondent 1 cannot, therefore, be held to be one in contempt of court.

(13) As regards the report sent by respondent 1, to the Revenue Board on the application filed by Sithayya and the mahazar presented by the residents of Gudipudi village, respondent 1 says in his counter:—

> "It is also incidentally mentioned that even this report of mine which has nothing to do with the Criminal complaint against the Sub Magistrate was sent on 11-6-1954. The criminal complaint was thrown out by the Additional First Class Magistrate on 17-5-1954 and the Revision Petition in the Sessions Court was filed on 7-8-1954. This report of mine was sent on 11-6-1954 i. e., after the Judgment of the Additional First Class Magistrate and before the matter was taken up in revision before the Sessions Court. Hence at the time the report was sent, the matter was not at all 'sub judice'".

This respondent has, therefore, nothing to do with the criminal complaint filed against the sub Magistrate, and as respondent 1 says, even that report was sent when no proceedings were pending in any court of law. We cannot, therefore, hold that respondent 1 made a parallel enquiry at a time when the revision petition was pending in court and therefore, he would be guilty of contempt.

(14) The second ground of attack is that respondents 1 and 2 asked the Public Prosecutor to represent to the Court that respondent 1 had made an enquiry found the allegations to be false and submitted the same to the Government, who accepted it. The allegations in the counters filed

by respondents 1 and 3, if accepted, we see no reason to reject them — clearly establish that neither respondent 1 nor respondent 2 asked the Public Prosecutor to represent the aforesaid facts to the Court. The facts, which we have alreaoy narrated, show that notwithstanding the request of the Public Prosecutor to respondents 1 and 2 to state whether he could mention before the Sessions Judge that the matter was enquired into by the District Collector and the Magistrate and that it was found that no action was called for, respondent 2 had distinctly written to him the following letter:

"The whole matter was confidential. I am unable to say anything more about this and as the Public Prosecutor, it should be for you to decide whether or not it is necessary to mention all this in court and if the Revision Petition cannot otherwise be opposed on merits with the information already available before you."

(15) This is the last in the series of letters that passed between the Public Prosecutor and respondent 2 or respondent 1. The said letter indicates that respondents 1 and 2 emphasised upon the confidential nature of the record and left it to the Public Prosecutor as their legal adviser to decide whether the contents could be disclosed or not to the Judge. From the correspondence, it is manifest that respondents 1 and 2 expressed their personal view that the matter was confidential, which could only mean that the contents could not be disclosed, but they left it to the final decision of their legal adviser. We must, therefore, hold that respondents 1 and 2, did not ask the Public Prosecutor to state before the Sessions Judge that respondent 1 made an enquiry and found the allegations against the Sub Magistrate to be false.

(16) The next question is whether the Public Prosecutor stated those facts to the court, and if so, under what circumstances he did so. The Public Prosecutor admits in his counter that he stated before the Sessions Judge that the matter was investigated into both in the criminal court and also departmentally and that the Government dropped the matter. But he says that he made that statement under the following circumstances:

"On 13-9-1954, the revision petition came up for hearing and the learned Sessions Judge for his own information enquired of me whether the matter was investigated into. In reply, to that question, I was obliged to state that the matter was investigated into both in the criminal court and also departmentally and that the Government dropped the matter. The learned Sessions Judge observed "I am not bothered about the departmental enquiry. I will hear the matter on some other day."

The learned Sessions Judge in his report says on this aspect of the matter thus:

"A further querry also was incidentally raised by me whether in view of the alleged misappropriation of case properties by a public servant, who in this case is a Sub Magistrate, any departmental action also has been taken for recovery of the alleged missing articles. To that the Public Prosecutor Sri M. O. Hanmantha Rao replied that a petition had been filed before the District Magistrate and found against. I must state that it was in answer to what I felt was a relevant querry in that context and that the Public Prosecutor gave the information and he did not do so of his own accord.

It is not true that the Public Prosecutor (R-3) sought "any permission to submit something" and he did not volunteer any information. The question of my granting him 'permission' to make a submission did not, therefore, arise. I am definite that in giving that information, it was not the intent of the Public Prosecutor to influence my decision on the judicial side, for the enquiry by the District Magistrate regarding loss of properties was of an administrative nature.

The Statement of Sri. M. O. Hanumantha Rao in his counter affidavit in this matter viz., that I then observed 'I am not bothered about the departmental enquiry. I will hear the matter on some other day' is substantially — though not verbally correct."

(17) The report of the learned Sessions Judge, therefore, completely supports the version given by the Public Prosecutor in his counter. We do not, therefore, see any reason not to accept it. If so, the position is that the Public Prosecutor made this statement in court in answer to a querry put by the Judge.

(18) The learned counsel for the petitioner argues that even if the Judge asked the Public Prosecutor he should have submitted that the matter could not be disclosed as it might prejudice the course of justice. Though that might have been done, by the Public Prosecutor, ordinarily it cannot be expected of any Public Prosecutor or for the matter of that any advocate to refuse to answer questions, pertinent to the enquiry put by the court. If he refused, the advocate might be found fault with for not showing the regard due to a court of law. It would also be putting undue strain on an advocate to decide on the spur of the moment whether to answer the question put to him by the Judge or not at the risk of his being committed for contempt of court.

In this connection, the observations of the Master of the Rolls in — 'Munster v. Lamb', (1883) 11 QBD 588 (C), which the Full Bench in — 'Sullivan v. Norton', 10 Mad 28 (D), approved, may usefully be extracted. At p. 34, it is stated

"In 'Munster v. Lamb', (C), the Master of the Rolls says referring to — 'Dawkins v. Lord Rokeby', (1873) 8 QB 255 (E), and other cases "if it is right and wise that such a privilege shall be extended to a Judge ..... and if the privilege is equally given to a witness... ..... how can it be considered that it is not equally, I would say more beneficial to the public that a counsel and an advocate should come to the performance of his duty with an equally free and unfettered mind?

If any one needs to be free from all fear in the performance of his arduous duty, an advocate is that person. His is a position of difficulty ;he does not speak of that which he knows, that he has to argue and to support a thesis which it is for him to contend for, he has to do this in such a way as not to degrade himself, but he has to do it under difficulties which are often pressing.

If in this position of difficulty he had to consider whether everything which he uttered were false or true, relevant or irrelevant, he could not possibly perform his duty with advantage to his client and the protection which he needs and the privilege which must be acceded to him is needed and accorded above all for the benefit and advantage of the public."

(19) Though those observations were made in a different context, they forcibly indicate the difficulties of an advocate when discharging his duties before a court. We cannot, therefore, hold that when an advocate bona fide answered a question put to him by the court, he would be guilty of contempt of Court. The Public Prosecutor in the present case, therefore, did nothing more than his duty when he answered truthfully to the query of the Judge.

(20) In support of his contention, the learned advocate for the petitioner relied upon a Full Bench decision of the Pepsu High Court in — 'Nirmal Singh v. Gainda Mal', AIR 1954 Pepsu 91 (F). There a criminal case was pending in a court of the First Class Magistrate, Mansa. Presumably there was no separation of judiciary from the executive in that State. The Public Prosecutor applied for the withdrawal of the case on the ground that there was no evidence in support of it. But he also mentioned that the District Magistrate came to the opinion that the case had been falsely made and that the same had to be withdrawn. It was argued that by stating that fact, the Public Prosecutor influenced the mind of the Magistrate in giving sanction to the withdrawal or not. In that connection, the learned Chief Justice observed at P. 93:

"It must be remembered that when once a case is before a court of law, it is for that court and that court alone to decide whether the case is true or false and if any other person ventures to form an opinion on this point and communicates that opinion to the court during the pendency of the case, his conduct amounts to interference in the administration of justice and consequently to contempt of court. The same remarks apply to a person who communicates to the court some one else's opinion about a pending case in the court."

(21) A Special Bench of the Madras High Court in — 'Tuljaram Rao v. Governor, Reserve Bank of India', AIR 1939 Mad 257 (G), held that, if the act constitutes contempt the honesty of the motive of the contemner cannot remove it from that category.

(22) It is not necessary to multiply cases. The said decisions lay down nothing more than that, when a person communicates to a Judge his opinion or decision on the facts of a case, which is 'sub-judice', it constitutes contempt and his motive in so communicating is irrelevant. But in this case, the facts are different. Respondent 1 did not communicate to the Sessions Judge the result of his enquiry. The Public Prosecutor only replied to the question of the Sessions Judge, which he should do under the circumstances. The said act of the Public Prosecutor cannot, therefore, constitute contempt of court.

(23) In this case, we are satisfied that there were no bona fides in filing this application. The Judge before whom the Criminal Revision Petition was pending is the District and Sessions Judge, the head of the judiciary in this district. The Collector is the head of the executive in this district. Both are officers of the same rank. Indeed on the judicial side under S. 408, Criminal P. C., the Sessions Judge exercises appellate jurisdiction in regard to orders made by the Collector in his capacity as District Magistrate.

In this particular case, the Sessions Judge also happens to be senior of the two. There cannot, therefore, be any apprehension in regard to the nature of relationship between the two officers. The Public Prosecutor says that when he told the Sessions Judge that the matter was enquired into departmentally, the learned Sessons Judge observed that he was not bothered about the departmental enquiry.

The Sessions Judge in his report accepted that he made an observation substantially to that effect. He further adds that when he expressed his intention to transfer the case to the Additional Sessions Judge, the advocate for the petitioner politely pressed for its retention before him, indicating thereby that notwithstanding the communication made by the Public Prosecutor, he had no apprehension that the Sessions Judge was influenced by the said communication.

It might have been different if the communication of a fact as in the present case, was made by the Public Prosecutor to a Sub Magistrate in a non-separation district for the Collector is the controlling Officer on the executive side. We are also satisfied that the petition was filed by the accused more in a sense of frustration than in any attempt to protect the dignity and prestige of the court in public interests.

(24) In the result, this application fails and is dismissed with costs Rs. 300/-.

V.B.B. Application dismissed.

(S) A.I.R. 1955 ANDHRA 161 (V. 42 C. 57 Aug.)

SUBBA RAO C. J. AND BHIMASANKARAM J.

(18-1-1955)

In re Gopisetti Chinna Venkata Subbaiah and others, Accused-Appellants.

Referred Trial No. 66 of 1954 and Criminal Appeals Nos. 422, 423 and 424 of 1954.

(a) Criminal P. C. (1898), S. 164 — Statement of witness to be voluntary — Evidential value — 27 Cal 295 and AIR 1938 Pat 290, Not foll.

If a statement of a witness is previously recorded under S. 164, Criminal P. C., it leads to an inference that there was a time when the police thought the witness may change but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded under S. 164 will not be sufficient to discard it. The Court, however, ought to receive it with caution and if there are other circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon. AIR 1940 Nag 340, Foll.; 27 Cal 295 and AIR 1938 Pat 290, Not foll. (Para 10)

Held that the statement of the eye-witness recorded under S. 164 after keeping him in

police custody for 5 days was inherently improbable and could not be acted upon.

(Para 10)

Anno: AIR Com., Cr. P. C., S. 164 N. 14a; 1953 Mitra, S. 164 P. 609 N. 512A "Statement of a witness", Paras 5 and 7 (Effect of AIR 1940 Nag 340 and AIR 1941 Oudh 517 on views expressed in 39 Cri L Jour 635: AIR 1938 Pat 29 and 27 Cal 295, not brought out in Mitra).

(b) **Criminal P. C. (1898), S. 164 — Retracted confession — Conviction on — Corroboration — Necessity — (Evidence Act (1872), S. 24).**

It is well-settled that, as a rule of prudence, a retracted confession should not be the basis of a conviction unless it is substantially corroborated by independent evidence. Held on the facts of the case that the retracted confession was not even voluntary. (Para 13)

Anno: AIR Man., Evid. Act, S. 24 N. 9.

AIR Com., Cr. P. C., S. 164 N. 18; 1953 Mitra, S. 164 P. 615 N. 515 "Retracted confession" (Pt. 7 extra in AIR Com.).

(c) **Evidence Act (1872), S. 3 — Circumstantial evidence.**

The mere possession of the bill-hooks by the accused cannot be relied upon as a circumstantial evidence to support the case that those bill-hooks must have been used for committing murder where the bill-hooks do not contain blood-stains. There must be further evidence to connect the bill-hooks found with the accused with bill-hooks alleged to have been used for committing the murder.

(Paras 14, 15)

Anno: Evid. Act, S. 3 N. 6.

(d) **Criminal P. C. (1898), S. 162 — 'Statement', meaning of — Test identification held by police — Evidence of identification in Panchayatnama — Admissibility.**

Where the identification test with regard to the ornaments worn by the deceased was conducted and supervised by the police and the panchayatnama was signed by the panchayatdars and attested by the police.

Held that the evidence of identification contained in the panchayatnama was inadmissible under S. 162, Criminal P. C., (S) AIR 1955 SC 104, Foll. (Para 16)

Anno: AIR Com., Cr. P. C., S. 162 N. 3; 1953 Mitra, S. 162 P. 559 N. "Statement" and the following notes.

(e) **Criminal P. C. (1898), S. 367 — Appreciation of evidence — Murder trial — Motive — Absence of, how far relevant — (Penal Code (1860), S. 302).**

In a murder trial if the evidence as regards the murder is clear, the fact that the motive for murder had not been established would not be of much relevance. (Para 7)

Anno: AIR Com., Cr. P. C., S. 367 N. 6; 1949 Mitra, S. 367, P. 1128 N. "Decision thereon" (Topic discussed in AIR Com. on "Appreciation of evidence", extra; AIR Man., Penal Code, S. 302 N. 14.

CASES REFERRED: Paras

(A) (1900) 27 Cal 295: 4 Cal WN 129 9, 10

(B) (V25) AIR 1938 Pat 290: 39 Cri LJ 635 9, 10

(C) (V27) AIR 1940 Nag 340: 42 Cri LJ 17 10

(D) (V42) (S) AIR 1955 SC 104: 1955 Cri LJ 196 (SC) 15

K. Srinivasamurthy (in Cri App No. 422) and C. Srinivasa Rao (in Cri App Nos. 423 and 424), for Appellants; Public Prosecutor, for the State.

SUBBA RAO C. J.:

The three accused were convicted by the Court of Session, Cuddappah Division, under S. 302 read with S. 34, Penal Code and also under S. 392 read with S. 34, Penal Code and sentenced to death.

(2) One Yedoti Subbamma, daughter of Kandula Nagayya of Kandulavaripalle village was brutally murdered on 11-2-1954, near the vanka lying to west of Kumarapalle village. The case of the prosecution is that the deceased Subbamma was the only daughter of Kandula Nagayya, that there were disputes between the deceased and her brother Pedayya and his wife Sitamma and that, at the instigation of Sitamma, the three accused, who were hired assassins, waylaid the deceased near the vanka and killed her. According to the prosecution, the murder was committed in the following way. The three accused having been pre-informed of the movements of the deceased, took arrack and awaited the deceased near the aforesaid vanka. When the deceased came that way, accused 3 pelted a stone of the size of a big orange at the deceased. The deceased fell down shouting "Amma, I am dead." Accused 1 cut on the neck of the deceased with the bill-hook M. O. 6. Accused 2 was having a bigger bill-hook M. O. 7 in his hands. Accused 1 snatched it from accused 2 and cut the deceased again on her neck with the bill-hook M. O. 7. Then accused 1 gave M. O. 7 to accused 2, who cut off the two feet of the deceased, removed the silver anklets and leg-chains worn by the deceased and gave them to accused 1.

(3) The learned Sessions Judge accepted the prosecution case and convicted and sentenced the accused as aforesaid.

(4) Mr. Srinivasamurthi, in an able argument, satisfied us that the conviction and sentence cannot be sustained on the material placed before us.

(5) First as regards the motive, there is the evidence of P. W. 1 the father of the deceased. He has two sons Subbayya and Peddayya and one daughter the deceased. The two sons became divided from him about two years prior to the occurrence. Peddayya, his second son, married one Sitamma without his knowledge. He purchased 700 acres of waste land in Narayanarajupadu village and brought the deceased, her husband and their children to his house and they were residing in his house. He also gifted 1 1/2 acres of land to the deceased under Ex. P-1 the gift deed. On account of this, there were quarrels between the deceased and Sitamma, and Sitamma filed a criminal complaint against the first son for assault. This witness does not in terms say that the murder was at the instigation of Sitamma, though his evidence insinuates that that must have been the reason. P. W. 8, the husband of the deceased, says in his evidence that there were quarrels between the deceased and Sitamma. But, in cross-examination, he dilutes it by saying that he mostly heard about the quarrels, and that he saw them quarrelling only twice or thrice. P. W. 9 is a cousin of Sitamma.

On the evening of the day previous to the day of occurrence, he went to Sitamma's house to collect money due to one Mylapalli Venkatareddi on a pronote. At that time, according to him, accused 2 came to Sitamma's threshold & called her & went to the threshold. He would add that they both talked something in low tones, and when Sitamma was about to go inside, accused 2 asked her "where is the balance" and that Sitamma said that she would pay. Accused 2 then went away.

(6) In the confessional statement made by accused 1 before the Sub-Magistrate, he stated that Sitamma asked him to kill the deceased, that Sitamma and her husband Peddayya stated that they would give him half a kunta of land and Rs. 100/- each if he killed her and that they paid him Rs. 70/-. This confession was subsequently retracted. We are not prepared to act upon this confession and we shall give our reasons for doing so at a later stage in the appropriate place. On this evidence, it is not possible to hold that the three accused were hired by Sitamma to do away with the deceased. Without more definite evidence, it is not possible to hold that the quarrels between the sisters-in-law or the preferential treatment given to the daughter by her father would have been a sufficient motive for a young lady like Sitamma to be a party to the murder of her sister-in-law. Anyhow, there is no sufficient evidence on record to sustain such a finding.

(7) But, if the evidence is clear as regards the murder, the fact that the motive has not been established would not be of much relevance. The main evidence in this case consists of that of two alleged eye-witnesses P. Ws. 10 and 11. As P. W. 10 is the most important witness in the case, we shall discuss his evidence in some detail. He lives in the village of Kumarapalle to which accused 1 belongs. He has no property and ekes out his livelihood by doing cooly work. He knows all the three accused and also the deceased and P. Ws. 1, 2 and 7. His version of the events may be stated thus. On the day of occurrence he had stomach-ache, and indeed, he had it since two days prior to it. The three accused came to him just before sunrise and told him that, if he drank arrack, he would be relieved of the pain. They took him into the vanka by the side of P. W. 1's village and gave him a dose of arrack to drink. The three accused also drank arrack fully at that time.

A short while afterwards, the deceased came that way and accused 3 pelted a stone of the size of a big orange at the deceased. The deceased was hit and she fell down shouting "Amma, I am dead." He went near her and lifted her up. The accused abused him and threatened him. Then, accused 1 cut the deceased on her neck with M. O. 6. Accused 2 was having another big bill-hook M. O. 7. Accused 1 snatched it from accused 2 and cut the deceased again on her neck with M. O. 7. Then accused 1 gave M. O. 7 to accused 2, who cut off the two feet of the deceased, removed the silver anklets and leg-chains and gave them to accused 1. Then, the three accused left the place threatening him, that they would cut him if he told about the incident to anybody. If his version is believed, it would certainly establish the prosecution case. But it is a very curious and extraordinary version. Would the three accused who planned the murder of the deceased, have come to the house of P. W. 10 and taken him to the scene of offence and thereby created an eye-witness to the offence? It is impossible to believe such a story. If really he went along with them, it is more likely that he was an accomplice. In such an event, the prosecution, instead of following the straight course of taking him as an approver, would have put him forward as a disinterested witness. But it is not the prosecution case that he was an accomplice.

(8) P. W. 10 admits that when the police questioned him at first, he did not tell them that he saw the incident. He explains it by stating that he did not tell them as he was threatened by the accused. The offence was committed on 11-2-1954. The Circle Inspector examined him on 22-2-1954, i.e., more than ten days after the occurrence. P. W. 21, the Circle Inspector, says that P. W. 10 told him that he was related to P. W. 1, that he went and saw a woman who was dead and that he did not tell him that he went with the accused to the rastha to drink arrack. If he was an eye-witness unconnected with the crime, there is no acceptable reason why ten days after the incident he had not given the true facts to the Circle Inspector. Whatever fear he might have had soon after the incident, the time lag was sufficient to enable him to give the true version. But on 18-3-1954, he made a statement under S. 164, Criminal P. C., before the Sub-Magistrate. This statement was made 1 1/2 months after the incident. For the first time therein, he gave the present version. He admits in his evidence that he was kept in the police station for five days and that he was not allowed to go out. Such statements taken after keeping witnesses in police custody for a number of days are always looked upon by Courts with suspicion.

(9) Princep and Hill JJ., in — 'Queen Empress v. Jadub Das', 27 Cal 295 (A) deprecated the practice of taking statements under similar circumstances as follows: at p. 299:

"We think it was never intended that S. 164 should be applied to such a purpose. It was not intended to enable the police to obtain an incriminating statement by some person, and as it were to put a seal on that statement by sending in that person to a Magistrate, practically under custody, to be examined before the judicial inquiry or trial, and therefore compromised in his evidence when judicial proceedings are regularly taken."

This view was accepted and followed by Chatterji J., in — 'Emperor v. Manu Chik', AIR 1938 Pat 290 (B). At p. 295 the learned Judge observed:

"It was pointed out by Princep J., in the well-known case in 'Queen Empress v. Jadub Das (A)' that a statement of a witness obtained under this section always raises a suspicion that it has not been voluntarily made."

(10) The Nagpur High Court dealt with such statements in — 'Paramanand v. Emperor', AIR 1940 Nag 340 (C) and stated the law at p. 346 in a slightly modified form. They observed:

"We are of the opinion that if a statement of a witness is previously recorded under S. 164, Criminal P. C., it leads to an inference that

there was a time when the police thought the witness may change, but if the witness sticks to the statement made by him throughout, the mere fact that his statement was previously recorded under S. 164 will not be sufficient to discard it. The Court, however, ought to receive it with caution, and if there are other circumstances on record which lend support to the truth of the evidence of such witness, it can be acted upon."

We would prefer to accept the aforesaid observations of the learned Judges as laying down the correct law in preference to the observations in 'Queen Empress v. Jadub Das (A)' and 'Emperor v. Manu Chik (B)'. In the present case, the version of P. W. 10 that the three accused before committing a planned murder came to his house and took him to the scene of offence for giving him a dose of arrack to cure him of his stomach-ache is inherently improbable. At the earliest stage, he gave to the police a different story. He came out with the present version only after 1 1/2 months and after he was in custody of the police for five days. Though his evidence is consistent with his being a participant in the crime, it is not the case of the prosecution. He is also a man of impecunious circumstances. We are not, therefore, prepared to act upon his evidence.

(11) The evidence of P. W. 11 is not better. She is a woman aged 60. Her evidence is that, in the early hours of the morning of the day of occurrence, she went towards the vanka for gathering broomstick material and that, having heard the cry "Amma", she went towards that direction and found accused 1 with a bill-hook in his hands accused 2 with a knife. She also saw accused 3 and P. W. 10 there. She describes the incident in so far as accused 1 and 2 took part in it in the same manner as stated by P. W. 10. Her cross-examination disclosed that she saw the incident from about 30 yards. She never came to that locality except on the one occasion when the murder was committed. No other woman engaged in the same avocation came along with her. She says that she knew accused 1 who belongs to Kumarapalle though she admits that all the people of Kumarapalle are strangers to her. She admits that she works now and then under P. W. 1. She also admits that she never informed anyone about the murder till she was examined by the police ten days later, that she was taken to the police station and that she was kept there for two or three days when P. W. 10 was also there. About her evidence, the learned Judge himself says in his judgment as follows:

"Of course, there appears to be some doubt whether P. W. 11 would have been able to identify the accused or whether she would have known the accused at all prior to the occurrence."

The Circle Inspector, who examined P. W. 11 on 23-2-1954, says as P. W. 21 that P. W. 11 did not tell him that she saw the occurrence or that she saw accused 3 or P. W. 10 at the scene of offence or that accused 2 was armed and that she told him that she heard about the murder in the noon from Gumpa Subbaiah. After keeping her for some days in the police station, a statement was taken from her under S. 164, Criminal P. C., on 18-3-1954. Exhibit P. 11 is the statement. For the reasons already mentioned by us in connection with the evidence of P. W. 10 we must, in the circumstances of the case, look upon that statement with suspicion. The suspicion is not dispelled but is enhanced by the evidence of P. W. 11 in Court. She appears to us as a witness improvised for the occasion. For the reasons already given, we cannot act upon the evidence of P. Ws. 10 and 11.

(12) The next piece of evidence relied upon for the prosecution is the confession made by accused 1 on 18-3-1954. Exhibit P-8 is the said confession. In that confession, accused 1 states that Sitamma told him that Subbamma was to be killed that Sitamma and Peddayya said that they would give half a gunta of land and Rs. 100/- if he committed the murder of Subbamma and that they paid him Rs. 70/- and asked him to go to their house in the evening. He further adds that, after day-break at 5 O'Clock Peddayya came and told him that the deceased would be coming into the wet lands and asked him to be on the way, that he had brought a bottle of arrack and had drunk and that, when Subbamma came there, he cut her. Before the Committing Magistrate, he retracted from this confession and stated:

"For 15 days the police gave me arrack confusingly and beat me. From this place I was taken to Royachoti. As I was threatened that if I did not state as they instructed my bones would drop. I gave the statement. It is true".

It is, therefore, a retracted confession. It exculpates the other two accused and is, therefore, inconsistent with the prosecution version. It is suggested that suggestion was accepted by the learned Sessions Judge that accused 1 must have made the confession revealing the true facts in so far as he was concerned and exculpating the other two accused in an attempt to take over the entire responsibility and at least to save the other two.

(13) It is well-settled that, as a rule of prudence, a retracted confession should not be the basis of a conviction unless it is substantially corroborated by independent evidence. In this case, we are not even satisfied that the confession is voluntary. The three accused made their statements on 18-3-1954. Exhibits D-1 and D-2 are statements of accused 2 and 3 taken at 4-15 P. M. and 4-30 P. M. respectively. It may be mentioned that the statement of accused 1 was taken at 4 P. M. Accused 2 stated that the police beat him for 11 days in station and that they troubled him. He said he did not know any thing. Accused 3 stated in his statement that the police questioned him five or six times and forced him to make a confession. He also said that he did not know anything. So too accused 1 answered to the question put by the Sub-Magistrate "Did the police force you to give the confessional statement" that the police troubled him. Instead of accepting his answer, the Magistrate pursued the question and accused 1 said that nobody troubled him to confess. The Sub-Magistrate himself felt a doubt whether he was making a voluntary statement and, therefore, he gave him 24 hours time for reflection and ordered him to be kept in a separate cell under the care of the Sub-Jail warder. On 19-3-1954, he admitted that he committed the murder. On the facts disclosed in the case, we

have no hesitation to hold that the confession was not voluntary.

(14) Reliance is placed upon the discovery of M. Os. 6 and 7, bill-hooks and M. Os. 8 and 9 shirts, at the place shown by the accused. When these shirts along with M. Os. 6 and 7 were sent to the serologist for examination, he sent a report that no blood marks were traced on them. But there is no evidence to connect the bill-hooks found with the bill-hooks alleged to have been used for committing the murder. An attempt was made in regard to M. O. 7 by examining P. W. 13 to prove that M. O. 7 was pledged with her by accused 2 after the offence, P. W. 13 in her evidence, stated in chief-examination that five or ten days after P. W. 13 heard about the murder of the deceased, accused 2 came to her house and pledged the bill-hook with her. But she immediately corrected herself and stated that accused 2 came and pledged the bill-hook six days prior to the murder. It is, therefore, not proper to rely upon this evidence to show that he pledged the bill-hook after the murder. Anyhow, the mere possession of the bill-hook cannot be relied upon as a circumstantial evidence to support the case that those bill-hooks must have been used for committing the murder as the bill-hooks do not contain any blood-stains.

(15) Lastly, it is stated that M. O. 1, the silver Kadiyalu and M. O. 2 the silver leg-chains worn by the deceased were buried in the vanka where the murder was committed and that, pursuant to Ex. P-23, a statement made by accused 3, the said items were discovered. In view of the decision of the Judicial Committee only that portion of the statement which led to the discovery of M. Os. 1 and 2 would be admissible. If so, it is necessary that there should be other admissible evidence to connect M. Os. 1 and 2 with that worn by the deceased. Ex. P-25 dated 9-3-1954 is the Panchayatnama prepared at the time said M. Os. were identified by P. W. 1 and his wife P. W. 2. Ex. P-25 was signed by three Panchayatdars and also attested by the police. The document discloses that the identification was conducted in the presence of the prominent persons who signed therein near the police station. P. W. 22, the Sub-Inspector says, in his evidence, that he sent for P. Ws. 1 and 2, held the identification in respect of M. Os. 1 and 2 and that both of them identified the jewels as those worn by the deceased. It is, therefore, clear from the evidence that the Sub-Inspector held the identification test, sent for P. Ws. 1 and 2, and, after the identification, got the Panchayatnama written and attested the same. The question is whether the identification of the jewels contained in Ex. P-25 is admissible in evidence under S. 162, Criminal P. C. Section 162(i), Criminal P. C., reads:

"No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

In a recent judgment in Criminal Appeals 4, 28 and 23 of 1954 reported in — 'Ramkishan v. Bombay State', (S) AIR 1955 SC 104 (D) the Supreme Court laid down the law on the interpretation of the said section at p. 114 as follows :

"The distinction therefore which has been made by the Calcutta and the Allahabad High Courts between the mental act of identification and the communication thereof by the identifier to another person is quite logical and such communications are tantamount to statements made by the identifiers to a Police Officer in the course of investigation and come within the ban of S. 162. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification and in so far as a Police Officer seeks to prove the fact of such identification such evidence of his would attract the operation of S. 162 and would be inadmissible in evidence, the only exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification which he would be entitled to give by way of corroboration of his identification of the accused at the trial."

When it was argued before the learned Judges that an identification involving a statement must be deemed to have been made to the panch witnesses and not to the police officers, they observed:

"The whole of the identification parades were thus directed and supervised by the Police Officers and the panch witnesses took a minor part in the same and were there only for purposes of guaranteeing that the requirements of the law in regard to the holding of the identification parades were satisfied. We feel very great reluctance in holding under these circumstances that the statements, if any, involved in the process of identification were statements made by the identifiers to the panch witnesses and not to the Police Officers as otherwise it will be easy for the Police Officers to circumvent the provisions of S. 162 by formally asking the panch witnesses to be present and contending that the statements, if any, made by the identifiers were to the panch witnesses and not to themselves."

(16) In the present case, also, the identification test was conducted and supervised by the Police. The Panchayatnama was also attested by them. We must, therefore, hold, following the Supreme Court decision, that the evidence of identification is inadmissible under S. 162, Criminal P. C. In the circumstances we are constrained to hold on the evidence that the prosecution has not brought home the guilt to the accused. We regret the result but, in the circumstances, it is inevitable. The convictions and sentences are set aside and the accused are set at liberty.

K.S.B. Convictions and sentences set aside.

(S) A.I.R. 1955 ANDHRA 165 (V. 42, C. 58 Aug)

SUBBA RAO C. J. AND BHIMASANKARAM J.

(27-1-1955)

Venkatasubbaiah, Appellant v. Thirupathiah and others, Respondents.

A. A. O. No. 338 of 1951, against order of Sub. J., Narasaraopet, D/- 3-1-1950.

(a) Civil P. C. (1908), O. 33, Rr. 5 (d) and (d1) and 6 (as amended in Madras).

A combined reading of Rr. 5 and 6 indicates that the Court is not bound to give any opportunity to the petitioner to establish that the petition is not vitiated by any of the prohibitions mentioned in R. 5 and that his right is confined only to adduce evidence in proof of his pauperism. So too, if the Court does not see any ground for rejecting an application under R. 5, the respondent has no right under R. 6 to establish that the petition is liable to be dismissed for any one of the reasons mentioned in R. 5. (Para 5)

Madras R. 6 in terms gives a right to the petitioner to be heard before his petition is rejected under R. 5. But the enquiry contemplated by the amended rule is only in respect of the prohibitions in R. 5. It does not enlarge or add to the said prohibitions. The right to adduce and give rebutting evidence must, therefore, be confined to the prohibitions in R. 5. Thus where the question is whether the allegations in the petition do not show a cause of action, obviously under Madras R. 6, no evidence can be adduced, for the prohibition in R. 5 is not that the petitioner has no cause of action but whether the allegations do not show a cause of action. If the allegations disclose a cause of action, no further evidence would be admissible. So too, in the case of R. 5 (d1) the evidence would be confined only to the question whether the suit appears to be barred by any law and not to the question whether the suit is barred by any law. The word "appears" therefore has been designedly used to confine the scope of the enquiry only to the allegations in the petition.

(Paras 6 and 7)

Anno: AIR Com. C. P. C., O. 33 R. 5 N. 5 Pt. 9; 1953 Mulla, O. 33 R. 5, P. 1065 N. "Clause (d)..... action" (3 Pts extra in AIR Com—4 Pts. extra in Mulla).

(b) Civil P. C. (1908), O. 33, R. 1 — Object of enacting order.

Order 33 has been enacted to serve a treble purpose: (i) to protect the bona fide claims of a pauper, (ii) to safeguard the interests of revenue, and (iii) to protect the defendant's right not to be harassed. (Para 8)

Anno: AIR Com. C. P. C., O. 33 R. 1 N. 1; 1953 Mulla, O. 33 R. 1, P. 1059 N. "Scope.... order" (2 Pts. extra in AIR Com — 2 Pts. extra in Mulla).

CASES REFERRED: Paras

(A) ('96) 19 Mad 197 5
(B) ('04) 27 Mad 37 5
(C) (V33) AIR 1946 Pat 316: 25 Pat 58 5
(D) (V19) AIR 1932 Rang 107: 10 Rang 357 (FB) 5
(E) (V35) AIR 1948 Mad 433: 1948-1 Mad LJ 400 9
(F) (V36) AIR 1949 Mad 591: 1949-1 Mad LJ 61 9

N. Rajeswara Rao, for Appellant; N. Bapiraju (for No. 2) and G. Ramachandrudu, for K. Kotayya (for Nos. 3 to 6), for Respondents.

SUBBA RAO C. J.:

This is a Civil Miscellaneous Appeal against the order of the learned Subordinate Judge, Narasaraopet, dismissing O. P. No. 1 of 1949, a petition filed for leave to sue in forma pauperis against respondents 32 to 36 on the ground that the petitioner has no cause of action against them.

(2) The said O. P. was filed for leave to sue in forma pauperis for setting aside certain alienations made by the petitioner's father, of the joint family properties and for partition of the schedule properties. In the petition, it is alleged that the alienations were not supported by consideration and were also made for purposes not binding on the family. The petition discloses that item 7, 8, 11 to 14, 16 to 18, 21 and 26 were alienated after the petitioner's birth, but items 22 to 25 were sold on 4-6-1928 and 3-7-1928 i.e., prior to the petitioner's birth. It is alleged in the petition that the father had another son, who was born in October 1928 and died in March 1930 and, therefore, the said alienations also were not binding on the family.

(3) The learned Subordinate Judge made an elaborate enquiry and held that it has not been established that the petitioner's father had another son who was born and who died between October 1928 and March 1930 and therefore the petitioner had no cause of action in respect of items 22 to 25. Though he held that the petitioner was a pauper and that he has a cause of action in respect of other items, he dismissed the petition in so far as respondents 32 to 36 were claiming items 22 to 25. The present appeal is filed against the said order.

(4) The main question in this appeal is whether the Court has power to make an elaborate enquiry under O. 33, R. 6, Civil P. C., and decide the question whether the petitioner has a cause of action as it would do in the suit. To give a satisfactory answer to this question, it is necessary to trace the history of the rule. The latest rules as amended by the Madras High Court, which also govern this Court, read as follows:

"R. 5: The Court shall reject an application for permission to sue as a pauper.

a. Where it is not framed and presented in the manner prescribed by Rr. 2 and 3, or
b. Where the applicant is not a pauper, or
c. Where he has, within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
d. Where the allegations do not show a cause of action, or
(d-1) Where the suit appears to be barred by any law, or
e. Where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

R. 6. Where the Court sees no reason to reject the application on any of the grounds stated in R. 5, it shall nevertheless fix a day (of which at least ten days' clear notice shall be given to the opposite party and to the Government Pleader) for receiving such evidence as the applicant may adduce to prove that the application is not sub-

ject to any of the prohibitions in R. 5 and for hearing any evidence which may be adduced to the contrary".

(5) The argument of the learned Counsel for the respondents is that cls. (d) and (d-1) of R. 5 read along with R. 6 as amended by the Madras High Court, make it incumbent upon the Court if evidence is adduced, to decide whether the plaintiff has a cause of action and whether the suit is barred by any law. Section 405, Civil P. C., 1882, corresponds to O. 33, R. 5. In S. 405 of the old Act, the words used were "that his allegations do not show a right to sue in such Court". When it was contended that the words referred only to the question of jurisdiction, Courts have held that the words were wide enough to enable Courts to decide whether an application showed a subsisting cause of action capable of enforcement in Court and calling for an answer and not barred by the law of limitation or any other law. See — 'Vijendra Tirtha Swami v. Sudhindra', 19 Mad 197 (A) and 'Amirtham v. Alwar Manikam', 27 Mad 37 (B).

Order 33, R. 5 (d) was substituted for the old clause adopting the interpretation put upon the corresponding words in the old Code. The amended clause again came under judicial scrutiny and Courts have invariably held that Courts should not embark on an elaborate enquiry and decide complicated questions of law and fact to ascertain whether the petition discloses a cause of action or not. See — 'Kamani Devi v. Kameshwar Singh', AIR 1946 Pat 316 (C), and 'U Ba Dwe v. Mg. Lu Pan', AIR 1932 Rang 107 (FB) (D). If the Court did not reject the application for permission to sue as a pauper for any one of the prohibitions mentioned in R. 5, under R. 6 a duty is cast on the Court to fix a day for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof.

A combined reading of Rr. 5 and 6 indicates that the Court is not bound to give any opportunity to the petitioner to establish that the petition is not vitiated by any of the prohibitions mentioned in R. 5 and that his right is confined only to adduce evidence in proof of his pauperism. So too, if the Court does not see any ground for rejecting an application under R. 5, the respondent has no right under R. 6, to establish that the petition is liable to be dismissed for any one of the reasons mentioned in R. 5.

(6) The Madras High Court amended R. 5 and framed a new rule in substitution of R. 6 to cure two defects. To R. 5 (d) the following clause (d-1) is added "where the suit appears to be barred by any law". Even before the amendment, Courts have held that under R. 5 (d), the petition should disclose a cause of action capable of enforcement in a Court of justice. Clause (d-1) is only a recognition of the pre-existing case law on the subject. Clauses (d) and (d-1) only indicate what has been the law all along viz., that a Court shall decide whether the petition discloses a subsisting cause of action. Madras R. 6, in express terms, casts a duty on a Court to give an opportunity to the petitioner to establish that the petition is not vitiated by any of the prohibitions mentioned in R. 5. It also gives an opportunity to the respondent to adduce rebutting evidence.

This rule, therefore, in terms gives a right to the petitioner to be heard before his petition is rejected under R. 5. But the enquiry contemplated by the amended rule is only in respect of the prohibitions in R. 5. It does not enlarge or add to the said prohibitions. The right to adduce and give rebutting evidence must, therefore, be confined to the prohibitions in R. 5. To illustrate, where it is stated that a petition is not framed and presented in the manner prescribed by Rr. 2 and 3, it is open to the petitioner to prove that the petition is so framed and for the respondent to establish that it has not been framed in compliance with those rules. Where a question arises whether the petitioner disposed of property fraudulently two months next before the presentation of the application, evidence can be adduced by both parties on the said question.

So too, when the question is whether the applicant is a pauper or not, R. 6 allows that question to be decided on evidence. When the question is whether there was an agreement with reference to the subject-matter of the proposed suit, the rule enables the parties to establish that fact one way or other. But where the question is whether the allegations in the petition do not show a cause of action, obviously under Madras R. 6, no evidence can be adduced, for the prohibition in R. 5 is not that the petitioner has no cause of action, but whether the allegations do not show a cause of action. If the allegations disclose a cause of action no further evidence would be admissible.

(7) So too, in the case of R. 5 (d-1) the evidence would be confined only to the question whether the suit appears to be barred by any law and not to the question whether the suit is barred by any law. The word 'appears' therefore has been designedly used to confine the scope of the enquiry only to the allegations in the petition. The Dictionary meaning of the word 'appear' is 'manifest' or 'seen'. The meaning of the word 'appearance' is 'outward look'. If it appears on the allegations in the petition that the suit is barred by any law, it will be rejected. The enquiry under R. 6 must, therefore, be confined to the question whether on the allegations in the petition, the suit is barred by any law.

This interpretation is not inconsistent with the express provisions of Madras R. 6. If the evidence contemplated under R. 6 is intended to prove that the application is not subject to any of the prohibitions in R. 5, it can only mean those prohibitions in respect of which evidence is necessary to establish that a particular prohibition does not affect the petition. So read, Madras R. 6 gives full effect to the intention of the framers, for, as aforesaid, the purpose of the rule is only to give an opportunity to the parties to adduce evidence only on the prohibitions mentioned in R. 5.

(8) If, on the other hand, the construction now sought to be put upon Madras R. 6 by the learned Counsel for the respondents is accepted, the distinction between a pauper petition and a suit disappears. Order 33 has been enacted to serve a treble purpose (1) to protect the bonafide claims of a pauper (2) to safeguard the interests of revenue and (3) to protect the defendant's right not to be

harassed. By enabling the Court to prevent persons with property from suing as paupers or third parties who acquire an interest in the claims of paupers from using the names of paupers and to dismiss petitions which do not 'ex facie' disclose a subsisting cause of action, the interests of bona fide paupers are safeguarded and defendants are protected from unnecessary harassment.

The procedure prescribed also protects revenue, for on enquiry if it is found that the petitioner is not a pauper, he will have to pay court-fees. On the other hand, if a Court should make an enquiry and decide on the evidence, even before the suit is numbered, whether the petitioner has a subsisting cause of action, the entire suit should be heard before leave is granted. The words 'subsisting causes of action' will comprehend the entire dispute between the parties; the questions whether the plaintiff has a right to the relief claimed, whether the defendant has infringed that right and whether the suit claim is barred by limitation by 'res judicata' or any other statutory law would have to be decided on the evidence.

If the petition was dismissed on such an enquiry the petitioner would have got a trial without payment of court-fee. If the petition was allowed on such an enquiry the same questions should be decided again if the suit was numbered. There would be two trials on the same evidence and perhaps two conflicting decisions and the Court's time would unnecessarily be wasted. This could not have been the intention of the framers of Madras R. 6 and we cannot attribute that intention to them.

(9) The learned Counsel for the respondent relied upon the judgment of Satyanarayana Rao J., in — 'Mythili Ammal v. Mahadeva Ayyar', AIR 1948 Mad 433 (E), in support of his contention. There, the Subordinate Judge of Cuddalore, refused to allow evidence on the question whether the suit was barred by limitation. The learned Judge held that the rule as amended by the Madras High Court gave a right to the parties to adduce evidence to establish whether the suit was barred by 'res judicata' or by limitation. The same learned Judge followed the earlier decision in — 'Ponnuswamy Goundan v. Alamel Ammal', AIR 1949 Mad 591 (F), and held that the Court was not justified in shutting out evidence by the opposite party to show that the suit was barred by limitation. We regret our inability to accept the view expressed by the learned Judge.

We therefore, hold that Madras R. 6 was intended only to give an opportunity to the parties to adduce evidence before the petition is rejected on the ground of one or other of the prohibitions contained in R. 5 and it does not enlarge the content or scope of those prohibitions. In the present case, the allegations in the petition disclose a cause of action. It is clearly stated in the petition that the alienations of items 22 to 25 were made by the father during the lifetime of the first son. Necessary particulars also were given in support of the petitioner's plea that the alienations were made for purposes not binding on the petitioner. As the lower Court held that the petitioner is a pauper and that the allegations in the petition disclose a cause of action, the petitioner is entitled to have leave to sue in forma pauperis.

(10) In the result, the appeal is allowed with costs.

V.R.B. Appeal allowed.

(S) AIR 1955 ANDHRA 168 (V 42 C 59 Aug.)

SATYANARAYANA RAJU J. (4-2-1955)

S. Thakoorjee and another, Petitioners v. State of Madras (Now Andhra) and another, Respondents.

Writ Petn. Nos. 858 and 863 of 1953.

(a) Constitution of India, Art. 311(2) — "Reasonable opportunity of showing cause" — Notice to civil servant before his dismissal — Provisional conclusion reached by Government — Legality.

What Art. 311(2) requires is that the accused Officer should be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him, and in order that Government might satisfy this requirement, they must come to a prima facie conclusion which should be capable of revision on their being satisfied, after the receipt of the explanation by the officers concerned, that their prima facie view is right or wrong; but what is necessary is that the Government must come to a provisional conclusion. The employment of the word 'provisional' in the notice only makes the intention of the Government clear, that what all has been stated, is merely provisional. Therefore, the contention that the Government have finally made up their mind in regard to the merits and also with regard to the punishment which is sought to be imposed, and that the notice is merely formal and in a sense illusory, must fail. AIR 1948 PC 121 — AIR 1953 Mad 54, Rel. on. (Para 11)

(b) Constitution of India, Art. 311(2) — Reasonable opportunity — Irregularity in conduct of enquiry — Effect.

So long as the dismissed petitioner had sufficient opportunity to put forward his defence, any irregularity in the conduct of the enquiry as such will not enable the petitioner to attack the validity of the order of dismissal. CMP 4296 of 1951 (Mad), **Foll.** (Para 14)

(c) Constitution of India, Art. 311 — Reasonable opportunity — Procedure — Joint enquiry of officers — Legality.

When a complaint is made that there should not be a joint trial of accused officers, it must be borne in mind that the provisions of the Code of Criminal Procedure regarding the joint trial of the accused are not to be imported with regard to enquiries made against officers charged with corruption and bribery. The essential requirement is that the accused officers should be given a fair and reasonable opportunity of putting forward their defence, and so long as that requirement is satisfied, the fact that there have been other irregularities in the trial, even if true, would not vitiate the ultimate order of the Government imposing the punishment. W. P. No. 739 of 1953 (Mad), Disting. (Para 18)

CASES REFERRED: Paras

(A) (V35) AIR 1948 PC 121: 1948-2 Mad LJ 55 (PC) 12, 13, 14

(B) (V24) AIR 1937 PC 27: ILR (1937) Mad 517 (PC) 12, 14

(C) (V40) AIR 1953 Mad 54: 1952-1 Mad LJ 540 13

(D) ('51) CMP No. 4296 of 1951 (Mad) 14, 16

(E) (V24) AIR 1937 PC 31: ILR (1937) Mad 532 (PC) 14

(F) ('52) Writ Petn. No. 145 of 1952 (Mad) 16

(G) ('53) Writ Petn. No. 739 of 1953: 1954-2 Mad LJ SN 49 23

A. V. Krishna Rao, for Petitioners; Govt. Pleader, for Respondents. (in W. P. Nos. 858 & 863 of 1953); D. V. Reddi Pantulu, for Govt. Pleader (in No. 863 of 53).

ORDER: In W. P. No. 858 of 1953 one Thakoorjee is the petitioner. He prays for the issue of a Writ of Certiorari or any other appropriate Writ or order calling for the records in G. O. Ms. No. 1793 (Revenue Department) dated 26-6-1953 and to quash the order therein. In W. P. No. 863 of 1953 one M. V. Joga Rao is the petitioner and he prays for the issue of a Writ of Certiorari or any other appropriate writ, to call for the records and to quash the proceedings in G. O. Ms. 1753 dated 26-6-1953. Both these petitions raise identical questions for consideration and can be conveniently dealt with in a common Judgment.

(2) The petitioner in W. P. No. 858 of 1953 was the Revenue Inspector in Vishakapatnam Taluk, having put in ten years' service as a clerk. During the years 1950-1951, he worked as Special Revenue Inspector for loans for a period of six months. On a charge of corruption, a preliminary enquiry was started by the Sub-Collector, Vizianagaram against the petitioner and as a result of the enquiry, the matter was handed over to the Crime Branch for investigation. The Crime Branch made an investigation and the petitioner eventually had to face proceedings before the Disciplinary Proceedings Tribunal. The Tribunal held an enquiry and sent its report to the Government recommending dismissal of the petitioner. The Government communicated a copy of the Tribunal's report and issued a "show cause notice" to the petitioner. The petitioner submitted his written explanation and in G. O. Ms. No. 1793 dated 26-6-1953 the Government ordered the dismissal of the Petitioner.

(3) In W. P. No. 863 of 1953, the petitioner was a permanent Tahsildar of Vishakapatnam District and in 1950 he worked as Special Thasildar for lons, Vishakapatnam. There was a preliminary enquiry by the Sub-Collector, Vizianagaram against the petitioner on charges of corruption and the investigation was made over to the Crime Branch. The petitioner ultimately had to face an enquiry before the Tribunal for Disciplinary Proceedings. The Tribunal made an enquiry and in its report to Government recommended dismissal of the petitioner from service. The Government communicated a copy of the report of the Tribunal and directed the petitioner to show cause. He submitted a written explanation. The Government eventually accepted the recommendation of the Tribunal and in G. O. Ms. No. 1793 dated 26-6-53 ordered the dismissal of the petitioner from service.

(4) Mr. A. V. Krishna Rao appearing for the petitioners in the two Writ Petitions, contended before me that the notice issued to the petitioners by the Government does not satisfy the requirements of law; that there has been violation of the rules which according to him, has resulted in substantial prejudice to the petitioners, and that, therefore, the order of the Government is vitiated and must be quashed. The learned counsel submits that the following are the violations of the rules:

(a) that there was a joint trial of the petitioners for which there is no provision;

(b) that the investigation was conducted by the investigating officer and not by the Director of Prosecutions, which is contrary to Rule 5(f) of the Madras Civil Service (Disciplinary Proceedings Tribunal) Rules;

(c) that Rule 8(a) enables the accused officer to examine himself in his defence; that in W. P. No. 863 of 1953 the accused officer examined himself as D. W. 4 and the Tribunal did not accept his evidence on the sole ground that his evidence is interested and this ground on which his evidence was rejected is against the spirit of Rule 8(a);

(d) that the statements of the prosecution witnesses had been marked as Exhibits for the prosecution and the procedure is irregular and has caused prejudice to the accused officers;

(e) that the Government's order shows that the Board of Revenue has been consulted which is contrary to the rules and that the order of the Government is bad; and

(f) that the final order of the Government must indicate the grounds on which the punishment has been imposed and that the order in question is, therefore, vitiated, in that it does not contain the grounds.

(5) Except one small point with regard to the non-examination of the petitioner in W. P. No. 858 of 1953 at the enquiry before the Tribunal, the other points are common for both the petitioners.

(6) The learned Government pleader contended that there has been a complete compliance with the statutory rules and the rules of natural justice; that the procedure is neither irregular nor illegal, that, in any view, no prejudice has been caused to the petitioners by reason of any alleged defect or irregularity in the matter of procedure and that there are no grounds for interference under Art. 226 of the Constitution.

(7) The statutory provisions, which govern the matter in dispute are embodied in Article 311 of the Constitution. That Article reads thus:

"(1) No person who is a member of a Civil Service of the Union or an All India Service or a Civil Service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed;

(2) No such person, as aforesaid, shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him....."

(8) The first contention of the learned counsel for the petitioners involves the construction of the

expression "until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" occurring in Art. 311(2).

(9) The notice which preceded the final order of the Government in G. O. Ms. No. 1793 dated 26-6-1953 is as follows :

"Government of Madras — Revenue Department.
(Confidential)
Memorandum No. 53596/G/52-7 dated 7th January 1953.
Sub : Public Servants — (Vishakapatnam) — Sri S. Thakoorjee — Departmental enquiry No. 4 of 1952.
Ref : From the Chairman, Tribunal for Disciplinary Proceedings letter No. 2834/52 dated 29-7-1952.

.....

A copy of the report of the Tribunal for Disciplinary Proceedings on the subject mentioned above is communicated to Sri S. Thakoorjee, formerly Special Revenue Inspector for loans, Vishakapatnam. The Government agree with the findings of the Tribunal in respect of the charges as well as its recommendation regarding the punishment and have arrived at a provisional conclusion that the accused officer should be dismissed from service. Sri S. Thakoorjee is accordingly directed to show cause within one month from the date of receipt of this Memo why he should not be dismissed from service.

2. The available records relating to the case have been sent to the office of the Tribunal for Disciplinary Proceedings. Sri S. Thakoorjee is informed that he may peruse the records and take copies or notes thereof, if required at that office. No extension of time beyond the limit specified in para 1 above will however be granted under any circumstances."

(10) In response to this notice, which is similar in the case of the petitioner in W. P. No. 863 of 1953, the pettioner submitted written explanations. Mr. Krishna Rao contends that the notice shows that the Government have already decided to agree with the findings of the Tribunal in respect of the charges as well as its recommendations regarding the punishment and the statement that the Government "have arrived at a provisional conclusion that the accused officer should be dismissed from service" is illusory, the same being merely a formal compliance with the provisions of Statute, and that, therefore, the notice does not satisfy the requirements of law.

(11) On a fair reading of the notice, it cannot be said that the Government have finally determined on their acceptance of the recommendations of the Tribunal to dismiss the petitioners from service. What the Article requires is that the accused Officer should be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. In order that Government might satisfy this requirement, they must come to a prima facie conclusion which should be capable of revision on their being satisfied, after the receipt of the explanation by the officers concerned, that their prima facie view is right or wrong; but what is necessary is that the Government must come to a provisional conclusion. The notice in question, in fact, does not say anything more than that. The provisional conclusion which the Government arrived at must be communicated to the petitioner, in order that he might be given an opportunity of showing cause against the proposed action to be taken and the language of the notice does not, therefore, suffer from any infirmity. In fact, the employment of the word 'provisional' in the notice must make the intention of the Government clear, that what all has been stated, is merely provisional. Therefore, the learned counsel's contention that the Government have finally made up their mind in regard to the merits and also with regard to the punishment which is sought to be imposed, and that the notice is merely formal and in a sense illusory, must fail. I may at once state that this objection has not been taken in the written explanation filed by the petitioners before the Government, which shows that the accused officers had no doubt as to what the notice really meant.

(12) In — 'High Commissioner for India v. I. M. Lall', AIR 1948 PC 121 (A), their Lordships of the Privy Council had to construe the provisions of Sec. 240 of the Government of India Act, which is in pari materia with Article 311 of the Constitution. At pp. 124-125 their Lordships posed the questions and gave their answers as follows :

"Three important questions of construction arise for decision viz., 1st : Is sub-section (1) of Sec. 240 qualified by sub-section (3)?; secondly, is sub-section (3) mandatory or permissive?; thirdly, what is the proper construction of the words in sub-section (3) 'the action proposed to be taken in regard to him'."

At page 126 their Lordships of the Privy Council state thus:

".....the provision as to a reasonable opportunity of showing cause against the action proposed is now put on the same footing as the provision now in sub-section (2) of S. 240 which was the subject-matter of the decision in — 'Rangachari v. Secy. of State', AIR 1937 PC 27 (B) and that it is no longer resting on rules alterable from time to time, but is mandatory and necessarily qualifies the right of the Crown recognised in sub-section (1) of Sec. 240 of 1935".

Their Lordships agreed with the view taken by the majority of the Federal Court which was expressed by the learned Chief Justice of the Federal Court and which is as follows:

"It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or reduce in rank a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action, and as that opportunity has to be a reasonable opportunity, it seems to us that the section requires not only modification of the action proposed, but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given a reasonable time to make his representations against the proposed action, and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against

being dismissed or reduced if all or any of the charges are proved, dismissal or reduction of rank will follow. This may indeed be sufficient in some cases."

"In our judgment, each case will have to turn on its own facts but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omission on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed....."

At pp. 126-127, their Lordships held as follows:

"If the civil servant has been through an enquiry under Rule 55, it would not be reasonable that he should ask for a repetition of that stage if duly carried out, but that would not exhaust his statutory right, and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry."

(13) In — 'Sambandam v. General Manager S. I. Railway', AIR 1953 Mad 54 (C), Rajamannar C. J., and Venkatarama Iyer J., had to consider the scope of these provisions once again. After noticing the decision in — 'High Commissioner for India v. I. M. Lall (A)', the learned Judges held as follows:

"In other words in a case governed by S. 240(3) there will be two stages, firstly an enquiry after notice into the charges against the civil servant and this is the rule of natural justice that no person should be condemned without a hearing and secondly after the enquiry is over and a punishment decided on a further notice in terms of sub-section (3) informing the civil servant of the action proposed to be taken and giving him an opportunity to show cause against that action and this a statutory requirement."

(14) In — 'John Joseph v. State of Madras', C. M. P. No. 4296 of 1951 (Mad) (D), Rajamannar C. J. and Venkatarama Iyer J., had to consider the questions raised in the present Writ Petition. The learned Judges held therein as follows:

"We shall assume that the petitioner is right in his contentions that there were irregularities in the conduct of the enquiry in the sense that technically the Tribunal which succeeded the Special Officer must be deemed to be a new Tribunal.....The petitioner can, at the most, complain that there were errors in the procedure and that there was a charge as regards his right of appeal between the time when the enquiry started and the time when the final report of the Tribunal was sent up. Even assuming that there were irregularities and even assuming that the rules were not strictly observed, the question nevertheless remains whether the petitioner has any right to invoke our jurisdiction to set aside the order of dismissal passed by the Government. Has he any cause of action against the Government because there were irregularities committed in the procedure adopted in the departmental enquiry? In our opinion, so long as the petitioner had sufficient opportunity to put forward his defence, any irregularity as such would not in the least enable the petitioner to attack the validity of the order of dismissal. This conclusion follows from the provisions of the Constitution in the light of the decisions of the Privy Council in — 'AIR 1937 PC 27 (B); — 'Venkata Rao v. Secretary of State for India', AIR 1937 PC 31 (E) and — 'AIR 1948 PC 121 (A)'.

(15) The learned Judges pointed out that the provisions of Sec. 240 of the Government of India Act, 1935, were substantially similar to the provisions of Section 96B of the Government of India Act, 1915, which are now embodied in Article 311 of the Constitution and held that "the only statutory limitation imposed on the power of the Crown is to dismiss at pleasure, namely that 'no person shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him". The learned Judges ultimately held that:

"It must therefore be taken as well established that any disregard of any of the rules made under Sec. 240 cannot give a dismissed servant a right of action against the State. The right of the Crown to dismiss any member of the civil service at pleasure is only subject to two conditions and they are the conditions expressly mentioned in sub-sections (2) and (3) of Section 240 of the Government of India Act, 1935."

(16) The learned Judges finally held that they were deciding the case no doubt under the provisions of Sec. 240 of the Government of India Act, 1935, but that they would have reached no different conclusion, even if they had applied the provisions of the new Constitution to the case, because the material provisions are in pari materia with the provisions of the Government of India Act, 1935. This unreported decision in C. M. P. No. 4296 of 1951 (Mad) (D), has been followed by Mr. Justice Subba Rao (as he then was) in Writ Petn. No. 145 of 1952 (Mad) (F). In the case before him, the irregularities complained of were that there was a joint trial which has prejudiced the accused officer. The learned Judge dealing with the objections, referred to the decision in C. M. P. No. 4296 of 1951 (Mad) (D), above cited and held that the irregularities complained of did not make the opportunity given to the accused-petitioner in that case illusory and that the accused officer did not suffer any prejudice on that ground.

(17) In the light of the principles settled by these decisions, I shall now consider the contentions which have been raised by the learned counsel for the petitioner. With regard to the first objection as to the joint trial, I may state that the transaction in respect of which the accused Officers in both the writs have been charged with is corruption in respect of matters arising out of the same transaction. The accused officers have been charged with instances of bribery and corruption while both of them were in charge of disbursements of loans, and the witnesses spoke to the incidents, with which the petitioners have been charged are common and in any view the transactions which have given rise to the enquiries against the petitioners are contemporaneous in point of time. The Officers were working at the same place. On a consideration of the materials placed before me, I am satisfied that the joint trial has not in the least affected the fair trial of the accused officers nor have they suffered any prejudice on that ground.

(18) When a complaint is made that there should not be a joint trial of accused officers, it must be borne in mind that the provisions of the Code of Criminal Procedure regarding the joint trial of the accused are not to be imported with regard to enquiries made against officers charged with corruption and bribery. The essential requirement is that the accused officers should be given a fair and reasonable opportunity of putting forward their defence, and so long as that requirement is satisfied, the fact that there have been other irregularities in the trial, even if true, would not vitiate the ultimate order of the Government imposing the punishment.

(19) The second irregularity complained of is that the investigation has been conducted not by the Director of Public Prosecutions, but by the investigating officer which is contrary to R. 5(f). Rule 5(f) runs as follows:

> "There shall be a Director of Prosecutions to conduct enquiries on behalf of the Government in disciplinary cases before the Tribunal and the accused officers concerned shall be allowed to be represented by counsel."

Here again, I am not satisfied that the conduct of the prosecution by the investigating Officer and not by the Director of Public Prosecutions has resulted in any prejudice to the accused. Nor am I satisfied that the fact that the Tribunal has not accepted the evidence of the accused officer who has examined himself as D. W. 4 in W. P. No. 863 of 1953, vitiates the finding of the Disciplinary Proceedings Tribunal, nor renders illegal the ultimate order of the Government. These are, at best, irregularities which do not render the punishment awarded illegal. The further submission of the learned counsel for the petitioners is that the statements of the prosecution witnesses at the enquiry had been marked as Exhibits for the prosecution. Here again, there is no evidence that it has resulted in any prejudice to the accused officers.

(20) The learned counsel for the petitioners also contended that the Board of Revenue was consulted. It is really a matter in which the Board of Revenue should be consulted. It was done in pursuance of an order of Government G. O. No. 329 (Public Services) dated 23-1-1950, as subsequently amended, which provides that the Revenue Department should consult the Board of Revenue before imposing the punishment on the persons who have been serving in that department. The rules do not, of course, provide for consultation with the Board of Revenue before the punishment is imposed, but there is no express or implied prohibition anywhere in the rules against such consultation. In fact, the consultation with the Board of Revenue was made with a view to get the antecedent history of the accused officers who have been serving in the Revenue Department which is under the superintendence of the Board of Revenue. This is not a matter about which the accused officers can have any grievance.

(21) Finally, it has been contended that the order of the Government does not ex facie show that they have given due consideration to the representations made by the accused Officers. This contention of the learned counsel for the petitioners proceeded on a misapprehension of the final order of the Government in G. O. 1763 of 30-6-1953. The typed papers supplied by him to the court do not contain the recital that the petition of Mr. Joga Rao is also taken into consideration. This was pointed out to the learned counsel for the petitioners and he accepted that there has been a mistake in the typed copy.

(22) Taking all the circumstances of the case, it must be held that the statutory provisions as to reasonable opportunity being afforded to the accused officers before they are dismissed have been amply complied with in this case and there have been really no irregularities in the matter of procedure, which resulted in any prejudice to the accused officers. On the findings arrived at by the Tribunal which have been accepted by the Government after due consideration of the representations received from the accused officers, it must be held that the accused officers have been given every opportunity of submitting their cases i.e., of examining the witnesses and of putting forward their case.

(23) Mr. A. V. Krishna Rao relied upon the decision of Mr. Justice Rajagopalan in — 'Ayya Gounder v. State of Madras',W. P. No. 739 of 1953 (Mad) (G). In that case, the learned Judge reached the finding that there has been a violation of specific rule of procedure which has materially affected the finding of the Tribunal, in that the Tribunal refused to call a witness, which the accused desired to be examined on the ground "that it is not its duty to summon witnesses to help the accused". I am in respectful agreement with the view of the learned Judge. The learned Judge rightly held that where the Tribunal refused to examine witnesses which the accused desires to be examined, on the ground that it is not its duty to summon witnesses to help the accused, such a refusal is opposed to every principle of justice and good conscience, which governs both courts and Tribunals. In this case no such complaint has been made, nor could be made.

(24) In the result, these Writ Petitions are dismissed with costs of the Government Pleader. Advocate's fee in each Writ is Rs. 150/-.

V.S.B. Petitions dismissed.

(S) AIR 1955 ANDHRA 172 (V 42 C 60 Aug.)

UMAMAHESWARAM J. (21-1-1955)

K. Venkata Subbaiya, Appellant v. K. Veeraiyya and another, Respondents.

A. A. O. No. 518 of 1949, against order of Sub-J., Tenali, D/- 27-12-1948.

Civil P. C. (1908) O. 20, R. 18 — Suit for partition — Ascertainment of future profits — (1954) 2 Mad LJ 696, Not foll.

In a suit for partition, though there is no prayer in the plaint for the ascertainment of future profits from the date of suit and though there is no specific direction in the preliminary decree for such ascertainment, the Court is bound, under the provisions of O. 20, R. 18, to direct such an enquiry. The right to an account of such profits is implicit in the right to a share in the common properties and need not be separately asked for. Even after the passing of the preliminary decree, it is open to the Court to give appropriate directions either

suo motu or on the application of the parties. AIR 1947 Mad 106 and AIR 1951 Mad 938 (FB), Foll.; AIR 1952 SC 358 and AIR 1953 Pat 289, Distinguished. 1954-2 Mad LJ 696, criticised and not followed. (Para 6)

Anno: AIR Com.: C. P. C., O. 20 R. 18 N. 6 Pt. 1; 1953 Mulla, O. 20, R. 18 P. 744 N "Giving .....directions" "(Subsequent Madras view in AIR 1949 Mad 743, AIR 1947 Mad 106 and 1931 Mad WN 846 and Sind and Oudh views not noticed in Mulla — 4 Pts. extra in AIR Com.)

CASES REFERRED: Paras

(A) (V34) AIR 1947 Mad 106: 1946-2 Mad LJ 117 1, 3

(B) (V38) AIR 1951 Mad 938: 1951-2 Mad LJ 176 (FB) 2, 4, 6

(C) (V42) (S) AIR 1955 Andhra 87: 1955 Cri LJ 770: (Cri. R. C. No. 603 of 1954 — Andhra) (FB) 3, 6

(D) (V39) AIR 1952 SC 358: 1952 SCJ 539 (SC) 4

(E) ('54) 1954-2 Mad LJ 696: 67 Mad LW 1088 4, 6

(F) ('86-87) 14 Ind App 37: 14 Cal 493 (PC) 5

(G) (V10) AIR 1923 Mad 147: 43 Mad LJ 406 5

(H) (V40) AIR 1953 Pat 289: 1953 BL JR 274 7

G. Venkatarama Sastri, for Appellant; K. Koataiah, for Respondents.

JUDGMENT: This appeal raises a simple question of law. The 1st respondent herein filed I. A. No. 461 of 1948 in O. S. No. 318 of 1939, District Munsif's Court, Repalle, on 5-7-1948, for the ascertainment of profits from the date of the plaint. The suit in which the application was filed was instituted in 1939 for partition and separate possession of joint family properties and the preliminary decree was passed on 23-8-1946. The final decree was passed on 31-8-1948, long after the application for the ascertainment of future profits was filed. The ground on which the District Munsif of Repalle dismissed the application was that the final decree had been passed by the time the application was taken up for hearing on 17-9-1948.

On appeal, the Subordinate Judge of Tenali rightly held that the delay in the disposal of the application ought not to prejudice the 1st respondent herein in the determination of his legal rights. He followed the decision of Somayya J. in — Raghava Mannadiar v. Theyyunni Mannadiar', AIR 1947 Mad 106 (A) and held that though there was no prayer in the plaint for the ascertainment of future profits from the date of suit and though there was no specific direction in the preliminary decree in the partition suit for such ascertainment, the Court is bound under the provisions of O. 20, R. 18, Civil P. C., to direct such an enquiry and consequently set aside the order of the trial Court and remanded the application to the District Munsif for fresh disposal and ascertainment of profits. As against the Order of remand, the C. M. A. No. 518 of 1949 has been filed before this Court.

(2) The decision of Somayya J. relied in by the Subordinate Judge was approved by a Full Bench of the Madras High Court in — 'Basavayya v. Guravayya', AIR 1951 Mad 938 (FB) (B). The legal position is summed up at pp. 941-942 in the following terms:

"A tenant-in-common who files a suit for partition seeks a petition not only of his share of the properties forming the subject-matter of the suit, but also of his share of the profits accruing from those properties during the pendency of the suit or till he is put in possession of his share. He cannot anticipate how long the suit would be pending or estimate even approximately what amount of profits would be realised during that period. He need not therefore specifically ask for any relief in respect of future profits, the prayer for general relief being sufficient to enable the Court to award him such profits.....The right to an account of such profits is implicit in the right to a share in the common properties and both rights have to be worked out and provided for in the final decree for partition.

A suit for partition by a Joint Hindu family is substantially a suit for an account of the joint family properties on the date of the suit as well as all the profits received by the manager since that date, so that the profits should also be divided and his proper share given to him. If, as we think, this is the true nature of the proceedings in a suit for partition, a direction for an enquiry into profits of the common property received or realised by one of the parties during the pendency of the suit may be made even after the passing of the preliminary decree and there is nothing in O. 20, R. 18, Civil P. C., interdicting such procedure".

(3) As held by a Full Bench of this Court in — 'Subbarayudu v. State', (S) AIR 1955 Andhra 87 (C), I am bound by the Full Bench decision of the Madras High Court already referred to (which has approved the decision of Somayya J. in — 'Raghava Mannadiar v. Theyunni Mannadiar (A)', and following that decision I hold that the Order of remand is perfectly justified.

(4) The learned advocate for the appellant, Sri G. Venkatarama Sastri, contended that the Full Bench decision of the Madras High Court in 'Basavayya v. Guravayya (B)' requires re-consideration in view of the decision of the Supreme Court in — 'Mohd. Amin v. Vakil Ahmad', AIR 1952 SC 358 (D) and the decision of Rajagopala Iyengar J., in — 'Arunachala Mudali v. Maragathammal', 1954-2 Mad LJ 696 (E). In AIR 1952 SC 358 (D) the suit was filed for a declaration that the deed of settlement dated 5-4-1940 was invalid and for recovery of the share of the plaintiffs in the estate of Haji. The decree for mesne profits awarded by the High Court of Allahabad was set aside by the Supreme Court. The relevant portion of the judgment dealing with the question of profits runs in the following terms:

'It was, however, pointed out by Shri S. P. Sinha that the High Court erred in awarding to the plaintiffs mesne profits even though there was no demand for the same in the plaint. The learned Solicitor-General appearing for the plaintiffs conceded that there was no demand for mesne profits as such, but urged that the claim for mesne profits would be included within the expression 'awarding posession and occupation of the property aforesaid together with all the rights appertaining thereto'. We are afraid that the claim for mesne profits cannot be included within this expression and the High Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint. The

provision in regard to the mesne profits will therefore have to be deleted from the decree."

(5) These observations have no application to the facts of the present case which is a suit for partition. What is claimed by the 1st respondent in his application is not mesne profits from a trespasser. The nature of the claim is clearly set out by the Judicial Committee in — 'Pirthi Pal v. Jowahir Singh', 14 Ind App 37 (PC) (F). Referring to that decision, Sadasiva Iyer J. observes in — 'Ramaswami Aiyar v. Subramania Aiyar', AIR 1923 Mad 147 at p. 149 (G) in the following words:

"As stated by their Lordships.....a sharer has a 'clear right' to an account of the profits received by the person in possession of the whole, and to be awarded his share thereof, not as mesne profits received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the land".

(6) As pointed out by the Full Bench at pp. 941-942 in AIR 1951 Mad 938 (B), the right to an account of such profits is implicit in the right to a share in the common properties and need not be separately asked for. Even after the passing of the preliminary decree, it is open to the Court to give appropriate directions either 'suo motu' or on the application of the parties. The observations of the Supreme Court apply only to a case where mesne profits in an ejectment suit are not specifically prayed for against the defendant. It is not necessary for me to decide in this case as to whether the Full Bench decision, in so far as it deals with a claim for future mesne profits under O. 20, R. 12, Civil P. C., does not require reconsideration in the light of the Supreme Court decision. The case before Rajagopala Ayyangar J., in 1954-2 Mad LJ 696 (E), dealt with an application under O. 20, R. 12, Civil P. C. The learned Judge distinguished the Full Bench case on the ground that it

"related not to O. 20, R. 12, but to O. 20, R. 18, Civil P. C., dealing with preliminary and final decrees in suits for partition."

In my opinion, this decision does not purport to and cannot affect the correctness of the Full Bench decision. Moreover, as pointed out by the Full Bench of this Court in (S) AIR 1955 Andhra 87 (FB) (C), I am not bound by the decisions of the Madras High Court pronounced subsequent to 5-7-1954, but only by the decisions prior to that date. I might however point out that the grounds on which the Full Bench decision was distinguished by the learned Judge are not wholly justifiable as from the statement of the facts, it appears that the application under O. 20, R. 12, Civil P. C., was filed during the pendency of the Second Appeal in the High Court and the decree passed by the trial Court for ejectment has not become final. If so, the observations in AIR 1951 Mad 938 at pp. 939 to 941 (FB) (B) directly governed that case and the learned Judge ought to have followed it. The relevant observations of the Full Bench which were applicable to that case are as follows:

"The cause of action for future mesne profits is the plaintiff's being kept out of possession during the suit and arises subsequent to the suit. In empowering Courts to award future mesne profits O. 20, R. 12, Civil P. C., makes an exception to the general rule that a plaintiff can only sue on such cause of action as has arisen on the date of instituting his suit. The objection is to avoid multiplicity of litigation that would result if persons, unlawfully kept out of possession of their lands, were obliged to file suits every three years for mesne profits accruing after the institution of a suit in ejectment and during its pendency in the Original and Appellate Courts."

(7) Similarly, the decision of the Patna High Court in — 'Raghu Mahton v. Bulak Mahton', AIR 1953 Pat 289 (H) also arose out of an application under O. 20, R. 12, Civil P. C., and not under O. 20, R. 18, Civil P. C. and it has consequently no application on the facts of the present case.

(8) In the result, the Civil Miscellaneous Appeal fails and is dismissed with costs. No leave.

V.R.B. Appeal dismissed.

(S) AIR 1955 ANDHRA 174 (V 42 C 61 Aug.)

SUBBA RAO C. J. AND BHIMASANKARAM J.

(28-1-1955)

P. Narayana, Appellant v. P. Seetharamayya, Respondent.

Letters Patent Appeal No. 267 of 1952 and Memorandum of Cross Objections, against judgment and decree of Rajagopalan J., Madras, in S. A. No. 1746 of 1948, D/- 28-2-1952.

Partnership Act (1932), S. 32 — Partners — Two persons purchasing decree.

If several persons jointly purchase goods for re-sale with a view to divide the profits arising from the transaction, a partnership is thereby created. But persons, who join in the purchase of goods not for the purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners. (Para 4)

Where two persons jointly obtained a transfer of decree for consideration,

Held that what the parties contemplated was nothing more than taking their shares of the net returns obtained by the execution of the decree, which was the common property, and there was no question of an agreement of partnership. The persons were not therefore partners. (Para 5)

Anno: Partnership Act, S. 6 N. 5.

CASES REFERRED: Paras

(A) (V35) AIR 1948 Mad 343: 1948-1 Mad LJ 312 3

(B) (V26) AIR 1939 Bom 410: ILR (1939) Bom 616 3

P. Somasundaram, for Appellant; E. Venkatesam, for Respondent.

BHIMASANKARAM J.:

This is an appeal against the decree and judgment of Rajagopalan J. of the Madras High Court in S. A. No. 1746/48. The learned Judge granted leave to both the appellant and the respondent before him to appeal against his decision. The respondent before us has therefore filed a Memorandum of Cross-objections.

(2) The facts of the case may be briefly stated. The appellant and the respondent who were respectively the defendant and the plaintiff in O. S. No. 61 of 1945 on the file of the Subordinate

Judge's Court, Vishakapatnam, out of which the present appeal arises, jointly obtained a transfer of the decree in O. S. No. 34 of 1935 on the file of that court, under a registered deed of transfer dated 5-3-1938, for a consideration of Rs. 3,000/-. During the execution of the decree, an amount of nearly Rs. 1,500/- was deposited into the executing court by the judgment-debtors and at the time of this suit, there was still a considerable balance outstanding. The plaintiff respondent filed the present suit for a declaration that he was entitled to receive the whole of the amount in deposit as also the amount thereafter to be recovered, alleging that though the transfer deed was taken in the names of both of them, he was the person solely interested in the transfer as the whole of the consideration passed from him alone, though as he had taken some money from the defendant by way of loan for the purpose of the transfer the defendant's name also happened to be included in the transfer-deed.

The defendant-appellant, on the other hand, claimed that he himself had paid the whole of the consideration and therefore he was the person entitled to the amount in deposit as well as future realisations. The trial court dismissed the suit, but on appeal, the learned District Judge held that both the plaintiff and the defendant were entitled to equal rights in the decree of which they had obtained a transfer and were therefore entitled to share the decretal amount equally. He also held that both had contributed equal amounts and had shared at an earlier point of time in equal halves a sum which had been then realised.

(3) In the Second Appeal filed by the defendant, it was contended before the learned Judge that the relationship between the plaintiff and the defendant was one of partnership and that the suit was not therefore maintainable, in its present form. It was urged that the suit should have been by way of dissolution of partnership and for accounts. The learned Judge held that, in order to constitute a partnership, the agreement should provide for each of the partners to be the agent of the other besides also being the principal and further held that, judged by that test, the plaintiff and the defendant were not partners. He referred to some of the decisions bearing on the point particularly that reported in — 'Govindan Nair v. Nagabhushanammal', AIR 1948 Mad 343 (A) and that in — 'Chimanram Motilal v. Jayanti Lal Chhaganlal', AIR 1939 Bom 410 (B).

(4) The question presented by this appeal is of considerable difficulty. The difficulty in our opinion is considerably enhanced by the fact that the persons whose relationship is to be judged joined only in a single venture. As Lindley observes in his book on "Partnership" at page 35, (11th Edition):

> "If several persons jointly purchase goods for resale with a view to divide the profits arising from the transaction a partnership is thereby created. But persons who join in the purchase of goods not for the purpose of selling them again and dividing the profits, but for the purpose of dividing the goods themselves, are not partners".

(5) Having regard to the fact that the subject-matter of the purchase in this case is a decree, it is difficult to see how it could be described as a purchase of goods for re-sale. Nor could it be described as having been purchased for the purpose of dividing the goods themselves. It seems to us that in this case what the parties contemplated was nothing more than taking their shares of the net returns obtained by the execution of the decree, which is the common property, and that there is no question of an agreement of partnership. We, therefore, agree with the learned Judge in his conclusion that the defendant had not established that the plaintiff and the defendant were partners. The learned Judge also held that the plaintiff and the defendant were interested in the money realised under the decree in the proportion of Rs. 1,650/- to Rs. 1,350/- and not in equal moities. The learned counsel for the respondent objects to this part of the learned Judge's decree. This direction of the learned Judge was based upon admissions made by the parties, and therefore in our judgment not open to criticism.

(6) We, therefore, dismiss both the appeal and the Memorandum of Cross Objection with costs.

V.R.B.

Appeal and cross-objection dismissed.

(S) A.I.R. 1955 ANDHRA 175 (V. 42, C. 62 Aug)

SATYANARAYANA RAJU J. (10-12-1954)

Vishakapatnam Co-operative Motor Transport Society Ltd. by Secretary, Petitioner v. M. Subba Rao and another, Respondents.

Writ Petn. No. 480 of 1954.

Constitution of India, Art. 226 — Territorial jurisdiction — Authority to whom writ to be issued located at Madras — Petition filed in the High Court of Andhra — Maintainability — Waiver — (Civil P. C. (1908), S. 9).

A petition under Art. 226 filed in the High Court of Andhra to call for the records on the file of the Commissioner for Workmen's Compensation of Andhra at Madras is not maintainable, as Madras is outside the territorial jurisdiction of the High Court of Andhra. AIR 1953 SC 210 and (S) AIR 1955 Andhra 23. Foll. (Paras 2, 3)

The fact that the office is temporarily located at Madras does not make any difference, for it is the location within its territorial limits that gives jurisdiction to the High Court and so long as the office is located outside the territorial jurisdiction of the High Court, it is immaterial whether that location is temporary or permanent. AIR 1953 SC 210, Relied on. (Para 7)

Further, although the Government represented that they were willing to waive the objection as to the jurisdiction it could not be waived and the High Court could not exercise its jurisdiction by consent of parties; for, there is an essential distinction between cases where there is a total want of jurisdiction and cases where there is merely an irregular exercise or assumption of jurisdiction. The latter may be waived but the doctrine cannot be invoked in the former case. 11 Mad 26 (PC), Relied on. (Para 10)

Anno: Const. of India, Art. 226 N. 41(b).

AIR Com.: C. P. C., S. 9 N. 5; 1953 Mulla, S. 21 P. 129 N. "Waiver .... jurisdiction" (Pt. 7 extra in N. 5 to S. 9 in AIR Com.).

CASES REFERRED: Paras

(A) (V40) AIR 1953 SC 210: 1953-1 Mad LJ 702 (SC) 3

(B) (V42) (S) AIR 1955 Andhra 23: 1954-2 Mad LJ (Andhra) 73 3

(C) ('88) 11 Mad 26: 14 Ind App 160 (PC) 9

D. V. Reddi Pantulu, for Petitioner; M. S. Ramachandra Rao and Vepa P. Sarathy for Addl. Govt. Pleader, for Respondents (Nos. 1 and 2 respectively).

ORDER: This is a petition under Art. 226 of the Constitution of India for the issue of a Writ of Certiorari to call for the records in Case No. 482 of 1953 on the file of the Commissioner for Workmen's Compensation of Andhra at Madras and to issue an appropriate writ quashing the orders of the Commissioner for Workmen's Compensation.

(2) A preliminary objection was raised by the respondents' Advocate that the Writ Petition is not maintainable in as much as the Commissioner for Workmen's Compensation has his office at Madras, outside the territorial jurisdiction of the High Court of Andhra.

(3) Following the decisions of the Supreme Court in — 'Election Commr., India v. Saka Venkata Rao', AIR 1953 SC 210 (A) the learned Chief Justice of Andhra held in — 'V. Janaiah v. Board of Revenue, Andhra', (S) AIR 1955 Andhra 23 (B) that the Board, which is situated in the City of Madras, is not within the area of the Andhra State over which the Andhra High Court has jurisdiction and that no Writ under Article 226 could be issued to it. In this view, Writ Petition must be held to be not maintainable.

(4) But the learned Counsel for the petitioner submitted that the office of the Commissioner for Workmen's Compensation is temporarily located at Madras and the Government may waive their objection to the jurisdiction of the Andhra High Court hearing the petition. At the time of the hearing of the petition, the learned Govt. Pleader represented that the Government are willing to waive the objection as to jurisdiction. Even so, the respondents' Advocate contends that an objection to jurisdiction cannot be waived and this Court cannot exercise its jurisdiction by consent of parties.

(5) Article 226 (1) of the Constitution of India runs as follows:

"Notwithstanding anything in Article 32, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories, directions, orders or writs, including writs in the nature of 'Habeas Corpus, Mandamus, prohibition, quo warranto and Certiorari' or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose."

(6) At pp. 212-213 of the Supreme Court decision, Patanjali Sastri C. J., stated as follows:

"But wide as were the powers thus conferred a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction' that is to say, the writs issued by the court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be within those territories', which clearly implies that they must be amenable to its jurisdiction, either by residence or location within those territories."

(7) The fact that the office of the Commissioner for Workmen's Compensation is 'temporarily' located in the City of Madras does not in my view, make any difference. It is the 'location' within its territorial limits that gives jurisdiction to this Court and so long as the office is located outside the territorial jurisdiction of this court, it is immaterial whether that location is temporary or permanent. In either case the jurisdiction to issue a writ does not exist.

(8) Then the question as to whether there can be a waiver of objection to jurisdiction falls to be considered. In Mulla's Code of Civil Procedure, 12th edition, at page 129 the following passage occurs under the heading "Waiver of Objections" to jurisdiction:

"Where by reason of any limitation imposed by Statute Charter, or Commission, a court is 'without jurisdiction' to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court, nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Where a limited court takes upon itself to exercise a jurisdiction, it does not possess, its decision amounts to nothing. The general rule, therefore, is that consent cannot give jurisdiction and want of jurisdiction cannot be waived."

(9) This principle has been well stated by the Privy Council in — 'Meenakshi Naidoo v. Subramaniya Sastri', 11 Mad 26 (C). That was a case in which the High Court of Madras had entertained an appeal from an adjudication from which no appeal was provided for by any enactment. Their Lordships of the Privy Council held that the decree of the High Court was a nullity, because there was an inherent incompetency in the High Court to deal with the question brought before it and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

(10) There is an essential distinction between cases where there is a total want of jurisdiction and cases where there is merely an irregular exercise or assumption of jurisdiction. The irregular exercise or assumption of jurisdiction may be waived, but the doctrine of waiver cannot be invoked in a case where there is a total want of jurisdiction.

(11) I am satisfied that the Government's offer to waive their objection as to jurisdiction in the instant case therefore does not avail the petitioner. The petition is, therefore dismissed with costs of the 1st defendant Rs. 100/-.

H.G.P. Petition dismissed.

(S) AIR 1955 ANDHRA 177 (V 42 C 63 Sept.)

SATYANARAYANA RAJU J. (11-1-1955)

In re Karam Bapanna Dora, Petitioner

Writ Petn. No. 12 of 1955.

Constitution of India, Arts. 226, 329 (b) — Improper acceptance of nomination — Remedy against — Writ petition not maintainable.

The rejection of a nomination and the acceptance of a nomination stand on the same footing and there is no difference in principle between the two cases. Hence, the acceptance of a nomination cannot also be the subject-matter of a writ petition under Art. 226. Having regard to the fact that the process of nomination is a part of the election, Art. 329(b) the Constitution provides a complete bar to Court entertaining a writ petition under Art. 226.

Article 329(b) has provided this bar for a very good reason that in a country with a democratic Constitution in which the Legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed. (1952) 1 Mad LJ 775: AIR 1952 SC 64 (for SC Judgment only), Rel. on. (Paras 7, 8)

Anno: AIR Com., Const. India, Art, 226 N. 161.

CASE REFERRED : Paras

(A) ('52) 1952-1 Mad LJ 775: AIR 1952 SC 64 (for SC judgment only) 4, 6

S. V. Kondapi, for Petitioner.

ORDER : This is a petition under Art. 226 of the Constitution of India for the issue of a Writ in the nature of certiorari, to call for the records and quash the order of the Returning Officer, Bhadrachalam (G.7052 of 1954 dated 7-1-1955) declaring the nomination of Sri Syamala Sitaramayya to the Scheduled Tribes Reserved Seat of the Bhadrachalam Constituency as valid and to give such other direction or directions as may be deemed fit.

(2) For an election to the Scheduled Tribes Reserved Seat to the Andhra Legislative Assembly from the Bhadrachalam Constituency the petitioner and two others, viz., Kondamodalu Rami Reddy and Syamala Sitaramayya filed nominations. On 7-1-1955, the Returning Officer for that Constituency took up for scrutiny the nomination papers filed by the various candidates. At the time of the scrutiny, the petitioner took objection to the nomination of Syamala Sitaramayya alleging that he (the said Sitaramayya) is less than 25 years and as such he is not competent to be chosen to fill a seat in the State Legislature under Art. 173(b) of the Constitution.

(3) The Returning Officer passed an order which runs as follows :

"The scrutiny of the nominations was taken up at 11 a.m. on 7-1-1955. The nomination of the candidate, Sri Syamala Sitaramayya, was taken up for scrutiny at about 11-15 a.m. The petitioner raised an objection stating that the candidate is underaged, that is less than 25 years, and as such he is not competent to stand for election. But he did not produce any evidence in support of his contention and requested time till this evening. On a perusal of the electoral roll prepared in 1953, it is seen that his age is noted as 24 years and I accordingly considered that he should be definitely above 25 years of age now. As I could not adjourn the issue under S. 36(5) of the Representation of the People Act, 1951, I passed an order accepting the nomination then and there. After completing the scrutiny of all the other nominations (8 in all) and after the candidate's party left the hall, the petitioner filed a birth extract of the candidate at 12-30 p.m., wherein it is shown that the date of birth of the candidate is 30-4-1931, indicating that his age is less than 25. Since I have already passed orders accepting the nomination of the respondent the petition stands dismissed."

The petitioner has filed this petition under Art. 226 of the Constitution to quash the said order.

(4) In — 'Ponnuswami v. Returning Officer, Namakkal', 1952-1 Mad LJ 775: (AIR 1952 SC 64 for SC judgment only) (A), Mr. Justice Subba Rao (as he then was) and Mr. Justice Venkatarama Ayyar had to consider the scope and effect of Art. 329(b), Constitution of India, which provides as follows:

Article 329.—"notwithstanding anything in this Constitution — (b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature".

(5) After an exhaustive review of all the relevant provisions of the Constitution and the Representation of the People Act, (43 of 1951), the learned Judges held that an election can be questioned only in the manner provided by Art. 329(b) and not otherwise, notwithstanding the provisions of Article 326. The learned Judges also held that the nomination is a part of an election.

(6) The decision of the Madras High Court was taken in appeal to the Supreme Court in 'Ponnuswami v. Returning Officer, Namakkal (A)'. The Supreme Court summarised their conclusions at p. 797 thus :

"(1) Having regard to the important functions which the Legislatures have to perform in democratic countries it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule, and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call in question they should be brought

up before a Special Tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress."

(7) Mr. Kondapi, the learned counsel for the petitioner, urges that in the decisions above cited the Madras High Court and the Supreme Court were dealing with a case regarding improper rejection of a nomination and that in this petition what is complained of is the improper acceptance of a nomination and that therefore, there is an essential distinction between the present case and the cases which the Madras High Court and the Supreme Court had to deal with. I am unable to accept this contention. In my opinion, the rejection of a nomination and the acceptance of a nomination stand on the same footing and there is no difference in principle between the two cases. If it is conceded that the rejection of a nomination cannot be the subject-matter of a Writ petition under Art. 226, the acceptance of a nomination cannot also be the subject-matter of a Writ Petition under Art. 226. Having regard to the fact that the process of nomination is a part of the election, Article 329(b) of the Constitution provides a complete bar to this court entertaining a Writ Petition under Art. 226.

(8) Mr. Kondapi urges that non-interference at this stage would involve the postponement of the determination of the dispute to a stage after the declaration of the election result. That is so, but in view of the express bar contained in Art. 329(b) there is no escape from this position. Art. 329(b) has provided this bar for a very good reason. As has been pointed out by the Supreme Court it does not require much argument to show that in a country with a democratic Constitution in which the Legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed.

(9) The Writ Petition must therefore be dismissed.

D.R.R. Petition dismissed.

(S) AIR 1955 ANDHRA 178 (V 42 C 64 Sept.)

SATYANARAYANA RAJU J. (10-1-1955)

V. Lakshmi Reddi, Petitioner v. Collector and Addl. Dist. Magistrate, Kurnool, and another, Respondents.

S. R. No. 203-A of 1954.

(a) **Constitution of India, Art. 226 — Territorial jurisdiction of High Court — Authority to whom writ is issued must be within jurisdiction — AIR 1954 Raj 145; AIR 1954 Raj 189 and AIR 1954 Trav-C 131 (FB), Dissented from.**

The Board of Revenue (Andhra) which is situated in the City of Madras is not within the area of the Andhra State, over which the High Court of Andhra has jurisdiction. Hence, no Writ under Art. 226 can be issued to it. (S) AIR 1955 Andhra 23 — AIR 1953 SC 210 and AIR 1954 SC 207, Foll. (Paras 2, 13)

It is contended for the petitioner that the Writ is maintainable as the order sought to be quashed is really that of the District Collector, Kurnool, who is amenable to the jurisdiction of the High Court, Andhra and that the order of the Board of Revenue is only an appellate order confirming the order of the Collector. This contention cannot be accepted. For it is difficult to appreciate the distinction between a reversing order and a confirming order of an appellate authority, so far as the exercise of jurisdiction under Art. 226 is concerned. Once there is an appeal to the Board of Revenue the final order is that of the Board of Revenue because the appeal destroys the finality of the order of the District Collector. If so, the order sought to be quashed must be deemed to be that of the Board of Revenue which is situated outside the territorial jurisdiction of the High Court, and when a writ is sought to be issued, it makes no difference whether the order of the Board of Revenue is merely an affirming one or an order of reversal. AIR 1954 Raj 145 — AIR 1954 Raj 189 and AIR 1954 Trav-C 131 (FB), Dissented from. (Para 11)

Anno: Const. India, Art. 226 N. 41(b).

(b) **Constitution of India, Art. 226 — Territorial jurisdiction — Waiver of.**

There cannot be a waiver of objection to jurisdiction of the High Court, to issue a Writ; for the doctrine of waiver cannot be invoked in a case where there is total want of jurisdiction, such as, when the Authority or Tribunal is beyond the territorial jurisdiction of the High Court. AIR 1955 Andhra 175, Foll. (Paras 3, 4)

CASES REFERRED: Paras

(A) (V42) (S) AIR 1955 Andhra 23: 1954-2 Mad LJ (Andhra) 73 2,7,12

(B) (V40) AIR 1953 SC 210: 1953-1 Mad LJ 702: 1953 SCJ 293 (SC) 2,8,9

(C) (V42) AIR 1955 Andhra 175: (Writ Petn. No. 480 of 1954 Andhra) 2, 3

(D) (V41) AIR 1954 Raj 145: ILR (1953) 3 Raj 891 4

(E) (V41) AIR 1954 Raj 189 4, 5

(F) (V41) AIR 1954 Trav-C 131: ILR (1953) Trav-C 1145 (FB) 4, 6

(G) (V41) AIR 1954 SC 207; 1954 SCJ 254 (SC) 8, 9

(H) (V30) AIR 1943 PC 164: ILR (1944) Mad 457 (PC) 8

O. Chinnappa Reddy, for Petitioner; Asst. Govt. Pleader, for the State.

ORDER: This is a petition for the issue of a Writ of Certiorari to quash the proceedings in H. O. M. 3-212-M/53 dated 29-3-1953 of the Collector and Additional District Magistrate of Kurnool as affirmed by the Board of Revenue (Andhra) in its B. P. Pt. 792 dated 1-3-1954.

(2) The office has taken objection to the maintainability of this writ in view of the decison of the learned Chief Justice in — 'Venkayala Janaiah v. Board of Revenue (Andhra)', (S) AIR 1955 Andhra 23 (A). Following the decision of the Supreme Court in — 'Election Commission, India v. Saka Venkata Rao', AIR 1953 SC 210 (B), the learned Chief Justice held that the Board which is situated in the City of Madras is not within the area of the Andhra State, over which the High Court of Andhra has jurisdiction and that no Writ under Art. 226 can be issued to it. I followed the decision of the learned Chief Justice in — 'Vishakapattam Co-

operative Motor Transport Society Ltd. v. Subba Rao', AIR 1955 Andhra 175 (C).

(3) The learned Government Pleader, to whom notice has been ordered submits that the respondents are willing to waive the objection as to jurisdiction. In AIR 1955 Andhra 175 (C), I have considered the question as to whether there can be a waiver of objection to jurisdiction of this Court, to issue a Writ and held that the doctrine of waiver cannot be invoked in a case where there is total want of jurisdiction.

(4) Mr. Chinnappa Reddy, the learned Counsel for the petitioner contends that the Writ is maintainable as the order sought to be quashed is really that of the District Collector, Kurnool, who is amenable to the jurisdiction of this court and that the order of the Board of Revenue is only an appellate order confirming the order of the Collector. He relied upon two decisions of the Rajasthan High Court — 'Madan Mohan v. Bankatlal', AIR 1954 Raj 145 (D) and — 'Har Prasad v. Union of India', AIR 1954 Raj 189 (E), and also the decision of the Travancore-Cochin High Court in — 'Thangalakunju Musaliar v. Venkitachalam Potti', AIR 1954 Trav-C 131 (FB) (F). In 'Madan Mohan v. Bankatlal (D)' Wanchoo C. J. and Dave J. held that the fact that the High Court cannot issue any writ, direction or order to the Election Commission is no reason why it should not be able to interfere with the order of the Election Tribunal at Bikaner, if such interference is otherwise warranted. They held that if the High Court were to come to the conclusion that the Bikaner Tribunal exceeded its jurisdiction, the High Court can besides quashing the decision of the Tribunal direct the Returning Officer, who is within its jurisdiction, not to hold a bye-election in pursuance of the order of the Election Tribunal.

(5) In 'Har Prasad v. Union of India (E)' the facts were these. The petitioner before the High Court was the Head Travelling Ticket Examiner, who on his periodical eye-sight examination was ordered by the Chief Traffic Inspector, Bandikui to rejoin as Head Ticket Collector. The petitioner filed an appeal to the D. T. S. Bandikui, R. S. Ajmer, General Traffic Manager, Bombay and General Manager, Bombay. As a result of these representations, he was asked to appear again before the Chief Medical Officer, Bombay, who maintained his earlier opinion. The petitioner then applied under Art. 226 making the Union of India and the General Manager, Western Railway, as respondents to this petition. An objection was taken that the General Manager had his office outside the jurisdiction of the High Court of Rajasthan and that, therefore, no writ could be issued against him.

It was held, that the original order of posting the petitioner, as Head Ticket Examiner, was passed by the C. T. I., Bandikui, and it was that order which was under question in the petition, and that it was immaterial that the petitioner's efforts in setting aside that order right up to the General Manager proved fruitless and that the High Court had jurisdiction to entertain the petition.

Bapna and Ranawat JJ. held that there are two classes of cases where the respondent, a head of a department against whom relief under Art. 226 is sought, is resident outside the jurisdiction of a particular High Court. The first is, where the order is passed by an officer, who is residing or is having his office within the jurisdiction of the High Court and the superior Officer, who resides outside the jurisdiction only confirms that order & dismisses the appeal made by the Subordinate Officer, and the other where the Superior Officer residing outside the jurisdiction of the High Court purports to set aside the order of the Subordinate Officer and substitutes his own order for the same.

The learned Judges observed that in the first class of cases, the superior Officer is made a party because the petitioner wants to avail himself of the remedy provided by the rules, but in the second class of cases, the prayer would directly involve a direction to the superior Officer, who is not within the jurisdiction. Making this distinction, the learned Judges held that in a case where the order of a subordinate Officer is affirmed, by an order of the superior officer, then, notwithstanding the fact that the superior Officer resides outside the territorial limits of the jurisdiction of the High Court, a writ could be issued.

(6) In 'Thangalakunju Musaliar v. Venkitachalam Potti (FB) (F)', the petitioner in a petition under Art. 226 sought a writ of prohibition against the Income Tax Officer, Trivandrum and the Income Tax Investigation Commission, repesented by its Secretary, New Delhi, and Koshi C. J., and Subramania Iyer and M. S. Menon JJ. held that where one of the respondents to the petition is amenable to the jurisdiction of the High Court by reason of his residence and location of his office within the State and all the activities complained about are activities confined to the State, the High Court would be competent to entertain an application under Art. 226, even if the other respondent is not so amenable to its jurisdiction particularly when a writ against the 1st respondent, if issued, is sufficient to stop the mischief complained against.

(7) In 'Venkayala Janaiah v. Board of Revenue (Andhra) (A)' the learned Chief Justice was no doubt dealing with a case where the Order of the Board of Revenue sought to be quashed was an order reversing that of the Collector and the contention raised in this Writ Petition did not arise for consideration therein.

(8) In — 'K. S. Rashid and Son v. Income Tax Investigation Commission', AIR 1954 SC 207 (G) their Lordships of the Supreme Court had to consider the question as to whether the Punjab High Court had jurisdiction to issue writs under Art. 226 of the Constitution of India against the Income Tax Investigation Commission, Delhi, which was holding an inquiry in respect of assessees of Uttar Pradesh who were originally assessed in that State. The Supreme Court referred to its earlier decision in AIR 1953 SC 210 (B) and also the observations of the Judicial Committee in — 'Ryots of Garabandho v. Zamindar of Parlakimedi', AIR 1943 PC 164 (H) and at p. 210 of that report stated thus:

"There are only two limitations placed upon the exercise of these powers by the High Court under Art. 226 of the Constitution; one is that the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction' that is to say, the Writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The other limitation is that the person

or authority to whom the High Court is empowered to issue writs 'must be within those territories', and this implies that they must be amenable to its jurisdiction, either by residence or location within those territories. It is with reference to these two conditions thus mentioned that the jurisdiction of the High Courts to issue writs under Art. 226 of the Constitution is to be determined".

(9) After the very authoritative pronouncements of the Supreme Court in AIR 1953 SC 210 (B) and AIR 1954 SC 207 (G) I am unable to follow the decisions of the Rajasthan High Court and the Travancore-Cochin High Court referred to above.

(10) The test is whether the Board of Revenue to whom the writ is sought to be issued is amenable to the jurisdiction of this Court, either by residence or location within its territories. Judged by this test it must necessarily be held that this Court has no jurisdiction to issue a writ against the Board of Revenue which is situated at Madras.

(11) I find it difficult to appreciate the distinction between a reversing order and a confirming order of an appellate authority, so far as the exercise of jurisdiction under Art. 226 is concerned. In my opinion, once there is an appeal to the Board of Revenue the final order is that of the Board of Revenue because the appeal destroys the finality of the order of the District Collector. It is a well-settled principle of law that an appeal destroys the finality of the decision and the judgment of the lower Court is superseded by the judgment of the Court of appeal. This is so in all cases where an order is reversed, modified or affirmed on appeal. If so, the order sought to be quashed must be deemed to be that of the Board of Revenue, which is situated outside the territorial jurisdiction of this Court, and when a writ is sought to be issued, it makes no difference whether the order of the Board of Revenue is merely an affirming one or an order of reversal.

In both cases the Order of the Board of Revenue is the order sought to be quashed, and it must follow that this writ is not maintainable in this Court. In fact, I asked the learned counsel for the petitioner whether he would be willing to confine his relief in the writ petition against the District Collector alone and whether he was prepared to say that he is not asking for any relief against the Board of Revenue. The petitioner's learned counsel is not willing to do so. I have, therefore, reached the conclusion that so long as the petitioner seeks relief in a petition under Art. 226 against the Board of Revenue, which is outside the territorial jurisdiction of this Court, it must be held that the petition is not maintainable.

(12) Any other view would also lead to this anomaly namely, that this High Court may issue a Writ against the District Collector, who is subordinate to the Board of Revenue. Whereas, the Madras High Court may issue a Writ against the Board of Revenue, and this, as has been pointed out by the learned Chief Judge in 'Vankayala Janaiah v. Board of Revenue (Andhra) (A)' may result in conflicting orders and jurisdiction.

(13) I must, therefore, hold that this petition in so far as it is directed against the Board of Revenue, Andhra, at Madras does not lie, and cannot be entertained in this Court.

V.S.B. Order accordingly.

(S) **AIR 1955 ANDHRA 180 (V 42 C 65 Sept.)**

SATYANARAYANA RAJU J. (8-2-1955)

Chenchurama Naidu, Petitioner v. Chief Electoral Officer, Andhra State and another, Respondents.

Writ Petn. No. 698 of 1954.

Constitution of India, Arts. 226 and 329 — Power to entertain writ having effect of interfering with electoral process.

Article 329 provides a complete bar to the High Court entertaining any writ which has the effect of interfering with any part of the electoral process. There can be no doubt that the issue of a writ of mandamus would have the consequence of interfering with the election while it is in progress. Part XV of the Constitution of India is headed "Elections" and Articles 324 to 329 of that part form a separate code by themselves. They create rights and provide for their enforcement through a special tribunal to the exclusion of all Court including the High Court. The words "notwithstanding anything in this Constitution" exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress. AIR 1952 SC 64, Foll. (Para 9)

Anno: Const. of India, Art. 226 N. 39 Pt. 1 N. 132.

CASE REFERRED: Paras

(A) (V39) AIR 1952 SC 64: 1952-1 Mad LJ 775 (SC) 7, 9

P. Babulu Reddy and G. Venkiah Naidu, for Petitioner; Advocate General (D. Narasaraju) and Addl. Govt. Pleader (M. Seshachalapati), for Respondents.

ORDER: This is a petition under Art. 226 of the Constitution for issuing a writ in the naure of Mandamus, directing the respondents to prepare the electoral roll in the Kondapi Constituency consisting of the three entire revenue firkas of Singarayakonda, Kondapi and Gudlur as notified in the final order in the India Gazette Extraordinary, or for issuing any other suitable writ or direction in the circumstances of the case.

(2) The petitioner was a Member of the Andhra State Assembly from the Kandukur constituency. The Andhra Legislative Assembly was dissolved and a fresh notification was issued on 20-12-1954, calling for nominations to be filed on or before 3-1-1955.

(3) In the last general elections conducted in 1952, Kandukur Taluk as a whole was part of a double-member constituency having one reserved seat and one general seat. In 1952, the Delimitation Commission Act was passed, and in pursuance of the said Act, a Delimitation Commission was appointed. It made enquiries with a view to the delimitation of constituencies in the Andhra State. With respect to the Nellore District, the Delimitation Commission published its recommendations as required under S. 8(3)(a) of the Delimitation Com-

mission Act on 26-4-1954, and gave time till 17-5-1954 for preferring objections. As per the proposal of the Delimitation Commission, Kandukur and Kondapi and it was provided that the Kandukur constituency should consist of Kandukur, Ponnalur and Chundi firkas, and that the Kondapi constituency should consist of Kondapi, Singarayakonda and Gudlur firkas. It is stated by the Chief Electoral Officer, Andhra, that no objections were filed on or before the date fixed for preferring the objections, that is, 17-5-1954, for the above proposals. On the basis of the proposal of the Delimitation Commission, final Order No. 19 was published in the Gazette of India on 4-10-1954.

(4) According to the petitioner, in the electoral roll finally published, a portion of the Kondapi constituency has been taken away and added to the Kandukur constituency. He submits that 23 villages from Gudlur out of 40 villages have been omitted and 9 villages out of 44 villages have been taken away from Kondapi revenue firka and these villages have been added to the Kandukur constituency. The petitioner states that the population of the 32 villages taken out from the Kondapi constituency will be about 25,000 and the number of voters will be about 12,000. According to him they have been illegally disabled from voting in the Kondapi constituency. He has filed the petition for the issue of a writ in the nature of Mandamus directing respondent 1 to prepare the final electoral roll in Kondapi constituency consisting of the entire revenue firkas of Singarayakonda, Kondapi and Gudlur.

(5) The learned Advocate General appearing for the respondents, who are the Chief Electoral Officer, Andhra State, and the Returning Officer for Kondapi Constituency, Kandukur, contends that the writ petition is not maintainable by reason of the bar contained in Art. 329 of the Constitution of India.

(6) Article 329 of the Constitution of India runs thus :

"Notwithstanding anything in this Constitution—

(a) the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such Constituencies made or purporting to be made under Art. 327 or Art. 328, shall not be called in question in any Court;

(b) No election to either house of Parliament or in the House of either House of Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

(7) In — 'Ponnuswami v. Returning Officer, Namakkal Constituency', AIR 1952 SC 64 (A), the Supreme Court of India held that the words "notwithstanding anything in this Constitution" in Art. 329 give to that Article the same wide and binding effect as a statute passed by a sovereign Legislature like the English Parliament and that Art. 329 covers all "electoral matters". In summing up their conclusion, their Lordships of the Supreme Court stated thus:

"(1) Having regard to the important functions which the Legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress."

(8) It is common ground that the constituency in question has been called upon to elect a member and, in pursuance of the notification published in that behalf, nominations have been filed and the list of valid nominations have been finally published. The election has been fixed for 24-2-1955.

(9) The question for consideration is whether the Court has jurisdiction to issue a writ of the nature prayed for. Following the decision of the Supreme Court, in — 'Ponnuswamy v. Returning Officer, Namakka Constituency (A)', I hold that Art. 329 provides a complete bar to the High Court entertaining any writ which has the effect of interfering with any part of the electoral process. There can be no doubt that the issue of a writ of mandamus as prayed for in this petition would have the consequence of interfering with the election while it is in progress. Part XV of the Constitution of India is headed "Elections" and Arts. 324 to 329 of that part form a separate code by themselves. They create rights and provide for their enforcement through a special tribunal to the exclusion of all courts, including the High Court. The words "Notwithstanding anything in this Constitution" exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress. If so much is conceded the conclusion is inevitable that this writ petition cannot be maintained. In the view I have taken I am not expressing any opinion about the merits of the contention of the petitioner.

(10) Upholding the preliminary objection of the learned Advocate General, I hold that the writ petition must fail. It is, therefore, dismissed with costs. Advocate's fee Rs. 150/-.

V.R.B. Petition dismissed.

(S) AIR 1955 ANDHRA 181 (V 42 C 66 Sept.)

CHANDRA REDDY J. (15-11--1954)

V. Nagabhushanam and others, Petitioners v. V. Nagendramma, Respondent-Complainant.

Criminal Revn. Case No. 614 of 1954 and Criminal Revn. Petn. No. 571 of 1954, from order of Addl. S. J., Guntur, Division, D/- 6-3-1954.

(a) Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 4(1), Proviso — Validity — Not repugnant with S. 494, I. P. C. — (Penal Code (1860), S. 494) — (Constitution of India, Art. 254(1)).

The Proviso to S. 4(1) of the Madras Act is evidently based on the provisions of S. 57 of the Indian Divorce Act. It was competent for the local Legislature to enact the proviso. There is no inconsistency between the proviso and S. 494, I. P. C. and hence it is not void under Art. 254(1) of the Constitution. (Para 15)

(b) Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 4(3) and 4(4) — Distinction.

Sub-section (3) applies only to a case of a guardian who permits such a void marriage to take place with the knowledge of the existence of the first marriage or who fails to take steps or who neglects to take steps to prevent such a marriage. It only applies to a person who does not take an active part in the solemnization of such a marriage and a case of the second category is provided for in sub-s. (4). Where therefore the prosecution case is that the accused took an active part in the performance of the second marriage he is rightly convicted under S. 4(4). (Para 18)

CASES REFERRED: Paras

(A) (V3) AIR 1916 Mad 847(2): 38 Mad 452 16
(B) ('12) 34 All 203: 13 Ind Cas 958 16

T. V. Sarma, for Petitioner; Public Prosecutor, for the State.

ORDER: The two petitioners have been convicted, the first under S. 494, Penal Code, and the second under S. 4(4) of the Madras Act (6 of 1949) and sentenced to rigorous imprisonment of 6 months and to a fine of Rs. 200/- with a default rigorous imprisonment of six weeks respectively.

(2) A complaint was filed by the wife of the 1st accused that during the subsistence of her marriage with him he had taken a second wife, the daughter of the 3rd accused. The 2nd wife was impleaded as the 2nd accused. The charge against the 1st and 2nd accused was one under S. 494, Penal Code, while that against the 3rd accused, that is, the 2nd petitioner, was one under S. 4(4) of Madras Act (6 of 1949).

(3) The defence of the accused was that the 2nd marriage had not taken place as alleged by the prosecution and that, in any event, as the marriage with the complainant was dissolved, the 1st accused was competent to marry a second time and therefore no offence was committed by any of the accused. A plea was put forward on behalf of the second accused that she, being a minor, could not be held to be guilty of the offence with which she was charged.

(4) The trial Court acquitted the second accused finding that she was a minor. With regard to the celebration of the second marriage, the Magistrate found that the prosecution had established it beyond reasonable doubt. He also found that there was really no divorce between the complainant and the 1st accused as pleaded by the accused. In the result, he convicted the two petitioners for the offences mentioned above. This was confirmed in appeal by the Additional Sessions Judge, Guntur.

(5) In this revision case against the judgment of the lower appellate court, Mr. Sarma attacks the findings of the court below regarding the divorce. not questioning the finding with regard to the factum of the second marriage. In addition he raised a constitutional point that the proviso to S. 4(1) of the Madras Hindu (Bigamy Prevention and Divorce) Act is repugnant to the provisions of S. 494, Penal Code and by virtue of Art. 254(1) of the Constitution, the law enacted in S. 494, Penal Code shall prevail and to that extent the law made by the local Legislature would become void.

(6) Art. 254(1) of the Constitution of India, enacts thus :

"If any provision of the law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of the existing law with respect to one of the matters enumerated in the Concurrent list, then, subject to the provisions of cl. (2) the law made by Parliament whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."

(7) According to Mr. Sarma, the repugnance between S. 494, Penal Code, and the proviso to S. 4(1) of the Madras Hindu (Bigamy Prevention and Divorce) Act consists in this: while the exception to S. 494, Penal Code permits a person accused of the offence under that section to plead in defence that the first marriage had been declared by a court of competent jurisdiction void the proviso to S. 4(1) of the Madras Hindu (Bigamy Prevention and Divorce) Act requires six months to lapse between the actual divorce or the order of the Court as the case may be and the second marriage, to make the second marriage valid. In other words, the divorce would become effective only if the period mentioned in the proviso had lapsed.

(8) I will deal with this point first.

(9) To appreciate these contentions it is necessary to set out the relevant provisions of both the enactments. Section 4(1) of the Madras Hindu (Bigamy Prevention and Divorce) Act enacts as follows :

"4(1) Notwithstanding any rule of law, custom or usage to the contrary, any marriage solemnised after the commencement of this Act between a man and a woman either of whom has a spouse living at the time of such solemnisation shall be void, whether the marriage is solemnised within or outside the State of Madras:

Provided that a man or woman whose marriage has been dissolved by a final order of a court of competent jurisdiction under S. 5 or under any other law for the time being in force, or in accordance with any custom or usage permitting of divorce, may solemnise a valid marriage with another, after the expiry of six months from the date of such final order or from the date on which the marriage was dissolved in accordance with such custom or usage, as the case may be.

Explanation : An order shall be deemed to be a final order within the meaning of the above

proviso, if no appeal lies against such order or if the time allowed for the filing of an appeal against such order has expired without an appeal having been filed."

(10) Section 494, Penal Code runs thus:

"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception: This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts as far as the same are within his or her knowledge."

(11) It is seen from the Exception to S. 494, Penal Code, that an exception is made in the case of a person whose first marriage is declared void by a Court of competent jurisdiction. The proviso to S. 4(1) says that before the second marriage could be solemnized six months should expire from the date of the order of Court or the date of dissolution of marriage in accordance with such custom or usage. This proviso contemplates a marriage being dissolved either by an order of Court or in accordance with custom or usage and the six months' period fixed in this proviso governs both types of divorces. The question for consideration is whether really there is any repugnancy between this proviso and the terms of the Exception to S. 494, Penal Code.

(12) At the outset it has to be mentioned that Exception to S. 494, Penal Code, merely speaks of a Court declaring the first marriage void. The machinery for doing it is not provided for in that section and this has to be looked for elsewhere. That provision is contained in S. 57 of Act (4 of 1869) entitled the Indian Divorce Act. Section 57 provides as follows:

"When six months after the date of an order of a High Court confirming the decree for dissolution of marriage made by a District Judge have expired, or when six months after the date of any decree of a High Court dissolving a marriage have expired and no appeal has been presented against such decree to the High Court in its appellate jurisdiction, or when any such appeal has been dismissed or when in the result of any such appeal any marriage is declared to be dissolved:

But not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death:

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree."

(13) When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death.

(14) According to this section the first marriage becomes null and void only after the expiry of six months from the date of the decree of the Court. This section confers a liberty upon a spouse to marry again only if the requirements thereof are satisfied. Before the expiry of the six months the first marriage shall be deemed to be in force and it is therefore not competent for either of the spouses to contract a second marriage during that period and if a second marriage is contracted, it is void. It follows that the benefit of the Exception to S. 494, Penal Code, could be availed of only when the first marriage is declared void as stated above.

(15) So, 'de hors', the proviso to S. 4(1) of the Madras Hindu Bigamy Prevention and Divorce) Act, if a person, be it a husband or a wife, contracts a second marriage before the expiry of six months of decree 'nisi' (if the divorce is effected by virtue of an order of Court) or from the date of actual divorce if it is in accordance with custom or usage such a marriage is rendered void by reason of S. 57, Divorce Act. So there is nothing new in the impugned section. The proviso is evidently based on the provisions of S. 57, Indian Divorce Act. It was competent for the local Legislature to enact this proviso and really there is no inconsistency between this proviso and S. 494, Penal Code. Provisions analogous to S. 4 are contained in S. 5 of the Parsi Marriage and Divorce Act and S. 15 of the Special Marriage Act.

(16) In — 'J. S. Battle v. G. G. Brown', AIR 1916 Mad 847 (2) (A), it was laid down that the second marriage, solemnized before the expiry of six months from the date of the decree 'nisi' was issued was void as S. 57, Indian Divorce Act does not completely dissolve the tie of the marriage until the lapse of six months. This view was shared by the Allahabad High Court in — 'Jackson v. Jackson', 34 All 203 (A). In the present case admittedly the second marriage took place within six months of the decree. This argument based on the terms of Exception to S. 494 is therefore repelled.

(17) It follows that a second marriage solemnized within six months from the date of the alleged divorce is void and the contracting parties to such a marriage are guilty of an offence under S. 494, Penal Code. That apart, in this case the finding of the Courts below is that there was in reality no divorce at all. As pointed out by the Additional Sessions Judge, the effect of the evidence adduced by the accused was only a divorce was permissible under the custom of the community and to which the parties belong and not that there was in fact a divorce. That is not the same thing as saying that there was in fact a divorce. So even if the whole evidence for the defence was accepted, it did not establish the factum of divorce. Consequently, the finding of the Courts below has to be

accepted and the plea of the accused that there was a divorce rejected even on that basis.

(18) It was lastly argued that the second petitioner ought to have been convicted under sub-section (3) of S. 4 and not under sub-section (4). First I fail to see what difference it makes for the second petitioner whether he is convicted under S 4(3) or 4(4). Besides, there is no force in this contention. Sub-section (3) applies only to a case of a guardian who permits such a void marriage to take place with the knowledge of the existence of the first marriage or who fails to take steps or who neglects to take steps to prevent such a marriage. It is seen that it only applies to a person who does not take an active part in the solemnization of such a marriage and a case of the second category is provided for in sub-s. (4). In the present case, the prosecution case is that the second petitioner took an active part in the performance of the second marriage. He was therefore rightly convicted under S. 4(4) of the Madras Hindu (Bigamy Prevention and Divorce) Act. It follows that the petitioners were rightly convicted.

(19) The Revision Case is therefore dismissed.

D.R.R. Revision dismissed.

(S) AIR 1955 ANDHRA 184 (V 42 C 67 Sept.)

SATYANARAYANA RAJU J. (10-2-1955)

V. Harihara Prasad, Petitioner v. K. Jagannadham and another, Respondents.

Writ Petn. No. 656 of 1953.

(a) Land Acquisition Act (1894), S. 6 — Scope — Acquisition for company for public purpose — Validity.

The use of the words 'public purpose' and 'a company' in the disjunctive in S. 6 does not exclude and is not inconsistent with the view that the purpose, even in the case of acquisitions for a company should be a public purpose. (Para 10)

Therefore, where the notification and the declaration stated that the lands were acquired for a public purpose, to wit, for the construction of temples on behalf of a limited company, the acquisition was not bad. AIR 1954 Mad 481 — 30 Cal 36, Rel. on. (Para 9)

Anno: A. M. Land Acqui. Act, S. 6 N. 1.

(b) Land Acquisition Act (1894), S. 6, Proviso — Acquisition for company for public purpose — Compensation need not be paid out of public revenue.

Where the acquisition is made for the purpose of a company it is not necessary that the compensation should be met wholly or partly out of public revenues. (Para 13)

Anno: A. M. Land Acqui. Act, S. 6 N. 1.

(c) Land Acquisition Act (1894), S. 6 — 'Public purpose', meaning of — (Words and Phrases — 'Public Purpose').

The expression 'public purpose' has not been defined in the Land Acquisition Act. But it has not a rigid meaning. It is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs. Thus, where the members of the community are to be benefited by the construction of the temples, the acquisition for the purpose of construction of the temples must be held to be a public purpose. AIR 1952 SC 252, Relied on; Case law reviewed. (Paras 14, 17, 22)

Anno: A. M. Land Acqui. Act, S. 6 N. 5.

(d) Land Acquisition Act (1894), Ss. 48(1), 4, 5A — Withdrawal of proceedings — Effect — Power to restart proceedings.

The mere withdrawal under S. 48(1) of an earlier notification issued under S. 4 does not amount to a decision on objections raised under S. 5A in favour of the applicant whose land is sought to be acquired. The Government is entitled to reconsider its previous decision withdrawing the earlier notification under S. 4 and restart acquisition proceedings with respect to the same land in view of the different considerations prevailing at the time. The fact that the Government had made certain suggestions does not show want of any bona fides on the part of the Government; nor the fact that the Government decided after considering the objections of the petitioner to acquire the land at a subsequent stage denotes any mala fides. AIR 1953 All 182, Relied on. (Paras 23, 24)

Anno: A. M. Land Acqui. Act, S. 48 N. 1; S. 4 N. 1; S. 5a N. 1.

(e) Land Acquisition Act (1894), Ss. 17(4), 5A — Urgency whether exists or not — Matter for determination of Government, not of court.

In cases of urgency what all is required is that the Government must be satisfied that there is such urgency as is contemplated by S. 17(4); if they are so satisfied they are entitled to pass an order under S. 17(4) suspending the application of S. 5A. Whether an urgency exists or not is a matter solely for the determination of the Government and it is not a matter for judicial review: AIR 1954 Mad 481, Relied on. (Para 26)

Anno: A. M. Land Acqui. Act, S. 5A N. 1.

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 481: 1953-2 Mad LJ 684 — 9, 26
(B) ('03) 30 Cal 36: 7 Cal WN 249 — 10
(C) (V1) AIR 1914 PC 20: 39 Bom 279 (PC) — 14
(D) (V9) AIR 1922 PC 333: 49 Cal 838 (PC) — 14
(E) (V40) AIR 1953 All 182: ILR (1954) 1 All 61 — 15, 23
(F) (V40) AIR 1953 Mad 537: 1953-I Mad LJ 262 — 16
(G) (V39) AIR 1952 SC 252: 1952 SCJ 354 (SC) — 17
(H) (1905) 49 Law Ed 1085: 198 US 361 — 18

V. Vedanthachary and K. Ramachandra Rao and T. Rangaswamy Iyengar, for Petitioner; N. Rajeswara Rao and Govt. Pleader, for Respondents (Nos. 1 and 2 respectively).

ORDER: This is a petition under Art. 226 of the Constitution for the issue of a Writ of Prohibition

or other appropriate Writ prohibiting respondent 2 (The State of Andhra, represented by the Collector, Guntur District) from acquiring and taking possession of the lands belonging to the petitioner or in the alternative for the issue of a Writ of Certiorari, calling for the records relating to the acquisition of the said lands by respondent 2 and quashing the proceedings therein.

(2) The petitioner is the hereditary trustee of Sri Bhavanarayana Swami temple, Ponnur village in the Guntur District. Respondent 1 is one Kota Jagannadham. Respondent 2 is the State represented by the Collector of the Guntur District.

(3) The facts which give rise to this Writ petition may be stated: Sri Bhavanarayanaswamy temple, of which the petitioner is the trustee, owns various lands in and around Ponnur. About 10 years ago, respondent 1 started building a temple in the same village by the name of Sri Sahasralingeswaraswami temple. He raised money mostly by donations and subscriptions for the construction of the temple. In or about the year 1947, he (respondent 1) wished to acquire Ac. 3-18 cents of land belonging to Sri Bhavanarayanaswamy temple and for that purpose made a proposal to the petitioner offering to give in exchange wet lands of double the extent in the neighbouring village of Patchalatadiparru and this proposal was agreed to by the petitioner subject to the sanction of the Hindu Religious Endowments Board.

The proposal was not however accepted by the Hindu Religious Endowments Board, whereupon respondent 1 on behalf of the Sahasralingeswaraswami Sangham, applied to the Government for acquisition of the lands by private negotiation for the temple. He was informed by the Government that the acquisition of land on behalf of private individuals was not provided for under the Land Acquisition Act. He was further informed on 21-1-1949 that the land could not be acquired as the Sangham was not a registered body and as it did not come within the definition of 'Company' in S. 3(e), Land Acquisition Act. The Sangham thereupon got itself registered under the Indian Companies Act and then applied for the acquisition of the lands required for the construction of the temple. The petitioner objected to the acquisition stating that the lands were very valuable. On a consideration of the objections so raised, the Government finally approved the draft notifications and the draft declaration and also directed that the articles in the Memorandum of the Association of the Sangham be suitably amended to make the temple, proposed to be constructed accessible to the Hindu public without distinction of caste or community.

(4) On 3-2-1953, in G. O. Ms. No. 169 (Rural Welfare Department) the following Notification was published:

"Whereas it appears to the Government of Madras that the land specified below is needed for a public purpose, to wit, for the construction of temples on behalf of Sri Sahasralingeswaraswami Seva Sangham, Limited, Ponnur, notice to the effect is hereby given to all whom it may concern in accordance with the provisions of S. 4(1), Land Acquisition Act 1 of 1894, as amended by the Land Acquisition (Amendment) Act of 1923; and the Government of Madras hereby authorises the Sub-Collector, Guntur, his staff and workmen to exercise the powers conferred by S. 4(2) of the Act. Under sub-s. (4) of S. 17 of the Act, the Governor of Madras directs that, in view of the urgency of the case, the provisions of S. 5A of the Act shall not apply to the acquisition of the arable land specified below:

Guntur District, Bapatla Taluk, Ponnur village.
(The extent given is approximate)

Unregistered religious service Inam, dry, S. No. 228, belonging to trustee of Sree Bhavanarayanaswamy Temple, Ponnur — 3.11 acres.

Unenfranchised religious service Inam, dry, S. No. 386-22 belonging to same as in S. No. 228 — 0.07 acres. Total 3.18 acres."

(5) On 3-2-1953 the following Declaration under S. 6 was also published:

"Under S. 6, Land Acquisition Act, the Governor of Madras hereby declares that the lands specified below and measuring 3.18 acres, be the same a little more or less, is needed for a public purpose, to wit, for construction of temples; and under Ss. 3 and 7 of the same Act, the Sub-Collector, Ongole, is appointed to perform the functions of a Collector under the Act and directed to take order for the acquisition of the said lands. Under sub-s. (1) of S. 17 of the Act, the Governor of Madras further directs that the possession of the said lands may be taken on the expiry of 15 days from the date of the publication of the notice mentioned in S. 9(1) of the Act. A plan of the lands is kept in the office of the Sub-Collector, Ongole, and may be inspected at any time during office hours."

Guntur District, Bapatla Taluk, Ponnur village. Unenfranchised religious service inam, dry, S. No. 228 belonging to the trustee of Sree Bhavanarayanaswamy temple, Ponnur, for the time being 3.11 acres.

Unenfranchised religious service inam, dry S. No. 388-22 belonging to the same as in S. No. 228 — 0.07. Total 3.18 acres."

(6) The petitioner's case is that the acquisition is not valid as it is not for a public purpose, that the emergency provisions of the Act, even as amended by Madras Act 21 of 1948, can have no application to this case and that by reason of the said acquisition the Government have invaded or threatened to invade the fundamental rights of the petitioner under Art. 19(1)(f) read with Art. 31 of the Constitution and that the proceedings of the Government are mala fide, unjustifiable and erroneous on the face of the record.

(7) The Collector of Guntur stated in his counter-affidavit that the lands in dispute are not being used for any act of worship or ceremonies connected with the Bhavanarayanaswami temple; that the purpose of the acquisition is for the construction of a temple which is intended to serve the worshipping public; that the acquisition was sanctioned by the Government after duly considering all the objections of the petitioner and that the acquisition proceedings are just, bona fide and in accordance with law.

(8) Mr. Vedanthachari, the learned Counsel for the petitioner, has contended that the acquisition is bad because it purports to be for a public purpose

and not for the purposes of a Company; that in so far as the Notification purports to be for a public purpose, the proviso to S. 6(1), Land Acquisition Act must be satisfied by the payment of the whole or part of the compensation from out of the public revenues or some fund controlled or managed by a local authority; that the purpose for which the lands are sought to be acquired is not a public purpose; that the action of the Government in notifying the land for acquisition is not a bona fide exercise of power because what could not be done directly is sought to be done indirectly for the benefit of respondent 1 and that the urgency provisions of the Land Acquisition Act are not intended to meet a case like this and for that reason also the acquisition is bad.

(9) The notification states that the land specified is needed for a public purpose, to wit, for the construction of temples on behalf of Sahasralingeswaraswami Seva Sangham Limited, Ponnur. The declaration under S. 6 also states that the lands specified are needed for a public purpose, to wit, for construction of temples. The contention is that the acquisition 'ex facie' purports to be for a public purpose and not for the purpose of a company and that therefore the acquisition must be held to be bad. The notification and the declaration state that the lands are acquired for a public purpose, to wit, for the construction of temples. The argument of the learned Counsel is best answered by a decision of the Madras High Court in — 'Natesa Asari v. State of Madras', AIR 1954 Mad 481 (A) where Rajamannar C. J. and Venkatarama Iyer J. held that where there is a public purpose, the powers of the Government to acquire land are not excluded because the acquisition is for the benefit of a company. The learned Judges, considering a similar argument, observed that:

> "In fact, we are unable to see any antithesis in two such dissimilar things as 'public purpose' and 'company'. In our judgment, the proper construction to be put upon this section is whenever there is a public purpose an acquisition can be made by the Government whether it is for a company or not. But in case of a company where the acquisition is sought to be made for one of the purposes mentioned in S. 40 that could validly be done without reference to the question whether it is a public purpose or not. In that view, we do not find that there is any prohibition in the Act against the Government acquiring lands for a company when there is a public purpose and following the procedure prescribed in Ss. 6 to 37."

(10) A similar argument was advanced in — 'Ezra v. Secretary of State', 30 Cal 36 (B) and it was rejected as fallacious. The use of the words 'public purpose' and 'a company' in the disjunctive in S. 6, Land Acquisition Act does not exclude and is not inconsistent with the view that the purpose, even in the case of acquisitions for a company should be a public purpose.

(11) The next contention is that in so far as the notification purports to be for a public purpose, the proviso to S. 6(1) must be satisfied by the payment of the whole or part of the compensation from out of the public revenues. It is a fact that no part of the compensation has been paid out of public revenues.

(12) Section 6(1), Land Acquisition Act runs as follows :

> "(6)(1). Subject to the provisions of Part 7 of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under S. 5A, sub-s. (2) that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a Secretary, to such Government or some officer duly authorised to certify its order:
>
> "Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority."

(13) As I read the section and the proviso it is clear to me that if the acquisition is made for the purpose of a company it is not necessary that the compensation should be met wholly or partly out of public revenues. A plain reading of the proviso makes this position clear.

(14) The question then is whether the acquisition is for a public purpose. The expression 'public purpose' has not been defined in the Land Acquisition Act but the expression has been construed in several decided cases. In — 'Hamabai Framjee v. Secretary of State', AIR 1914 PC 20 (C) the learned Judges held that the expression 'public purpose' "Whatever else it may mean, must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned." In — 'Amulya Chandra v. Corporation of Calcutta', AIR 1922 PC 333 (D) the question arose as to whether the acquisition of land for the purpose of erecting, at the expense of a private benefactor, a dharmashala for the use of the numerous worshippers resorting at certain seasons of the year to a Hindu temple, was a public purpose. Their Lordships of the Privy Council held that the construction and maintenance of a dharmashala is one which is likely to promote the public health, safety or convenience of the public and that being so, the acquisition cannot be impeached.

(15) In — 'Brij Nath Sarin v. Uttar Pradesh Government', AIR 1953 All 182 (E) Agarwala and Chaturvedi JJ., had to consider whether the acquisition of land for building a public library was an acquisition for a public purpose and the learned Judges held that it was so.

(16) The decision in — 'Gundachar v. State of Madras', AIR 1953 Mad 537 (F) is very instructive. The learned Judges held that the expression 'public purpose' is not capable of precise definition and has not a rigid meaning. In a very exhaustive judgment the learned Judges held that an acquisition for carrying out any part of an irrigation scheme would certainly be acquisition for a public purpose which was also a State purpose.

(17) In — 'State of Bihar v. Kameshwar Singh', AIR 1952 SC 252 (G) Mahajan J. (as he then was) pointed out that the expression is not capable of a precise definition and has not a rigid meaning, that

the definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs.

(18) The following passage from the decision in — 'Clark v. Nash', (1905) 49 Law Ed 1085 (H) which is a decision of the Supreme Court of the United States, is apposite:

"..... that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State."

(19) The following passage from 'Nichols on Eminent Domain' is also useful:

"It is a public use for which property may be taken by eminent domain."

(1) To enable the United States or a State or one of its sub-divisions or agencies to carry on its Governmental functions, and to preserve the safety, health and comfort of the public, whether or not the individual members of the public may make use of the property so taken provided the taking is made by a public body;

(2) To serve the public with some necessity or convenience of life which is required by the public as such and which cannot be readily furnished without the aid of some Governmental power, whether or not the taking is made by a public body, provided the public may enjoy such service as of right;

(3) In certain special and peculiar cases sanctioned by ancient customs or justified by the requirements of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner in which it could not otherwise be done, if their success will indirectly enhance the public welfare, even if the taking is made by a private individual and the public has no right to service from him or enjoyment of the property taken."

(20) In Rottschaefer on Constitutional Law the effect of the decisions on this aspect of the law is summarised as follows:

"It is frequently sufficient if the use to which the private condemnor is to put the property is one of widespread general public benefit not involving any right on the part of the general public itself to use the property. The adoption of this general test has expanded the scope of valid public uses to include uses by private parties in purely private activities. The public benefit that has been relied upon to sustain such exercises of the power of eminent domain has usually consisted in that derived from the development of a State's important natural resources rendered possible by such exercises of that power. It is on that basis that one private person has been permitted to condemn land for the purpose of conveying water in ditches across that land in order to properly irrigate his own, and to condemn a right of way across another's land for a aerial bucket line necessary for the working of the condemnor's mine. The same considerations are frequently invoked in sustaining the condemnation of property required by drainage or irrigation districts for the accomplishment of their objectives and the condemnation of land and water rights to be used for developing power for general public distribution."

(21) With this exposition of law by decided cases, it will be convenient to examine the purpose for which the acquisition is being made in this case. Article 42 of the Articles of the Association of the Company as amended by a Special Resolution passed on 29-7-1950 runs as follows:

"The temples are private temples belonging to the Sangham and they are open to the members of all the communities".

(22) One of the resolutions which has been passed by the Sangham is that the temples are open to all members of the Hindu community without distinction of caste. The temples are being constructed with public funds. The stated purpose of the construction of the temples is to make them available to the members of all communities without any distinction of caste. The temples are therefore intended to serve all the members of the community by giving them opportunities of worshipping the deity to be installed therein. The members of the community will therefore be benefited by the construction of the temples, and judged by any test, the acquisition for the purpose of construction of the temples must be held to be a public purpose. I have no doubt that the purpose is a public purpose.

(23) One other contention of the learned counsel for the petitioner which requires notice is that the Government having once declined to initiate the acquisition proceedings, it is not open to them to start the acquisition proceedings at a later stage. This argument of the learned counsel is best answered by a judgment of the Allahabad High Court in AIR 1953 All 182 (E), where the learned Judges stated that the "mere withdrawal under S. 48(1) of an earlier notification issued under S. 4 does not amount to a decision on objections raised under S. 5-A in favour of the applicant whose land is sought to be acquired", and that the Government is entitled to reconsider its previous decision withdrawing the earlier notification under S. 4 and restart acquisition proceedings with respect to the same land in view of the different considerations prevailing at the time.

(24) Mr. Vedanthachari has endeavoured to use this fact of the Government's decision not to initiate acquisition proceedings at an earlier stage and their decision to acquire the land subsequently as proof of lack of bona fides on the part of the Government. The Government have pointed out at an earlier stage to the respondent that the acquisition could not be at the instance of a private individual and have made certain suggestions to respondent 1. The fact that the Government have made these suggestions does not show want of any bona fides on their part nor the fact that the Government have decided after considering the objections of the petitioner to acquire the land at a subsequent stage denotes any mala fides. On this part of the case Mr. Vedanthachari's argument is that what has been attempted is to seek to do indirectly what could not be done directly. I have set out the various stages at which the Government at first declined to make the acquisition proceedings and subsequently decided to acquire the property. The charge of want of bona fides is to my mind wholly un-

proved in this case and there is no basis at all for the same. I am satisfied that the Government in acquiring the property were not actuated by considerations other than those which are strictly germane to the public use, which these properties will be put to.

What is more important in this case is that the petitioner himself was willing to give this property in exchange for other properties and this is, in fact, common ground. The proposal could not be put through because the Hindu Religious Endowments Board refused to give its sanction to the acceptance of this proposal for some reason or other. The promoters of the Sangham have been pressing upon the Government the need for acquiring the property for the purposes of the construction of the temple. The Government have been satisfied that the interests of the public will be served by their acquiring this property for the purpose of the construction of the temple. I am not prepared to hold that there is any want of bona fides on the part of the Government.

(25) One other argument which has been advanced by the learned counsel for the petitioner is that the urgency provisions are not intended to meet a case like the instant one and on that ground also the acquisition must be held to be bad. Section 17 (4) of the Land Acquisition Act, which is material, runs as follows:

"In the case of any land to which, in the opinion of the appropriate Government the provisions of sub-s. (1) or sub-s. (2) are applicable, the appropriate Government may direct that the provisions of S. 5-A shall not apply, and if it does so direct, a declaration may be made under S. 6 in respect of the land at any time after the publication of the Notification under S. 4, sub-s. (1)."

(26) What all is required is that the Government must be satisfied that there is such urgency as is contemplated by S. 17(4); if they are so satisfied they are entitled to pass an order under S. 17(4) suspending the application of S. 5-A. Whether an urgency exists or not is a matter solely for the determination of the Government and it is not a matter for judicial review. This is the view which has been taken by a Bench of the Madras High Court consisting of Rajamannar C. J., and Venkatarama Ayyar J., in AIR 1954 Mad 481 (A) and I am in respectful agreement with this view. This disposes of all the points raised by the learned counsel for the petitioner.

(27) I am satisfied that this is not a case which merits interference under Art. 226 of the Constitution. This Writ Petition must, therefore, fail and it is dismissed with costs of the respondents. Advocates' fee Rs. 200/-.

H.G.P. Petition dismissed.

(S) AIR 1955 ANDHRA 188 (V 42 C 68 Sept.)

CHANDRA REDDY J. (23-12-1954)

K. Lakshmikantayya and another, Appellants v. M. Nagayya (died) and others, Respondents.

Second Appeal No. 588 of 1950, against decree of Sub. J., Guntur in A. S. No. 100 of 1948.

(a) **Specific Relief Act (1877), S. 14 — Specific relief in regard to part of contract — Law relating to.**

The law bearing on the grant of specific relief in regard to a part of the contract is enacted in Ss. 14 to 17, Specific Relief Act, which constitute a complete Code in that regard, and relief in that behalf can be granted only within the terms of these sections. (Para 6)

Anno: Sp. R. Act, S. 14 N. 1 Pt. 1.

(b) **Specific Relief Act (1877), S. 16 — Applicability — "Separate and independent footing."**

Where the land, the subject of a contract for sale, consists of several bits included in different survey and demarcation numbers, but no distinction is drawn between the plots as regards the terms of the contract or requisitions and in every respect, the plots are dealt with together as a whole, then the mere fact that the basis of the calculation of the sale price is mentioned and the lands in respect of which specific performance is claimed bear different demarcation numbers does not make the contract as two distinct and severable ones and independent of each other.

In such a case the ordinary presumption is that it is an entire contract intended to be dealt with as a whole and not piecemeal unless and until the contrary is shown. Hence, specific performance could not be decreed as to one of the plots with an abatement of price, as S. 16 is inapplicable to the case. AIR 1925 PC 45 — AIR 1938 Bom 134, Rel. on. AIR 1944 Mad 540; AIR 1954 Orissa 110, Disting. (Paras 9, 13)

Anno: Sp. R. Act, S. 16 N. 1 Pt. 1.

(c) **Specific Relief Act (1877), S. 15 — Applicability.**

Where of the total land, the subject-matter of a contract of sale between A and B, a portion X was sold in an execution of a decree against B and purchased by A who subsequently brought a suit for specific performance for the remaining portion Y and offered to pay therefore a proportionately less amount:

Held that if A wanted to exercise his option under S. 15, he must be prepared to pay the whole purchase price for getting the conveyance in respect of Y and that the payment made by A for the acquisition of X could not be treated as a payment made to B, much less in respect of that part of the contract, specific performance of which was sought in this suit. (Para 15)

Anno: Sp. R. Act, S. 15 N. 1.

CASES REFERRED	Paras
(A) (V 31) AIR 1944 Mad 540: 1944-2 Mad LJ 187	9
(B) (V 41) AIR 1954 Orissa 110: ILR (1954) Cut 1	10
(C) (V 12) AIR 1925 PC 45: 52 Cal 335 (PC)	10, 13
(D) (V 25) AIR 1938 Bom 134: 174 Ind Cas 75	13

P. V. Chelapati Rao, for Appellants; Advocate-General and N. Chandramouli, for Respondents.

JUDGMENT: The Second Appeal is brought by the defendants against the judgment of the Subordinate Judge of Guntur confirming that of the District Munsif of Guntur in O. S. No. 365 of 1946, granting specific performance of a part of suit contract.

(2) The plaint contained the following allegations: Defendant 1 entered into a contract with the plaintiff by writing dated 24-6-1943 for the sale of 4 acres 3 cents for a sum of Rs. 2,438-0-0 at the rate of Rs. 605/- per acre. On the date of the agreement, Rs. 250/- was paid by way of advance and the balance was to be paid within a year. Subsequently, defendant 1 failed to execute a sale

deed and receive the balance of consideration in spite of repeated demands, and allowed a portion of the subject-matter viz., 2 acres and 38 cents to be sold in execution of a decree obtained against him.

This property was purchased by the plaintiff in court auction for Rs. 1,000/-. Later on the plaintiff required defendant 1 to fulfil the terms of the contract in regard to the 1 acre and 65 cents left unsold, and the defendants refused to comply with this demand. It was prayed in the plaint that the defendants should be directed to execute a conveyance in respect of 1 acre 65 cents mentioned in A schedule for a price of Rs. 998-4-0.

(3) The suit was resisted by the defendants, inter alia, on the ground that the agreement relied upon was a forgery, and that the plaintiff was not entitled to "split the contract for a execution of a deed for a portion of the property for a portion of the consideration".

(4) The trial Court gave a decree as prayed for, which was confirmed in appeal by the Subordinate Judge. Both the courts took the view that the case is governed by S. 16, Specific Relief Act.

(5) In this Second Appeal by the aggrieved defendants the view of the Courts below as regards the applicability of S. 16, Specific Relief Act is canvassed. The main point for consideration, therefore, is whether the plaintiff could invoke S. 16, Specific Relief Act.

(6) The law bearing on the grant of specific relief in regard to a part of the contract is enacted in Ss. 14 to 17, Specific Relief Act, which constitute a complete code in that regard, and relief in that behalf could be granted only within the terms of these sections. Sections 14 to 17 are in the following terms:

"Section 14: Where a party to a contract is unable to perform the whole of his part of it and the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money to the deficiency."

"Section 15: Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

"Section 16: When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

"Section 17: The court shall not direct specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections".

(7) It is clear from S. 17 that there can be no specific performance of a part of the contract unless it comes under Ss. 14, 15, or 16.

(8) Section 14 is inapplicable to this case, nor has the plaintiff relied on it. As stated above, reliance was placed only on S. 16 on the ground that the contract relating to 1 acre 65 cents stands on a separate and independent footing from the other part concerning 2 acres and 38 cents purchased by him in the court auction. The applicability of S. 15 will be considered at a later stage.

(9) The lower Appellate Court based its decision, that S. 16, Specific Relief Act governs this case on a ruling of the Bench of the Madras High Court reported in "Rosi Reddi v. Krishna Reddy", AIR 1944 Mad 540 (A). I do not think that the principle of that ruling could be attracted to the instant case. In that case, in one contract, two vendors agreed to sell two distinct items of property of an equal extent, viz., 1 acre and 25 cents severally belonging to them, each for half the amount specified in the contract.

In that situation, the learned Judges held that the part of the contract in respect of which specific performance was claimed was severable and independent of the other part.

(b) But the facts of this case are altogether different. 8 acres and 3 cents were contracted to be sold for a total consideration of Rs. 2,438/- for all the lands together. No distinction was drawn between the two plots as regards the terms of the contract or requisitions. In fact the land in question consists of several bits included in different survey and demarcation numbers. In every respect, the lands were dealt with together as a whole. The mere fact that the basis of the calculation of the sale price is mentioned and the lands in respect of which specific performance is claimed bear different demarcation numbers does not, in my opinion, make the contract as two distinct and several ones and independent of each other.

(10) Reliance was placed on behalf of the respondent on — 'Radha Kamal v. Puri Municipality', AIR 1954 Orissa 110 (B). That again is inapplicable to this case. There a contract for leasing out some land belonging to the Municipality was divided into four contracts, not by unilateral action, but by consensual authority, and one lease was split up into four leases, each of them standing on a separate and independent footing from the rest.

Neither of the two cases cited for the respondent advances the case. In this connection, the remarks of the Privy Council in — 'Graham v. Krishna Chunder Dey', AIR 1925 PC 45 (C), at p. 47 are very apt.

"It may be that in the estimation of the parties at the time of the agreement one was more valuable than the other, bigha for bigha, or one was made more valuable than it would otherwise have been by the simultaneous acquisition of the other, apart from their respective areas. Nothing is stated about the quality or amenities of the land. It may be that, because both were sold together, the total price was less than the aggregate prices would have been, if both had been sold apart."

(11) In that case, two plots of land of an equal area with definite boundaries were agreed to be sold for a price of both together. The vendor failed to make out a title to one of the plots and the purchaser sued for specific performance of the other part or for damages in the alternative declining to make, under S. 15, a conveyance of one of plot only. Their Lordships of the Judicial Committee held that specific performance could not be decreed as to the other plot with an abatement of price as S. 16 was inapplicable to the case. The doctrine

of that case applies with great force to the present one.

(12) It may be that, if the contract was in respect of the suit property alone, the vendor would have demanded a higher price and this plot is of superior quality, and has better amenities than the other one sold in court auction. In fact, it is seen that the plaintiff himself bought 2 acres and 38 cents only for Rs. 1,000/-, which indicates that it was of an inferior quality. There is nothing here to indicate that the parties intended to deal with each plot separately.

(13) Mr. Chelapathi Rao for the appellant called in aid — 'Hiralal Lachmiram v. Janardan Govind', AIR 1938 Bom 134 (D). In that case A, owner of 4 plots (a) (b) (c) and (d) agreed to sell plot (d) to B for Rs. 2,000/-. The latter paid Rs. 200/- by way of advance and the contract was to be completed within about a fortnight. Later on, A agreed to sell all the plots including (d) to P for Rs. 7,000/-. In the second contract the prior one in favour of B was referred to. B filed a suit against A claiming specific performance in respect of plot (d) and P also filed a suit claiming specific performance of the agreement in his favour or for damages.

In the former suit, a consent decree was passed under which P received Rs. 1,600- and executed a sale deed of plot (d) in favour of B. P was not willing to pay the whole agreed price for plots (a), (b) and (c). The plaintiff filed a suit to enforce the contract in respect of plots (a), (b) and (c) basing it on S. 16, Specific Relief Act. It was argued on his behalf that the contract in respect of (a), (b) and (c) stood on an independent footing and that the price to be fixed in respect of this could be arrived at by deducting Rs. 2,000/- for which plot (d) was agreed to be sold.

This was repelled by the Bombay High Court following AIR 1925 PC 45 (C), and the suit was dismissed, as in the opinion of the learned Judge, that part of the contract which was sought to be enforced could not be severed from the rest of it and did not stand on an independent footing. They observed that the ordinary presumption is that it was an entire contract intended to be dealt with as a whole and not piecemeal unless and until the contrary is shown. The principle of that case applies with equal force to the present one.

(14) It follows that the plaintiff cannot rely on S. 16, Specific Relief Act.

(15) The Advocate General next invoked S. 15, Specific Relief Act in favour of the respondent, but without being willing to pay the total consideration. It was contended by him that the respondent was under no obligation to pay the whole purchase price for the reason that already a sum of Rs. 1,000/- was spent by him for acquiring Ac. 2—38 cents of land which originally belonged to the first appellant.

According to him price paid by the respondent for 2 acres 38 cents in the court auction must be deemed to have been paid to the defendant. I find it a little difficult to accede to this proposition. If this contention is to be accepted, it would amount to granting specific performance of the whole contract, treating the sale certificate granted in respect of 2 acres 38 cents as a conveyance by the vendor and the money paid by the plaintiff as a deposit on his behalf.

To such a situation S. 15 cannot apply. If the purchaser wants to exercise his option under S. 15, he must be prepared to pay the whole purchase price for getting the conveyance in respect of the remaining land. I do not think that the payment made by the plaintiff for the acquisition of this land could be treated as a payment made to the defendant, and much less in respect of that part of the contract, specific performance of which is sought in this suit.

(16) That apart, the conduct of the plaintiff throughout would negative such an assumption. The suit was for enforcement of the contract only in regard to Ac. 1—65 Cents for a price of Rs. 900/-, and odd and not for the full price minus the amount already paid by him in the court auction. This itself implies that he regarded the court sale as an independent transaction, having nothing to do with the defendant. Further, it must be stated that in the courts below he was not willing to proceed on the basis of S. 15.

He only wanted the specific performance of a part of the contract on the terms of S. 16. It follows that he is not entitled to rely on S. 15.

(17) For the reasons mentioned above, the decree of the lower appellate Court is set aside and the appeal allowed. The respondent will pay the costs of the appellants in this appeal, but in the courts below the parties will bear their own costs. No leave.

V.S.B. Appeal allowed.

(S) AIR 1955 ANDHRA 190 (V 42 C 69 Sept.)

CHANDRA REDDI J. (17-2-1955)

Public Prosecutor, Andhra, Petitioner v. Palapati Ramakrishnaiah representing the Andhra State, Respondent.

Criminal Revn. Case No. 655 of 1954 (Criminal Revn. Petn. No. 609 of 1954), from order of Stationary Sub Magistrate, Kavali, D/- 11-5-1954.

(a) Criminal P. C. (1898), S. 348 — It is not obligatory to commit accused to Sessions in all cases under S. 75, Penal Code — (Penal Code (1860), S. 75).

It is not obligatory on the Magistrate to commit the accused to Sessions in all cases falling under S. 75, Penal Code under all circumstances without any regard to the nature and the gravity of the offence. In fact S. 348, Criminal P. C. directs him to commit the accused to Sessions only if he is satisfied that there are sufficient grounds for doing so. When once he feels that there are grounds for committing the accused to sessions, then he is under a duty to do it unless he is competent to try the case and comes to the conclusion that he can himself pass an adequate sentence.

It is true that the latter part of S. 348 is mandatory but that would come into play only when the Magistrate feels that the circumstances of the case warrant the committal of the accused to Sessions. It does not contain any invariable rule that in all cases governed by S. 75, Penal Code, a committal to the Sessions should follow. In such case, the Magistrate has to apply his mind to the circumstances and decide whether it is a fit case for committing the accused to sessions 11 All. 393, Disting. (Para 6)

Anno: AIR Com. Cr. P. C. S. 348, N. 9;
1954 Mitra, S. 348 (Topic not separately discussed in Mitra — 3 Pts extra in AIR Com.)

(b) Penal Code (1860), S. 75 — Case of previous conviction — It is not necessary that enhanced sentence must be awarded.

The principle of S. 75 is that if the previous sentence borne by the accused had had no effect

on him, a more severe sentence should be awarded. But it does not follow as a rigid and inflexible rule that in all cases of previous convictions, an enhenced sentence should be awarded. It is good as a rule of thumb but the circumstances of each case should be taken into account in inflicting punishment. It is certainly open to a Magistrate to award a sentence less than that given on a previous occasion if the circumstances of the case warrant it. 'AIR 1937 Mad 231 Rel. on. (Para 10)

Anno: AIR Man. Penal Code, S. 75, N. 6.

(c) Penal Code (1860), S. 75 — List of previous convictions should be appended to judgment — (Criminal P. C. (1898), Ss. 348 and 367).

Clearly the number of previous convictions is a circumstance to be taken into consideration in determining the sentence. Moreover, the Criminal Rules of Practice require that Magistrates and Judges should append to their judgments a list of previous convictions. It is therefore essential that Magistrates and Judges should set out in a tabular form all the previous convictions at the end of the judgment. AIR 1943 Mad 418, Approved. (Para 12)

Anno: AIR Com. Cr. P. C. S. 367 N 4;

1949 Mitra, S. 367, P. 1126 N 1047 "Contents of judgment" (6 Pts extra in AIR Com — 2 Pts extra in Mitra)

CASES REFERRED: Paras

(A) ('89) 11 All 393: 1889 All WN 152 7
(B) ('35) 1935 Mad WN 1293 8
(C) (V34) AIR 1947 Mad 386(1): 1947 Mad WN 609 9
(D) (V1) AIR 1914 Mad 149(2): 38 Mad 552 9
(E) (V24) AIR 1937 Mad 231: 1936 Mad WN 985 10
(F) (V30) AIR 1943 Mad 418: 1943 Mad WN 126: 44 Cri LJ 585 12

Public Prosecutor (D. Munikannaiah), for The State; T. V. Sarma, Amicus Curiae, for Respondent.

ORDER: In this case, the State Government seeks to have the conviction of the respondent quashed. The respondent was charge-sheeted under Ss. 454 and 380, Penal Code before the Stationary Sub Magistrate, Kavali, the case against him being that he broke into house of one Danam Annamma P. W. 1 in the case at about 10-30 A. M. and stole a sum of Rs. 10/- in cash and some old clothes worth about Rs. 65/-. According to P. W. 1, she locked her house and went out at about 10-30 A. M. on 29-4-1954 to a relative's house and returned shortly thereafter to find the back door of her house open and some clothes and cash lost.

Sometime later in the day, the accused was apprehended with all the things lost. P. W. 1 was corroborated by P. W. 2, her husband. A charge was framed against him under S. 379, Penal Code, and he pleaded guilty. He was additionally charged under S. 75 Penal Code for having been previously convicted by the Additional First Class Magistrate, Vellore to two years' rigorous imprisonment. To this charge also he pleaded guilty. In view of the circumstance that the accused was found in possession of all the goods lost immediately after the theft and the admission of the guilt, the Magistrate convicted him under S. 379, and sentenced him to six months rigorous imprisonment. It is this conviction and sentence that are sought to be quashed by the State Government.

(2) It is urged by the learned Public Prosecutor that in view of the provisions of S. 348, Cr. P. C. read with S. 75 I. P. C. the Magistrate ought to have committed the accused to sessions. The accused had a number of convictions and the Second Class Magistrate was not competent to punish him adequately, so runs the argument of the learned Public Prosecutor. It is further argued that the procedure followed by the Magistrate is opposed to R. 95 of the Criminal Rules of Practice.

(3) To appreciate this argument, it is necessary to refer to the relevant provisions of law. Section 75, I. P. C. is in these words:

"Whoever having been convicted, by a Court in India, of an offence punishable under Chap. 12 or Chap. 17 of the Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with like imprison ment for the like term, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years".

(4) This section only provides for enhanced punishment to the case of old offenders for certain offences under Chap. 12 or Chap 17.

(5) Section 348, Criminal P. C. recites:

"Whoever, having been convicted of an offence punishable under Chap. 12 or Chap. 17, Penal Code with imprisonment for a term of three years or upwards is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, shall, if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted."

Rule 95 says:

"Cases in which persons accused of offences punishable under Chap. 12 or Chap. 17, Penal Code with imprisonment for a term of three years or upwards such persons having been previously convicted of offences punishable under either of those chapters with imprisonment for a term of three years or upwards shall not be forwarded by Subordinate Magistrate to District or Sub-Divisional Magistrate under S. 349, Criminal P. C. but shall be committed to the Court of Session under S. 348, if the Magistrate trying the case is of opinion that he cannot himself pass an adequate sentence."

In effect this rule affirms the principle of S. 348. It further directs the Magistrate to adopt the procedure laid down in S. 348 instead of forwarding the offenders in such cases to higher Magistrates under S. 349, Criminal P. C. This rule was framed obviously to correct the procedure adopted by some of the Magistrates, who when they thought that they could not sufficiently punish the accused forwarded them to the Sub-Divisional or District Magistrates under S. 349, Criminal P. C.

(6) Now the question for consideration is whether in every case falling under S. 75, Penal Code, a Magistrate is bound to commit the accused to Sessions, in other words, has he no discretion to consider whether it is a fit case for committing the accused to sessions? It looks to me that it is not obligatory on the Magistrate to commit the accused to Sessions in all cases under all circumstances without any regard to the nature and the gravity of the offence. In fact, the section directs him to commit the accused to sessions only if he is satisfied that there are sufficient grounds for doing so.

When once he feels that there are grounds for committing the accused to Sessions, then he is under a duty to do it unless he is competent to try the case and comes to the conclusion that he can himself pass an adequate sentence. It is true that the latter part of S. 348 is mandatory but that would come into play only when the Magistrate

feels that the circumstances of the case warrant the committal of the accused to Sessions.

It does not contain any invariable rule that in all cases governed by S. 75, Penal Code, a committal to the Sessions should follow. In such case, the Magistrate has to apply his mind to the circumstances and decide whether it is a fit case for committing the accused to sessions. The construction sought to be placed by the learned Public Prosecutor in my opinion, is opposed to the plain meaning of the section.

(7) Reliance was placed by the learned Public Prosecutor for the position taken up by him on — 'Queen Empress v. Khalak', 11 All 393 (A). There a Joint Magistrate tried an accused under Ss. 411 and 75, Penal Code. As the accused was previously convicted under S. 411, Penal Code and was released just six months previously, after 2½ years imprisonment, he thought he could give double the punishment under S. 35, Criminal P. C.

The learned Judge, in quashing the proceedings, expressed the opinion that the best course for the Magistrate was to have committed the accused for trial under S. 411 read with S. 75, Penal Code. I do not think that this case would furnish any anology. In cases where the Magistrate feels that the accused could not be adequately punished by him, the only course to be adopted by him is the one indicated in S. 348, Criminal P. C.

(8) The judgment of King J. in — 'Emperor v. Basava Apparao', 1935 Mad WN 1293 (B), is not very helpful in this context. There, all that was laid down is that when a Magistrate feels that he could not pass an adequate sentence after convicting the accused, the procedure to be adopted by him is to commit him to Sessions under S. 348 and not forward him to a higher Magistrate under S. 349. This is the principle embodied in R. 95 of the Criminal Rules of Practice.

So neither of the cases is an authority for the proposition stated by the Public Prosecutor. If the theory advocated by the learned Public Prosecutor is to be accepted, in every case of previous conviction coming within the purview of S. 75, there should be necessarily an enhanced sentence.

(9) It is now fairly settled that it is not absolutely necessary that in every case, irrespective of the nature of the offence, an enhanced punishment should be awarded. It is a well understood principle of administration of criminal justice that the punishment should be commensurate with the gravity of the offence. It should neither be too lenient nor very excessive being disproportionate to the nature of the crime committed. The circumstances of each case have to be considered by the Magistrate before awarding a particular sentence. This principle is laid down in several cases. Vide — 'Munuswamy v. Emperor', AIR 1947 Mad 386(1)(c) and in — 'Re: K. Sellandi', AIR 1914 Mad 149(2)(D).

(10) The principle of S. 75 is that if the previous sentence borne by the accused had had no effect on him, a more severe sentence should be awarded. But it does not follow as rigid and inflexible rule that in all cases of previous convictions, an enhanced sentence should be awarded. As pointed out by Pandrang Row J., in — 'Re: Abdul Gani Sahib', AIR 1937 Mad 231 (E), it is good as a rule of thumb but the circumstances of each case should be taken into account in inflicting punishment.

It is certainly open in my opinion, to a Magistrate to award a sentence less than that given on a previous occasion if the circumstances of the case warrant it. So, in deciding whether a Magistrate should himself try the case or should commit the accused to Sessions, he should bear in mind surrounding circumstances.

(11) In this particular case the justification for the Magistrate trying the case is set out in these words:

"The learned Assistant Public Prosecutor argues that in view of the property involved being only valued about Rs. 75/- and in view of the previous conviction being in 1949 this Court itself can sufficiently and adequately punish him."

Had it been only one previous conviction there would be nothing to quarrel about the procedure adopted by the Magistrate. But I am told by the learned Public Prosecutor that there are 17 previous convictions. Normally, in the circumstances, I would have been inclined to quash the proceedings and direct the Magistrate to commit him to Sessions. However it does not appear that the several convictions prior to the one referred to by him were brought to the notice of the Magistrate.

There is the further fact that there has been a lapse of more than five years between the previous conviction and the present one and also the fact that the accused had served out the full term of imprisonment in addition to the fact that it was the Assistant Public Prosecutor that invited the Magistrate to adopt that course. I have, therefore, come to the conclusion that it is not necessary to quash the proceedings in this case.

(12) Before leaving this case, I would like to endorse with respect the suggestion made by Horwill J. in — 'Venkatasubbayya v. Emperor', AIR 1943 Mad 418(F).

"Clearly the number of previous convictions is a circumstance to be taken into consideration in determining the sentence. Moreover, the Criminal Rules of Practice require that Magistrates and Judges should append to their judgment a list of previous convictions; but the learned Sessions Judge has made no attempt to do this. He has referred only to one previous conviction, whereas it appears clear from the fact that the previous conviction was under S. 75, Penal Code that there were other previous convictions.

In all probability these previous convictions were referred to in the calendar that was filed in the Sessions Court. The learned Sessions Judge should have included those previous convictions in his charge under S. 75, Penal Code, and got the accused to plead to them, and should then have set them out in a tabular form at the end of his judgment."

These observations apply with force to a case like this. It is essential that Magistrates and Judges should set out in a tabular form all the previous convictions at the end of the judgment.

(13) In these circumstances, the Criminal Revision case is dismissed. I must express thanks to Mr. T. V. Sarma, who has assisted me as Amicus Curiae on behalf of the accused.

D.S.P. Revision dismissed.

(S) AIR 1955 ANDHRA 192 (V 42 C 70 Sept.)

BHIMASANKARAM J. (17-2-1955)

Machiraju Mahalakshmamma, Petitioner v. Suryanarayana Vishnubhotla, and others, Respondents.

Civil Revn. Petn. No. 1322 of 1954, against order of Revenue Divisional officer Guntur, D/- 2-8-1954.

(a) Evidence Act (1872) S. 114 — Presumption as to official acts — Madras Proprietary Estates' Village Service Act (II of 1894) S. 13 — Proprietor of village.

The Court must assume, in the absence of proof to the contrary, that official acts are done in accordance with rules and regulations governing them.

Held that the scheme relating to Pushpagiri Mutt indicated that the Executive officer concerned was the person who conducted all the affairs of the Mutt and who, in law, was the person entrusted with the management of the institution. The Executive Officer, Pushpagiri Mutt was the proprietor of the village in question and the nomination submitted by him to the Revenue Divisional Officer under S. 13 was a proper or valid nomination. The Court had no reason to suppose that the officers concerned with this matter overlooked the fact that the executive officer was not the proprietor in respect of this village. (Para 2)

Anno: AIR Man. Evi. Act S. 114 N. 29.

(b) Madras Proprietary Estates' Village Service Act (II of 1894) S. 10(1), (3) — Appointment of person qualified.

If there is no person qualified under sub-s. (1) for the appointment among the nearest heirs, the appointment cannot be held in abeyance until one of them becomes qualified and the proprietor is bound to appoint the person next in order of succession, who is so qualified. Of course, the Act does not provide for the supersession of a minor on the ground of the disqualification. Therefore when people are passed over on the ground of disqualification and there is a minor who is next in succession, the minor will have to be registered by the Revenue Divisional Officer under S. 13 on the submission of his name by the proprietor.

No person who has been superseded under sub-s. (3) of S. 10 can have a valid ground to complain unless he can establish that at the time when the appointment was made he or she was fully qualified to hold the office. (Para 3)

(c) Constitution of India, Art. 227 — Other remedy open.

In all cases where a person wants to question the validity of an appointment under Madras Act II of 1894 he can file a suit before the Collector, whose powers are vested in the Revenue Divisional Officer, under S. 13 of Act III of 1895. The order of the Revenue Divisional Officer is even subject to revision by the District Collector. The suit under S. 13 is also to be filed before the Revenue Divisional Officer, and when a remedy is available before the same authority, which is at least equally convenient and inexpensive, the powers of the High Court under Art. 227 should not be invoked. AIR 1938 Mad 903 Rel. on. (Para 4)

Anno: AIR Com. Const. of India Art. 227 N. 8.

(d) Constitution of India Art. 227 — Tribunal — Revenue Divisional Officer acting under S. 13 Madras Act II of 1894.

The Revenue Divisional Officer cannot be said to be acting as a Tribunal in registering the name of the minor as the holder of the office under S. 13 of the Madras Act II of 1894. Article 227 of the Constitution confers jurisdiction only in respect of Courts and tribunals unlike Art. 226 which refers to any person or authority. (Para 4)

Anno: AIR Com. Const. of India Art. 227 N. 4.

CASE REFERRED: Para

(A) (V25) AIR 1938 Mad 903: 1938 -2 Mad LJ 488 4

T. Veerabhadravva, for Petitioner; M. Seshachalapathi, C. Mallikarjuna Rao and P. Venkataramamurthy, for Respondents.

ORDER: This is an application under Art. 227 of the Constitution of India to revise an order of the Revenue Divisional Officer, Guntur, registering the appointment of one Rachapudi Seetharamanjaneya Sarma, 2nd respondent in this petition, as a minor Village Munsif in the vacancy created by the death of one Panakala Rao on 3-10-1953, acting under S. 13 of Madras Act II of 1894.

(2) The learned Counsel for the petitioner attacks the validity of the registry on the following grounds: His client is the third of three daughters left by the deceased Village Munsif, and she is fully qualified under the Act for appointment. Her rights were ignored by the Executive Officer, Pushpagiri Mutt, who submitted the name of the 2nd respondent as the person entitled to the office. Mr. Veerabhadrayya contends that the Executive Officer, Pushpagiri Mutt is not the proprietor of the village in question and the nomination submitted by him to the Revenue Divisional Officer under S. 13 is not a proper or valid nomination, and the Revenue Divisional Officer has no power to register the name so submitted.

I cannot accede to this contention. There is nothing before me to indicate that the Executive Officer, Pushpagiri Mutt, is not the registered proprietor of this village. Indeed, no evidence has been produced in support of the contention that he is not the proprietor. On the other hand the scheme relating to the Mutt, to which Mr. Srinivasa Rao appearing on behalf of the Government Pleader drew my attention, clearly indicates that he is the person who conducts all the affairs of the Mutt, and who in law, is the person entrusted with the management of the institution.

I have no reason to suppose that the Officers concerned with this matter overlooked the fact that the Executive Officer is not the proprietor in respect of this village. I must assume, in the absence of proof to the contrary, that official acts are done in accordance with rules and regulations governing them. I therefore reject this contention.

(3) It is next argued that the supersession of the petitioner by registry of the name of the 2nd respondent as the holder of the office is invalid on the ground that it contravenes the provisions of S. 10(3) of the Act. It is argued that her elder sisters are not qualified for appointment because of their not having passed the necessary test prescribed for the office, and it is contended further that they relinquished their rights in favour of the petitioner.

The petitioner, therefore, claims to be the only daughter entitled to the appointment because she was fully qualified for the appointment at the time when it was actually made. I cannot see my way to accept this contention. No evidence was adduced before the Revenue Divisional Officer that the present petitioner was qualified for appointment at the time when the Registry was made. The name of the 2nd respondent was submitted by the Executive Officer as early as 15-11-1953, while a certificate has now been produced before me to indicate that the petitioner became fully qualified sometime in May, 1954.

That being so, it is clear that when the proprietor submitted the name of 2nd respondent there was no person among the nearest heirs of the deceased holder of the office, who could be said to be qualified under S. 10(1) of the Act. That being so, sub-s. (3) to S. 10 applied, which runs as follows:

"Where the next heir to an hereditary village-office is not qualified under sub-s. (1), the proprietor shall appoint the person next in order of succession who is so qualified, and in the absence of any such person in the line of succession, may appoint any person duly qualified under sub-s. (1)."

In my view, if there is no person qualified under sub-s. (1) for the appointment among the nearest heirs, the appointment cannot be held in abeyance until one of them becomes qualified, and the pro-

prietor is bound to appoint the person next in order of succession, who is so qualified. Of course, the Act does not provide for the supersession of a minor on the ground of any such disqualification. Therefore, when people are passed over on the ground of disqualification and there is a minor who is next in succession, the minor will have to be registered by the Revenue Divisional Officer under S. 13 on the submission of his name by the proprietor.

No person who has been superseded under sub-s. (3) of S. 10 can have a valid ground to complain unless he can establish that at the time when the appointment was made he or she was fully qualified to hold the office. That proof is wanting in this case. No affidavit has been filed, either here or before the Revenue Divisional Officer, and indeed no attempt has been made to establish any of the facts alleged.

The application actually made to the Revenue Divisional Officer by the petitioner is dated 5-10-1953, and that mentions only that she passed the necessary tests only in part. No subsequent application of hers, either to the proprietor or to the Revenue Divisional Officer, has been brought to my notice.

(4) Apart from these difficulties involved in the merits of the claim advanced by the petitioner, it appears to me that this is not a case for interference under Art. 227 of the Constitution. In the first instance, in all cases where a person wants to question the validity of an appointment under this Act, he can file a suit before the Collector, whose powers are vested in the Revenue Divisional Officer, under S. 13 of Act III of 1895.

It has also been held by a Bench of the Madras High Court in — 'Srinivasa Ayyangar v. Jagannatha Ayyangar', AIR 1938 Mad 903 (A), that the Order of the Revenue Divisional Officer is even subject to revision by the District Collector. The suit under S. 13 is also to be filed before the Revenue Divisional Officer, and there is no reason why when a remedy is available before the same authority, which is at least equally convenient and inexpensive, the powers of this Court under Art. 227 should be invoked.

Further, it seems to be doubtful whether the Revenue Divisional Officer could be said to be acting as a Tribunal in registering the name of the minor as the holder of the Office under S. 13 of the Act. He merely accepts the name submitted by the proprietor and enters it in official records for the purpose of evidence. He is not the appointing authority, the appointing authority, as is clear from the provisions of S. 10, being the proprietor himself.

Article 227 of the Constitution confers jurisdiction only in respect of Courts and Tribunals unlike Article 226 which refers to any person or authority. It seems to me, therefore, that the maintainability of the present application for revision under Art. 227 is open to serious doubt.

(5) For all these reasons, I dismiss the Civil Revision Petition, but make no order as to costs.

(6) Any observations of mine relating to the merits of the case will not be understood as affecting the rights of the petitioner, because these observations are primarily based not on evidence but on its absence.

D.H.Z. Revision dismissed.

(S) A.I.R. 1955 ANDHRA 194 (V 42, C 71 Sept.)

SUBBA RAO C. J. (9-2-1955)

Kalisetti Subbarayudu and others, Appellants v. Pagadala Balaramayya, Respondent.

Second Appeal No. 2312 of 1950, against decree of Sub J., Nellore, in Appeal Suit No. 55 of 1950.

(a) Civil P. C. (1908) S. 11 — Heard and finally decided.

In cases of judgment 'inter partes' the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made. AIR 1917 Mad 950. Rel. on. (Para 7)

(b) Civil P. C. (1908) S. 11 — Issue of law.

There is no reference in S. 11 to questions of law or questions of fact. If the issue has been finally decided it is immaterial whether that decision has been arrived at on a consideration of questions of law or questions of fact or mixed questions of fact & law. What matters is that the issue has been heard and finally decided. It is true that observations on general questions of law may not be binding between the parties but the decision on the matter in issue is conclusive.

Otherwise, the object of the section, viz., to give finality to questions directly raised and decided in suits inter partes would be frustrated. AIR 1933 Mad 925 Rel. on. AIR 1937 Mad 254 (F.B.) distinguished. (Para 9)

Anno: AIR Com. C. P. C. S. 11 N. 9, 10, 11.

(c) Civil P. C. (1908) O. 2 R. 2 — Identity of parties.

Where all the plaintiffs in the previous suit were entitled to file the previous suit being jointly interested against the defendant within the meaning of O. 2 R. 3 and could not have contended that O. 2 R. 2 would not be a bar to a subsequent suit by them, the fact that only one of the plaintiffs in the previous suit filed the subsequent suit would not in law make any difference. (Para 20)

Anno: AIR Com. C. P. C. O. 2 R. 2 N. 21.

(d) Civil P. C. (1908) O. 2 R. 2 — Same cause of action.

O. 2 R. 2 is obviously aimed against multiplicity of suits in respect of the same cause of action. The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. If the evidence to support the two claims is different then the causes of action are also different. The causes of action in the two suits may be considered to be the same if in substance they are identical.

Held that the facts necessary for the plaintiffs to prove, if traversed, in order to support their right were the same in both the suits. The evidence also was the same in both the suits. As the plaintiff did not include the present claim which arose in respect of the same cause of action in the previous suit he was barred by reason of O. 2, R. 2 from filing a separate suit in respect of the same cause of action. AIR 1949 PC 78, Foll. (Paras 18, 19)

Anno: AIR Com., C. P. C., O. 2, R. 2 N. 4, 7.

CASES REFERRED: Paras

(A) (V4) AIR 1917 Mad 950: 31 Mad LJ 219 7
(B) (V20) AIR 1933 Mad 925: 57 Mad 73 10, 13
(C) (C24) AIR 1937 Mad 254: ILR (1937) Mad 364 (FB) 11
(D) (V10) AIR 1923 All 613(2): 45 All 515 15
(E) (V36) AIR 1949 PC 78: 75 Ind App 121 (PC) 18

K. Krishnamurthi and T. Veerbhadrayya, for Appellants; Alladi Kuppuswami and C. S. Prakasa Rao, for Respondent.

JUDGMENT: This is an appeal by the plaintiffs against the decree and Judgment of the Court of the Subordinate Judge of Nellore, confirming those of the District Munsif of Nellore in O. S. No. 258 of 1948, a suit filed by the appellants for recovery of possession of the plaint schedule property from the defendant and for mesne profits. Both the Courts dismissed the suit on the ground that the suit was barred by res judicata as well as by O. 2, R. 2, Civil P. C.

(2) The facts found or admitted by the parties may be briefly stated: One Kalisetti Narasimhalu is propositus. He had five sons. Govindamma, the widow of one of the sons, filed a suit O. S. No. 260 of 1918 on the file of the District Munsif's Court, Nellore, for partition of the family properties against Narasimhalu and his sons. The defendant pleaded that the property, which is the subject-matter of the suit, was the self-acquired property of Narasimhalu.

That suit was compromised and on 23-4-1920, a preliminary decree for partition was passed. Pursuant to the preliminary decree a Commissioner was appointed who divided the properties into six shares. Final decree was passed on 18-9-1924. When an appeal was filed in the Subordinate Judge's Court against that decree, it was confirmed with some modifications. After the preliminary decree, Narsimhalu mortgaged most of the property covered by the partition suit under Ex. B. 8 dated 12-2-1923, to one Subbaramireddi on the basis that the properties were his self-acquisitions, contrary to the terms of the compromise decree.

After the death of Narasimhalu, Subbaramireddi filed O. S. No. 701 of 1924 on the file of the District Munsif's Court, Nellore, to enforce the said mortgage, impleading as defendants all the sons of Narasimhalu. The present 1st plaintiff was also one of the defendants. The sons remained ex parte and a mortgage decree was passed in that suit. In execution of the final decree made therein, the mortgaged properties were brought to sale and were purchased by one Pattabirama Reddi who sold it to the defendant under the sale deed Ex. B. 11 dated 7-11-1941 and defendant took possession of the property purchased by him including the well.

The 1st plaintiff, his brothers and the grandsons of Narasimhalu filed O. S. No. 725 of 1943 against the defendant claiming that the defendant, who had only 1/6th share in the well, had no right to close the well.

(3) The defendant contended that he acquired exclusive right to the entire property including the well under the sale deed dated 7-11-1941, from the Court auction purchaser in O. S. No. 701 of 1924. The learned District Munsif held that the plaintiffs were entitled to 5/6th share and the defendant was entitled only to 1/6th share on the ground that the court auction purchaser acquired only Narasimhalu's interest in execution of the aforesaid decree.

Both parties preferred appeals to the Subordinate Judge's Court. It was, inter alia, contended before the learned Subordinate Judge that the decree in O. S. No. 701 of 1924 operated as res judicata, and, therefore, the plaintiffs in O. S. No. 725 of 1943 could not rely upon the earlier decree in O. S. No. 260 of 1918, wherein Narasimhalu was given only 1/6th share in the joint family properties.

The learned Subordinate Judge held that the decision in O. S. No. 701 of 1924 did not operate as res judicata on the question of title to the property and, on that basis, confirmed the decree of the District Munsif.

(4) The 1st plaintiff, one of the sons of Narasimhalu, and his two sons, plaintiffs 2 and 3 filed the present suit, to recover possession of the plaint schedule property, which was purchased by the court auction purchaser and sold to the defendant as aforesaid. Both the Courts dismissed the suit on the ground that the decree in O. S. No. 701 of 1924 operated as res judicata and also on the ground that, by reason of the decision in O. S. No. 725 of 1943, the present suit was barred under O. 2 R. 2, Civil P. C.

(5) No document have been printed or placed before me and both learned counsel proceeded to argue on the basis of the aforesaid facts.

(6) The learned counsel for the appellants raised before me the same points which his clients have unsuccessfully raised in the two Courts below. It is contended that when there are two decrees between the same parties, in regard to the same matter, the later adjudication supersedes the earlier one, and, in this view, it is argued that the decree in O. S. No. 725 of 1943 would govern the rights of the parties. From the aforesaid facts, it is apparent that there were three adjudications between the parties or their representatives.

In O. S. No. 260 of 1918, which was a suit between the members of the family Narsimhalu got only 1/6th interest in the joint family properties. In O. S. No. 701 of 1924, though the sons were made parties they were ex parte and allowed a decree to be passed against them on the basis that Narasimhalu had exclusive title to the entire property covered by the mortgage deed. If O. S. No. 725 of 1943 did not supervene, it must be conceded that in any subsequent suit between the parties to O. S. No. 701 of 1924 or their representatives, that decree would operate as a bar on the basis of constructive res judicata. The defendants therein, i.e., the present 1st plaintiff and his brothers might and ought to have raised the plea in that suit that Narasimhalu had only 1/6th interest in the mortgage properties, and therefore, no decree should be passed therein against the other shares of the sons.

But, in O. S. No. 725 of 1943, though that plea was raised it was negatived and the Court held that Narasimhalu had only 1/6th interest in the properties and, therefore, the defendant only acquired his interest therein under the sale deed. This judgment being also inter partes certainly supersedes the earlier decision and the rights of the parties thereafter would only be governed by this judgment.

(7) A Division Bench of the Madras High Court in — 'Moturi Seshayya v. Venkatadri Appa Rao', AIR 1917 Mad 950 (A) held that in cases of judgments inter partes the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made. There, in 1893, in a suit between the landlord and his tenants, a competent Court adjudicated upon the rate of rent. In a subsequent suit in the year 1895, another competent Court gave a different finding.

In the later suit, no question was raised by the tenants that the earlier suit would operate as res judicata. In 1912, the landlord filed another suit for rent wherein the question of rate of rent again arose for consideration. The tenants contended that there being two conflicting judgments, neither of them could be pleaded as res judicata, and the Court was bound to try the issue over again.

The learned Judges negatived that contention and applied the principle that in cases of judgments inter partes, the later adjudication should be taken as superseding the earlier. I respectfully

follow the principle laid down in the aforesaid decision. If so, it follows that, in the instant case, the decision between the parties in O. S. No. 725 of 1943 supersedes that in O. S. No. 701 of 1924 and, therefore, the rights of the parties are governed only by the later decision.

(8) But it is contended that findings on questions of law in a previous suit, though inter partes, will not operate as res judicata except in regard to the subject-matter of that suit. Basing the argument on the aforesaid proposition, it is said that the finding in O. S. No. 725 of 1943 that the judgment in O. S. No. 701 of 1924 would not operate as res judicata, being a finding on a question of law, should be confined to the rights of the parties in regard to the well alone.

(9) Under S. 11, Civil P. C., no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court. There is no reference in that section to questions of law or questions of fact.

If the issue has been finally decided, it is immaterial whether that decision has been arrived at on a consideration of questions of law or questions of fact or mixed questions of fact and law. What matters is that the issue has been heard and finally decided. It is true that observations on general questions of law may not be binding between the parties but the decision on the matter in issue is conclusive. Otherwise, the object of the section, viz., to give finality to questions directly raised and decided in suits inter partes would be frustrated.

(10) In — 'Ramchandra Deo v. Ramamurthi', AIR 1933 Mad 925 (B) a Division Bench of the Madras High Court considered this aspect of the question in some detail. There, the Maharajah of Jeypore instituted a suit on the file of the Agency Additional District Judge, Waltair, for Kattubadi for the years ending with 30-6-1918, 30-6-1919 and 30-6-1920. The defendants to that suit were the Mokhasadars of Pachipenta estate and the usufructuary mortgagees from the Mokhasadars. The mortgagee-defendants contended that there was no privity of contract between them and the plaintiff, and, therefore, they were not liable for the rent payable by the mortgagors.

But in O. S. No. 18 of 1913 on the file of the Special Assistant Agent, Koraput, the question of the liability of the mortgagees was not raised and a decree was made therein against them for the recovery of Kattubadi. The question arose whether that previous decision operated as res judicata. It was contended that the decision holding that the mortgagee was liable to pay rent was an erroneous decision on a question of law and as such could not operate as res judicata in a subsequent suit.

After considering the cases cited, the learned Judges made the following observations at p. 928:

"Section 11, Civil P. C. makes no reference to question of law or to cause of action. Under that section if an issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and if that has been heard and finally decided then the decision on that issue is res judicata in the subsequent suit provided the other conditions are fulfilled. Both on principle and on authority it follows that the arguments that the previous decision was erroneous in law and that it was given with respect to previous faslis have no bearing on the question whether that decision does or does not operate as res judicata.

(11) I respectfully follow the aforesaid observations. But it is argued that a Full Bench of the Madras High Court in — 'Narayana Ayyangar v. Subramania Chettiar', AIR 1937 Mad 254 (FB) (C) expressed a different view. But a perusal of the judgment does not support the said contention. There a ryot resisted the claim of a landlord for a higher rate of rent with respect to a particular area and stated that he was liable to pay only the dry rate on the ground that the cocoanut plantation in the same was an "improvement" within the meaning of S. 3(4)(f), Estates Land Act.

In a prior litigation between the same parties for a previous year with respect to a portion of the area of the same holding, it was held that the planting of a cocoanut garden was not an improvement and that the landlord was entitled to the enhanced rate.

In regard to that argument, Ramesam J., who delivered the judgment and with whom the other Judges agreed, observed at p. 257 as follows:

"The principle of res judicata should be confined only to matters which actually existed at the time of the former decision. If there are new areas in Patta No. 54, which were not planted with cocoanut at time of the former suit and in respect of which no claim for enhanced rate of rent was or could be made in the former suit, the matter is not res judicata in the present suit in respect of such areas".

(12) The scope of the said observations must be understood with reference to the facts of the case and the principle accepted by the Full Bench. There, the question was whether the earlier decision on a question of law given in respect of a cocoanut plantation in a particular area was res judicata in respect of a cocoanut tree planted in a different area subsequent to the earlier decision. The Full Bench applied the following principle to the facts:

"The principle that a decision of law though erroneous is res judicata in a later suit between the same parties should be confined only to the matters which existed at the time of the prior suit unless some question of general principle was settled in the same".

(13) Applying this principle, they held that the decision of law in regard to one area would not apply to a different area, for, in the latter area, no cocoanuts were planted at the time the earlier decision was given. To state it in terms of S. 11, the matter in issue in the latter suit was not directly and substantially in issue in the earlier suit. Further, an attempt made by the learned counsel to question the correctness of AIR 1933 Mad 925 (B) before the Full Bench has also failed.

(14) The relevant test for the application of the principle of res judicata is stated by D. F. Mulla in his "Civil Procedure Code" at page 47, as follows:

"As the test of res judicata is the matter directly and substantially in issue, it follows that the subject-matter of the second suit may be entirely different".

(15) Where in a suit brought by A against B for possession of one of two properties comprised in a sale deed, passed by B to A, B contended that the deed was fictitious and the Court found that the deed was fictitious it was held in — 'Kedar Nath v. Sheo Shankar', AIR 1923 All 613 (2) (D) that the finding that the sale deed was invalid would operate as res judicata in a subsequent suit filed by A against B to recover the other property under the same deed. It was so held because, though the subject-matter was different, the matter in both the suits was the same.

(16) In the instant case, it is true that the subject-matter of O. S. No. 725 of 1943 was a well and the subject-matter in the present suit was a different property. But the defendant acquired title to both the plots under a sale deed in his favour from the Court auction-purchaser. The matter in dispute in O. S. No. 725 of 1943 was whether the Court sale in favour of the defendant's vendor and the sale deed in his favour conveyed only the 1/6th share of Narasimhalu or the interests of all the members of the family.

In regard to that matter, the Court held that it conveyed only the 1/6th share of Narasimhalu. The decision, whether it depended upon a question of law or a question of fact, was a final decision in respect of the matter which is also now in issue and therefore under the express terms of S. 11 and the case law noticed above, the decision in that suit would operate as res judicata in the present suit.

(17) This conclusion would not help the appellants to succeed unless they also get over the second obstacle in their way viz., the objection under O. 2, R. 2, Civil P. C. Order 2, R. 2, Civil P. C. reads:

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court".

(18) This rule is obviously aimed against multiplicity of suits in respect of the same cause of action. What a "cause of action" is has been authoritatively stated by the Judicial Committee in — 'Mohammad Khalil Khan v. Mahbub Ali Mian', AIR 1949 PC 78 (E). Their Lordships summarised their view on the subject at p. 86 as follows:

"The principle laid down in the cases thus far discussed may be thus summarised—

(1) The correct test in cases falling under O. 2, R. 2, is, "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(3) If the evidence to support the two claims is different then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

(19) Applying the said test, what is the position here? O. S. No. 725 of 1943 was filed by the 1st Plaintiff, his brothers and the grandsons of Narasimhalu, who had 5/6th share in the family properties. The present defendant was the sole defendant in that suit. The plaintiffs in that suit alleged that by reason of the decree in O. S. No. 260 of 1918 they had 5/6th share in the joint family properties, that the sale in execution of the decree in O. S. No. 701 of 1924 and the sale by the Court auction-purchaser in favour of the defendant did not convey their interest to him and that the defendant illegally trespassed on their property wherein the well was situated.

The 1st plaintiff and his sons alone have filed the present suit for possession of their shares in the property. In this suit, before the plaintiffs can succeed, they must establish that, under the decree in O. S. No. 260 of 1918, only 1/6th share was given to Narasimhalu, that in the Court sale, in execution of the decree in O. S. No. 701 of 1924 and under the sale deed executed by the auction-purchaser in favour of the defendant, the 1/6th share of the father alone was legally conveyed and that the defendant trespassed upon the extent of the property not covered by the sale deed.

The trespass on the land by the defendant which constituted an infringement of the plaintiffs' right was the same in respect of the subject-matter of both the suits. The facts necessary for the plaintiffs to prove, if traversed, in order to support their right, are the same in both the suits. The evidence also is the same in both the suits. All the tests laid down by the Judicial Committee are satisfied in this case. The cause of action to the plaintiffs in the present suit as well as in the earlier suit is the same. If so, as the 1st plaintiff did not include the present claim which arose in respect of the same cause of action in the previous suit, he is barred by reason of O. 2, R. 2, Civil P. C., from filing a separate suit in respect of the same cause of action.

(20) But it is contended that the plaintiffs in O. S. No. 701 of 1924 included not only the 1st plaintiff but others and therefore the 1st plaintiff could not have included the present claim in that suit. As he was not entitled to include the present claim in the previous suit, it is said that O. 2, R. 2 would not in terms apply. The question, therefore, is whether the present 1st plaintiff was entitled to include the present claim in O. S. No. 701 of 1924.

That suit, as I have already stated, was filed by the 1st plaintiff, his brother and nephews in respect of a part of the property purchased by the defendant. The plaintiffs' case was that they were entitled to 5/6th share and the defendant was entitled to 1/6th share in the property including the well. If all the plaintiffs in O. S. No. 725 of 1943 filed the present suit, they could not contend that O. 2, R. 2 would not be a bar to it. If that was conceded, the fact that one of the plaintiffs alone filed the present suit could not in law make any difference. All the plaintiffs in the previous suit were entitled to file the previous suit as they were jointly interested against the defendant within the meaning of O. 2, R. 3. The defendant on the basis of a Court sale and a sale deed trespassed on their property and they were jointly interested in removing the trespass. They could have also asked for relief in the previous suit for possession of their 5/6th share in the property purchased by the defendant. In this view, this contention fails.

(21) In the result, the appeal fails and is dismissed with costs. No leave.

D.H.Z.

Appeal dismissed.

(S) **A.I.R. 1955 ANDHRA 197 (V 42, C. 72 Sept.)**

CHANDRA REDDY J. (18-11-1954)

Kuppagiri Atchamma and others, Accused-Petitioners v. Jakki Reddi Koti Reddi, Respondent.

Criminal Revn. Case No. 740 of 1954 and Criminal Revn. Petn. No. 692 of 1954, against order of Court of Sessions, Guntur Division, D/- 17-8-1954.

(a) Criminal P. C. (1898), Ss. 259 and 403 — Dismissal of complaint or discharge of accused — Fresh complaint.

A second complaint can be entertained despite the fact that the order dismissing the first complaint or the order discharging the accused under S. 259 has not been set aside. 28 Mad 310 and AIR 1932 Mad 369, Rel. on. (Para 9)

Anno: AIR Com.: Cr. P. C., S. 403 N. 13, Pts. 1 and 2; 1943 Mitra, S. 403 P. 1197 N "Explana-

tion", P. 1198 N "What.....acquittal" and "Discharge of accused" (3 Pts extra in AIR Com. note — Bombay, Madras, Rangoon, Nagpur, Punjab and Sind views and the contra views of Allahabad, Calcutta and Sind on the last proposition in N "Explanation" on P. 1197 not noted in Mitra).

(b) Criminal P. C. (1898), Ss. 203 and 403, 259 — Complaint dismissed against some accused — Order under S. 259 — Fresh complaint against all accused.

Where a complaint is taken on file only against some of the accused, this amounts to a dismissal of the complaint against the other accused. Where, therefore, the accused against whom the complaint is taken on file are discharged under S. 259, it is open to the Magistrate to refuse to take on file a fresh complaint against those persons against whom the complaint was dismissed originally.

(Para 10)

Anno: AIR Com.: Cr. P. C., S. 203 N. 2; 1953 Mitra, S. 203 P. 859 N. 675 "Dismissal of complaint" (10 Pts. extra in AIR Com. — AIR Com. note illustrative).

AIR Com.: Cr. P. C., S. 403 N. 13; 1949 Mitra, S. 403 P. 1197 N "Explanation", P. 1198 N "What .....acquittal" and "Discharge of accused" (3 Pts. extra in N. 13 to S. 403 in AIR Com. — Bombay, Madras, Rangoon, Nagpur, Punjab and Sind views and the contra views of Allahabad, Calcutta and Sind on the last proposition in N. "Explanation", on P. 1197 not noted in Mitra).

CASES REFERRED: Paras

(A) ('05) 28 Mad 310: 2 Cri LJ 758 9

(B) (V19) AIR 1932 Mad 369: 55 Mad 622: 33 Cri LJ 454 (FB) 9

(C) (V35) AIR 1948 All 46: ILR (1947) All 464 10

(D) (V33) AIR 1946 Mad 167: 1945-2 Mad LJ 577: 47 Cri LJ 595 10

M. Venkatasubba Rao and R. Venugopal Reddy, for Petitioners; Public Prosecutor, for the State and A. V. Krishna Rao and N. V. Appa Rao, for Respondent.

ORDER: In this case, the order of the Sessions Judge, Guntur directing further enquiry against all the accused is sought to be revised. The petitioners are accused 1, 2, 7 to 9 in C. C. No. 201 of 1954 on the file of the Additional First Class Magistrate, Narasaraopet. A complaint was filed against them on 11-2-1954, against these petitioners and four others for offences under Ss. 148, 326, 307 and 504, Penal Code, with the following allegations:

(2) On 8-2-1954, at about 7-30 P. M. a boy aged about ten years belonging to the family of the accused was answering calls of nature before the house of the complainant. The complainant advised the boy not to commit nuisance in front of the house and that he could go a little farther from the house for the purpose. Immediately all the accused who were inimically disposed to the complainant

"came out of the house of the 5th accused with axes and sticks; formed into an unlawful assembly; abused the complainant in an indecent language and came against him to beat him".

A-2 and A-3 were having axes in their hands and the rest armed with sticks. The 3rd accused raised the axe in his hand to strike the complainant, but the latter escaped and the blow fell upon A-1 a very old woman who was pouncing upon the complainant. A-1 then fell down. Then the second accused got enraged and attempted to kill him by striking on his head with the axe.

(3) A complaint was sent by post and it reached the court of the Additional First Class Magistrate on 11-2-1954. A sworn statement of the complainant was taken on 19-2-1954. Therein he stated that, when he asked the grandson of A-5 who was answering calls of nature not to commit nuisance there, but to go a little farther away, A-1 to A-6 standing on front of their house indecently abused him. Then A-1 and A-2 went to him.

A-2 attempted to beat him with an axe in his hand, but he escaped the blow and it fell upon A-1. Meanwhile A-3 came and beat him on his head with an axe and he fell down. A-4 beat him on his shoulders with a stick. A-5 and A-6 beat him on his loins. Then A-7 to A-9 came on the scene and the complainant could not say on which part of the body A-7 to A-9 beat him.

(4) The case was taken on file by the Additional First Class Magistrate, Narasaraopet, against A-3, A-4, A-5 and A-6 for offences under Ss. 323 and 324, Penal Code. It was transferred to the Taluk Magistrate. Subsequently it was sent back to the same Magistrate who originally took cognisance of the case. The case was being adjourned from time to time and it was finally posted to 16-7-1954. On that date, as the complainant was absent, the accused were discharged under S. 259, Criminal P. C.

A fresh complaint was filed on the next day with the same allegation as in the first giving reason for his absence on the 16th. A statement of the complainant was again recorded on 19-7-1954. The complainant then stated that when he asked the grandson of the 5th accused to go a little farther from his house to ease himself, A-1 to A-9 came out of the house of A-5, A-2 and A-3 armed with axes and the rest with sticks, that A-3 attempted to cut him with an axe on his head and when he escaped it the blow fell on A-1, the mother of A-5, when A-2 who was by his side beat him with an axe in his hand. The rest of the accused beat him on various parts of the body.

(5) The Additional First Class Magistrate thought that the absence of the complainant was satisfactorily explained and there were sufficient grounds for entertaining the fresh complaint. But instead of saying that the fresh complaint was taken on file he ordered the case to be "restored to file and re-heard". But what he seems to have meant was that the fresh complaint could be entertained only against A-3, A-4 and A-5 and A-6 against whom only the case was originally taken on file for offences under Ss. 323 and 324, Indian Penal Code. This is evidenced from what is contained in the docket.

"Taken on file under S. 324, Indian Penal Code, against A-3 and under S. 323, Indian Penal Code against A-4, A-5 and A-6; posted to 6th August 1954, for apprehension of the accused. Issue summons to accused. Complainant informed".

(6) The matter was taken in revision by the complainant before the Sessions Judge challenging the validity of the order in so far as it did not direct processes to be issued against the other accused mentioned in the complaint. The learned Sessions Judge allowed the revision petition remarking that the procedure adopted by the trial court was grossly irregular as there was no question of restoring a criminal complaint to file and re-hearing it and that the trial court ought to have treated it as a fresh complaint. He sent back the matter to the trial court with a direction for holding further enquiry against all the accused. This revision case is against the said order of the Sessions Judge.

(7) I have already pointed out that the Magistrate did treat the second complaint as a fresh complaint as appears from the endorsement referred to above although the language used by him namely "restored to file" is not quite happy.

(8) In support of this revision case, Mr. Venkata Subba Rao, argued that the Magistrate was justified in treating the fresh complaint as an application for restoration of the original complaint

and that the Magistrate had jurisdiction to restore the complaint to file even after an order under S. 259, Criminal P. C., was passed. In support of the proposition that a Magistrate has jurisdiction to restore a complaint, he cited a number of rulings. The question is not whether a court has jurisdiction to restore a complaint dismissed, but whether a Magistrate could pass an order restoring the dismissed complaint when a fresh complaint is filed. Therefore, all the rulings cited by him are irrelevant and need not be considered.

(9) It was next urged by the counsel for the petitioners that a fresh complaint could not be entertained on the same facts, if the order under S. 259, Criminal P. C. passed by the Magistrate was not revised. There is not much substance in this argument either. A fresh complaint is not barred as the principle underlying S. 403, Criminal P. C., does not apply to a case like that. This matter has been considered in a number of cases wherein it was stated that a second complaint is competent.

In — 'Chinnathambi Mudali v. Salla Gurusamy Chetty', 28 Mad 310 (A), a Bench of the Madras High Court held that when the accused were discharged under S. 259, Criminal P. C., a fresh complaint could be filed and the Magistrate could re-hear the same. In — 'Ponnuswamy Goundan v. Emperor', AIR 1932 Mad 369 (FB) (B) a Full Bench of the Madras High Court decided that a Magistrate had jurisdiction to entertain a second complaint even when the first complaint was dismissed and the order of dismissal was not set aside.

There can, therefore, be no doubt that a second complaint can be entertained despite the fact that the order dismissing the first complaint or the order discharging the accused under S. 259, Criminal P. C., has not been set aside. That apart, no exception has been taken by the accused to the fresh complaint being taken on file.

(10) The next question and a more substantial one is whether that part of the order of the Sessions Judge which directed a further enquiry against all the accused is a correct one. Although it does not appear from the record placed before me that an express order was passed dismissing the complaint against accused 1, 2, 7 to 9, it is clear that it was taken on file only against accused 3 to 6. It looks to me this amounts to a dismissal of the complaint against the other accused. That this is the effect of such an order also appears from a ruling of the Allahabad High Court in — 'Sheoraj v. Emperor', AIR 1948 All 46 (C).

If so, it is open to the Magistrate to refuse to take on file a fresh complaint against those persons against whom a complaint was dismissed originally, presumably on the ground that the complaint could not be entertained against him. If really a second complaint is entertained against the very persons this amounts to an abuse of process of court in the words of Kuppuswamy Ayyar J., in — 'Kumariah Naicker v. Chinna Naicker', AIR 1946 Mad 167 (D).

It could not be said that the Magistrate acted improperly in confining the second complaint only to persons against whom the case is proceeding up to the stage when the accused were discharged under S. 259, Criminal P. C. Surely, the complainant could not be in a better position by absenting himself and allowing the accused to be discharged under S. 259, Criminal P. C., and trying to re-open the matter.

(11) In the result, the order of the Sessions Judge in so far as it directs a further inquiry against all the accused is set aside. To that extent, the Criminal Revision case is allowed.

V.R.B. Order accordingly.

(S) A.I.R. 1955 ANDHRA 199 (V 42, C 73 Sept.)

UMAMAHESWARAM J. (17-11-1954)

Addanki Ramanamma, Appellant v. Ramavarapu Anthamma, Respondent.

Second Appeal No. 127 of 1950, against order of Sub. J., Narasapur, D/- 24-2-1950.

Transfer of Property Act (1882), S. 52 — Right to immovable property — Easement — (Easements Act (1882), Ss. 4, 8 and 19) — 26 Bom 140, Not followed.

Under the provisions of the Easements Act, an easement is a right or interest in immovable property. (Para 3)

Where, therefore, A obtained a decree against B's vendor for an injunction restraining him from interfering with his right to drain off water through his lands and B purchased the property after the passing of the decree:

Held that, though an injunction being personal does not run with the land, the terms of S. 52 applied to the case and so the only course was to execute the decree as against B and not to file a separate suit. AIR 1927 Bom 93, Foll.; 26 Bom 140, Not followed. (Paras 2 and 4)

Anno: AIR Man.: Easements Act, S. 4 N. 1; S. 8 N. 1; S. 19 N. 1.

AIR Com.: T. P. Act, S. 52 N. 14; 1949 Mulla: S. 52 P. 246 N. (18) "The right..... question" (AIR 1940 Nag 8 and AIR 1936 Pat 571 not noticed in Mulla—See also N. (19) "Misdescription" on P. 252 in Mulla, where AIR 1937 Bom 244 is not noticed—Part of topic discussed in N. (18) in Mulla discussed under appropriate headings in different notes in AIR Com., e.g., Ns. 17 to 26).

CASES REFERRED:	Paras
(A) ('02) 26 Bom 140: 3 Bom LR 564	2, 4
(B) (1881) 17 Ch D 685: 50 LJ Ch 786	2
(C) (V14) AIR 1927 Bom 93: 51 Bom 37	4
(D) ('02) 26 Bom 283: 4 Bom LR 14	4
(E) ('89) 12 Mad 356	4

B. V. Ramanarasu, for Appellant; B. V. Subrahmanyam, for Respondent.

JUDGMENT: This appeal raises an interesting question of law. The respondent herein obtained a decree against the appellant's vendor for an injunction restraining him from interfering with her right to drain off water through his lands. The appellant purchased the property after the passing of the decree.

Two questions are raised by Sri B. V. Ramanarasu the learned Advocate for the appellant: (i) that the decree for injunction passed as against the vendor, being personal, cannot be enforced against her; (ii) that both the Courts below erred in holding that the terms of S. 52, Transfer of Property Act apply and that his client is not affected by lis pendens.

(2) In support of his first contention, he relied upon the decision in — 'Dahyabhai v. Bapalal', 26 Bom 140 (A), Jenkins C. J. in delivering the judgment of the Bench held that the purchaser of the land in execution of a decree was not bound on the ground that the injunction does not run with the land and the decision in — 'Attorney General v. Birmingham, Tame and Rea District Drainage Board', (1881) 17 Ch D 685 (B) was relied on by him. Jessel M. R., held therein that the new Board was not bound by the injunction issued against the previous Board and observed as follows:

"It is an injunction merely against the Council, their workmen and agents, and cannot be said to run with the land. If they have sold the property to somebody else, there is no injunction against the new owner, and nobody ever heard in such a case of the new owner or purchaser of land being liable to the former decree.

If he continues the nuisance or commits a fresh nuisance, you can bring an action against him, and that is all; he has nothing to do with the former proceedings, and I cannot see any ground whatever for supposing that he can be bound by that decree, nor, I believe, was such a thing ever heard of before."

In Halsbury, Vol. 18 at page 4, relying on this decision, the following passage occurs, namely:

"An injunction being personal does not run with the land."

I am, therefore, of opinion that the injunction decree will not be binding unless the terms of S. 52, Transfer of Property Act apply to this case.

(3) Section 52, Transfer of Property Act runs, in the following terms:

"During the pendency in any Court having authority in the Union of India, or established beyond the limit of the Union of India by the Central Government, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of Court on such terms as it may impose."

The main contention of the learned Advocate for the appellant is that the suit or proceeding instituted by the respondent does not relate to a right to immovable property within the meaning of S. 52, and that he is not bound though the property was transferred to him by the judgment-debtor. The right which was litigated in the suit was, whether the respondent was entitled to a right of easement to discharge water from her land on to the land belonging to the appellant's vendor.

An easement is defined in S. 4, Easements Act (V of 1882) as being a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or prevent and to continue to prevent something being done, in or upon, or in respect of, certain other land not his own. The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof dominant owner, the land on which the liability is imposed is called the servient heritage.

Section 8 provides that an easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed. Under S. 19 where the dominant heritage is transferred or devolves, the transfer or devolution shall be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

So, there can be no doubt that under the provisions of the Easements Act, an easement is a right or interest in immovable property."

(4) The following passage in Gale on Easements is relevant for understanding the nature of an easement right and the passages are as follows:

"When once an easement is validly created it is annexed to land. The benefit of it passes with the dominant tenement and the burden of it passes with the servient tenement to every person into whose occupation the dominant and servient tenements respectively come."

A licence is, on the other hand, distinguished as being personal to both grantor and grantee unless it is coupled with a grant. So, I do not agree with the contentions of the learned Advocate for the appellant that the suit or proceeding did not relate to a right to immovable property within the meaning of S. 52, Transfer of Property Act. There is no force in the contention that as the right to immoveable property was not transferred in his favour S. 52 does not apply.

What the Section states is that if the property is transferred or otherwise dealt with by any party to the suit or proceeding, he is bound by the suit or proceeding in which any right to immoveable property is directly or specifically in question. The right of easement related to the property which was transferred to the appellant.

So, I agree with the Courts below that the terms of S. 52 of the Transfer of Property Act are attracted. In — 'Krishnabai Pandurang v. Sawalaram Gangaram', AIR 1927 Bom 93 (C), an identical question arose for decision. It was held by their Lordships that, as the transfer was made during the pendency of the execution proceedings, the terms of S. 52 applied.

Though as pointed out by the learned Advocate for the appellant in — Sakarlal Jaswantrai v. v. Bai Parvatibai', 26 Bom 283 (D) the earlier decision reported in 26 Bom 140 (A) was only distinguished on the ground that no question under S. 234 of the Code of 1882 corresponding to S. 50 of the present Code arose for decision in that case, still in my view, the decision in 26 Bom 140 (A) need not be followed as the question of Lis Pendens was neither argued nor discussed in that case.

As already stated the general proposition of law stated therein is no doubt correct. The decision in 26 Bom 283 (D) is not of any assistance in this case, as execution is not sought as against the legal representatives. I follow on the other hand the decision in AIR 1927 Bom 93 (C) and hold that the terms of S. 52, Transfer of Property Act, apply to this case.

If the appellant is bound by the terms of S. 52, Transfer of Property Act the only course is to execute the decree as against him and not to file a separate suit. The decision in — 'Sadagopachari v. Krishnamachari', 12 Mad 356 (E) has no bearing on this case, as the question that arose for decision there was, whether a decree for injunction obtained against specific individuals impleaded as parties to the suit under O. 1, R. 8, could be enforced as against other individuals who are not parties eo nomine to the suit.

Even on that question, there is a difference of opinion and I do not think it is necessary for me to consider that matter in this case. That decision is no authority on the applicability of S. 52, Transfer of Property Act.

(5) In the result the Civil Miscellaneous Second Appeal fails and is dismissed with costs. No leave.

V.R.B. Appeal dismissed.

(S) A.I.R. 1955 ANDHRA 200 (V 42, C 74 Sept.)

SUBBA RAO C. J. (25-2-1955)

Nori Srirama Sastri, Petitioner v. Nori Lakshmidevamma and others, Respondents.

Civil Revn. Petn. No. 1810 of 1952, against order of Sub. J., Bapatla, D/- 3-10-1952.

(a) Court-fees Act (1870), S. 7 — Determination of court-fee payable in suits.

For ascertaining the court-fee payable on a plaint the terminology used in the plaint is not of much relevance but it is the substance that matters. A plaintiff by a clear device and camouflage cannot evade court-fee if in substance the relief he asks for falls under one or other of the provisions of the Court-fees Act. (Para 3)

Anno: AIR Com.: Court-fees Act, S. 7 (Gen.) N. 3.

(b) Court-fees Act (1870), S. 7(v), 7(iv)(b), Sch. II, Art. 17B (Mad) — Joint family property — Suit for partition by excluded coparcener — Properties in possession of benamidar and latter claiming adversely to plaintiff — Court-fee.

A suit for partition and separate possession of the plaintiff's share, where he is in either actual or constructive possession of the family properties is incapable of valuation and therefore chargeable with fixed fee under Sch. II, Art. 17B (Mad): AIR 1940 Mad 113 (FB), Ref. (Para 3)

Conversely, where the plaintiff is not in joint possession of all or any of the common properties, the suit in respect of the plaintiff's share should be valued under S. 7(v): AIR 1938 Mad 278, Ref. (Para 3)

It is common phenomena among joint families that properties are purchased sometimes, for various reasons, in the name of the female members of the family but that fact does not make the properties any the less joint family properties. If a member of the family files a suit for partition on the basis that the family is in possession of those properties, the plaintiff can pay court-fee under Art. 17B of Sch. II of the Court-fees Act. (Para 6)

But where the benamidar is in actual possession and is claiming adversely to the family, the plaintiff is liable to pay court-fee under S. 7(v) in respect of his relief for possession of those properties. C. R. P. No. 1547 of 1936 (Mad) — AIR 1949 Mad 471 — AIR 1951 Mad 732 and AIR 1936 Mad 411, Disting. (Para 7)

Anno: AIR Com.: Court-fees Act, S. 7(iv)(b) N. 4.

(c) Court-fees Act (1870), S. 7(v), 7(iv)(b) — Suit for re-opening partition — Valuation for court-fee.

Where in a partition suit brought against his mother and brother the plaintiff alleges that the previous partition effected between the parties was brought about by fraud practised by his father and that he was entitled to more property than what was allotted to his share, the suit is in effect to recover the entire properties in the possession of the defendant on behalf of the family so that they might be pooled together along with the properties in his possession for re-partition.

It is not possible to predicate that in any re-partition that may be effected the property in his possession would again be allotted to the plaintiff and that only a part of the property in the possession of the defendants to make up his half share would be given to him. (Para 11)

In this view, as the plaintiff did not seek to recover only an additional share but claimed a re-partition of the entire property ignoring the previous partition, it cannot be contended on behalf of the plaintiff that he need only pay court-fee on the valuation representing the difference between the value of the property in his possession and the additional property that might be allotted to him on the re-partition that might be effected, should he succeed in the suit. AIR 1931 Mad 94, Disting. (Para 12)

Anno: AIR Com.: Court-fees Act, S. 7(iv)(b) N. 12.

CASES REFERRED: Paras

(A) (V27) AIR 1940 Mad 113: ILR (1940) Mad 259 (FB) 3

(B) (V25) AIR 1938 Mad 278: ILR (1938) Mad 309 3

(C) ('36) C. R. P. No. 1547 of 1936 (Mad) 6

(D) (V36) AIR 1949 Mad 471: 1949-1 Mad LJ 648 6

(E) (V38) AIR 1951 Mad 732: 1951-1 Mad LJ 289 8

(F) (V23) AIR 1936 Mad 411: 70 Mad LJ 398 9

(G) (V18) AIR 1931 Mad 94: 1930 Mad WN 358 11

M. Ramakrishna and G. Venkatarama Sastry, for Petitioner; Govt. Pleader (M. Seshachalapathi), for Respondents.

ORDER: This revision petition raises a question of court-fee. The plaintiff is the adopted son of late Adiseshayya. Defendant 1 is the wife of the said Adiseshayya. Defendant 2 is alleged to have been taken in adoption by Adiseshayya subsequent to the plaintiff's adoption. There was a partition between the plaintiff and Adiseshayya, where under the "A" schedule properties were allotted to the share of the plaintiff and B-1 schedule properties to that of Adiseshayya.

Adiseshayya before his death executed a will in regard to the B-1 schedule properties excluding items 4 and 23 in favour of defendant 2. The B schedule properties were all purchased in the name of the defendant 1. It is alleged in the plaint that Adiseshayya brought about the alleged partition fraudulently and that the defendants were setting up rights in the A and B-1 schedule properties.

From the allegations in the plaint, it is clear that Adiseshayya during his life-time and after his death, defendants 1 and 2 were exclusively in possession of the A and B-1 schedule properties. The gist of the plaint is that by a fraud practised by Adiseshayya, the plaintiff was given A-1 schedule property and the rest of the property whether in the name of defendant 1 or in the name of Adiseshayya, is in the possession of the defendants who were setting up adverse claims to the same.

There is no allegation in the plaint that the plaintiff is either directly or constructively in possession of A-1 and B-1 schedule properties. He valued the plaint under Art. 17-B of Sch. II of the Court-fees Act. The court-fee examiner objected to the valuation and pointed out that as the plaintiff did not and could not claim actual or constructive possession of A-1 and B-1 Schedule items he should pay court-fee under S. 7(v) of the Court-fees Act.

The learned Judge agreed with him and directed the plaintiff to pay deficit court-fee of Rs. 1332-7-0. The revision is filed against that Order.

(2) Learned Counsel for the petitioner contends that the proper Article applicable is Art. 17-B of Sch. II of the Court-fees Act.

(3) The principles governing the valuation of reliefs for the purpose of court-fee in partition suits are well settled. A suit for partition and separate possession of the plaintiff's share, where he is in either actual or constructive possession of the family properties has been held to be incapable of valuation and therefore chargeable with fixed fee under Sch. II of Art. 17-B—See — 'Ramaswamy Ayyangar v. Ranghachariar', AIR 1940 Mad 113 (FB) (A).

Conversely it has been held that where the plaintiff is not in joint possession of all or any of the common properties the suit in respect of the plaintiff's share should be valued under S. 7(v)—See — "The Secretary of State v. Subramanian Chettiar', AIR 1938 Mad 278 (B).

It has also been held over and over again that for ascertaining the court-fee payable on a plaint the terminology used in the plaint is not of much relevance but it is the substance that matters. A plaintiff by a clever device and camouflage cannot evade court-fee if in substance the relief he asks for falls under one or other of the provisions of the Court-fees Act.

(4) If the aforesaid principles are applied, there is no doubt in my mind that the plaintiff should pay court-fee under S. 7(v) of the Court-fees Act.

The plaint discloses a clear ouster of the plaintiff by defendants 1 and 2. According to the plaintiff, a fraud has been practised on him by his adoptive father by allotting to his share the A-1 schedule properties and by settling the rest of the properties in favour of defendant 2 who admittedly has been in possession of the same in his own right.

So too, defendant 1 the widow of Adiseshayya in whose name the properties were purchased is admittedly is in possession of the same to the exclusion of the plaintiff claiming absolute rights therein. As the plaintiff is not directly or constructively in possession of B-1 schedule properties Art. 17-B of the Court-fees Act cannot apply.

(5) Learned Counsel for the petitioner argued in respect of the B schedule properties, that a member of a joint Hindu family can file a suit for partition treating the properties purchased benami in favour of a wife or other relative of a member of the family and in that event it would be enough if he valued the relief under Art. 17-B. In support of this contention he relied upon some decisions which I will briefly notice.

(6) In an unreported judgment in C. R. P. No. 1547 of 1936 (Mad) (C), Pandrang Rao J., held that where in a suit for partition by a member of a joint Hindu family there is an allegation that a certain property standing benami in the name of the wife of one of the coparceners is joint family property, no separate court-fee is leviable in respect of the property on the footing that that must be deemed to be an item alienated in favour of a stranger. That may be so in a case where notwithstanding the benami transaction the family continues either in direct or constructive possession of the properties so purchased in the name of the female members of the family.

It is a common phenomena among joint family that the properties are purchased sometimes for various reasons, in the names of female members of the family, but the fact does not make the properties any the less joint family properties. If a member of the family files a suit for partition on the basis that the family is in possession of those properties, the plaintiff can pay court-fee under S. 17-B of Sch. II of the Court-fees Act.

But in this case, the widow is admittedly in possession of the properties claiming them to be her own properties to the exclusion of the plaintiff. That decision has, therefore, no bearing on the present case. Nor is the decision of Satyanarayana Rao J., and Panchapakesa Sastri J., in — 'Joga Rao v. Venkata Rao', AIR 1949 Mad 471 (D), of much relevance. There in a suit for partition one of the defendants pleaded that the plaintiff has purchased some properties in the names of strangers fraudulently and collusively and benami with a view to defeat the rights of the several members to the family properties and that those items should be brought into the hotchpot and the benamidars also were added as parties. It was contended that the defendant had to pay court-fee in respect of his share in such items.

(7) The learned Judges held that in a suit for declaration, as no question of set-off or counter claim arises, and there is no provision in the Court-fees Act which requires court-fees to be paid in respect of such claim by the defendant in a partition suit, the defendants need not pay any court-fee. The question, viz., when a benamidar is in actual possession and is claiming adversely to the family, whether a plaintiff should pay court-fee under S. 7(v) of the Court-fees Act was neither raised nor decided in that case. I, therefore, hold that the plaintiff is liable to pay court-fee under S. 7(v) in respect of his relief for possession of the B schedule properties.

(8) I cannot also find any distinction in the application of the principle even in regard to the B-1 schedule properties. The cases cited by the learned counsel only reiterated the well-settled principles and applied them to the facts of those cases. In — 'Rehanna Basana v. Adeppa', AIR 1951 Mad 732 (E), Balakrishna Ayyar J., held that in a suit for partition of the family properties some of which were alienated but were in the possession of the family, no separate court-fee was payable as the properties were in the possession of the family, and it could not be deemed that such possession was on behalf of the alienee.

As the family was in actual possession of the properties alienated, the learned Judge was certainly right in holding as he did.

(9) In — 'Sellammal v. Jothimani Nadar', AIR 1936 Mad 411 (F), Varadachariar J., accepted and applied the aforesaid principles to the following facts. There a suit was filed by two sons of a Hindu father against their step-brothers and step-mother for a declaration that the suit properties were the undivided ancestral properties of the family, that a sale-deed executed by the plaintiff's father in favour of their step-mother was invalid as it was intended merely to conceal the assets of the family at the registered partition that was effected shortly after and the plaintiffs prayed for separate possession of their shares after a partition by metes and bounds.

The learned Judge held that the plaint was leviable to court-fee under S. 7(v) of the Court-fees Act and that clauses (iv)(b)(c) and (iv-a) of the Act had no application to the case. At p. 412, the learned Judge observes :

"Where the relief asked for is by way of possession, the suit will prima facie fall under cl. (v) and not under cl. (iv)(c)...It is in the circumstances of this case not possible to bring the suit under sub-cl. (b) of clause (iv) because even according to the plaintiffs defendant 4 is claiming the property adversely to the plaintiffs insisting on her own title under the sale-deed. It cannot therefore in any sense be said that the plaintiffs are even constructively in possession of the property."

(10) It is not necessary to multiply decisions. From the aforesaid allegations in the plaint, it is manifest that in regard to B-1 schedule properties, defendant 2 is in actual possession claiming rights under the will executed by Adiseshayya and claiming adversely to the plaintiff. Even according to the allegations in the plaint, it is a clear case of ouster.

(11) Even so it was contended by the learned Counsel for the petitioner that his client need only pay court-fee on the valuation representing the difference between the value of the A schedule property and the additional property that might be allotted to him in the re-partition that may be effected should he succeed in the suit. To put it differently, if a re-partition is effected the B-1 schedule properties will be brought into the hotchpot along with the A schedule properties and the plaintiff will get half of the entire property. As he is already in possession of the A schedule properties the argument proceeds that he seeks relief for the recovery of possession of only that extent which falls short of his half share in the entire property.

But the suit is not for the recovery of any definite extent out of the B-1 schedule property to make up the deficiency. The suit is in effect to recover the entire B-1 schedule properties on behalf of the family so that they might be pooled together along with the A schedule property for re-partition. It is not possible to predicate that in any re-partition that may be effected the A schedule property would again be allotted to the plain-

tiff and that only a part of B-1 schedule property to make up his half share would be given to him. It may be that the A schedule property may fall to the share of the representatives of Adiseshayya and that the B Schedule property or part of it may be allotted to the plaintiff. In the circumstances, it is not possible to adopt the basis suggested by the learned Counsel.

The decision of Ramesam J. in — 'Sundara Ganapathi Mudali v. Daivasikamani Mudali', AIR 1931 Mad 94 (G), was relied upon in support of this argument. There the plaintiff brought a suit against his father and step-brother for partition of the family properties. Alleging that an unfair partition was effected owing to the pressure of his father and was compulsorily registered and that nonetheless he remained joint. At p. 96, the learned Judge made the following observations :

"In the present case the plaintiff has got some immoveable properties allotted to him but he complains that this is an unfair allotment. And he apparently thinks that he is entitled to some more properties. I think an opportunity ought to be given to him so that he may state the valuation of his share of the immoveable properties in the manner stated by the proviso, that is, according to para. 5 of S. 7 and the valuation of the properties allotted to him and half the difference between the two would be the minimum value on which he is to pay the court-fees".

(12) I do not think that that method of valuation can be adopted when the plaintiff does not seek to recover only an additional extent, but claims re-partition of the entire property ignoring the previous partition. Further this is a new basis which has not been suggested in the court below.

(13) In the result, the revision petition fails and is dismissed with costs. One month's time is granted to pay the court-fee.

V.B.B. Revision dismissed.

(S) A.I.R. 1955 ANDHRA 203 (V 42, C 75 Sept.)

UMAMAHESWARAM J. (4-11-1954)

Mathuri Suryanjaneyalu, Appellant v. Thummalasetto Venkateswarlu and others, Respondents.

A. A. O. Nos. 326 to 330 of 1951, against orders of Sub-J., Tenali, D/- 15-12-1949.

Civil P. C. (1908), S. 47 O. 21 Rr. 95, 96 — Purchase of undivided share — AIR 1944 Mad 62 — AIR 1927 Sind 199 and AIR 1928 Oudh 251 (FB), Dissented from.

A decree-holder auction purchaser of an undivided share is entitled to bring a suit for partition and possession of his share and S. 47 is no bar to such a suit. There is no specific rule enacted as to how a purchaser of an undivided share is entitled to obtain possession. The judgment-debtor being a co-owner with others, O. 21 R. 95 will not apply as actual delivery cannot be effected and the auction-purchaser cannot be put in actual possession, along with the other co-owners.

Rule 96 also will not apply as the property sold is not in the occupancy of a tenant or other person entitled to occupy the same under the judgment-debtor, as the co-owner or tenant-in-common is not holding under the judgment-debtor. Case Law discussed; AIR 1944 Mad 62 — AIR 1927 Sind 199 and AIR 1928 Oudh 251 (FB), Dissented from. (Para 5)

Anno: AIR Com., Civil P. C., S. 47 N. 2; 1953 Mulla, S. 47 (Topic discussed in AIR Com., note extra — See however, P. 180 N. "Section.. .....liberally" in Mulla).

AIR Com., Civil P. C., O. 21 R. 96 N. 4; 1953 Mulla, O. 21 R. 96 (Topic in AIR Com., note extra).

CASES REFERRED: Paras

(A) ('06) 29 Mad 294 7, 9, 10

(B) (V3) AIR 1916 Mad 430: 28 Mad LJ 642 8, 10, 11

(C) (V6) AIR 1919 Mad 949: 9 Mad LW 81 8, 9

(D) ('31) 1931 Mad WN 1176 8

(E) (V31) AIR 1944 Mad 62: 215 Ind Cas 130 9

(F) ('06) 29 Mad 296 9

(G) (V22) AIR 1935 Mad 803: 58 Mad 893 (FB) 10

(H) (V14) AIR 1927 Sind 199: 102 Ind Cas 311 11

(I) (V15) AIR 1928 Oudh 251: 3 Luck 506 (FB) 12

Neti Subramanyam and J. V. Krishna Sarma, for Appellant; G. Venkatarama Sastri, for Respondents.

JUDGMENT: This is an appeal filed by defendant 1 as against the order of remand passed by the Subordinate Judge of Tenali in Appeal Suit No. 113 of 1949.

(2) The suit was dismissed by the District Munsif of Repalle on the ground that it was not maintainable and that the remedy of the plaintiff was only by an application under S. 47, Civil P. C. For the purpose of appreciating the contention based on S. 47, Civil P. C., it is sufficient to set out a few relevant facts.

(3) Venkateswarlu, respondent 1 herein, purchased an undivided 2/3rd share of the suit properties in execution of a money-decree as against the appellant and his sons for Rs. 518/- on 29-6-1936. The sale was confirmed on 31-7-1936, and though he applied for delivery on 28-6-1939, it was dismissed as not pressed. The present suit is for recovery of possession of 3 acres 5 cents out of the schedule land or in the alternative for partition and recovery of possession of 2/3rd share of the plaint schedule land.

(4) The main contention addressed on behalf of the appellant is that Venkateswarlu, the decree-holder-auction-purchaser ought to have applied for possession under O. 21, R. 95 or R. 96, Civil P. C., and that as he did not obtain delivery of possession, his suit for partition is not maintainable.

(5) Rule 95 of O. 21 runs in the following terms:

"Where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under R. 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and if need be, by removing any person who refused to vacate the same."

It provides for delivery of actual possession of the property from the judgment-debtor. R. 96 enacts that if the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under R. 94, the Court shall order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property and by proclaiming to the occupant by

beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

There is no specific rule enacted as to how a purchaser of an undivided share is entitled to obtain possession. The judgment-debtor being a co-owner with others, R. 95 will not apply as actual delivery cannot be effected and the auction-purchaser cannot be put in actual possession, along with the other co-owners. R. 96 also will not apply as the property sold is not in the occupancy of a tenant or other person entitled to occupy the same under the judgment-debtor, as the co-owner or tenant-in-common is not holding under the judgment-debtor. So there are no rules provided for the auction-purchaser of an undivided share obtaining delivery of possession.

(6) If a decree of a specific item of property is obtained, O. 21, R. 35, Cl. (1) provides for the delivery of possession of that property. If the property decreed is in the occupancy of a tenant or other person entitled to occupy the same under the judgment-debtor, R. 36 provides for the procedure to be followed. O. 21 R. 35 Cl. (2) enacts that if the decree is for joint possession of immoveable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode at some convenient place the substance of the decree. There is no such provision made for obtaining delivery of possession by an auction-purchaser of an undivided share.

(7) The point which arises for consideration in the present case is directly governed by a series of decisions of the Madras High Court In — 'Yelumalai Chetty v. Srinivasa Chetty', 29 Mad 294 (A) it was held as follows:

"The only right acquired by the court sale against defendant 2 was a right to effectuate the sale by a suit for partition of the joint property of the co-parceners and the delivery to the plaintiffs of what might be allotted to the share of defendant 2 at the partition."

"It was not competent to the Court in the circumstances of this case, on a mere application for execution by the purchaser, to enforce the right of the purchaser by an order for partition. Consequently no orders of the kind contemplated by S. 318, Civil P. C. (corresponding to O. 21, R. 95) could have been passed in favour of the plaintiffs in the circumstances of this case. It follows that S. 244 (corresponding to S. 47) could not have been a bar to a suit, brought by these plaintiffs for partition."

(8) This decision was followed in — 'Hassan Ammal Bibi v. Moideen Rowther', AIR 1916 Mad 430 (B) by Sir John Edward Power Wallis, Kt., C. J., and Seshagiri Iyer J. The learned Chief Justice no doubt stated that it was unnecessary to consider whether O. 21, R. 96 was applicable to a case where the judgment-debtor, whose interest was purchased, was in joint possession with a third party because he took the view that the title having vested under S. 65 and O. 21, R. 94, the suit for partition without obtaining any formal delivery of possession was maintainable. Seshagiri Iyer J., however, held at p. 432 that R. 96 has no application to cases of co-tenants. He observed:

"The rule itself speaks of the possession of 'tenants' and others entitled to possession. These latter words would 'prima facie' apply only to persons who claim possession in their own right, and not to those who are entitled to hold possession for themselves and for others".

The same view was taken in — 'Rama Row v. Sivanarayana', AIR 1919 Mad 949 (C), viz., that S. 47, Civil P. C., did not apply and that the petitioner's remedy was only to bring a suit for partition and delivery of their 1/3rd share. Reilly J., followed these decisions in — 'Muhideen Abdul Kadir v. Chidambaram Chettiar', 1931 Mad WN 1176 (D).

(9) The learned advocate for the appellant, Mr. Sitarama Sastri relied on the decision of Horwill J., in — 'Bala Lingayya v. Sunku Nallayya', AIR 1944 Mad 62 (E), as supporting his contention that S. 47 was applicable. There is no discussion of this question in the decision. The passage relied on is in the following terms:

"When the appellant tried to obtain possession he was obstructed by the respondent. He sought for the removal of that obstruction, but his petition was dismissed on the ground that his proper remedy was to file a partition suit, such as was suggested in — '9 Mad LW 81 (C)', and — 'N. A. Pokker v. K. K. Patumma', 29 Mad 296 (F)'. Instead of taking the matter in appeal, the appellant filed the suit out of which this Second Appeal arises".

The reference to '29 Mad 296 (F)', is apparently a mistake for the decision in '29 Mad 294 (A)'. From a reading of the judgment, I am unable to see how and why the learned Judge did not follow the two Bench decisions of the Madras High Court. In my opinion, the decision of Horwill J., is wrong and is not consistent with the Bench decisions of the Madras High Court.

(10) The learned Advocate for the appellant next relied on the observations of Ramesam J., at p. 806 in — 'Abdul Aziz Saheb v. Chokkan Chettiar', AIR 1935 Mad 803 (FB) (G). Those observations have really no bearing on this question as Ramesam J., held that delivery might have been obtained of the lands as also the house in respect of which there was no obstruction. The learned Judge has not considered the correctness or otherwise of the decisions in '29 Mad 294 (A)', and AIR 1916 Mad 430 (B)', or the provisions of O. 21 R. 95 and R. 96, Civil P. C. So these observations ought not to be read out of their context as supporting the contention of the appellant.

(11) The next case relied on is the decision of a single Judge in — 'Thakursi Raisi v. Fida Hussain', AIR 1927 Sind 199 (H). Though the learned Judge referred to the decision in 'AIR 1916 Mad 430 (B)', he overlooked the observations of Seshagiri Iyer J., wherein the learned Judge expressed his opinion that the provisions of O. 21, R. 96 are not applicable where the judgment-debtor purchased only an undivided share. I do not agree with the decision of the Sind Court that as far as possible consistent with Rr. 95 and 96 of O. 21, Civil P. C., possession might be delivered to a purchaser of an undivided share.

(12) There is only one other decision which remains to be referred to, namely, the Full Bench decision of the Oudh Court in — 'Gulab Khan v. Ataullah', AIR 1928 Oudh 251 (FB) (I). The first question that was referred to the Full Bench was

"whether the delivery of possession by means of beat of drum under O. 21, R. 95, Civil P. C., to an auction-purchaser who has purchased a share in the property so sold, can be considered to be a valid and effective delivery of possession sufficient to give to the auction-purchaser a fresh start for limitation".

There are no doubt observations of the learned Judges of the Full Bench to the effect that such possession as the nature of the property is capable of might be delivered under O. 21, R. 95. I prefer to follow the Bench decision of the Madras High Court in preference to the Full Bench Judgment of the Oudh Court and hold that the provision of O. 21, R. 95 and R. 96 do not apply to a case of this description and that S. 47 is, therefore, not attracted.

(13) I, therefore, confirm the judgment of the Subordinate Judge and hold that the suit for partition is maintainable and that S. 47, Civil P. C., is no bar to the maintainability of the suit.

(14) As regards the question whether the respondent is entitled to rely on the agreement entered into with Punnamma and recover possession of the specific land, I am clearly of the opinion that the Subordinate Judge is wrong. Punnamma, defendant 1's wife, claimed that she was entitled to the property and filed a claim petition and it was dismissed. A suit was, thereafter, filed and it was also dismissed. So the respondent is not entitled to recover possession of the property or any agreement entered into with her. I, therefore, disagree with the conclusion of the Subordinate Judge contained in para. 12 of his judgment. As already stated, the respondent is entitled to sue for partition and recover his 2/3rd share of the property. This appeal illustrates how a cantankerous judgment-debtor may cause obstruction to the decree-holder realising the fruits of his decree for nearly 20 years.

(15) In the result, the Civil Miscellaneous Appeal fails and is dismissed with costs, of the respondents.

(16) This judgment covers the other four appeals C. M. A. Nos. 327, 328, 329 and 330 of 1951, and they are also dismissed with costs. No leave.

D.H.Z. Appeals dismissed.

(S) A.I.R. 1955 ANDHRA 205 (V 42, C 76 Sept.)

UMAMAHESWARAM J. (21-9-1954)

Addanki Venkata Rukminiamma, Petitioner v. Chilakamarthi Krishnamurthy, Respondent.

C. M. P. No. 7053 of 1954.

Civil P. C. (1908), O. 41, R. 10 — Discretion under — Exercise of — Principles.

Poverty by itself is neither a ground for dismissing nor ordering an application for security for costs. The terms of O. 41, R. 10, are very wide and leave an unfettered discretion to be exercised by the appellate Court. Both the interests of the appellant and the respondent have to be secured or safeguarded by the appellate Court. The respondent, who has succeeded in the suit, ought not to be harassed by a poor litigant and deprived of his costs of suit and appeal.

At the same time the poor litigant, who is aggrieved by a manifestly wrong judgment of the trial Court, ought not to be prevented from prosecuting such an appeal by an oppressive order requiring him to furnish security for costs. The discretion should be judicially exercised on the facts of each particular case. Case law discussed.

(Para 12)

Anno: AIR Com.: Civil P. C., O. 41, R. 10 N. 1; 1953 Mulla: O. 41, R. 10, P. 1194 N. "Scope and object of the rule" (5 Pts. extra in AIR Com.)

AIR Com.: Civil P. C., O. 41, R. 10 N. 6; 1953 Mulla: O. 41, R. 10 P. 1195 N. "In its discretion" (14 Pts. extra in AIR Com.—Madras and Lahore views not noticed in Mulla).

CASES REFERRED: Paras

(A) ('85) 7 All 542: 1885 All WN 127 8
(B) ('86) 8 All 203: 1886 All WN 310 (FB) 8
(C) (1881) 19 Ch D 84: 51 LJ Ch 96 8
(D) ('89) 13 Bom 458 9
(E) (V10) AIR 1923 Bom 399: 73 Ind Cas 474 9, 11
(F) (V18) AIR 1931 Cal 40: 58 Cal 117 10
(G) (V25) AIR 1938 Mad 380: 1938-1 Mad LJ 142 11, 12
(H) (V8) AIR 1921 Pat 233 (1): 55 Ind Cas 835 11
(I) (V41) AIR 1954 Mad 881: 1954-2 Mad LJ 276 11
(J) (V18) AIR 1931 Lah 70 (1): 130 Ind Cas 771 11

K. Krishnamurthy, for Petitioner; J. V. Suryanarayana Rao, for M. S. Ramachandra Rao, for Respondent.

ORDER: This application is filed by respondent 1 in Appeal No. 36 of 1954 to direct the appellant to furnish security for costs awarded in the trial Court and for costs to be incurred in the High Court.

(2) The provision of law that governs the application is O. 41, R. 10, Civil P. C. which runs in the following terms:

"The appellate court may, in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of India, and is not possessed of any sufficient immoveable property within India other than the property (if any) to which the appeal relates."

(3) The respondent herein filed O. S. No. 2 of 1952 on the file of the Subordinate Judge's Court of Ongole for a declaration of his title to the plaint "A" Schedule property on the ground that he was adopted by his uncle Chilakamarthi Adinarayana and for other reliefs. The petitioner, who resisted the suit, is the daughter of Adinarayana and she contended that the respondent was not adopted by her father.

She also alleged that the properties were conveyed to her under a registered settlement deed executed by her father in 1951. The Subordinate Judge of Ongole in a careful and elaborate judgment held that the adoption was not true and that the petitioner was entitled to the properties under the settlement deed executed by her father. The appeal is filed by the alleged adopted son.

(4) I have carefully perused the judgment of the Subordinate Judge and heard arguments addressed by the Advocates for the petitioner and this respondent to satisfy myself as to whether the respondent herein has made out a prima facie case in the appeal. There is no document evidencing the adoption.

There is also no proof, as pointed out by the Subordinate Judge in para 21, that the respondent was living in the house of Adinarayana after the alleged adoption. The truth or otherwise of the adoption depends upon the appreciation of the oral evidence, adduced on behalf of the respondent and the Subordinate Judge, who heard and saw the witnesses, observed as follows:

'I am of opinion that the oral evidence adduced by the defendant (respondent herein) cannot be relied on to come to the conclusion that Adinarayana adopted defendant 3 on 9-6-1943, in Somavarapad in the house of A. Hanumiah".

(5) The circumstances also probabilise that the adoption is not true, as Adinarayana had a daughter (the petitioner herein) and grand-sons by her. Some of the documents relied on by the respondent to show that Adinarayana admitted that the respondent was his adopted son were held by the Subordinate Judge to be not genuine or that Adinarayana was not aware of the recitals contained in those documents.

As Adinarayana happened to be rich and his brother Venkatasubbaiah comparatively poor, the adoption of one of his sons appears to have been set up and to support the case of adoption, certain documents seem to have been brought into existence as pointed out by the Subordinate Judge in para 15. So, in my opinion, the respondent herein has not made out a prima facie case. He has not satisfied me that the Judgment of the Court below is manifestly wrong.

(6) According to the petitioner, the appeal is filed only "to tease and tire me out, expecting that I would compromise in disgust". The petitioner alleged in para. 3 that inspite of the several steps taken by her to recover the costs of Rs. 992-8-0 awarded to her by the Subordinate Judge, she was not able to recover any amount.

She also stated that in E. P. No. 102/1953 filed by her, the Subordinate Judge made an order that the respondent should pay the amount of costs decreed in equal instalments of Rs. 10/- per month. The application was therefore filed for security for costs of the trial court amounting to Rs. 992-8-0 and for the costs of the appeal estimated at Rs. 2,000/-.

(7) The respondent herein filed a counter affidavit stating that the object of the application was only to stifle the appeal, that the appeal is not a frivolous one, that the order passed by the executing court enabling him to pay the decree for costs in instalments of Rs. 10/-, is an equitable arrangement binding upon the petitioner, that the present application was made only to circumvent the order passed by the executing court and that his share in the properties of his natural family would be sufficient to cover the decree for costs.

(8) The main contention that was urged by the learned Advocate for the respondent was that his client's poverty was not a sufficient ground to direct security to be furnished under the provisions of O. 41, R. 10, Civil P. C. In support of that contention, he invited my attention to the decisions of the Allahabad High Court under S. 549, Civil P. C.(old), corresponding to O. 41, R. 10 of the present Code, in — Lakshmichand v. Gatto Bai', 7 All 542 (A) and — 'Jiwan Ali Beg v. Basammal', 8 All 203 (FB) (B). Straight J. in delivering the Judgment of the Full Bench stated as follows:

"We are unable to lay down any general rule by which the exercise of the discretion conferred by S. 549, Civil P. C. should be governed; but we may go so far as to say that the mere fact of the poverty of an appellant, standing by itself, and without reference to any of the general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs."

Tyrell J. delivered a separate judgment in the following terms:

"Section 549 of the Code prescribes no conditions which absolutely entitle a respondent to an order under the terms of that section requiring the appellant to furnish security for the costs of the appeal, and I should hesitate to import into the provisions of the section any rule either way upon the question whether or not the poverty of an appellant by itself justifies an order requiring him to furnish security for costs."

In the Order of Reference made to the Full Bench two reliefs of the Court of appeal in England were cited. It is sufficient if I refer to one of them, namely, — 'Harlock v. Ashberry', (1881) 19 Ch D 84 (C), which sets out the law obtaining in England on this point. Lush L. J., points out the difference that existed between the practice in the Court of Chancery and in Common Law Courts before the Judicature Acts as follows:

"In the Court of Chancery, it was the practice to require security to a certain amount for the costs of an appeal to be given in every case. That was not the practice in the Courts of Common Law; there poverty alone was not considered a sufficient reason for requiring security to be given .....The rule under the Judicature Act (R. 15 of O. 58) provides that such security for the costs of any appeal shall be given as may be directed under special circumstances by the Court of appeal.

This was intended to alter the whole practice both of the Court of Chancery and of the Courts of Common Law, and to leave it in the discretion of the Court whether security should be given under special circumstances."

As regards the practice now obtaining in England, Jessel M. R., observed as follows:

"For sometime past it has been the settled practice if the respondent asks for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the respondent's costs of the appeal if it should be unsuccessful. The amount is generally very moderate and often turns out to be a good deal less than the actual costs."

(9) The learned Advocate for the respondent drew my attention to two decisions of the Bombay High Court in — 'Ahmad v. Shaik Issa', 13 Bom 458 (D) and — 'Ratan Chand Daya Chand v. Damji Dharsey', AIR 1923 Bom 399 (E). It is not necessary for me to discuss these cases as there is a rule framed by the Bombay High Court that an appellant shall, with the Memorandum of Appeal deposit into Court a sum of Rs. 500-0-0 as security for the costs of the respondent in the appeal.

The question that arose in those cases was whether it was open to the respondent to demand any further security for costs in addition to the amount deposited as per the rule.

(10) So far as the Calcutta High Court is concerned, it is sufficient if I refer to — 'Birendranath v. Mt. Begum Jan Zada', AIR 1931 Cal 40 (F), wherein Rankin C. J., refers to the decisions of English Courts for the purpose of laying down how the discretion of the appellate Court should be exercised under O. 41, R. 10, Civil P. C. The learned C. J. made an Order for security on the ground that the appellant has not paid the respondent's costs in the Lower Court and costs awarded against her in other suits.

Mulla in his Commentary on "Civil Procedure Code" 12th Edn. refers at page 1195 to all the decisions bearing on this question as to how the discretion under O. 41, R. 10 should be exercised.

(11) There remains only one Bench decision of the Madras High Court to be referred to in this connection. Venkatasubba Rao J. who delivered the judgment in — 'A. Kuttoossa v. M. K. Kunhamma', AIR 1938 Mad 380 (G) laid down that while the appellant's poverty by itself would not be sufficient to warrant his being required to furnish the security, it does not mean "that the appellant can rely upon his own poverty as being an

important or decisive factor and resist the application on that ground".

He further held that the respondent should be prompt in applying for security for costs and that the mere fact that the effect of ordering security for costs might have the effect of stifling an appeal was not a sufficient ground to dismiss an application under O. 41, R. 10. There is no doubt that if the appellant is a puppet in the hands of others or is merely a nominal party acting on behalf of others, who are keeping themselves behind the scene, security for costs might be ordered, as held in — 'Raghunath Das v. Sheokumar Missir', AIR 1921 Pat 233 (1) (H) and — 'Ratanchand Daya Chand v. Damji Dharsey (E)'. It is also clear that security for costs may not be ordered as pointed out by Venkatasubba Rao J., at pages 380-381 as follows:

"Where the liberty of the appellant is in question or where highly penal consequences will be entailed upon him by the Order appealed against the Court as a general rule will refuse to order security for costs; that seems to be the true doctrine. Where the appeal raises grave issues which vitally affects the appellant's position, the Courts may well refuse to make an order which will have the effect of stifling the appeal although circumstances may exist which normally would justify an Order for security."

Vide also the decision of Mack J. in — 'Ramaraju Gounder v. Molayan', AIR 1954 Mad 881 (I). One other case which was referred to by the learned Advocate for the respondent was the decision in — 'Hari Ram v. Jowala Mal', AIR 1931 Lah 70 (1) (J) in support of the proposition that the mere fact that an appellant has not paid him in full or in part the costs of the original suit is no ground for calling upon him to furnish security under O. 41, R. 10, Civil P. C., unless his conduct has been shown to be vexatious, that is:

"such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs."

(12) To sum up, the practice that obtains in England after the passing of the Judicature Act is as pointed out by Jessel M. R., to direct security for costs to be given by an appellant who would be unable through poverty to pay the respondent's costs of the appeal if it should be unsuccessful. The High Courts of Allahabad and Bombay have taken the view that poverty of an appellant by itself does not justify an order requiring the appellant to furnish security for costs.

Though the Calcutta High Court took the same view as the High Courts of Allahabad and Bombay in the earlier cases, Rankin C. J., struck a different note and preferred to follow the English practice. The view taken by the Madras High Court is only a via media between the view expressed by the High Courts of Allahabad and Bombay and the view of the English Courts followed by the Calcutta High Court. In the language of Venkatasubba Rao J. in — 'AIR 1938 Mad 380 (G)', the legal position is as follows:

"The proposition is well established that the appellant's poverty by itself would not be sufficient to warrant his being required to furnish security. That has not been seriously disputed here, but surely that does not mean that the appellant can rely upon his own poverty as being an important or decisive factor and resist the application on that ground."

Or, in other words, poverty by itself is neither a ground for dismissing nor ordering an application for security for costs. In view of the conflicting decisions referred to supra the proper course appears to be to address myself to the terms of O. 41, R. 10, Civil P. C., which are very wide and which leave an unfettered discretion to be exercised by the appellate Court.

Both the interests of the appellant and respondent have to be secured or safeguarded by the appellate Court. The respondent who has succeeded in the suit ought not to be harassed by a poor litigant and deprived of his costs of suit and appeal. At the same time, the poor litigant, who is aggrieved by a manifestly wrong judgment, of the trial Court, ought not to be prevented from prosecuting such an appeal by an oppressive order requiring him to furnish security for costs.

The discretion should be judicially exercised on the facts of each particular case. I shall, therefore, proceed to consider the facts of this case, and decide whether security for costs should be ordered or not.

(13) As already stated, the appellant has not established a prima facie case in appeal. He is merely setting up his adoption to defeat the lawful rights of the petitioner herein, that is, Adinarayana's daughter. The appeal is in my view not filed bona fide, but only to coerce the petitioner to enter into a compromise. His father and other brothers are possibly behind the scene and conducting the litigation.

The petitioner's interests have also to be adequately safeguarded. She has not been able to realise the costs awarded to her by the trial court. The order passed by the executing court directing the payment of costs decreed in equal instalments of Rs. 10/- per month is, in my opinion, not an equitable arrangement, but a most inequitable order as the petitioner will not be in a position to realise the full amount of the decree for costs for at least eight years.

The respondent states that he is entitled to a share in the natural family if his adoption is not true and that the petitioner would be in a position to realise the amount of costs from the share. If so, he is not really poor, and is certainly in a position to furnish adequate security for costs.

(14) In the circumstances of the case, I think it is just and proper that he should be directed to furnish security for the costs of suit i.e., Rs.992-8-0 as also for an equal sum being the possible costs of appeal. The sum of Rs. 2,000/- mentioned in the affidavit as the estimated costs of appeal is, in my opinion, excessive.

(15) In the result, I direct that the respondent in this petition should furnish security for a sum of Rs. 1,985/- to the satisfaction of the Subordinate Judge of Ongole within a period of three months from today. It is open to the respondent to offer by way of security his undivided share in his natural family.

H.G.P. Order accordingly

(S) A.I.R. 1955 ANDHRA 207 (V 42, C 77 Sept.)

UMAMAHESWARAM J. (8-11-1954)

Pulavarthi Sreeramamurthi, Petitioner v. Pulavarthi Lakshmikantham and another, Respondents.

Civil Revn. Petn. No. 1812 of 1953, against order of Sub-J., Eluru, D/- 6-7-1953.

Civil P. C. (1908), S. 151 — No power to compel a party to undergo medical examination.

In absence of any statutory provision compelling the medical examination of a party and restricting the enjoyment of personal liberty of that person, it is not right to rely upon the general or inherent powers of the Court under S. 151, Civil P. C., to achieve that purpose. AIR 1951 Mad 910 (1), Rel. on. (Para 4)

Held, on facts, that the respondent could not be compelled to undergo medical examination,

and further that it was impossible to ascertain, after a lapse of four years, as to whether the respondent was enceinte and had given birth to a child. (Para 5)

Anno: AIR Com., C. P. C., S. 151 N. 1; 1953 Mulla, S. 151, P. 476 N. "Inherent powers of Court" (Pts. 21 and 23 extra in AIR Com., — Pt. (m) in Mulla extra).

CASES REFERRED: Paras

(A) (V38) AIR 1951 Mad 910 (1): 1951-1 Mad LJ 580 2, 4

(B) (V37) AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383 (SC) 3

B. V. Subramaniam and B. V. Krishnamurthi, for Petitioner; N. C. V. Ramanujachari, for Respondents.

JUDGMENT: This Civil Revision Petition is filed as against the order of the Subordinate Judge of Eluru, in I. A. No. 196 of 1953, in O. S. No. 53 of 1952 dismissing an application filed by the petitioner to direct the medical examination of respondent 1, as to whether she had become enceinte and given birth to a child at any time. The suit was filed by the plaintiff, respondent 1 for partition and recovery of a one-third share of the suit properties, on the ground, that her husband died divided from his brothers, the petitioner and respondent 2 herein.

Alternatively, she prayed that, if the partition was found to be not true, she was entitled to a one-third share in the non-agricultural properties and for maintenance. It was contended by the petitioner that the plaintiff had given birth to a child subsequent to her husband's death and being unchaste, she was not entitled to recover any maintenance. Issue 8 was raised in regard to the question of respondent 1's chastity.

(2) The present application was field on 14-2-1953, to find out, by medical examination, whether respondent 1 gave birth to a child at any time. The Court below followed the judgment of Raghava Rao J., in — 'Venkateswarlu v. Subbayya', AIR 1951 Mad 910 (1) (A), and held that the respondent could not be compelled to undergo medical examination. The learned Advocate for the petitioner contended that under S. 14, Evidence Act, facts showing the existence of any state of body is a relevant fact and that he is entitled to lead evidence to show that the respondent was enceinte after her husband's death.

The respondent's advocate does not challenge that position that evidence may be let in to prove that fact. The only question is, whether there is any power in Court to compel an unwilling party to be medically examined. The petitioner's advocate has not drawn my attention to any specific provision in the Code of Civil Procedure or in the Indian Evidence Act, for compelling the attendance of a party for medical examination. It is on that very ground that the learned Judge, Raghava Rao, held in 'AIR 1951 Mad 910 (1) (A)', that such an application was not maintainable.

(3) Section 151, Civil P. C., was next sought to be relied on, as conferring power on the Court to pass such an order. The learned advocate for the respondent contended that such an examination would offend the provisions of Art. 21 of the Constitution which enacts that

"no person shall be deprived of his life or personal liberty except according to procedure established by law".

As pointed in — 'A. K. Gopalan v. State of Madras', AIR 1950 SC 27 (B).

"The right to the safety of one's life and limbs and to the enjoyment of personal liberty, in the sense of freedom from physical restraint and coercion of any sort are the inherent birthrights of a man. The essense of these rights consists in restraining others from interfering with them and hence they cannot be described in terms of 'freedom' to do particular things ..... An individual can be deprived of his life or personal liberty only by action of the State either under the provisions of any penal enactment or in the exercise of any other coercive process vested in it under law .....

There must be a substantive law, under which the State is empowered to deprive a man of his life and personal liberty and such law must be a valid law which the Legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the fundamental rights that the Constitution lays down."

(4) In the absence of any statutory provision compelling the medical examination of a party, and restricting the enjoyment of personal liberty of that person, it is not right to rely upon the general or inherent powers of the Court under S. 151, Civil P. C., to achieve that purpose. The examination of a party as a witness is however warranted by the provisions of the Code of Civil Procedure. Medical examination is in certain cases specifically provided as under the terms of the Indian Lunacy Act. I therefore follow the decision of Raghava Rao J., in — 'Venkateswarlu v. Subbayya', (A), and agree with the Court below that the respondent cannot be compelled to undergo medical examination.

(5) Moreover, it is impossible to ascertain, after a lapse of four years as to whether the respondent was enceinte and gave birth to a child. Taylor in his treatise on Principles and Practice of Medicial Jurisprudence (Vol. II) discusses this question on pp. 64 to 68. At p. 64 he states:

"In some strong and vigorous women the body resumes its natural state within a few days and the traces of parturition may have become so ambiguous as to furnish no satisfactory evidence. In others proofs of delivery may be obtainable for a fort-night or three weeks afterwards. In most cases, however it is difficult to say after the lapse of eight or ten days that delivery has certainly taken place, the signs having partially disappeared".

The passage in Modi's "Medical Jurisprudence and Toxicology" and Lyon's "Medical Jurisprudence for India" are to the same effect. At p. 368 of Lyon's book the question "Has this woman ever been delivered of a Child" is answered by Dr. Meadows as follows:

"No certain answer can be given except in the case of recent delivery".

So, in my opinion even if such a medical examination is to be ordered, it will throw no light on the question. The learned advocate for the petitioner relied on para. 5 of the counter affidavit to show that respondent 1 had no objection to undergo medical examination. I do not think that that is a correct reading of para. 5. The respondent contended that the application was not maintainable and that the Court has no jurisdiction to direct her medical examination but that if her objection was overruled, she had no objection to be examined by an efficient lady doctor at the cost of the petitioner. There is, therefore, no substance in this contention of the petitioner.

(6) In the result, the Civil Revision Petition fails and is dismissed with costs.

Petition dismissed.

D.R.R.

(S) AIR 1955 ANDHRA 209 (V 42, C 78 Oct.)

SUBBA RAO C. J. (22-9-1954)

Khagum Khan and another, Appellants v. Mohamed Ali Sahib and another, Respondents.

Second Appeals Nos. 41 to 43 of 1950, against decree of Sub. J., Cuddappah in A. S. Nos. 101, 77 and 90 of 1949.

(a) Muhammadan Law — Wakf — Mutawalli — Appointment of — Modes of appointment — Direction of founder — Inference.

Ordinarily there are three modes by which a person may trace his right to be a mutawalli; they are (i) appointment by the wakif or by some person expressly authorised by the wakif to appoint and in the absence of any person so authorized; (ii) appointment by the executor of the wakif and in the absence of such an appointment; (iii) appointment by the Court. Apart from these, the appointment may also be made by a congregation in the case of an institution confined to a particular sect in a particular locality. AIR 1914 Mad 714 and 19 Cal 203, Rel. on. (Paras 11, 15)

The directions of the founder as regards the appointment of mutawalli can be inferred from the subsequent conduct of the parties. (Para 21)

(b) Muhammadan Law — Wakf — Mutawalli — Appointment of — Appointment by Jamait — Procedure.

There must be some procedure prescribed by rules, or by custom to enable the jamait to function in the exercise of its power to appoint a mutawalli. The procedure must indicate that the Jamait has exercised its mind in making the appointment. Jamait means a congregation of all the worshippers in a particular mosque. This general body may meet through their accredited representatives through a system of selection or customary method of selection or, if the body is not unwieldy, all the members may meet together and function as a body. Even in that case, there must be some procedure enabling the members to know the date and the place of the meeting and the subject that would be considered at that meeting. Unless these fundamental principles are followed, the general body cannot obviously function. (Para 16)

A custom enabling the jamait to function through such of the worshippers who attended on a particular day would mean that one or two persons attending on a particular date could revoke a resolution passed by 40 people and substitute one in its place. Such a custom, even if established, is unreasonable and contrary to all principles of natural justice. (Para 16)

(c) Muhammadan Law — Wakf — Mutawalli — Appointment of — Finding of fact — Interference in second appeal (Civil P. C. (1908), S. 100).

The finding as to who is appointed a mutawalli of a particular mosque is a finding of fact and cannot be interfered with in second appeal unless there are sufficient grounds. (Para 17)

Anno: C. P. C., Ss. 100-101 N. 52.

(d) Evidence Act (1872), S. 32(4) — Statement in deed made by dead person before controversy — Admissibility.

A statement in a gift deed executed by a third person in favour of the suit mosque as early as 1903 stating that the mosque was constructed by certain person as a matter of charity is relevant and admissible under S. 32(4), Evidence Act, when the question in issue is whether the mosque in question was constructed with the private funds of a particular person or from the public funds collected by a particular sect. (Para 19)

Anno: Evid. Act, S. 32 N. 23.

(e) Muhammadan Law — Wakf — Mutawalli — Powers of.

The mutawalli of a mosque can dismiss a servant of the mosque and it cannot be said that the peish Imam is not a servant of the mosque. Mutawallis can, therefore prevent him from functioning as peish Imam because of his misconduct. (Para 23)

CASES REFERRED: Paras

(A) (V1) AIR 1914 Mad 714: 38 Mad 491 11, 21
(B) ('92) 19 Cal 203 11, 15
(C) (V28) AIR 1941 Mad 42: 1940-2 Mad LJ 446 22
(D) (V34) AIR 1947 Cal 282: 51 Cal WN 111 22

A. Bhujanga Rao and R. Ramalinga Reddi, for Appellants; P. Ramachandra Rao for A. Viswanatha Ayyar and D. C. Krishnamurthy, for Respondents.

JUDGMENT: These three appeals arise out of three connected suits O. S. Nos. 233, 151 and 231 of 1946 on the file of the court of the District Munsif, Cuddappah.

(2) The suits relate to the disputes between the office holders of the mosque called Ahle Hadiz mosque in Mandi Sydumiah street, Cuddappah Town. This mosque was primarily intended to serve the needs of the members of the Ahle Hadiz sect resident in the said town. In course of time, the plaint schedule lands were endowed to the mosque. Muhammad Abdulla Saheb and Abdul Sattar have been the joint mutawallis of the mosque for about 45 years. Abdulla Saheb was the son and Abdul Sattar was the son-in-law of one Haji Shaick Mohideen Saheb.

Abdulla Saheb died in the year 1939. After the death of Abdulla Saheb, disputes arose between Muhammad Ali Saheb and his brother Abdul Sattar, each claiming to be the sole mutawalli. This dispute led to criminal proceedings before the Magistrate's Court, Cuddappah. The court decided that Abdul Sattar was entitled to be in possession of the properties as mutawalli. Abdul Sattar died in 1942. Syed Shah Muhammad is his son. On 13-3-1944, there was an agreement between Muhammad Ali Saheb and Syed Shah Muhammad, whereunder defendant 1 was to manage the mosque and its properties on behalf of the defendant 2 also.

(3) Hakim Muhammad Isaq alias Mowlana was the peish Imam of mosque and he was functioning in that capacity for about 36 years. Mowlana had been starting religious controversies and propagating tenets and advocating usages quite against the accepted principles of the Ahle Hadiz sect. On 8th June 1946, there was a disturbance in the mosque and Mowlana, it is said, started a quarrel and uttered blasphemous expressions about the Prophet and also attacked a regular worshipper, one Abdul Shukur.

Muhammad Ali Saheb issued a registered notice, dated 10-6-1946, to Mowlana prohibiting him from leading prayers from the date of the receipt of the notice as he rendered himself unfit to lead prayers after his unholy conduct. Subsequently, Muhammad Ali Saheb and Syed Shah Muhammad jointly issued another notice, dated 2-8-1946, prohibiting Mowlana from leading prayers in the said mosque, but the same was refused by the defendant on 7-8-1946.

In view of the disputes between the parties, the aforesaid three suits were filed.

(4) O. S. No. 233 of 1946 was filed by one Khagum Khan against Muhammad Ali Sahib, and Syed Shah Muhammad for a declaration that the plaintiff is the mutawalli of the suit mosque and for possession of the properties of the mosque. It is alleged in the plaint that the mosque was a

private mosque built from subscriptions collected, that it was built for the use and convenience of Ahle Hadiz Jamait consisting of about 60 houses in Cuddappah town and that the appointment of mutawallis vested in the entire Jamait.

It is further stated that 45 years ago Abdulla Sahib and Abdul Sattar were appointed by the said Jamait as joint mutawallis, that after the death of Abdul Sattar, on the request of defendant 2 Syed Shah Muhammad, the Jamait appointed him mutawalli, but he left the town two years ago, that defendant 1 was not the mutawalli of the mosque at all and that as the work of the mosque suffered by the default committed by defendant 2, the Jamait appointed the plaintiff as mutawalli of the mosque.

On those allegations, the plaintiff, claiming to be the new mutawalli appointed by the Jamait, filed the suit for declaration of his title and for possession.

(5) The defendants pleaded in their written statements that the mosque was built by Haji Shaik Mohideen Saheb, that before his death the founder appointed his son-in-law Abdul Sattar and his son Abdul Sahib as mutawallis of the mosque and also directed that thenceforward one descendant of his and one descendant of Abdul Sattar should act as joint mutawallis, and that Abdulla Saheb and Abdul Sattar appointed the defendants as joint mutawallis after them according to the directions of the founder.

They averred that they have been managing the mosque as joint mutawallis and that the suit was engineered by Mowlana.

(6) O. S. No. 151 of 1946 was filed by Mowlana for a permanent injunction restraining Muhammad Ali and others from interfering with the discharge of his duties as peish Imam of the mosque. The plaintiff's case is that Muhammad Ali illegally issued a notice to him prohibiting him from leading prayers in the mosque, that he had no right to do so that the real mutawalli was Syed Shah Ahmed, and that, in any event, the mutawalli of the mosque had no control over the peish Imam.

(7) The defendants raised the same pleas, which they had taken in O. S. No. 233 of 1946.

(8) O. S. No. 231 of 1946 was a suit filed by Muhammad Ali Saheb and Syed Shah Muhammad against Mowlana for a permanent injunction restraining him from leading prayers in the mosque. They base their relief on their right as mutawallis of the mosque. It is alleged in the plaint that Mowlana was responsible for the disturbance in the mosque on 8th June 1946, and that the plaintiffs as mutawallis issued a notice to the defendant dated 2-8-1946, prohibiting him from leading prayers at the mosque.

(9) The defendant Mowlana raised the plea that the plaintiffs were not mutawallis and that, in any view, the mutawallis have no right or control over the peish Imam.

(10) The learned District Munsif heard the three suits separately and delivered three separate judgments. He found that Haji Shaick Mohideen Saheb was not the founder of the mosque, that the jamait is the appointing authority of the mutawallis, that Muhammad Ali Saheb was never appointed mutawalli of the mosque, that though Syed Shah Muhammad was appointed mutawalli of the mosque, as he made default in the discharge of his duties he was removed and Khagum Khan was legally appointed Mutawalli by the jamait, that Hakeen Muhammad Isaq alias Mowlana has been the peish Imam of the mosque having been appointed by the jamait and that the mutawallis have no right to prevent him from leading prayers.

On those findings, he decreed O. S. No. 233 of 1946 and 151 of 1946 and dismissed O. S. No. 231 of 1946. On appeal, the learned Subordinate Judge came to a different conclusion on all the facts found by the first court. The learned Subordinate Judge, on a consideration of the evidence, held (i) that the jamait had no legal competency to appoint mutawallis and has not, as a matter of fact, appointed Khagum Khan as a mutawalli, (ii) that the mosque was built by Haji Sheik Mohideen Saheb 65 years ago, that before his death, the founder appointed his son-in-law Abdul Sattar and his son Abdulla Sahib as mutawallis of the mosque and also gave a direction that thenceforward one descendant of his and one descendant of Abdul Sattar should act as joint mutawallis and that Abdulla Saheb and Abdul Sattar appointed Muhammad Ali Sahib and Syed Shah Muhammad as mutawallis, and (iii) that the peish Imam was appointed only by the mutawallis and the present Mutawallis Muhammad Ali Saheb and Syed Shah Muhammad have a right to prevent him from functioning as peish Imam in the circumstances alleged by them.

In the result, he allowed the three appeals. Hence, the aforesaid Second Appeals.

(11) The first question is whether a jamait or a congregation of the worshippers of a mosque have a right to appoint mutawallis. The question in whom the power to appoint mutawallis of a mosque vests was considered by a Division Bench of the Madras High Court in — 'Phatmabi v. Abdulla Musa Sait', AIR 1914 Mad 714 (A). Tyabji J. who delivered the leading judgment, after considering the text books on the subject, laid down that there are only three modes by which a person may trace his right to be a mutawalli.

According to the learned Judge, the three sources are (i) appointment by the Wakif, (that is the original author of the Wakf) or by some person expressly authorised by the wakf to appoint and in the absence of any person so authorised; (ii) appointment by the executor of the wakif and in the absence of such an appointment (iii) appointment by the court. If the three sources laid down by the learned Judge exhaust the categories of appointing authorities, it follows that the jamait or the congregation has no power to appoint a mutawalli.

But reliance is placed on the decision of — 'Piran v. Abdul Karim', 19 Cal 203 (B), in support of the contention that the jamait also, under certain circumstances, can appoint a mutawalli. Ameer Ali J., in that decision says at p. 222:

"But as I understand the principle, those dicta refer to endowments of a public nature like a musjid-i-jammaa and similar institutions in which the public at large or the Mussalman public generally are interested. But when an institution is dedicated to the inhabitants of a particular locality or to a particular sect or fraternity, the members of which are ascertainable, whatever might have been the case in ancient times, the modern muslim jurists have recognised the validity of an appointment by the congregation."

(12) The learned Judge proceeded to state that

"in the Rudd-ul-Muhtar it is stated that the modern Muhammadan Lawyers recognise the validity of an appointment by the congregation. So also is the Wajiz-ul-muhit."

(13) This decision, therefore, lays down in the case of institutions dedicated to a particular sect, the congregation also has power to appoint a mutawalli.

(14) Sir Dinshaw Mulla in his book on the principles of Muhammadan Law, 12th edition summarises the law at page 178 as follows:

"The founder of the wakf has power to appoint the first mutawalli and to lay down a scheme for the administration of the trust and for succession to the office of the mutawalli. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawalli may be appointed, and may invest the mutawalli with power to nominate a successor after his death or relinquishment of office.

(2) If any person appointed as mutawalli dies, or refuses to act in the trust....or if the office of mutawalli otherwise becomes vacant and there is no provision in the deed of wakf regarding the succession to the office, a new mutawalli may be appointed

(a) by a founder of the wakf;
(b) by his executor (if any);
(c) if there be no executor, the mutawalli for the time being may, subject to the provisions of S. 166 below, appoint a successor on his death-bed;
(d) if no such appointment is made, the Court may appoint a mutawalli."

(15) The learned author notices the decision in 19 Cal 203 (B), without any comment. At p. 180, he says :

"In the case of an institution confined to a particular locality, such as a mosque or a graveyard, the appointment of a mutawalli may be made by the congregation of the locality."

I, therefore, hold that though ordinarily the appointment of a mutawalli vests in the three authorities mentioned by Tyabji J., the appointment may also be made by a congregation in the case of an institution confined to a particular sect in a particular locality. If it is established that the congregation has been exercising that right in the case of the suit mosque, the appointment of a mutawalli by it is not illegal.

(16) The next question is what is the machinery by which the said power can be exercised by the jamait or the congregation. No text-books have been placed before me prescribing the procedure to be followed by the jamait. But any procedure must be one to indicate that the jamait exercised its mind, for in that case only it can be said that the jamait appointed the mutawalli. There must be some procedure prescribed by rules, or by custom to enable the jamait to function in the exercise of its power.

It is said that jamait means a congregation of all the worshippers in a particular mosque. This general body may meet through their accredited representatives through a system of election or customary method of election or, if the body is not unwieldy, all the members may meet together and function as a body. Even in that case, there must be some procedure enabling the members to know the date and the place of the meeting and the subject that would be considered at that meeting.

Unless these fundamental principles are followed, the general body cannot obviously function. In this case, there is no evidence and the learned Judge rightly found that any procedure was prescribed expressly or by custom to enable the general body to meet. The evidence is vague. Even if the entire evidence is believed, the witnesses say that the jamait functioned through such of the worshippers who attended on a particular day, i.e., to put it concretely there are 40 families belonging to this Ahle Hadiz sect.

No notices are issued or information sent to any members of that sect that a particular item will be discussed on a particular day. Such of those, who happened to attend the mosque for worship on a particular day, can pass any resolution they like. One day two members may attend, another day five members may attend, on the third day 10 members may attend and on the fourth day 40 members may attend. This procedure, it is said alleged to be sanctioned by custom, will enable one or two persons attending on a particular day to revoke a resolution passed by 40 people and substitute one in its place.

Such a custom, even if established, is unreasonable and contrary to all principles of natural justice. I would, therefore, hold that it has not been established that the jamait was legally functioning as jamait in the case of this mosque.

(17) The learned Subordinate Judge also found that it has not been established that Khagum Khan was appointed mutawalli of the mosque. The learned Judge on a consideration of the evidence finds as follows :

"Thus the evidence of the P. Ws. does not bear scrutiny and is discrepant, besides being evasive on important particulars. I cannot, therefore, agree with the view of the learned District Munsif that the evidence of P. Ws. can be accepted as reliable or sufficient to prove the plaintiff's appointment."

The question is one of fact and there are no permissible grounds for interfering with this finding.

(18) The learned Judge also found on the evidence and the probabilities arising therefrom, that Haji Shaik Mohideen founded the mosque and that he gave a direction that a successor, to the mutawalli should be appointed from his family and from that of his daughter. The finding is one of fact but the learned Counsel for Mowlana argued that the finding is not supported by the evidence in the case. The learned Counsel has taken me through the relevant evidence.

After going through the evidence, I cannot say that the finding of the learned Subordinate Judge is not based upon the evidence.

(19) Exhibit P. 5 is a registration copy of a gift deed executed by one Ayisha Bi to the suit mosque as early as 1903. In that deed Ayisha Bi stated that the mosque was constructed as a matter of charity by Haji Shaik Mohideen Sahib. The learned Counsel for Mowlana contended that the recital is irrelevant and that, even if it is, relevant, it is ambiguous. I do not see any ambiguity in the document. The document in clear terms says that the mosque was constructed by Haji Shaik Mohideen Sahib; nor can I agree with him that it is irrelevant.

Under S. 32(4) statements of dead persons made before any controversy arose are admissible in evidence provided such statements are made by persons who would have been likely to be aware of them. The mosque is alleged to have been constructed in the last decade of the 19th century. Ayisha Bi was making the gift in the year 1903 in favour of the mosque. It is unreasonable to assume that a donor of properties to a mosque a few years after its construction would not have known the name of the person, who constructed the mosque.

As a person living very near to the date of the construction of the mosque and as one who made a gift of property to it, she must have special knowledge of the fact that Haji Shaick Mohideen Saheb constructed the mosque. The provisions of S. 32(4) of the Evidence Act are certainly complied with in this case and the document is admissible in evidence. P. W. 3 is a very old man of 90 years and he swears that the suit mosque was built with the private funds of Haji Shaick Mohideen Saheb.

He is a disinterested witness and the learned Subordinate Judge believed him and there is no

reason to hold that this old man of 90 years perjured himself in the witness box. It is also in evidence that the house of Mahomed Ali abuts the mosque. This is a strong probability in support of the case that the mosque was built by his predecessor. What is more, Abdulla Saheb, the son of the founder Haji Shaick Mohideen Saheb and Abdul Sattar his son-in-law were mutawallis for 45 years without any disturbance by any of the members of the Muslim public in that town.

The continuous management by the son and son-in-law of Mohideen Saheb for 45 years is a strong probability in support of the case that Mohideen Saheb was the founder. There is also no evidence that any other member of the public ever acted as mutawalli of the mosque. After Abdulla Saheb's death, in 1939, his brother Muhammad Ali stepped into his shoes. Though there were some disputes between Muhammad Ali and Abdul Sattar and consequent criminal proceedings, after Abdul Sattar died in the year 1913, his son Syed Shah Muhammad became the mutawalli in his place.

Exhibit P-1 dated 13-3-1944, the agreement that was entered into between Muhammad Ali and Syed Shah Muhammad, recognises that both of them are joint mutawallis. It is true, that in the course of the dispute between Muhammad Ali and Abdul Sattar, Muhammad Ali stated that he was appointed by the Jamait. But the learned Judge for good reasons pointed out that allegations were made to acquire the sole mutawalli of the mosque. Further, in 1939, when Abdul Sattar died, no person was appointed mutawalli in his place.

(20) That fact is indicative of the fact that the jamait was not conscious of its right to appoint a mutawalli for this mosque and allowed his son to take his place. Further when Syed Shah Muhammad left Cuddappah for two years, no attempt was made by the jamait to appoint a successor to him. It can only be because succession to the office of mutawalli is regulated by the directions of the founder. Only for the first time Khagum Khan was put forward as a mutawalli appointed by the jamait after the disputes arose between the parties.

On the aforesaid evidence and probabilities, the learned Subordinate Judge held that the mosque was constructed by Haji Shaick Mohideen Saheb and that the founder directed that the successive mutawallis must be appointed from his family and from that of his daughter.

(21) In this connection, some of the observations of Tyabji J. in AIR 1914 Mad 714 (A), would be apposite. The learned Judge observed at p. 715 as follows :

"Thus from the history of previous appointments the directions contained in the original dedication with reference to the mode in which the successive mutawallis are to be appointed may be inferred.....The law does not directly empower the mutawalli of every wakf to appoint his successor, but if in regard to any particular wakf it is proved that the mutawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin, and was founded on some provisions contained in the wakfnama or some oral directions given by the wakif empowering the mutawallis to nominate their successors.

Provisions in wakfnama empowering the mutawallis to nominate their successors are so usual that it would perhaps be representing the present state of the authorities more nearly if it were said that the Courts assume the existence of such a provision in the dedication, unless the contrary is proved."

It is clear from the aforesaid observations that the directions of the founder can be inferred from the subsequent conduct of the parties. I cannot, therefore say that there is no evidence to sustain the finding of the learned Judge. I accept the finding.

(22) The next question is whether the mutawallis can prevent the peish Imam from leading prayers in the mosque. I have agreed with the findings of the learned Subordinate Judge that Muhammad Ali and Syed Shah Muhammad are the validly appointed mutawallis of the mosque. I have also accepted the finding that Mowlana was the peish Imam of the mosque. The mutawallis issued a notice preventing Mowlana from leading prayers on the ground of insubordination and misconduct.

They allege that Mowlana was responsible for the disturbance in the suit mosque on 8-6-1946 and that he was also propagating tenets and advocating usages quite against the accepted principles of the Ahle Hadiz Sect. The question is whether the mutawallis can prevent a peish Imam from leading prayers on the ground of misconduct. In — 'Shahul Hameed Marakayar v. Muhammad Hussain', AIR 1941 Mad 42 (C), the learned Judges observed at p. 43 that

"doubtless it is customary in many mosques for the mutawallis to exercise full disciplinary powers over the servants of the mosque."

Lodge J. in — 'Wajid Ali v. Dadanessa Bibi', AIR 1947 Cal 282 (D), stated the law as follows at page 283 :

"In this connection, my attention was drawn to paras 166 and 167 of Mulla's Principles of Muhammadan Law. The note to para 167, makes it clear that a 'de facto' mutawalli will be recognised by the Courts. In Ameer Ali's Muhammadan Law (4th edition) at p. 465 the learned author observes :

'In the absence of a mutawalli, the power of nomination and appointment of an Imam and Muazzin to a mosque is given to the wakif's descendants and the members of his family preferentially to others. This is the view stated in the Ashbah.' "Therefore either as de facto mutawallis or descendants of the wakif, acting in the absence of a mutawalli, the plaintiffs had the power of appointment of the Imam, and, therefore, as it seems to me, the power of dismissal for sufficient cause."

(23) It is, therefore, obvious that the mutawalli of a mosque can dismiss a servant of the mosque and it cannot be said that the peish Imam is not a servant of the mosque. Here, the mutawallis prevented him from functioning as peish Imam because of his misconduct. They had certainly power to do so. The learned Judge was right in holding that the mutawallis were well within their rights in issuing a notice to him.

(24) In the result, all the appeals fail and are dismissed. The respondents will get their costs in S. A. No. 41 of 1950. They will also get printing charges in S. A. No. 42 of 1950. No leave.

D.R.R. Appeals dismissed.

(S) AIR 1955 ANDHRA 212 (V 42 C. 79 Oct.)

UMAMAHESWARAM J. (30-8-1954)

Doddipatla Kameswara Rao and others, Plaintiffs-Appellants v. Tarametla Somanna and others, Defendants-Respondents.

Appeal No. 715 of 1950, against decree of Sub-J., Ellore, D/- 30-12-1949.

Limitation Act (1908), Art. 144 — Public property — No managing committee, or President or Secretary, competent to sue — No adverse posses-

sion starts — Minority view in AIR 1941 Mad 449 (FB), Foll.

When there is no one competent to sue, there can be no cause of action and consequently limitation cannot run because there is no one against whom it can run. (Para 4)

Column 3 of Art. 144 postulates that the plaintiff against whom adverse possession commences must be capable of suing. S. 17, Limitation Act also embodies the same principle. (Para 4)

In order that possession should be adverse there must be "a competitor" capable of suing and exercising due diligence to take steps to oust the adverse possessor. (Para 6)

So, if in respect of the Town Hall and Reading Room belonging to the public there was no duly elected Committee, Secretary and President in existence, it is impossible to conceive how any adverse possession would commence or limitation start running in favour of the plaintiff who claims title to the Town Hall and the Reading Room by adverse possession. The adverse possession does not start till the Committee is formed and the Secretary and President are duly elected for taking action and recovering the property from the plaintiff. Minority view in AIR 1941 Mad 449 (FB), Followed. (Para 6)

Anno: Lim. Act, Arts. 142 & 144 N. 99a.

CASES REFERRED:

(A) (V3) 2 Mad LW 723: AIR 1916 Mad 1001 4
(B) (V4) AIR 1917 Mad 706(1): 4 Mad LW 369 4
(C) (V6) AIR 1919 Mad 972: 40 Mad 1040 (FB) 4
(D) (1821) 106 ER 1167: 5 B&Ald. 204 4
(E) (V10) AIR 1923 Mad 461: 46 Mad 579 4
(F) (V25) AIR 1938 Mad 353: ILR (1938) Mad 586 (FB) 4
(G) (V28) AIR 1941 Mad 449: ILR (1941) Mad 599 (FB) 4, 6
(H) (V20) AIR 1933 PC 75: 12 Pat 251 (PC) 4
(I) (V21) AIR 1934 PC 23: 61 Cal 262 (PC) 5
(J) (1900) 27 Cal 943: 27 Ind App 136 (PC) 5
(K) (V22) AIR 1935 PC 36: 14 Pat 327 (PC) 6
(L) (V40) AIR 1953 Mad 842: 1953-2Mad LJ 382 6

Y. G. Krishnamurthi, for Appellants; Ch. Sankara Sastri and D. Veerabhandrayya, for Respondents.

JUDGMENT: (After setting out the facts and, on an appreciation of the evidence, oral and documentary, confirming the findings of the trial Judge on all other points, His Lordship continued):

(2) The learned Advocate for the respondents contended that as the Committee was formed only in December 1939, there could be no adverse possession as against the Committee, till it was formed and the President and Secretary thereof elected.

Article 134-B, Limitation Act runs in the following terms:

Description of suit.	Period of limitation.	Time from which period begins to run.
By the Manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immovable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	12 years.	The death, resignation or removal of the transferor.

(3) As the plaintiffs now claim title by adverse possession, they must show that their possession was adverse to the Committee and that they were in uninterrupted and continuous possession for a period of 12 years. The Subordinate Judge accepted this contention and found in paras. 36 to 39 that as the Committee was not formed till December 1939 the adverse possession did not at all start.

(4) The learned Advocate for the respondents relied on — 'Palaniyandi Malavarayan v. Vadamalali Vidayan', 2 Mad LW 723: (AIR 1916 Mad 1001) (A). The headnote sets out the legal position correctly and is in the following terms:

"The right to trusteeship of a temple cannot be acquired by adverse possession so long as there is no lawful trustee who could claim to recover the office from the person who claims to hold it adversely to him."

Sundaram Ayyar J., had carefully and elaborately reviewed all the Indian and English authorities bearing on this question and held that even on principle, there are good reasons for holding that it would be contrary to public interests that a person should acquire the office of a trustee by mere possession when there is no one competent to recover it from him.

This decision was followed in — 'Manickkam Pillai v. Thanikachallam Pillai', AIR 1917 Mad 706 (1) (B). The relevant observations are as follows:

"Since however there were no properly constituted trustees of the plaintiff temple there was no person with knowledge of the acts of the defendants or capable of taking proceedings necessary for the protection of the suit property and, therefore, possession was not adverse until the appointment of trustees in 1900".

In 'Secti Kutti v. Kunhi Pathumma', AIR 1919 Mad 972 (FB) at pages 984-985 (C), Srinivasa Iyengar J., followed the two decisions referred to above. The decision in — 'Murray v. The East India Co.', (1821) 106 ER 1167 (D), referred to and relied on by Sundaram Ayyar J., in — 'Palaniyandi Malavarayan v. Vadamalali Odayan', (A), was followed in — 'Nataraja Desikar v. Govinda Rao', AIR 1923 Mad 461 at p. 462 (E), in support of the proposition that, when there is no one competent to sue, there can be no cause of action and consequently limitation cannot run because there is no one against whom it can run. In — 'Subbiah Thevar v. Samiappa Mudaliar', AIR 1938 Mad 353 (F), a Full Bench of the Madras High Court followed the decision in — 'Murray v. The East India Co.', (D), and held that

"there can be no cause of action until there is a party capable of suing and until there is a cause of action there can be no question of the law of limitation coming into operation."

It was further held that, if a sole trustee of a public trust committed a breach of trust, the loss could not be made good, without voluntary action on the trustee's part, until there was a new trustee and that the right to sue in such a case lay in abeyance until a new trustee was appointed and that under Art. 120, Limitation Act the period of six years' limitation would not commence until the new trustee was appointed.

It was further pointed out that if the co-trustees, had also made themselves liable for the breach of trust, the position would be the same as in the case of a defaulting sole trustee while if there were other trustees who were themselves not liable, the period of limitation started running immediately the loss was occasioned because those other trustees had in themselves the right to sue their co-trustees for the loss occasioned by him.

'In Venkateswara v. Venkatesa', AIR 1941 Mad 449 (FB) (G), the question arose whether Art. 134 (b), Limitation Act applies to the case of an alienation of the property of a Hindu religious institution by the manager for valuable consideration and the succeeding Manager sought to impeach that alienation by suit when there was an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager.

The third question that was referred to the Full Bench was, whether

"if Art. 144, Limitation Act be held applicable to the case, adverse possession under that Article must be deemed to have commenced from the date of the death of the previous Matadhipathi who effected the alienation and not from the date of the election or appointment of the plaintiff".

Though in the order of reference Venkataramana Rao J., referred to the provisions of the several English statutes, the case of '(1821) 106 ER 1167 (D)', and to the earlier decision of the Madras High Court in 'AIR 1916 Mad 1001 (A)'; 'AIR 1917 Mad 706 (1) (B)'; and 'AIR 1938 Mad 353 (F)', I find that in the opinion delivered by the Full Bench by Leach C. J., there is no discussion whatsoever or reference made to those cases while answering the third question referred to it. The only case that was referred to in that connection was the Privy Council decision in 'Ramacharan Das v. Naurangi Lal', AIR 1933 PC 75 (H). It was held that the starting point of limitation under both Art. 134 (b) and Art. 144 was the date of the death, resignation or removal of the manager who effected the alienation and not the date of the election or the appointment of his successor.

While Venkataramana Rao J., and Horwill J., agreed with Leach C. J., Abdul Rahman J., and Krishnaswamy Ayyangar J., dissented and delivered separate judgments. Abdul Rahman J., distinguished the Privy Council case in 'AIR 1933 PC 75 (H), and held as follows:

"It has no bearing to a case like the present where there was no manager in existence to challenge the action taken by the previous manager. If the Math is unable to sue without the intervention of the human agency of its own manager, limitation cannot be, in my opinion, held to run against the Math either".

Krishnaswamy Ayyangar J., also took the view that the aforesaid Privy Council decision was clearly inapplicable. Both the dissenting Judges held that adverse possession must be held to have commenced from the date of the plaintiff's election or appointment and not earlier.

I have carefully perused the dissenting Judgments as also the opinion of Leach C. J., and in my opinion, the majority view as to the starting point of limitation under Art. 144 is, with great respect, not correct.

I prefer to adopt the view taken by the dissenting Judges and my reasons are as follows: Column 3 of Art. 144 clearly sets out that the time from which period begins to run is when the possession of the defendant becomes adverse to the plaintiff which postulates that the plaintiff against whom adverse possession commences must be capable of suing. S. 17 Limitation Act, also embodies the same principle.

(5) In the Privy Council decision in — 'Secretary of State v. Debendralal Khan', AIR 1934 PC 23 (I), Lord Macmillan laid down what constitutes adverse possession in the following terms:

"As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the Judgment of the Board in — 'Radhamoni Devi v. Collector of Khulna', 27 Cal 943 (PC) at p. 950 (J), where his Lordship said that possession required must be adequate in continuity, in publicity and in extent, to show that it is possession adverse to the competitor.

The classical requirement is that the possession should be 'NEC VI NEC CLAM NEC PRECARIO', Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person, against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening".

(6) This decision is followed in — 'Srischandra Nandy v. Baijnath Jugal Kishore', AIR 1935 PC 36 (K), wherein Lord Thankerton adopted the aforesaid observations of Lord Macmillan. From those observations it appears to me to be quite clear that in order that possession should be adverse, there must be a 'competitor' capable of suing and exercising due diligence to take steps to oust the adverse possessor. So, if in respect of the Town Hall and Reading Room belonging to the public of Tanuku there was no duly elected Committee, Secretary and President in existence, it is impossible to conceive how any adverse possession would commence or limitation start running.

I therefore prefer to follow the two Privy Council decisions referred to supra & the earlier Madras decisions already discussed and the dissenting Judgments of Abdur Rahman J. and Krishnaswamy Ayyangar J., in preference to the majority opinion in 'AIR 1941 Mad 449 (FB) (G)', and hold that the adverse possession will not start till the Committee was formed in December 1939 and the Secretary and President were duly elected for taking action for recovering the property from the plaintiffs.

In a recent decision in — 'Padmanabha Bhatta v. Ramachandra Rao', AIR 1953 Mad 842 at p. 844 (L), Govinda Menon J., delivering the Judgment of the Bench observed as follows:

"By mere assertion it seems to me it is impossible to prescribe a hostile title against the trust because the assertion must be against a person who would be entitled to face the opposition and get rid of that assertion".

(7) So, I agree with the finding of the trial court that even on that footing, the plea of adverse possession has not been made out by the appellants.

(8) The learned Advocate for the appellants sought to contend that there was no proper election of the Committee and the Secretary and President. I am unable to appreciate how that contention supports him. If really no proper Committee has been constituted or if no Secretary or President had been duly elected, there is no one to represent the Town Hall and Reading Room and so no scope for the running of adverse possession for reasons stated supra.

(9) I accept the evidence of D. W. 4 and the other witnesses and hold that a proper meeting of the public of Tanuku was convened and the Committee duly formed and the President and Secretary duly elected. I agree with the finding of the Subordinate Judge on this question.

(10) In the result, the appeal fails and is dismissed with costs of respondents 1 to 4.

R.G.D. Appeal dismissed.

(S) AIR 1955 ANDHRA 215 (V. 42, C. 80 Oct.)

UMAMAHESWARAM J. (21-1-1955)

Katragadda Virayya, Appellant v. Katragadda Venkata Subbayya, Respondent.

Appeal No. 406 of 1951, against decree of Sub. J., Tenali, D/- 1-8-1950.

(a) Civil P. C. (1908) S. 11 Explanation V — Partition suit — Item not included in preliminary decree by mistake. AIR 1918 Mad 751, dissented from.

Where the Court in a partition suit holds that all the plaint schedule properties are joint family properties and the plaintiff is entitled to a certain share but the preliminary decree by mistake does not provide for partition and separate possession of one of the items, the plaintiff can maintain a subsequent suit for partition of such item. It cannot be held in such a case, in view of the clear finding of the Court, that by reason of Explanation V the relief in respect of such item should be deemed to have been refused. Case law discussed. AIR 1918 Mad 751, dissented from. (Para 9)

Anno: AIR Com. C. P. C., S. 11 N. 36, 37, 123.

(b) Court fees Act (1870) Sch. I, Arts. 4, 5 — Application for amendment of preliminary partition decree, for inclusion of item left out by mistake — (Civil P. C. (1908) S. 152, O. 47 R. 1) — Review and amendment.)

Where, by mistake, one of the items was not included in the preliminary decree passed in a suit for partition of joint family properties and the plaintiff applied for amendment of the decree.

Held that the amendment application for inclusion of such item in the decree should have been allowed and no court fee as for review ought to have been demanded from the plaintiff. (Para 2)

Anno: AIR Com. Court fees Act Sch. 1 Arts. 4 and 5 N. 1;

AIR Com. C. P. C. S. 152 N. 2 O. 47 R. 1 N. 4.

(c) Civil P. C. (1908), Pre. — Judicial Precedents — (Precedents — Conflict between decisions of same Court).

When there is a conflict between two Bench decisions of the Madras High Court it is open to the Andhra High Court to prefer and follow the Bench decision which is in accordance with justice and legal principles. (Para 5)

Anno: AIR Com. C. P. C. Pre. N. 15.

(d) Civil P. C. (1908) O. 2 R. 2 — Partition suit of properties held by tenants-in-common.

The rule applicable to the case of properties held by tenants-in-common is different from the rule applicable to partition of joint family property as between coparceners. A suit for partition of common properties and not joint properties is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition. AIR 1924 Mad 124 and AIR 1921 Mad 404 Rel. on. AIR 1918 Mad 751 distinguished. (Para 6)

Anno: AIR Com. C. P. C. O. 2 R. 2 N. 10.

(e) Civil P. C. (1908) S. 11 — Review application — Rejection for non-payment of court-fee.

Where a review application was rejected not on merits but only for non-payment of court-fee the order of rejection does not operate as res judicata. Moreover an application for review is not a suit and a decision of a question arising in an application for review cannot operate as res judicata. ILR 40 Cal 541, Rel. on. 5 IC 119, distinguished. (Para 10)

Anno: AIR Com. C. P. C. S. 11 N. 104, 28.

CASES REFERRED Paras

(A) ('08) 35 Cal 961: 6 Cal LJ 735 3, 4, 5
(B) ('78) 6 Ind App 177: 2 Mad 83 (PC) 3
(C) 157 Mass 479 3
(D) (V4) AIR 1917 Mad 761: 32 Ind Cas 179 3, 4, 5
(E) (V5) AIR 1918 Mad 751: 1917 Mad WN 327 4, 5, 6
(F) (V14) AIR 1927 Mad 213: 98 Ind Cas 538 5
(G) (V25) AIR 1938 Mad 287: 182 Ind Cas 348 5
(H) (V10) AIR 1923 Mad 584: 44 Mad LJ 652 6
(I) (V11) AIR 1924 Mad 124: 46 Mad 844 6
(J) (V8) AIR 1921 Mad 404: 41 Mad LJ 457 6
(K) (V1) AIR 1914 PC 31: 41 Ind App 247 (PC) 7
(L) (V41) AIR 1954 SC 352: 67 Mad LW 637 (SC) 8
(M) ('01) 25 Bom 115: 2 Bom LR 781 8
(N) ('75) 24 WR 304 8
(O) (V18) AIR 1931 Cal 511: 132 Ind Cas 625 8
(P) (V 38) AIR 1951 Nag 355: 1951 Nag LJ 89 8
(Q) ('13) 40 Cal 541: 18 Ind Cas 444 10
(R) ('09) 5 Ind Cas 119: 7 Mad LT 266 10

K. Kotayya, for Appellant; G. Venkatarama Sastry, for Respondent.

JUDGMENT: This appeal raises a difficult question of law. The plaintiff is the appellant and the appeal is confined only to item 2 of the plaint schedule. The suit was filed for partition and separate possession of a 2/3rd share in the land. The plaintiff and defendant are sons of two brothers Akkayya and Ramaswami. The defendant's father, Ramaswami, got himself divided from the joint family and took away his ¼th share. The plaintiff's father died thereafter and as the plaintiff was unwilling to live jointly with the defendant, he called upon him to effect a partition of the properties and deliver to him his 2/3rd share.

As there were crops on the land at the time, a letter marked as Ex. A-1 was executed by the defendant in favour of the plaintiff. O. S. No. 318 of 1939 was filed by the plaintiff in the file of the District Munsif's Court, Repalle, for partition and separate possession of all the joint family properties. Item 2 of the plaint schedule in the present suit was included as item 8 in the plaint in O. S. No. 318 of 1939 District Munsif's Court, Repalle. The B Schedule attached to the plaint in the former suit related to the property alienated by the defendant.

The defendant contended in the prior suit that the letter, dated 20-11-1936, and marked as Ex. A—1 in the present suit was a nominal one, that the plaintiff's father Akkayya gave up his interest in the joint family and was not entitled to any share in the suit properties. The trial Court having dismissed the suit, the plaintiff preferred A. S. No. 128 of 1943, before the Subordinate Judge's Court, Tenali. The appellate Court held that Akkayya did not give up any share in the family properties, that the letter dated 20-11-1936, was not a nominal document and that the plaintiff was entitled to a share in the plaint schedule properties.

As findings were not recorded on some of the issues, the suit was remanded to the trial Court. The plaintiff filed a memo into Court that he did not press for any relief in regard to B Schedule

property alienated in favour of third parties and prayed for permission to file a separate suit for recovery of a share in the sale proceeds from the defendant. A preliminary decree, marked as Ex. A—2 was passed by the District Munsif of Repalle on 23-8-1946.

Unfortunately, the decree did not provide for partition of items 6 and 8, even though, as stated supra, the Subordinate Judge of Tenali held on appeal that the plaintiff was entitled to a share in all the items mentioned in the plaint schedule. The plaintiff filed an application for amendment and review on 5-7-1948, marked as Ex. B—9 and also an application I. A. No. 492 of 1948 under O. 20, R. 18 and O. 26, R. 14, marked as Ex. B—7 that if 2/3rd share in item 8 was not given to him he might at least be awarded Rs. 2,400/- as the value of that share. As the plaintiff did not pay court-fee on the review application, it was rejected on 6-8-1948. The other application I. A. No. 492 of 1948 was not pressed as the review application had been rejected.

The present suit O. S. No. 98 of 1948 was filed before the Subordinate Judge, Tenali, for partition and recovery of a 2/3rd share in respect of item 2 (corresponding to item 8 of A schedule in the prior suit). The question that arises for consideration is, whether the plaintiff is not entitled to maintain the suit for partition and recovery of his 2/3rd share by reason of the proceedings in the prior suit O. S. No. 318 of 1939, District Munsif's Court, Repalle.

2. It might be pointed out that the defendant who claimed item 2 as the self-acquired property did not adduce any evidence on that question and so issue No. 1 was decided against the defendant, respondent herein. The facts narrated above establish beyond doubt that item 2 is joint family property in which the plaintiff is entitled to 2/3rd share and the defendant acknowledged the plaintiff's right in the letter Ex. A—1 dated 20-11-1936. It is also clear that the Subordinate Judge, on appeal, upheld the plaintiff's claim in regard to item 8 and that, by mistake, the preliminary decree did not provide for partition and separate possession.

I may however point out, at this stage, that the District Munsif of Repalle allowed the amendment application filed by the plaintiff to include item 6 which was similarly left out in the preliminary decree — vide Ex. B—11 and B—12. The Court below has also found on the facts that item 8 was omitted from the preliminary decree by mistake. The plaintiff who was examined in the case as P.W. 1 deposed as to the circumstances under which the mistake crept in the preliminary decree.

The defendant did not go into the witness box and suggest any reasons why relief was not given to the plaintiff in respect of item 8. I accept the evidence of the plaintiff. I have no doubt in my mind that the omission to include item 8 in the preliminary decree was the result of a pure mistake. The amendment application in respect of item 8 ought to have been allowed, as in the case of item 6 and no court-fee as for review ought to have been demanded.

3. The Subordinate Judge of Tenali held that the present suit is barred by res judicata by reason of the proceedings in O. S. No. 318 of 1939, District Munsif's Court, Repalle. Mr. K. Kotayya, the learned Advocate for the appellant, contended that the finding on the question of res judicata was unsustainable. He urged that if by mistake or by consent of the parties, a partition is effected of only some of the properties, a subsequent suit for partition of the other joint properties is maintainable.

He strongly relied on the decision in — 'Jogendra Nath Rai v. Baladeo Das', 35 Cal 961 (A), in support of his contention and this decision supports him. What happened in that case was that the preliminary decree provided for a partition; but by mistake, of the parties to the litigation, which was shared by the Commissioner, the portion in dispute in the subsequent suit was omitted from the report and therefore there was no final decree in respect of that property.

Reference was made therein to the Privy Council decision in — 'Chidambaram Chettiar v. Gauri Nachiar', 6 Ind App 177 (PC) (B), for the proposition that the mere definition of the shares of the joint family does not amount to partition of the property though such determination may effect a severance of the joint family. The decision in — 'Barness v. Boardman', 157 Mass 479 (C), was followed. The following passage sets out the proposition adumbrated by the Bench and is as follows:

"We must consequently, affirm, without hesitation the doctrine that, although a co-owner cannot enforce a partition of a part only of the common lands leaving the rest undivided, and, although the entire property must be included in the partition, yet, if by mistake or by consent of the co-owners, acting innocently and fairly, a partition of a portion only of their estate has been made, whether by the order of the Court or otherwise, there is no reason why the Court should not grant a division of the remainder at the instance of one or more of the co-owners.

The conclusion is, therefore, irresistible that the effect of the decree in the partition suit was to leave untouched the joint title and possession of the parties and that the present suit for recovery of joint possession may well be maintained."

A similar question came up for consideration before the Madras High Court in — 'K. Venkataswamy v. Baligadu', AIR 1917 Mad 761 (D). The head-note neatly sets out the point decided and is as follows:

"In a suit for partition between a father and his son a certain mortgage bond was left out of account as worthless. Subsequently, the father brought a suit on the mortgage-bond and it was pleaded that the plaintiff and his son were not divided in respect of the properties covered by the mortgage bond and that the son was, therefore, a necessary party:

Held, per Napier J., that, all the properties of the family not having been included in the partition suit, only partial partition had taken place and that therefore, the property covered by the mortgage bond remained joint family property.

Per Sadasiva Iyer J., that a complete partition having taken place between the father and the son, the latter was not a necessary party to the suit on the mortgage bond."

At page 762, Napier J., followed the decision of the Calcutta High Court in — 'Jogendranath Rai v. Baldeo Das', (A). Though Sadasiva Iyer J., did not specifically refer to this decision he held as follows:

"It follows that after such a partition, none of the parties to it holds any of the properties (till then held jointly) along with any other party, unless the partition agreement or the partition award or decree itself provides for such joint holding or unless there has been accident, mistake or fraud in the non-inclusion of some of the property at the division.....(except on the ground of accident, mistake or fraud, therefore, there cannot be a second partition".

(4) Mayne sets out the law in his treatise on Hindu Law (11th Edition) at page 567 as follows:

"Where at a partition intended to be final some part of the property has been overlooked or fraudulently concealed, but is afterwards discovered, it will be the subject of a like distribution among the persons who were parties to the original partition, or their representatives".

The decision relied on against the appellant is that reported in — Sethurama Sahib v. Chotta Raja Sahib', AIR 1918 Mad 751 (E). The question that arose was as to whether a suit was maintainable for partition of a few of the properties left undivided between the plaintiff and the defendant, though a decree for partition of the plaint properties and several other properties had been passed earlier. Sadasiva Iyer J., held that as the preliminary partition decree had not been completed by a final decree the Court was bound on the application of the parties, to proceed with the suit to pass a final decree. He treated the suit as such an application to pass a final decree.

In the course of his judgment, he referred to the decision of the Calcutta High Court in — 'Jogendra Nath Roy v. Baladeo Das', (A), and observed as follows:

"I, however, respectfully dissent from those decisions and hold that the cause of action for partition is one and the same and once it has merged into a preliminary decree and into a final decree which effected partition by metes and bounds and awarded possession of particular share to the parties, the plaintiff cannot have a second suit for partition as if the tenancy-in-common gave rise every day (even after the final decree) to a new cause of action".

Napier J., who delivered a separate Judgment did not refer to the decision of the Calcutta High Court which he previously followed and which according to him in AIR 1917 Mad 761 (D), laid down "the true proposition", but merely expressed his concurrence to treat the suit as an application for the passing of the final decree. Sadasiva Iyer J., did not refer to his earlier judgment in AIR 1917 Mad 761 (D), wherein he expressly observed that a second suit might be maintainable where some of the properties were not included, by accident, mistake or fraud. Moreover there is no discussion in his judgment in what respects, the well-considered judgment in 35 Cal 961 (A), is wrong or opposed to principle.

(5) As stated supra, I find it difficult to reconcile the decision in AIR 1918 Mad 751 (E), with the earlier decision of the same Bench in AIR 1917 Mad 761 (D). As the learned Judges in AIR 1918 Mad 751 (E), treated the suit as an application for the passing of a final decree in the earlier suit, it was not really necessary for them to consider the correctness of the decision of the Calcutta High Court in 35 Cal 961 (A). Moreover when there is a conflict between two Bench decisions of the Madras High Court, it is open to me, as stated by Salmond in his book on Jurisprudence (10th edition) at page 189 to prefer and follow the Bench decision which is in accordance with justice and legal principles.

I prefer to follow the earlier judgment in AIR 1917 Mad 761 (D). In — 'Subramaniam v. Lakshminarasamma', AIR 1927 Mad 213 (F), Devadoss J., has also taken a view, differing from that of Sadasiva Ayyar J., in AIR 1918 Mad 751 (E). Moreover the decision in — 'Abhirami Ammal v. Challammal', AIR 1938 Mad 287 (G), is in accordance with the principle laid down in 35 Cal 961 (A). What was held in that case was that a subsequent suit for partition was maintainable and was not barred by Res Judicata, if the parties agreed not to take advantage of the earlier decree for partition and had continued to be in joint possession of the properties.

(6) Moreover the rule laid down by Sadasiva Ayyar J., in AIR 1918 Mad 751 (E), may not apply to the facts of the present case. According to the learned Judge, the cause of action for partition is one and the same and once it has merged into a preliminary decree and final decree, a second suit for partition will not lie. That was also the view taken in — 'Basavana Gowd v. Doddalingappa', AIR 1923 Mad 584 (H), if the suit related to a partition of joint family property.

But in — 'Pakkiri Kanni v. Manjoor Saheb', AIR 1924 Mad 124 (I), it has been held that a suit for partition of common properties and not joint properties is not liable to be dismissed on the ground that the suit did not include all the common properties available for partition. This principle was followed in — 'Moidin Kutti v. Mariamumma', AIR 1921 Mad 404 (J), and the learned Judges observed as follows:

"If the property is not joint family property and the parties are not coparceners but only co-owners or tenants-in-common the rule is not so rigid and partial partition may be allowed if there is not much inconvenience to the other sharers and if the plaintiff will otherwise be left without a remedy".

So the rule applicable to the case of properties held by tenants-in-common is different from the rule applicable to partition of joint family property as between coparceners. On the facts of the present case, I find that a division in status between the plaintiff and defendant was effected as evidenced by Ex. A-1 and so they were only in the position of tenants-in-common. If so, the principle laid down by Sadasiva Ayyar J., does not at all apply to the facts of this case.

(7) The learned Advocate for the respondent relied upon the decision of the Privy Council in — 'Nalini Kanta v. Sarnamoyi Debya', AIR 1914 PC 31 (K). I do think that it governs the facts of the present case. What was held in that case was that if an error was made in the partitioning of properties, the remedy was to take appropriate proceedings in that suit to correct that error. It does not apply to a case where, by mistake, partition was not at all decreed in respect of some of the items.

8. Reference was next made by Sri G. Venkatarama Sastry, the learned Advocate for the respondent, to a number of decisions bearing on the interpretation of O. 2, R. 2, Civil P. C.; but I do not think it is necessary to refer to those cases as no objection is raised that the present suit is barred by the terms of O. 2, R. 2, Civil P. C. The decision of the Supreme Court in — 'Sankar Sitaram v. Balakrishna Sitaram', AIR 1954 SC 352 (L), only related to a question as to how for a compromise decree operated as Res Judicata and it has, therefore, no bearing on the question to be decided in this appeal.

Reliance was placed by the learned Advocate for the respondent on the decision in — 'Kachu v. Lakshmansingh', 25 Bom 115 (M), and 'Sreekisto Biswas v. Joy Kristo Biswas', 24 WR 304 (N), in support of the proposition that the plaintiff is bound to raise every title on which he can succeed and to obtain a decision upon every part of his case and that if it be found that any part of the case which he made has been neglected by the Court which tried the suit, he is at liberty to bring a fresh suit in respect of such part.

Those decisions are not applicable as item 2 in the present suit was included as item 8 in the

prior suit. Mr. K. Kotayya, the learned advocate for the appellant relied on the decision in — 'Gouri Sankar v. Gurupada Haldar', AIR 1931 Cal 511 (O), in support of the contention that where a decree is silent as regards the claim over certain property, it does not mean that the claimant can never lay any claim in respect of the property again. In — 'Abdeali v. Taiyab Ali', AIR 1951 Nag 355 (P), it was held that:

"Where the Court being under a misapprehension as to the actual relief claimed by the party did not apply its judicial mind to this part of the party's claim, its omission to grant that particular relief cannot, in law, operate as Res Judicata".

The two decisions referred to above support the conclusion that the omission to grant relief in respect of item 8 does not operate as Res Judicata.

9. Apart from the decisions referred to supra, I am inclined to take the view that the terms of S. 11, Civil P. C. support the appellant's case. Under S. 11,Civil P. C. the matter in issue will constitute Res Judicata only if it had been heard and finally decided by such Court. The judgment of the Subordinate Judge, on appeal, in the prior suit clearly shows that the question as to whether all the items comprised in the plaint in the prior suit constituted joint family properties liable to division or not, was decided in favour of the appellant.

The judgment, therefore, precludes the defendant-respondent herein from contending that item 2 is not joint family property or that the plaintiff is not entitled to a 2/3rd share therein. The whole difficulty as pointed out by the Court below no doubt arises by reason of the fact that in the preliminary decree, no relief was granted for partition of item 8 by mistake. Is it to be held that by reason of the terms of Explanation V as no relief was expressly granted by the decree in regard to item 8, though it was claimed in the plaint, that it should be deemed to have been refused?

Such a construction would be to ignore the judgment of the Subordinate Judge who held in clear and unequivocal terms that all the plaint schedule properties were joint family properties in which the plaintiff had a share. So, in my opinion, the Court below erred in holding that the present suit is barred by Res Judicata.

10. The last question that remains to be considered is whether by rejection of the review application, the plaintiff is precluded from maintaining the suit. I do not think that the order of rejection on the review application operates as Res Judicata, as it was not rejected on the merits but only for non-payment of court-fee. Moreover, it has been held in — 'Srish Chandra v. Triguna Prosad', 40 Cal 541 (Q), that an application for review is not a suit and a decision of a question arising in an application for review cannot operate as Res Judicata.

The decision in — 'T. Veeramma v. T. Palur Subbamma', 5 Ind Cas 119 (Mad) (R), is not applicable to the facts of the present case as the question arising for decision in the suit was adjudicated in the amendment application by the High Court at the prior stage by holding that there was no discrepancy between the judgment and decree so as to warrant any amendment.

(11) In the result, the decree of the trial Court is set aside and the appeal is allowed; but, in the circumstances, I direct the parties to bear their own costs throughout.

D.H.Z. Appeal allowed.

(S) AIR 1955 ANDHRA 218 (V. 42, C. 81 Oct.)

CHANDRA REDDY J. (27-8-1954)

Badduri Chandra Reddy and another, Appellants v. Pammi Rami Reddy and others, Respondents.

A. S. No. 702 of 1950, against decree of Sub. J., Narasaraopet, D/- 21-3-1950.

Tort — Malicious prosecution — Prosecutor, who is — Person giving information to complainant. AIR 1932 Mad 53, Dissented from.

If a person does nothing beyond giving information to the police which he considers to be true, an action for damages for malicious prosecution is not maintainable against him. If, on the other hand, besides setting the law in motion he takes an active part in the conduct of the prosecution he will be regarded as the real prosecutor although the actual prosecution is by the police and renders himself liable for damages. The reason why a person who gives information to the Police notwithstanding that he is not the actual prosecutor is said to be responsible for the malicious prosecution is that his information to the authorities, which naturally leads to prosecution is just the same as the prosecution.

The person sought to be made liable for damages should be directly or primarily responsible for the prosecution. One who merely gives some information to another who lodges a report before the police cannot be brought within the scope of such a principle. Case law discussed. AIR 1932 Mad 53, Dissented from. (Paras 9, 10, 16)

CASES REFERRED: Paras

(A) ('03) 26 Mad 362 : 12 Mad LJ 389 6, 7, 8, 10
(B) ('08) 35 Ind App 189 : 30 All 525 (PC) 6, 8, 9, 12, 15
(C) ('02) 24 All 317 : 1902 All WN 75 7
(D) (V6) AIR 1919 Mad 229 (2) : 42 Mad 880 8, 10, 11, 12
(E) (V7) AIR 1920 Mad 789 : 12 Mad LW 170 8
(F) (V13) AIR 1926 PC 46 : 1 Luck 215 (PC) 9, 12
(G) (V19) AIR 1932 Mad 53 : 62 Mad LJ 107 13, 14
(H) ('72) 11 Beng LR 321 : 17 WR 283 (PC) 14
(I) (1900) 25 Bom 230 : 2 Bom LR 623 14
(J) (V3) AIR 1916 Mad 666 : 29 Mad LJ 694 14
(K) (1856) 18 CB 126 : 25 LJCP 195 14
(L) (1859) 4 H and N 569 : 28 LJ Ex 360 14
(M) (V25) AIR 1938 Pat 529 : 178 Ind Cas 619 15
(N) (V27) AIR 1940 Sind 90 : ILR (1940) Kar 230 16

M. S. Ramachandra Rao and A. V. Krishna Rao, for Appellants; Konda Kotayya, for Respondents.

JUDGMENT : The appeal is brought by defendants 2 and 3 in O. S. No. 43 of 1949 against the Decree and Judgment of the Subordinate Judge, Narasaraopet. In order to appreciate the points arising for determination in this case, it is necessary to trace briefly the background of this litigation. One Ramamma, the wife of defendant 1 died in October 1948. In connection with her death, a complaint was filed by defendant 1 and the same is marked as "Ex. B.2" in this case.

It was stated therein that Ramamma died as a result of homocidal violence, that two persons by name Badduri Chandra Reddi and Badduri Ramana Reddi (Appellants in this case) informed him that five persons (the present plaintiffs) were seen coming

out of the backyard of the house of defendant 1 at about the time of the death of Ramamma.

On receipt of this complaint, the Police investigated into the case, filed a charge sheet against these five persons under S. 302 of the Penal Code and they were committed to Sessions at Guntur to take their trial for the offences with which they were charged. The case for the accused in that case (the plaintiffs herein) was that it was not as a result of violence that Ramamma died, but she sustained a fracture of the skull by falling on a Cuddappah slab while she was carrying some grain to the granary.

The learned Sessions Judge accepted the plea of the accused and acquitted them. It was also remarked by the Judge that the prosecution took advantage of the death of an old woman to make a false report against the accused therein. Consequent upon the acquittal of the accused therein, they have filed a suit for damages for malicious prosecution against the complainant, and the two persons who gave information to the complainant impleading them as defendants 1 to 3 respectively.

(2) The case for the plaintiffs as disclosed in the plaint is that on account of enmity that existed between the plaintiffs on the one hand and the defendants on the other, they concocted a case of murder against them taking advantage of the death of Ramamma, that Ramamma who was suffering from biliousness had a fall in the afternoon on 9-10-1948, while attending to her domestic work and her head struck against a Cuddappah slab resulting in the fracture of her head.

It is recited in the plaint that the defendants actuated by malice and without any reasonable or probable cause set the law in motion against the plaintiffs. A sum of Rs. 5,250/- was claimed as damages.

(3) The suit was contested by all the defendants denying that there was any conspiracy to give a false complaint against the plaintiffs. While defendant 1 stated that by reason of information which he received from defendants 2 and 3, he was led to believe that his wife died as a result of foul play by the plaintiffs and he merely mentioned his suspicion in the complaint, the case of defendants 2 and 3 was that they were not in any way responsible for the launching of the case, that information given by them to defendant 1 was not without reasonable and probable cause, nor was there any malice.

A plea was also taken that the plaintiffs did not suffer any damage and, at any rate, the damages claimed were excessive.

(4) The trial court dismissed the suit against defendant 1, but gave decree against defendants 2 and 3 for Rs. 3,250/-. Rs. 750/- towards expenses of the litigation, and Rs. 2,500/- towards mental suffering of all the plaintiffs i.e., at the rate of Rs. 500/- for each. The learned Judge thought that the evidence on record did not justify the plea of the plaintiffs that Ramamma died as a result of an accidental fall and that her death was due to injuries inflicted on her head with a heavy object like a big stone or a big pounder.

He also found against conspiracy amongst the defendants, to give a false report to the authorities concerned. In the opinion of the learned Judge no case was made out against defendant 1 because he merely communicated his suspicion in Ex. B.2 based upon the information given by the 2nd and 3rd defendants and that he was not over anxious to make out a case against the plaintiffs as seen from the contents of Ex. B.2.

(5) So far as defendants 2 and 3 are concerned, his view was that defendants 2 and 3 did not actually see the plaintiffs going out of the house and yet told the 1st defendant that they saw the plaintiffs going out of the house which showed malice on their part and absence of reasonable and probable cause for them. In that view he found defendants 2 and 3 are liable for damages for malicious prosecution of the plaintiffs. These two defendants have preferred this appeal against that Judgment and decree.

(6) In support of this appeal, it is first argued by Mr. Ramachandra Rao that on the findings of the learned Judge, the appellants cannot be mulcted with damages as they could not be regarded as prosecutors in any sense of the term. According to the learned Counsel, the view of the learned Judge that the appellants were responsible for the prosecution of the plaintiffs is erroneous. To substantiate this, the first case cited by the counsel for the appellants is — 'Narasinga Row v. Muthayya Pillay', 26 Mad 362 (A).

It is laid down there by Boddam and Bhashyam Iyengar JJ. that the only person who can be sued in an action for malicious prosecution is the one that actually prosecutes and any person who merely gives information to the Police cannot be said to have prosecuted the plaintiffs. A decision in — 'Gaya Prasad v. Bhagat Singh', 35 Ind App 189 (PC) (B), is cited as approving 26 Mad 362 (A).

Referring to 26 Mad 362 (A), the Privy Council in the latter case observed thus:

"The principle here laid down is sound enough if properly understood and its application to the particular case was no doubt justified; but in the opinion of their Lordships, it is not of universal application. In India the Police have special powers in regard to the investigation of criminal charge, and it depends very much in the result of their investigation whether or not further proceedings are taken against the present accused.

If, therefore, a complaint does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (excepting giving such honest assistance as they may require) think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution.

But, if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him.

The question in all cases of this kind must be — who was the prosecutor? — and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion, the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police."

(7) In that case, a person by name Imam-ud-din Shah made a report to the police that several persons had cut and carried away crops of certain lands and stolen other crops and property belonging to some tenant. Another person by name Bhagat Singh was directed by the police to inquire and report and he submitted a report stating that Gaya Prasad who subsequently filed the suit for malicious prosecution was one of those that participated in the rioting. Imam-ud-din and Bhagat Singh conducted the prosecution before police. They procured evidence that a riot was committed and that Gaya Prasad actually had taken part in it, and took an active part in the conduct of the prosecution at later stages.

When a suit was filed by Gaya Prasad after his acquittal in the criminal proceedings for damages

for malicious prosecution, one of the pleas taken was that they did not institute any criminal proceedings, that they were merely witnesses for the prosecution and so no suit could be brought against them. The trial court gave a decree against the defendants as it found the defendants to be the chief cause of the plaintiffs having been accused of rioting and of having concocted and fabricated false evidence against the plaintiffs, although their names did not appear on the face of criminal proceedings.

This decision was reversed by the Judicial Commissioner of Oudh on the authority of — 'Narasinga Rao v. Muthayya Pillai (A)', and — 'Dudhanath Kandu v. Mathura Prasad', 24 All 317 (C), and it was held that a person who has made a formal complaint could not be sued for damages for malicious prosecution. On appeal the Privy Council set aside the Judgment of the Judicial Commissioner on the view referred to already.

It is seen that both the defendants were held responsible for the prosecution of the plaintiff, one directly for the charge against the plaintiff and the other having made the original report of unlawful assembly upon which the prosecution for rioting was ultimately based and that both of them acted together throughout the subsequent proceedings. The test propounded in that case is that mere filing of a complaint does not amount to malicious prosecution and something more must be done to indicate that the defendants were the real prosecutors.

I have referred to this pronouncement at some length because this has formed the basis of several rulings of various High Courts and of the Privy Council.

(8) In — 'Periya Goundan v. Kuppa Goundan', AIR 1919 Mad 229(2) (D), a Bench of the Madras High Court struck a note different from that in 'Narasinga Rao v. Muthayya Pillay (A)'. The opinion expressed in that is that any person who gives information to the authorities, which, to his knowledge, is false and has led to the prosecution of the person who is ultimately acquitted, renders himself liable for damages for malicious prosecution. They dissented from 'Narasinga Rao v. Muthayya Pillai (A)'.

In the opinion of the learned Judges, 'Gaya Prasad v. Bhagat Singh (B)', should not be regarded as having approved the principles underlying 'Narasinga Rao v. Muthayya Pillai (A)'. In — 'Shunmugha Udayar v. Kandaswamy Asary', AIR 1920 Mad 789 (E), another Bench of the Madras High Court expressed its preference to AIR 1919 Mad 229 (2) (D), as against 'Narasinga Rao v. Muthayya Pillai (A)'.

(9) The principle laid down in 'Gaya Prasad v. Bhagat Singh (B)', was accepted by the Privy Council in another case — 'Balbhadar Singh v. Badri Sah', AIR 1926 PC 46 (F). It may be taken that it is now well established, that, if a person does nothing beyond giving information to the police which he considers to be true, an action for damages for malicious prosecution is not maintainable against him. If on the other hand, besides setting the law in motion he takes an active part in the conduct of the prosecution he made be regarded as the real prosecutor, although the actual prosecution is by the police and renders himself liable for damages.

(10) In this case I am relieved of the necessity of choosing between — 'Narasinga Rao v. Muthayya (A)' and — 'Periya Goundan v. Kuppa Goundan (D)', and the rulings that followed it, as the defendants, in my opinion, are not the persons, that set the law in motion. The reason, why a person who gives information to the Police notwithstanding that he is not the actual prosecutor is said to be responsible for the malicious prosecution is that his information to the authorities, which naturally leads to prosecution is just the same as the prosecution.

The complainant is regarded as the person who has set the law in motion.

(11) Even in 'Periya Goundan v. Kuppa Goundan (D)', the position is summed up thus:

"The fact that some Officer, whether Policeman or Magistrate, has to form an opinion on the apparent truth of the informant's information before the prosecution proceeds is no more reason in the one case than in the other for, exonerating the informant from liability for what follows. It is in each case his false information, out of which the prosecution arises, and it makes no difference whether the person led astray in the first instance is the Police Officer or the Magistrate."

(12) It is thus seen that the basis of liability is the information to the police in the one case and the complaint to the Magistrate in the other. Responsibility is fastened upon the complainant, because it is his complaint that is responsible for the starting of prosecution against the plaintiff and the starting point of the proceedings against him. This rule is stated in almost all the cases.

To hold that any person who gives information to the complainant will be guilty of malicious proceedings is opposed to the principles enunciated in 'Gaya Prasad v. Bhagat Singh (B); 'Balbhadar Singh v. Badri Sah (F)' and even 'Periya Goundan v. Kuppa Goundan (D)'. It is too much to extend the principle embodied in 'Periya Goundan v. Kuppa Goundan (D)', to a person who had furnished some information to the complainant because he cannot be regarded as having set the law in motion.

(13) Mr. Kotayya, the learned Counsel for the respondent relied on a Bench decision of the Madras High Court in — 'Venkatappa v. Ramakrishnamma', AIR 1932 Mad 53 (G). In that case Venkatasubba Rao and Pakenham Walsh JJ. thought that persons who concocted documents which created false evidence and helped others in giving false evidence on a charge were also liable in a suit for damages for malicious prosecution. I must express my respectful disagreement with this view as this is in the teeth of the several pronouncements of the Privy Council and of the Madras and other High Courts.

(14) In — 'Baboo Gunnesh v. Mugneeram', 11 Beng LR 321 (PC) (H), the Privy Council ruled that witnesses could not be sued for damages in respect of evidence given by them in a judicial proceeding, and the only way of punishing them if the evidence is found to be false was by charge-sheeting them for perjury. This has been followed in a number of decided cases. In — 'Templeton v. Lawrie', 25 Bom 230 (I), a Bench of the Bombay High Court expressed the opinion that giving of false evidence, however malicious and mala fide it might be, does not furnish any basis for filing a suit for damages in a civil court, the only remedy being a prosecution of perjury.

The same view is expressed by the Madras High Court in — 'Manickka Mudaliar v. Munuswamy Naidu', AIR 1916 Mad 666 (J). In this last mentioned case, reliance is placed on a number of English decisions, namely, — 'Revis v. Smith', 1856-18 CB 126 (K) and — 'Henderson v. Broomhead', (1859) 4 H & N 569 (L). It may also be stated here that in 'Venkatapa v. Ramakristnamma (G)', no reasons are given for holding that persons creating documents to be used as false evidence should be held liable, nor is any decision referred to.

(15) Mr. Kotayya next called in aid the Judgment of the Patna High Court in — 'Taharat Karim v. Malik Abdul Khaliq', AIR 1938 Pat 529 (M).

There the first defendant wanted to escape liability by pleading that the complaint was not lodged by him, but by the other defendant on his own initiative and so he could not be made to pay any damages.

On the finding that defendant 1 had a great deal to do with the case brought by defendant 2 that he wanted to file a complaint and that he did not do so because defendant 2 filed one and that he was prevented from doing so by his legal advisers, the learned Judges held that he was the real prosecutor, defendant 2 was only a formal complainant. The learned Judges stated that the responsibility for prosecution in such a case is a question of substance, as pointed by Sir Andrew Scoble in 'Gaya Prasad v. Bhagat Singh (B)', depending upon the circumstances of the case and that the mere setting of the law in motion is not the criterion.

It is not necessary for me to consider whether the principle in 'Gaya Prasad v. Bhagat Singh (B)', was correctly applied in the case cited, because of the finding that the second defendant in that case was only a name-lender and that the person behind the prosecution was defendant 1, who, in fact, went to thana to give the complaint but was prevented from doing so by his legal adviser. In my opinion, this case does not carry the respondents very far.

(16) Mr. Kotayya also cited the decision of the Sind Court in — 'Issardas Krishinchand v. Assudamal Ramandas', AIR 1940 Sind 90 (N). The opinion expressed by a Bench of that Court was that a person, who instigated false and malicious prosecution and is thus responsible for it, is liable for damages. This ruling is again inapplicable to this case, because it is not proved that the defendants 2 and 3 instigated defendant 1 to file a complaint. It may be that their information was in a way responsible for the malicious prosecution.

Further the principle that should guide the determination of the liability for damages for malicious prosecution, as already stated by me, is that the person sought to be made liable for damages should be directly or primarily responsible for the prosecution. It is difficult to say that one who gives some information to another who lodges a report before the Police can be brought within the scope of such a principle.

(17) Finally, Mr. Kotayya called in aid passages from Halsbury's Laws of England Volume 22 (2nd edition by Hailsham) at p. 3:

"A prosecution exists where a criminal charge is made before a Judicial Officer or Tribunal and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute it, and is called the Prosecutor. Thus a person who lays before a Magistrate an information stating that he suspects and has good reason to suspect another, or who prefers a bill of indictment, is engaged in a prosecution and he may be responsible for the prosecution even though the charge made before the Magistrate is an oral one."

(18) In para 3 at p. 4, it is stated:

"A person who prosecutes another in the sense explained above may be liable as prosecutor, and so may one who represents himself as prosecutor, though he did not in fact initiate the prosecution and is present only as witness."

(19) These passages do not in any way substantiate the proposition of Mr. Kotayya. All that they mean is that not only the actual Prosecutor but one who causes or procures the prosecution as in the case of a person who moves the police by his complaint who starts a prosecution against the defendant, is liable. It follows from the above discussion that the defendants cannot be made liable for damages for malicious prosecution.

(20) The above finding is sufficient to dispose of the appeal. However, as the question of quantum of damages also was argued before me, I proceed to give my finding on that aspect also. In the plaint, a sum of Rs. 5,250/- was claimed, without apportioning it under different heads. It is merely stated that the defendants are liable to pay to the plaintiffs damages which the plaintiffs estimated at the moderate figure of Rs. 5,250/-.

(21) But, in the witness-box, P. W. 1 stated that a sum of Rs. 3,000/- was expended in connection with the criminal case and that the total loss of the plaintiffs was more than Rs. 5,000/-. He also deposed that the health of the plaintiffs was affected because of the life in jail. P. W. 2, the 1st plaintiff, did not say anything about expenses in connection with the criminal case, but testified to a loss of Rs. 2,000/- on account of their inability to carry on the cultivation, having been confined in jail. P. W. 3 claims Rs. 5,000/-, Rs. 3,000/- as having been spent in connection with the case and Rs. 2,000/- towards the loss of income due to the non-cultivation of the lands.

(22) It is thus seen that none of the witnesses has claimed anything towards mental suffering. It is true that plaintiff 5 as P. W. 3 stated that he suffered bodily and mentally on account of the jail life, but he did not try to evaluate the mental suffering in terms of money. In the circumstances, it looks to me that it is difficult to support the Judgment of the trial court in so far as it awards Rs. 2,500/- as damages for mental suffering of the plaintiffs. Even in the plaint, all that is stated is that they had suffered a great deal in mind, body, finance and reputation.

Even if any damages could be awarded under that head notwithstanding the circumstances pointed out above, it looks to me that a sum of Rs. 500/- awarded to each of the plaintiffs is very excessive. There is no basis for the learned Judge having awarded Rs. 500/- to each of the plaintiffs. There is no discussion on this question. Assuming they are entitled to damages on account of mental suffering anything more than Rs. 200/- for each of the plaintiffs seems to be excessive.

(23) In the result, the appeal is allowed; the decree of the trial court is set aside and the suit dismissed. In the circumstances of the case, I direct each party to bear its own costs throughout.

D.H.Z.

Appeal dismissed.

(S) AIR 1955 ANDHRA 221 (V. 42, C. 82 Oct.)

FULL BENCH—SUBBA RAO C. J., VISWANATHA SASTRI AND BHIMASANKARAM JJ. (12-4-1955)

Amara Eswaramma and others, Plaintiffs-Appellants v. Makkam Seethamma, Defendant-Respondent.

Second Appeal No. 1290 of 1954, decided by a Full Bench on order of reference made by Subba Rao C. J. and Satyanarayana Raju, J., D/- 14-2-1955.

Court-fees Act (1870), Ss. 1, 7 (V) and 6, Sch. I Art. 1 — Suits Valuation Act (1887), Ss. 3, 12 — Rules under S. 3, Suits Valuation Act — R. 2 whether applies to appeal in suit filed before enactment of rule.

Rule 2 substituted by Andhra Government by G. O. MS No. 961 (Law Courts—1) dated 8-9-1954 in the place of R. 2 of the rules framed by the Government of Andhra in G. O. No. 367 Law, dated 12-4-1954 does not apply to an appeal arising out of a suit filed prior to the enactment of that rule. AIR 1927 Mad 360, Not followed; AIR 1953 SC 221, Applied. Case law discussed. (Paras 4 and 8)

Anno: Court-fees Act, S. 1 N. 15; Suits Valu. Act, S. 3 N. 1.

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 543 : 1954-1 Mad LJ 206 4
(B) (V14) AIR 1927 Mad 360 : 50 Mad 488 4, 5
(C) (V42) (S) AIR 1955 Andhra 87 : 1955 Andhra LT 53 : 1955 Cr LJ 770 (FB) 4
(D) (V40) AIR 1953 Mad 351 : 1953-1 Mad LJ 49 4
(E) (V11) AIR 1924 Cal 881 : 28 Cal WN 403 4
(F) ('13) 19 Ind Cas 971 : 18 Cal LJ 133 4
(G) ('73) 11 Beng LR 372 (N) 4
(H) ('71-74) 7 Mad HCR (App) 1 4
(I) ('79-80) 4 Bom 26 4
(J) (V30) AIR 1943 Oudh 225 : 204 Ind Cas 486 4
(K) (V20) AIR 1933 Nag 207 : 142 Ind Cas 416 4
(L) (V14) AIR 1927 Mad 977 : 50 Mad 857 (FB) 4, 6
(M) (1905) 1905 AC 369 : 74 LJPC 77 4, 7
(N) ('71-74) 7 Mad HCR 356 4
(O) (V31) AIR 1944 Mad 406 : 1944-1 Mad LJ 340 4, 5
(P) ('13) 20 Ind Cas 689 : 25 Mad LJ 205 4, 6
(Q) (V40) AIR 1953 SC 221 : 1953 SCR 987 (SC) 4, 7
(R) (1878) 3 AC 582 : 15 Sc LR 740 6

G. Venkatrama Sastri, for Appellants; Govt. Pleader, Nellore, for the State.

SUBBA RAO C. J.:

I agree.

VISWANATHA SASTRI J.:

(2) I too agree.

BHIMASANKARAM J.:

(3) The question propounded for determination by this Full Bench relates to the amount of the proper court-fee payable on a Memorandum of Second Appeal. The plaintiffs are the appellants in the Second Appeal. They filed O. S. No. 240/1952 on the file of the District Munsif's Court, Nellore, for recovery of possession of the plaint schedule properties consisting of five items. On the plaint, they paid a court-fee of Rs. 164-15-0 'ad valorem' on the market value of the said items. The suit was decreed, and the defendant, who preferred an appeal to the Sub Court, Nellore, paid the same court-fee.

The lower Appellate Court reversed the decree of the trial Court and dismissed the suit on 9-8-1954. Pending that appeal on 12-4-1954, the Government of Andhra issued a Notification by its G. O. No. 367 under Ss. 2 and 3, Suits Valuation Act, 1887 (Central Act 7 of 1887) making rules for the determination of the value of the land for purposes of jurisdiction in suits for possession of land mentioned in para. (v) of S. 7, Court-fees Act, 1870 (Central Act 7 of 1870). Rule 2 thereof provided for the valuation of different kinds of land, such as ryotwari land, inam land and other kinds of lands situate in different kinds of estates as defined in the Madras Estates Land Act and house sites.

This notification was superseded by G. O. No. 961 dated 8-9-1954, whereby in exercise of their powers under S. 3, Suits Valuation Act, 1887, the Government provided that for R. 2 in the prior notification (i.e., in G. O. No. 367) the following rule shall be substituted:

"In suits for possession of land, the value of the land for purposes of jurisdiction shall be half the market value of the land:

Provided that it shall be open to the State Government from time to time to fix by notification the market value, as they may deem fit, and different percentage may be fixed for different classes of lands, having regard to the nature of the land and the area in which it is situated."

This is followed by an Explanation not material for the present purpose.

(4) The present Second Appeal was presented on 30-11-1954 by the plaintiff with the following memo of valuation of the subject-matter of the appeal:

"Value of the Second Appeal for jurisdiction is the same as that of the trial Court viz., Rs. 1,700/- made up of Rs. 1,400/- being the market value of the A schedule properties plus Rs. 300/- claimed as past profits as per para. 6 of the plaint."

Value of the Second Appeal for court-fees in regard to possession under Sch. 7 (v), Court-fees Act, is half the market value, viz., Rs. 700/-
Past profits claimed. Rs. 300/-

Rs. 1,000/-

On that valuation, a court-fee of Rs. 112-7-0 was paid on the basis that the later G. O. (G. O. No. 961) applied to the Memorandum of Appeal. The office objected to this valuation and in doing so, placed reliance upon the ruling in — 'R. M. Seshadri v. Province of Madras', AIR 1954 Mad 543 (A). It insisted upon the appellants paying the same court-fee as they had paid upon the plaint. My Lord, the Chief Justice sitting as a puisne Judge of the Madras High Court along with Ramaswami J., held in the last mentioned decision that an appellant need only pay on the Memorandum of Appeal the same court-fee as that he had paid on the plaint despite the fact that between the date of the institution of the suit and the presentation of the Memorandum of appeal a higher amount was fixed by the appropriate authority as the proper court-fee leviable on the Memorandum of appeal.

The matter now under reference was posted in the first instance before the Taxing Judge Umamaheswaram J., who was of the opinion that the ruling conflicted with an earlier Bench ruling of the Madras High Court in — 'Punya Nahako v. Emperor', AIR 1927 Mad 360 (B) which had ruled that in regard to the amount of court-fee payable on a review application coming under Art. 5 of the first schedule to the Court-fees Act, the court-fee payable thereon will be

"the court-fee payable, as if on the date when the review application was put in, the applicant was filing a plaint or Memorandum of Appeal for the same relief."

In accordance, therefore, with the practice that obtained on the Madras High Court and which is to obtain in this High Court also as laid down by the Full Bench decision in — 'Subbarayudu v. State', (S) AIR 1955 Andhra 87 (FB) (C), the learned Judge directed that this matter should go before a Bench in the first instance, though strictly speaking in accordance with the observations of Subba Rao J. (as he then was) in — Dr. K. C. Nambiar v. State of Madras', AIR 1953 Mad 351 (D) he might have referred it to a Full Bench himself. The matter then came before the learned Chief Justice and Satyanarayana Rao, J., who referred the following question to a Full Bench:

"Whether R. 2 substituted by G. O. MS No. 961 (Law Courts—1) dated 8-9-1954 in the place of R. 2 of the rules framed by the Government of Andhra in G. O. No. 367 Law dated 12-4-1954, applies to an appeal arising out of a suit filed prior to the enactment of that rule."

It will be convenient in the first instance to set out the appropriate provisions of the Suits Valuation Act and the Court-fees Act, so far as they are material for the determination of the question thus formulated. Section 3, Suits Valuation Act enacts:

"S. 3 (1) The State Government may make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-fees Act, 1870, S. 7 paras. V and VI and para. X, clause (d).

S. 3(2): The rule may determine the value of any class of land, or of any interest in land, in the whole or any part of a local area, and may prescribe different value for different places within the same local area."

This section is in part I of the Act. Section 12 which is in Part III of the Act runs thus:

"Nothing in Part I or Part II shall be construed to affect the jurisdiction of the Court—

(a) with respect to any suit instituted before rules under Part I applicable to the valuation of the suit take effect or Part II has come into force, as the case may be, or

(b) with respect to any appeal arising out of any such suit."

Section 7 (V), Court-fees Act so far as it is relevant for the present purpose, provides as follows:

"The amount of fee payable under this Act in the suits next hereinafter mentioned.....
shall be computed as follows:

(V) In suits for possession of land, houses and gardens—according to the value of the subject-matter; and such value shall be deemed to be—

x x x

(some modes of statutory valuation as are given which are followed by a proviso to this effect):

Provided that if rules are framed under S. 3, Suits Valuation Act, 1887, for determining the value of land for purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph."

It is also necessary to refer to the material portion of S. 6, Court-fees Act which is as follows:

".....no documents of any of the kind specified.....annexed shall be filed, exhibited or recorded in any Court of justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

Article I in Sch. I to the Act relates to the amount of fee payable 'ad valorem' on a

"Plaint.....or Memorandum of Appeal.....presented to any Civil.....court....."

Column 3 thereof provides for a graduated scale of fee payable on the value of the plaint or Memorandum of Appeal referred to in col. 1 according as the amount or value of the subject-matter in dispute does or does not exceed the sums specified in col. 2. Now it is to be noted that S. 7 speaks only of the amount of court-fee payable in suits while S. 6 prohibits the filing, accepting or recording of

"a document of any of the kinds specified as chargeable in the first.....schedule to the Act, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules, as the proper fee for such documents".

Now the question to be decided is, having regard to the above provisions, what is the proper fee chargeable under Art. I, Sch. 1 on the present Memorandum of Appeal? How is the amount or value of the subject-matter in dispute in this Memorandum of Appeal to be ascertained? Is it to be ascertained with reference to rules of valuation which were in force at the time of the presentation of the plaint, or in accordance with the rules as they stood amended by the time of the presentation of the Memorandum of Second Appeal. In AIR 1927 Mad 360 (B) Odgers and Wallace JJ. were concerned with the proper amount of court-fee leviable on an application for review of a judgment in an appeal pronounced before an amendment of the Court-fees Act enhanced the amount of Court-fee payable on plaints or Memoranda of Appeals in such cases. Wallace J. who wrote the leading judgment, propounded the question for determination in these terms:

"The first question is whether the rate of fee to be levied is under old Act or under the Amended Act. Under Sch. I, Arts. 4 and 5, the court-fee for application for review of judgment is either the whole or half of 'the fee leviable on the plaint or Memorandum of appeal' and the decision turns on the interpretation of that phrase."

It may be construed in at least four different ways:

(1) as the fee actually levied in the plaint or Memorandum of Appeal when admitted;

(2) as the proper fee to be levied on the plaint or Memorandum of Appeal at the time of presentation thereof;

(3) as the fee which would have been properly levied on the plaint or Memorandum of Appeal, if that had been put in at the time of the presentation of the application for review; and

(4) as the proper fee to be levied if the applicant for review were then putting in a plaint or Memorandum of Appeal for the same relief."

The learned Judge preferred the fourth of the above construction to the other three. It seems to me that the proper way of construing it is "as the fee actually levied or leviable on the plaint or Memorandum of Appeal at the time of the presentation thereof." This view is in consonance with the interpretation put upon the language of the same articles in a similar case by their Lordships Mukerjee and Cuming JJ. in — 'Nandi Ram v. Jogendra Chandra Dutta', AIR 1924 Cal 881 (E). There, Mookerjee J., who delivered the judgment of the Bench observed as follows:

"The Assistant Government Pleader has invited us on behalf of the Secretary of State for India in Council to read into col. 3 of Arts. 4 and 5 of the following expression: 'if the plaint or memorandum of appeal were presented when the application for review is made'. There are two obvious objections to the proposed construction, namely, first, it requires us to read into the articles words which are not to be found there; and secondly, the fiction that is involved is absolutely contradictory to the actual facts, because an application for review of judgment cannot be concurrent with a plaint or memorandum of appeal which must of necessity precede the judgment to be reviewed.

The petitioner on the other hand, urges that the Court-fees Act itself contains a provision which specified when the fee is leviable on the plaint or memorandum of appeal and he invites our attention to S. 6 which is in the following terms:....."

The learned Judge after quoting S. 6 proceeded to say:

"This shows conclusively that the requisite court-fee is leviable when the plaint or memorandum of appeal is filed. This is corroborated by the provisions of O. 7, Civil P. C., 1908. Rule 1 requires that the plaint shall, in addition to other particulars, contain a statement of the value of the subject-matter of the suit for the purpose of jurisdiction and of court-fees. Rule 11 ordains that the claim shall be rejected when written upon paper insufficiently stamped, if the plaintiff has failed to supply the requisite stamp paper within a time to be fixed by the Court.

The Assistant Government pleader urges that if the expression "leviable" refers to the time of presentation of the plaint or Memorandum of Appeal, the Legislature might as well have replaced it by the word "levied". This argument is fallacious and overlooks the fact that what is leviable might not have been levied. (as in the case of a suit filed 'in forma pauperis').

x x x

"It is plain that if the Legislature had in Arts. 4 and 5 used the expression 'levied' instead of 'leviable' the result would have been that if by mistake a smaller amount than what is leviable on the plaint or Memorandum of Appeal has been levied, the applicant for review will be entitled to the conti-

nued benefit of the mistake. Conversely, if the amount levied is in excess of what is leviable, the petitioner will be prejudiced, though he may be entitled to a refund of the sum paid in excess: — 'Lakhi Narain Jagdeo v. Kritibas Das', 19 Ind Cas 971 (Cal) (F); — 'Re: Prasunna', 11 Beng LR 372n (G).

There is thus ample reason why the legislature should have used the term 'leviable' and not 'levied'. The use of the term "leviable" does not, in our opinion, justify the inference that the legislature intended to introduce a fiction into the law, namely, an imaginary representation of the plaint or Memorandum of Appeal at the time when the application for review is filed."

x x x

"The substance of the matter is that for the purpose of ascertainment of the court-fee payable on the application for review, the application relates back to the plaint or Memorandum of Appeal, as the case may be, the amount is levied in a fixed proportion independent of the scope of the application for review. To put the matter differently; as soon as a suit has been instituted, the amount of court-fee payable on a possible application for review of the prospective judgment in the suit becomes fixed."

x x x

The amount must be calculated on the basis of the fee leviable (which in the normal course of events is the fee actually levied) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum of appeal is filed in Court."

Dealing with the contention of the Government that an amended statute which came into operation after the memorandum of appeal was filed and before the application for review was lodged applied to the review application, the learned Judge held that

"the applicant could not be called upon to pay court-fee on the basis of the fee which would be payable on the plaint or the memorandum of appeal if it were to be filed on the date of the application for review."

In reaching the conclusion as to the basis on which the amount must be calculated the learned Judge referred to the decisions in — 'Anon', 7 Mad HCR (App) 1 (H) and — 'In re Manohar G. Tambegar', 4 Bom 26 (I), the former of the Madras High Court and the latter of the Bombay High Court as pointing to an opposite conclusion. The decision in 7 Mad HCR App 1 (H) which the learned Judges, who decided AIR 1927 Mad 360 (B) purported to follow does not, to my mind, appear to be directly in point so far as the specific question that fell to be decided in the later case is concerned.

There the question was whether the court-fee payable on an application for review of judgment is to be calculated upon the amount originally at issue in the plaint or appeal memorandum upon the amount at issue in the application for issue of judgment: The majority of the Court expressed the view that although the words of the schedule may seem in some measure to favour an opposite construction, the stamp fee must be calculated on the amount which would be obtained if the review were granted and not necessarily on the whole value of the suit. They proceeded to say:

"The leading principle of the Act is that the amount of the stamp fee is to be calculated on the relief sought and when a man seeks to obtain by a review more than the Court has already given him, the excess in the relief which he seeks by his petition. The words in Arts. 4 and 5 of Sch. I are "the fee leviable on the plaint or memorandum of appeal" and they must be taken to mean the fee which would be leviable on the plaint or memorandum of appeal, if there were a fresh plaint or memorandum of appeal seeking the additional relief which the petition of review seeks."

It is to be noted that there is no question in this case of retrospective operation of the Court-fees Act as amended. In 4 Bom 26 (I) a single Judge of the Bombay High Court decided that—

"When a plaint or memorandum of appeal comprises a number of claims and a portion only of such claim has been allowed by the judgment, the party seeking a review should be required to stamp his application with a fee sufficient to cover the amount of the claims in regard to which he wishes the Court to review its judgment."

The reasoning of the decisions is stated thus:

"Section 17 provides that when a suit embraces two or more subjects, the plaints or Memoranda of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or Memoranda of appeal in suits embracing separately each of such subjects, would be liable under the Act. A plaint, therefore, or memorandum of appeal which embraces two or more distinct subjects, is treated, for the purposes of the stamp revenue, as a collection of distinct plaints or memoranda of appeal; and treating it in this manner, I think that the words "the plaint or memorandum of appeal in Art. 5 may be construed as meaning not necessarily the plaint or memorandum of appeal, formed by the combination of the several subjects comprised in it, but the plaint or memorandum of appeal which would have been presented in respect to the particular subject in regard to which the review is sought, if the suit has embraced that subject and no other. In the present case, the plaint and the memorandum of appeal embraced several distinct subjects.....In case of doubt, a fiscal regulation should be construed in favour of the subject."

Here again, there was no question of the retrospective operation of an amendment of the law relating to court-fees. Notwithstanding that while the learned Judges who decided AIR 1927 Mad 360 (B) called in aid the above two decisions in support of their interpretation, Mukerjee J. thought they pointed in a direction opposite to that which he pursued, it seems to me that there is no necessary inconsistency between the views of Mukerjee, J., and those of the learned Judges of the Madras and Bombay High Courts in the two rulings cited above.

The fact is not to be overlooked that the report in 7 Mad HCR (App) 1 (H) is not a report of the 'ipsissima verba' of the learned Judges but is only a summary of their opinion, and if considered in the light of the reasoning adopted in 4 Bom 26 (I), it might be read as construing Arts. 4 and 5 in harmony with the intention of S. 17 of the Act. I am not prepared to agree with the views of Mukerjee J., in so far as he implies, that the proper fee for such an application is the fee leviable on the plaint or the memorandum of appeal, whether the review affects the whole or part of the decree.

On this point, there is a divergence of views between the several High Courts. The High Court of Oudh in — 'Ram Asray v. Rameshwar Prasad', AIR 1943 Oudh 225 (J) and the High Court of Nagpur in — 'Ibrahim Ali v. Ahsan Hussain', AIR 1933 Nag 207 (K) followed the view held by the Calcutta High Court in preference to that of the Madras and Bombay High Courts. But, it is to be observed that all these cases turned on the meaning of the word "leviable" in Arts. 4 and 5 of Sch. I, Court-fees Act.

The cases in AIR 1927 Mad 360 (B) and that in AIR 1924 Cal 881 (E) considered, it is true, the retrospective effect of a court-fee provision also but their view as to it was coloured by what the Judges who decided them thought was the meaning of that word. But, neither had to deal with the problem presented to us by the instant case. Much more in point to the present discussion, however, it seems to me, is the Full Bench decision in — 'Daivana-

yaga Reddiar v. Renukambal Ammal', AIR 1927 Mad 977 (FB) (L). It is true that this case also actually depended only on the construction of S. 13, Madras Civil Courts Act.

Indeed, the learned Judges in that case were dealing with the effect on jurisdictional value of a change in the value for purposes of court-fee (when both were statutorily made identical) when the change was brought about after a suit had commenced; while in the case now before us, we are called upon to pronounce on the effect on the value for court-fee of a notification under the Suits Valuation Act. What happened in that case was that between the date of the suit and that of appeal, S. 7 (2), Court-fees Act (8 of 1870) was amended by the Madras Court-fees Amendment Act (5 of 1922) as follows:

"In suits for maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit, and such value shall be determined to be, in suits for maintenance, the amount claimed to be payable for one year and in other suits to be ten times the amount claimed to be payable for one year."

The plaintiff, a widow, claimed maintenance at a particular rate and valued her claim in the plaint at ten times the amount payable for one year, under S. 7, Cl. (2), Court-fees Act. She also claimed past maintenance and a house to reside in. The total value of the claim according to her was Rs. 14,600/-. The Subordinate Judge gave a decree for maintenance at Rs. 60/- a month. He also decreed that she should be given possession of a house for her residence during her life.

The defendants thereupon preferred an appeal to the High Court valuing the relief for maintenance under the Court-fees Amendment Act. The total value of the appeal together with the past maintenance and the value of the house came to Rs. 2,633-5-4. It was contended that though the suit was valued at more than Rs. 5,000/- under the law in force at the time of the filing of the plaint, yet the value of the subject-matter of the suit according to the amended Court-fees Act at the time the appeal was presented being less than Rs. 3,000/- an appeal lay only to the District Court and not to the High Court.

After referring to the decision in — 'Colonial Sugar Refining Co. v. Irving', 1905 AC 369 (M), the learned Judges held that the Amended Court-fees Act, which came into force after the suit was filed, would not deprive the plaintiff of a right to appeal in the High Court which he had when he filed the suit. Then they proceeded to say:

"The answer to the question before us may also be put upon another ground and that is that the forum of appeal from a Subordinate Judge's Court depends on the value of the subject-matter of the suit. Presumably the value of the subject-matter of the suit is its value at the time of filing. Such value has to be set forth in the plaint and court-fee paid accordingly.

It is, however, contended that the value varies according to the particular enactment in force at the time; and that, although it may have a particular value when it is filed, the value of the suit can be changed if the law in respect of valuation is altered. This contention was distinctly negatived so long ago as 1874 in — 'Muthuswami Pillai v. Muthu Chidambara Chetti', 7 Mad HCR 356 (N), where it was held that it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages.

If this is so, the value of the subject-matter of the suit is the same throughout and it cannot be altered after the decree has been passed simply by an alteration in a fiscal enactment."

This decision, though it does not refer to S. 12, Suits Valuation Act above quoted, is in consonance with the policy underlying that section. We might have had a direct authority on the point now in controversy if the learned Judges had also been called upon to determine the court-fee chargeable on the Memorandum of Appeal before them. But, unfortunately, the problem was not posed to them.

This decision was, however, relied on by the advocate for the appellant in — 'In re Ghosh Beevi', AIR 1944 Mad 406 (O), in support of the contention that "the value of a suit (for court-fee purposes) as fixed according to the law then in force when the suit was instituted continues to apply to an appeal and a Second Appeal therefrom in spite of alterations subsequently made" (as to the mode of valuation).

But that argument was rejected by Krishnaswamy Ayyangar J., on the ground that "the Full Bench had not to consider the effect of a fiscal enactment in so far as fiscal purposes are concerned" and that the ruling did not touch the question of court-fees. He gave no reason, however, in support of his view that such an amendment would affect even the Memorandum of Appeal arising out of the suits instituted before it came into force.

This decision was referred to in AIR 1954 Mad 543(A), but it was stated therein that it was not entitled to weight for want of positive grounds for decision. The appellant in Seshadri's case (A) instituted C. S. No. 541 of 1949 on the Original Side of the Madras High Court and paid a court-fee of Rs. 935/- on the plaint which was the proper fee payble. The suit was dismissed by the learned Judge sitting on the Original Side on 25-3-1952.

During the pendency of the suit, R. 1 of O. 2 of the High Court Fees Rules, 1933 was amended so as to provide that the Registrar shall apply to certain documents which included memorandum of appeal the law for the time being in force relating to Court-fees, etc. i.e., (the Court-fees Act) in the manner and to the extent that it is applicable to similar documents filed in original proceedings in a District Court and in appeals from decrees and orders of a District Court.

This rule came into force on 27-6-1950. The appellant presented his Memorandum of Appeal on 20-8-1952, paying the same amount of court-fee thereon that he had paid on the plaint. The office, however, required a court-fee of Rs. 2,332-7-0 to be paid on the Memorandum on the basis of the amended rule. The plaintiff-appellant successfully contended before the learned Judges that the lesser court-fee was sufficient. Dealing with the point as to retrospective operation of the amendment, Subba Rao J. (as he then was) observed as follows:

"It is then contended that in any view the amended rule could not affect the right of the plaintiff to prefer an appeal against the decree of the learned Judge sitting on the Original Side as the rule is not expressly or by necessary implication given retrospective operation. It cannot be disputed that an appeal is a continuation of the proceedings in the Court of the first instance—See — 'Muthiah Chettiar v. Ramasamy Chettiar', 20 Ind Cas 689 at p. 694 (Mad) (P). It is also settled law that a right of appeal is not merely a matter of procedure but is a matter of substantive right. The case in — 'Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh', AIR 1953 SC 221 (Q), is rather instructive."

After adverting to the decision in AIR 1953 SC 221 (Q) which I shall presently discuss and after quoting the language of the amendment, Subba Rao J., proceeded to say—

"This amendment does not give it retrospective operation. Nor can we infer retrospectivity by necessary implication. Full meaning can be given to the amendment, if it is confined to cases where the suit was filed after the amendment came into force. But can it be said that the amendment is such

that it places substantial restriction on the plaintiff's right of appeal? Under the rules, as they stood at the time when the suit was filed, the court-fee payable was only Rs. 935/-. Under the amended rule, the court-fee is Rs. 2,832-7-0 i.e., about three times the original rate.

This sudden increase in the burden could not have been anticipated by the plaintiff. Had he known that he would be asked to pay such heavy court-fee for preferring an appeal, it is problematical whether he would have filed the suit at all. At the time he filed the suit he must have been under the impression that with the payment of an additional court-fee of Rs. 935/- he could pursue the suit to its appellate stage.

The right of appeal that vested in him at the time when he instituted the suit was certainly and seriously curtailed by the unexpected heavy burden thrown on the appellant. It is a well-established principle that an Act or Rule imposing a burden has always to be construed strictly. On a fair construction of the language used in the rule, we cannot hold that the amendment is retrospective in operation. The court-fee prescribed thereby cannot apply to the appeal preferred by the plaintiff."

The Government Pleader relied upon a decision of Krishnaswamy Ayyangar J. in AIR 1944 Mad 406 (O). The learned Judge held that the notification increasing the court-fee was applicable to an appeal preferred after it came into force though the suit was instituted prior to the amendment. A perusal of the judgment shows that the learned Judge only distinguished the cases cited before him, but did not give any acceptable reasons why in his view the court-fee payable according to the amendment should be paid. The only reason given by the learned Judge is a statement of fact namely:

"The notification having taken effect on 1-11-1943, I can see no reason why it should be held inapplicable to an appeal preferred after it came into force."

(5) The learnemd Judge has not considered the point viz., when the amendment was not expressly or by necessary implication made retrospective in operation, whether it would apply to an appeal even though it has placed a substantive restriction on the appellant's right of appeal. We, therefore, regret our inability to follow the judgment. Strictly speaking, it is true that there is really no direct conflict between the decision in AIR 1927 Mad 360 (B) and that in AIR 1944 Mad 406 (O).

The one, as already shown, construed the word 'leviable' in an Article of Sch. I to the court-fees Act, while the other pointedly and solely dealt with the retrospective operation of a particular notification as regards court-fee. But it is fairly obvious that the reasoning in the one militates against that in the other and it is, therefore, desirable that the matter is placed beyond doubt.

(6) Now it is common ground in that argument before us that the general effect of the notification of the Government of Andhra in G. O. No. 961 is considerably to enhance the amount of court-fee payable in a number of cases, though it has the effect of reducing the amount of court-fee payable in a few cases, such as the one before us, in the first place, it must be observed that the notification in accordance with the terms of S. 7 (v) deals only with the valuation of suits as such.

It does not even mention appeals. A memorandum of appeal relating to this class of suits is chargeable with court-fee only by the combined effect of S. 6 and Art. 1, Court-fees Act. Article 1 refers to "a plaint or memorandum of appeal." It seems to me reasonable to hold that if the valuation of the suit is once fixed, for jurisdictional purposes, then under proviso to S. 7 (v) it is fixed for purposes of court-fee also.

When the Legislature makes the valuation identical both for jurisdiction as well as Court fee purposes, no interpretation in my judgment should be put upon a notification like the one in question, which would result in such identification being in abeyance so to say for some time at least, so far as appeals are concerned. Because, if the construction suggested on behalf of the appellants is right, while the value of the appeal for jurisdictional purposes remains unaltered (as the Full Bench decided in AIR 1927 Mad 977 (FB) (L)).

It would be different for court-fee purposes while the proviso to Section 7 (v) says both values should be the same. It is doubtless true, as has been observed by Lord Blackburn in — 'Gardner v. Lucas', (1878) 3 AC 582 at p. 603 (R) that alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be." But as observed in the judgment of the Madras High Court in 20 Ind Cas 689 at p. 694 (Mad) (P) "some matters coming within the law of procedure must be decided by the law as it stands at the time when the suit was instituted, while with regard to other matters, a change in the law subsequent to the institution of the suit will modify the procedure which the Court should adopt."

(7) As Craies points out in his "Statute Law" (Edn. 5) at page 371, if a statute deals merely with the procedure in an action and does not affect the rights of the parties, "it will be held to apply 'prima facie' to all actions, pending as well as future." This statement is followed by a paragraph entitled "Right of Appeal not affected as being a matter of existing right" in which the well-known passage of Lord Macnaghten in the case of 1905 AC 369 (M) is cited. Reference may now be made to the decision of the Supreme Court in AIR 1953 SC 221 (Q).

The question to be decided in that case was as regards the maintainability of an appeal to the Sales Tax Commissioner, Madhya Pradesh, under S. 22 (1), C. P. and Berar Sales Tax Act, 1947. Between the date of the institution of the assessment proceedings and the date of the filing of the appeal from the assessment, the said section was amended so as to require proof of the payment of the tax in respect of which the appeal had been preferred, as a condition precedent to the maintainability of the appeal.

Before the amendment, it was enough if the appellant satisfied the Commissioner that he had paid the tax admittedly due. The Nagpur High Court was of the view that the Income-tax Authorities rightly rejected the appeal as in their opinion, the amended provision applied to the case. In upholding the contentions of the appellant before them their Lordships of the Supreme Court made the following observations:

"That the amendment has placed a substantial restriction on the assessee's right of appeal cannot be disputed, for the amended section requires the payment of the entire assessed amount as a condition precedent to the admission of its appeal. The question is whether the imposition of such a restriction by amendment of the section can affect the assessee's right of appeal from a decision in proceedings which commenced prior to such amendment and which right of appeal was free from such restriction under the section as it stood at the time of the commencement of the proceedings.

The question was answered in the negative by the Judicial Committee in 1905 AC 369 (M)." They then discussed the facts of the Privy Council decision and after referring to a number of Indian decisions based on that ruling summed up the position in the following words:

"It was there regarded as settled that the right of appeal was not a mere matter of procedure, but was a vested right which inhered in a party from the commencement of the action in the Court of first instance and such right could not be taken away except by an express provision or by necessary implication."

They also declared that the right of appeal is not merely a matter of procedure, but one of substantial right. They repelled the contention that the mere imposition of an onerous condition does not prevent the exercise of the right of appeal in these words:

"There can be no doubt that the new requirement 'touches' the substantive right of appeal vested in the appellant. Nor can it be overlooked that such a requirement is calculated to interfere with or fetter, if not to impair or imperil, the substantive right. The right that the amended section gives is certainly less than the right which was available before.

A provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in the procedure. Indeed, the new requirement cannot be said merely to regulate the exercise of the appellant's pre-existing right, but in truth, whittles down the right itself and cannot be regarded as a mere rule of procedure."

It is clear that this reasoning hits not merely the total denial of a vested right of appeal, but also any substantial or serious interference with its exercise. Having regard to the general effect of the notification now in question, which is as adverted above, to increase the court-fee payable in a large majority of cases, the result of holding that the notification is retrospective would be to cripple or disable many would-be appellants in the pursuit of the right of appeal which vested in them when their suits were instituted.

(8) My answer, therefore, to the question referred to us would be in the negative.

R.G.D. Answer accordingly.

(S) AIR 1955 ANDHRA 227 (V 42 C 83 Oct.)

CHANDRA REDDY J. (12-11-1954)

Sabbarapu Venkanna, Complainant-Petitioner v. Pothula Simhachallam and others, Accused-Respondents.

Criminal Revn. Case No. 679 of 1954 and Criminal Revn. Petn. No. 633 of 1954, to revise order of Sub-Divisional Magistrate, Peddapuram, D/- 5-7-1954.

(a) Criminal P. C. (1898), S. 198 — Applicability — 'Offence deemed to be one under S. 494, I. P. C.' — Meaning — (Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), Ss. 4 (1), 4(2)).

As under S. 4(2) of the Madras Hindu (Bigamy Prevention and Divorce) Act the second marriage during the continuance of the first marriage is really sought to be made an offence under S. 494, I. P. C., surely the provisions governing the laying of complaints for an offence under S. 494 will be attracted and the complaints for offence under S. 4(1) of the Madras Act will be governed by S. 198, Cr. P. C. AIR 1952 Mad 193, Ref. (Paras 4, 5)

Anno: AIR Com., Cr. P. C., S. 198 N. 2a Pts. 2, 3; 1953 Mitra, S. 198 P. 829, N. "Scope", para 2.

(b) Criminal P. C. (1898), S. 198 — 'Person aggrieved by such offence' — Meaning — Offence under S. 4(1) of the Madras Act 6 of 1949 — Complaint by father without leave of Court — Legality — (Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949), S. 4(1)) — (Words and Phrases).

It is only a person who is directly affected and injured that can make a complaint and a person who is affected or injured in a remote degree cannot initiate proceedings for offences under S. 494 except with the leave of the Court. It is to provide for cases of guardians of minor spouses that the proviso to S. 198, Criminal P. C., was added. It follows that the Magistrate cannot take cognizance of the case on a complaint filed without the leave of the Court by the father of the minor girl whose husband is alleged to have married a second time. Case law referred. (Para 13)

The fact that the Court has taken the complaint on its files does not mean that it has accorded its sanction to its filing. In view of the mandatory provisions of S. 198, Cr. P. C., such filing cannot confer jurisdiction on the Magistrate to try the complaint. AIR 1935 Oudh 6, Rel. on. (Para 14)

Anno: AIR Com., Cr. P. C., S. 198 N. 4; 1953 Mitra, S. 198 P. 830 N. 652, "Person aggrieved", "Defamation" and P. 832 N. "Person .. ... bigamy."

AIR Com., S. 198 N. 6; 1953 Mitra, S. 198 P. 829 N. 650 "Magistrates' .....charge" (Conflict not indicated in Mitra).

(c) Criminal P. C. (1898), S. 198 — Complaint filed by unauthorised person — Proper course.

Where the Magistrate considers that the case cannot be taken cognizance of, on the complaint of a person who has no locus standi to do it, the only course open to him is to dismiss the complaint and not to acquit the accused. (Para 16)

Anno: AIR Com., Cr. P. C., S. 198 N. 5; 1953 Mitra, S. 198 (Topic of N. 5 not independently discussed in Mitra — See however, N. 652 A "Effect of non-compliance", on P. 833 of Mitra).

CASES REFERRED: Paras

(A) (V39) AIR 1952 Mad 193 : 1951 Mad WN 846: 1952 Cri LJ 434 6
(B) ('05) 28 Mad 420 6
(C) (V6) AIR 1919 Mad 590: 41 Mad 691 6
(D) ('05) 3 Cri LJ 187: 3 Cal LJ 38 7
(E) ('05) 32 Cal 425: 8 Cal WN 515 7, 11
(F) ('05) 2 Weir 231 (Mad) 9, 11, 12
(G) ('10) 32 All 78: 11 Cri LJ 51 10, 12
(H) ('86) 10 Bom 340 10
(I) (V22) AIR 1935 Oudh 6: 10 Luck 277: 36 Cri LJ 116 15

O. Chinnappa Reddy, P. Ramakrishna and C. Padmanabha Reddy, for Petitioner; Public Prosecutor, for the State; K. B. Krishnamurthy, for Respondents.

ORDER: This Revision case is against the order of acquittal passed by the Sub-Divisional Magistrate, Peddapuram.

(2) A complaint was filed by the petitioner against four persons under S. 494, Penal Code, read with S. 4(2) of the Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949) on the allegations that the first accused took a second wife while his marriage with the complainant's daughter was subsisting, that the second wife is the daughter of the 4th accused and that the accused 2 to 4 actually assisted the 1st accused in committing this offence. A number of witnesses were examined for the prosecution to prove both the marriages.

(3) The main plea of the accused was that the complaint was incompetent in that it offended against the provisions of S. 198, Criminal P. C.

Agreeing with this objection, the lower court acquitted all the accused. This revision is directed against that Order.

(4) The main point for consideration in this case is whether the view of the Sub-Divisional Magistrate is correct. It is urged in support of his case by Mr. Chinnappa Reddy, the learned counsel for the petitioner, that S. 198 is inapplicable to this case. According to him S. 198 governs only offences under S. 494 but not cases which are deemed to be offences under that section.

The substantive offence alleged to have been committed by the respondents, contends the learned counsel, is one under S. 4(2), Hindu (Bigamy Prevention and Divorce) Act, which only says that a party to a marriage void under S. 4(1) shall be deemed to have committed an offence under S. 494, which means that it is not really an offence under S. 494. It is urged that when a particular thing is deemed to be something it is really not what it is deemed to be.

Such being the case the procedure prescribed in S. 198 need not be followed in the case of offences created under S. 4 of the Madras Hindu (Bigamy Prevention and Divorce) Act.

(5) I do not think I can give effect to it. If, as contended, the second marriage during the continuance of the first marriage is sought to be made an offence under S. 494, surely the provisions governing the laying of complaints for an offence under S. 494 will be attracted.

(6) This point was considered by a Bench of the Madras High Court in — 'Srinivasa Aiyar v. Saraswathi Ammal', AIR 1952 Mad 193 (A), and it repelled a contention similar to the one urged in this case. At p. 197 of the report it is stated thus:

"In various Acts of the local legislature, the words 'as if they were arrears of land revenue' were introduced so as to recover the amount due to the State. This expression has been construed to mean that the procedure laid down in the Revenue Recovery Act is made applicable in its entirety, see — 'Ibrahim Khan v. Rangasamy Naicken', 28 Mad 420 (B) and — 'Sankaran Nambudripad v. Ramasamy Iyer', AIR 1919 Mad 590 (c) where the earlier authorities were all collected."

In view of this decision it is not necessary to pursue this point. Suffice it to say I express my respectful accord with the principles stated therein.

(7) It was next urged by Mr. Chinnappa Reddy that the complaint could be filed by the father of the first wife of the first accused, who is a minor, as he is a person aggrieved within the meaning of S. 198. To substantiate this position reliance was placed on the decision in — 'Daem Sradar v. Batu Dhali', 3 Cri LJ 187 (Cal) (D). In that case Woodroffe J. and Mukerji J. held that the father of a minor husband was entitled to lay a complaint against persons committing an offence under S. 494, Penal Code. In support of their conclusion reliance was also placed on — 'Thakur Das v. Adhar Chandra', 32 Cal 425 (E), which related to a case of a complaint for the offence of defamation.

With great respect to the learned Judges, the considerations that govern the right of members of the family with whom the person defamed resided to institute a complaint are altogether different from those relating to the offence of bigamy. The learned Judges thought that S. 199, Criminal P. C. throws some light on the intendment of S. 198. It was remarked that if really it was only a person directly affected that could file a complaint there was no necessity for enacting S. 199, and that even offences under Ss. 497 and 498, Penal Code, could have been included in S. 198. Emphasis was laid on the expression "some person aggrieved by such offence."

(8) As regards the reasoning based on S. 199, with great respect to the learned Judges, I must say that it is not quite forcible. Section 199 permits a person having the care of a woman to file a complaint on behalf of the husband at the time when the offence was committed provided the leave of the court was obtained. It seems to be for this reason that Ss. 497 and 498, Penal Code, have been excluded from the purview of S. 198, Criminal P. C. and in my opinion this argues more against the conclusion reached by the learned Judges.

(9) The expression "some person aggrieved by such offence" has been considered and explained by a Bench of the Madras High Court in — 'In re Sessions Judge, Godaveri', 2 Weir 231 (F) which took a contrary view. It was decided in this case that the mother of a minor husband aged 16 was not a person aggrieved within the meaning of S. 198 so as to enable her to file a complaint for an offence under S. 494. The ratio decidendi is that it is only a person that is primarily aggrieved that is competent to make a complaint.

In the opinion of the learned Judges, the intention of the legislature was not to permit other persons who might be indirectly aggrieved to file a complaint and according to the learned Judges, the reason is not far to seek.

"This view seems to be necessary to avoid the difficulties which would arise when the person more remotely aggrieved wished to complain and the husband was unwilling to do so."

They further remarked that the expression 'some person aggrieved' implies that in some cases

'there may be more persons aggrieved than one, as for instance, where a number of persons are defamed by a single statement or where a number of persons are equally injured by a criminal breach of contract.'

(10) This view is shared by the Allahabad High Court in — 'King Emperor v. Lala', 32 All 78 (G). To a similar effect is the opinion of the Bombay High Court in — 'Queen Empress v. Bai Rukshmoni', 10 Bom 340 (H).

(11) Mr. Chinnappa Reddy relied on a number of cases where it has been held that the father or a brother of a woman who was defamed by imputing unchastity to her was competent to maintain a complaint as a person aggrieved within the meaning of S. 198. In my view, those rulings have no bearing on the question to be answered by me. In all those cases, it was thought that since the reputation of the members of the family was inexplicably bound up with that of the woman defamed and they would be as much affected as the woman herself, they were persons aggrieved by the defamation.

The observations of the learned Judges Ameer Ali J. and Handley J. in 32 Cal 425 (E) may be cited usefully in this context.

"A Hindu lady residing with her father, her brother or her son is a member of his family; and her reputation is bound up with the reputation of the person in whose house and under whose charge she is living. If any imputation is made against her character, that would affect as much the relative with whom she is living as herself."

In my considered judgment the principle adumbrated in the decision 2 Weir 231 (F) is the correct one.

(12) It is to get over the effect of the rulings in 2 Weir 231 (F) and 'King Emperor v. Lala

(G)' and that line of cases the proviso to S. 198, Criminal P. C. was enacted. This enables the guardian of a minor spouse or someone who is really interested in either of them to institute a complaint with the leave of the Court. It looks to me that it is to avoid frivolous complaints being filed in such cases by persons other than the wife or the husband that the leave of the Court was prescribed as a condition precedent, and it is with this object that this expression 'leave of court' seems to have been introduced for the first time in S. 199 in 1923.

It is significant that at the time when the proviso to S. 198 was added, S. 199 was also amended by inserting a similar proviso. Provision was made by subsequent amendments to both Ss. 198 and 199 for complaints being filed on behalf of husbands serving in armed forces if so authorised by them and with the leave of the court.

(13) On a careful consideration of all the relevant provisions of the law and the decided cases, I have come to the conclusion that it is only a person who is directly affected and injured that could make a complaint and a person who is affected or injured in a remote degree could not initiate proceedings for offences under S. 494 except with the leave of the court. It is to provide for cases of guardians of minor spouses that the proviso to S. 198, Criminal P. C., was added.

It follows that the Magistrate could not take cognizance of the case on a complaint filed without the leave of the court by the father of the minor girl whose husband is alleged to have married a second time.

(14) Another contention raised on behalf of the petitioner is that when once the case was taken cognizance of, it is not open to the accused to challenge the validity of the complaint. It is argued that when the Court takes a complaint on file it must be deemed to have accorded its sanction. I feel that it lacks substance. It is difficult to postulate that a Court, which had not applied its mind, could be assumed to have considered the matter and given leave.

If this argument is to be accepted, the accused would be precluded from raising an objection if the complaint was entertained by a court without the least thought of the requirements of S. 198, Criminal P. C.

(15) In this connection, a ruling of the Lucknow High Court in — 'Jagdish Narain v. Shamsara Begam', AIR 1935 Oudh 6 (I) is pertinent. Repelling a similar contention Ziaul Hasan J. observed thus:

"On behalf of the opposite party it was contended that no objection with regard to jurisdiction was taken by the applicant in the trial court. This is no doubt true; but in view of the mandatory provisions of S. 198, this cannot confer jurisdiction on the Magistrates who tried the applicant."

I have no hesitation in rejecting this argument.

(16) There remains the question whether the Magistrate was competent to acquit the accused when he felt that the complaint was not properly made. If he considered that the case could not be taken cognizance of, on the complaint of a person who had no locus standi to do it, the only course open to him was to dismiss the complaint and not to acquit the accused. The order of acquittal is therefore set aside and in its stead one of dismissal is passed. With this modification, the criminal revision case is dismissed.

D.R.R. Order accordingly.

AIR 1955 ANDHRA 229 (V 42 C 84 Oct.)

SUBBA RAO C. J. AND BHIMASANKARAM J.

(25-1-1955)

Virina Soorayya, Appellant v. Virina Mallayya and others, Respondents.

Letters Patent Appeal No. 210 of 1951, against decree and judgment of Balakrishna Ayyar J., in A. A. A. O. No. 131 of 1948, D/- 30-1-1951.

(a) Income-tax Act (1922), S. 46(2), Proviso — Powers of Collector — Execution of decree obtained by assessee — Legality — (Civil P. C. (1908), O. 21, R. 53) — (Limitation Act (1908), Art. 182) — (Revenue Recovery Act (1890), S. 5).

The power conferred on the Collector under S. 46(2), Income-tax Act is limited and circumscribed. Under S. 5, Revenue Recovery Act, under which the Collector's right to recover the arrears is conditioned he can either sell the defaulter's movable or immovable property or recover the amount by execution against the person of the defaulter. But there is no provision enabling the Collector to recover the amount due from the assessee by executing the decree obtained by the assessee in another Court. (Para 6)

Under the proviso to S. 46(2) also, the Collector's powers are equated to that of a civil Court and as it cannot be said that a civil Court attaching the decree of another Court can itself file an application for executing the decree of that Court, and as under O. 21, R. 53 only the holder of the decree sought to be executed is deemed to be the representative of the holder of the attached decree, the Collector not being the holder of the decree is not in law entitled to file an execution application for the execution of the decree attached. If the execution application is filed by him it is not one made in accordance with law and, therefore, it cannot save the bar of limitation. AIR 1947 Mad 121, Considered; AIR 1938 Mad 360 (FB), Doubted; AIR 1930 Rang 342, Dist. (Paras 7, 10)

Anno: A. M., Income-tax Act, S. 46 N. 1.; AIR Com., Civil P. C., O. 21 R. 53 N. 2, 9, 10; Lim. Act, Art. 182 N. 120.

(b) Limitation Act (1908), S. 15, Art. 182 — Scope — Attachment of decree — Exclusion of period — (Civil P. C. (1908), O. 21, R. 53).

The scope of S. 15 is confined only to an absolute stay granted by Courts. (Para 14)

Held, in the circumstances of the case that an order made under O. 21, R. 53, Civil P. C., by the attaching Court, was not a stay order contemplated by S. 15 and therefore that period could not be excluded from the period of limitation prescribed for the filing of the execution application. AIR 1935 Mad 352 — AIR 1924 Bom 383 and AIR 1934 Cal 140, Rel. on. (Para 14)

Anno: AIR Com., Lim. Act, S. 15 N. 2, 9, 12; Art. 182 N. 120; Civil P. C., O. 21 R. 53 N. 8.

CASES REFERRED: Paras

(A) (V34) AIR 1947 Mad 121 : ILR (1947) Mad 515 8

(B) (V25) AIR 1938 Mad 360 : ILR (1938) Mad 744 (FB) 8

(C) (V17) AIR 1930 Rang 342 : 8 Rang 294 9

(D) (V22) AIR 1935 Mad 352 : 164 Ind Cas 896 11

(E) (V11) AIR 1924 Bom 383 : 48 Bom 485 13

(F) (V21) AIR 1934 Cal 140 : 149 Ind Cas 1130 13

C. Rama Rao, for Appellant; M. S. Ramachandra Rao and M. Krishna Rao, for Respondents.

SUBBA RAO C. J.:

This is a Letters Patent Appeal against the Judgment of Balakrishna Ayyar J., of the Madras High Court. The question raised is one of limitation and the following facts may be useful for appreciating it.

(2) Veerina Venkatarathnam and some others filed O. S. No. 95 of 1938 on the file of the District Munsif's Court of Rajamundry, to enforce a mortgage. On 7-10-1938, a preliminary decree was made therein. Final decree followed on 9-2-1940. On 30-1-1933, as the decree-holders made default in payment of income-tax, the Income-tax Officer issued a certificate to the Collector of East Godavari intimating to him that a sum of Rs. 1,080-1-0 was due from the decree-holders and requesting him to recover the same under the provisions of S. 46(2), Indian Income-tax Act.

Pursuant to the certificate, the Collector attached the decree in O. S. No. 95 of 1938. He also requested the court to stay execution of the decree. On 4-7-1941, the Collector filed an execution petition for executing the decree but it was rejected for default on 6-9-1941. He filed another execution application E. P. No. 305 of 1941 on 29-10-1941, but that was dismissed on 12-8-1943, on the objection taken by the decree holders that the Collector had no right to execute the decree. On 1-12-1944, the decree holders filed an execution petition to execute the decree. The District Munsif, and on appeal, the Subordinate Judge held that the application was barred by limitation as having been filed more than three years from the date of the final order.

The decree-holders preferred an appeal to the Madras High Court against the order of the Subordinate Judge. Balakrishna Ayyar J., agreed with the Subordinate Judge's view that the said E. P. was barred by limitation and dismissed the appeal. But, in dismissing the appeal, he granted leave to prefer a Letters Patent Appeal. One of the decree-holders has preferred this appeal against the order of Balakrishna Ayyar J.

(3) Mr. Rama Rao, learned Counsel for the appellant raised before us two points :

(i) The execution application filed by the Collector was one in accordance with law and the present execution application having been filed within three years from the date of the final order of the said application, it would be well within time.

(ii) The stay order issued by the Collector would enable the decree-holders to exclude the time covered by the operation of the said order and, if so excluded, the present application would be within time.

(4) To appreciate his contention, some of the relevant statutory provisions may be read at this stage :

LIMITATION ACT :

Art. 182:—

For the execution of a decree or order of any civil court.	Three years.	(Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper court for execution, or to take some step-in-aid of execution of the decree or order.

CIVIL PROCEDURE CODE :

O. 21, R. 53 :

1. Where the property to be attached is a decree either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made.

* * *

(b) If the decree sought to be attached was passed by another court then by the issue to such other court of a notice, by the Court which passed the decree sought to be executed, requesting such other court to stay the execution of its decree unless and until

(i) the court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his Judgment-debtor applied to the court receiving such notice to execute its own decree.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in Sub-r. 1 shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

INCOME-TAX ACT :

S. 46(2) :

The Income-tax Officer may forward to the Collector, a certificate under his signature specifying the amount of arrears due from an assessee and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue.

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure, 1908, a Civil Court has for the purpose of the recovery of an amount due under a decree.

(5) The effect of the aforesaid provisions may be summarised thus : An execution application would be within time if filed within three years from the date of the final order made in the previous application filed in accordance with law. A decree-holder may attach a decree obtained by his judgment-debtor The attachment can be effected by the Court by issuing a notice to the Court which passed the decree sought to be attached requesting the court to stay the execution. The holder of a decree sought to be executed is deemed to be the representative of the holder of the attached decree and, in that capacity, he is entitled to execute the attached decree.

The Collector, on receipt of a certificate from the Income-tax Officer specifying the amount due from the assessee empowered under S. 46, Indian Income-tax Act, to proceed to recover the said amount as if it were an arrear of land revenue. Further, for the purpose of recovering the said amount he has the same powers which a civil court has for the purpose of recovery of an amount due under a decree. The Collector, therefore, under the said provisions can attach the decree by the assessee, for his position is equated to that of a court passing a decree for the said amount.

So far, there is no difficulty. Under the aforesaid provisions, the Collector in the instant case was well within his rights when he issued a notice to the court attaching the decree obtained by the appellant. But, the question is, whether the said provisions expressly or by necessary implication empower the Collector to file an execution application as if he were the holder of a decree against the appellant.

(6) As strong reliance is placed upon the provisions of S. 46, Indian Income-tax Act, they may now be scrutinised with some care. Under S. 46(2) on the receipt of a certificate from the Income-tax Officer, the collector shall proceed to recover from the assessee the amount specified therein as if it were an arrear for land revenue. The Collector's right to recover the amount is, therefore, conditioned by the provisions of the Revenue Recovery Act prescribing the mode of collection of arrears of land revenue.

To put it differently, is there a provision in the Revenue Recovery Act, empowering the Collector to file an application for execution of a decree obtained by the assessee against a third party? We find no such provision therein.

Under S. 5, Revenue Recovery Act, whenever revenue may be in arrear, it shall be lawful for

the Collector or other Officer empowered by the Collector in that behalf to proceed to recover the arrear together with interest and costs of process by the sale of the defaulter's moveable and immoveable property or by execution against the person of the defaulter in manner therein provided. The Collector, therefore, can either sell the defaulter's moveable or immoveable property or recover the amount by execution against the person of the defaulter.

Sections 11 to 23 prescribe the procedure for bringing to sale the moveable property of the defaulter. Sections 25 to 36 provide for the realisation of the amount by the sale of the immoveable property of the defaulter. Sections 48 and 49 regulate the machinery for the recovery of the amount due from the person of the defaulter. There is no provision enabling the Collector to recover the amount due from the assessee by executing the decree obtained by the assessee in another court by filing an application to execute the same. The power conferred on the Collector under S. 46(2) is limited and circumscribed and it does not give him the right to apply for executing the attached decree.

(7) Nor can we find such a right under the proviso to S. 46(2). Under that proviso, the Collector has, for the purpose of recovering the amount due from the assessee, the powers which, under the Code of Civil Procedure, a Civil Court has for the purpose of recovering the amount due under a decree. His powers are equated to that of a civil court. It cannot be said that a civil court attaching the decree of another court can itself file an application, for executing the decree of that court. There is no provision in the Civil Procedure Code and none has been shown to us. Indeed, under O. 21, R. 53, only the holder of the decree sought to be executed is deemed to be the representative of the holder of the attached decree. In no sense of the term can a civil court attaching a decree be the holder of the decree within the meaning of the said clause.

On a plain reading of the express terms of the relevant provisions, we have no hesitation to hold that the Collector has no right to file an execution application and, therefore, the application filed by him to execute the attached decree was not one made in accordance with law.

(8) But, as the learned Counsel cited some decisions in support of his contentions, we shall proceed to deal with them. The decision of Sjr Lionel Leach, C. J., and Patanjali Sastri J. in — 'Nukamma v. Bhansayya', AIR 1947 Mad 121 (A) does not lay down anything more than that an attaching decree-holder is a representative of the holder of the decree attached, and as such, an application for execution filed by the former would save the bar of limitation under Art. 182, Limitation Act.

Nor is the decision of the Full Bench in — 'Manickam Chettiar v. Income tax Officer, Madura', AIR 1938 Mad 360 (FB) (B) on which some reliance was placed by the learned Counsel for the appellant, of much relevance. There, the petitioner obtained a money decree against the respondent and, in execution thereof, attached and brought to sale some moveable properties of the respondent. The Income tax due by the respondent being in arrear, the Income-tax Officer applied to the executing Court under S. 151, Civil P. C., for an order directing payment out to him from the sale proceeds.

After reserving the amount required for the costs of the execution, the executing Court ordered the balance to be paid out to the Income-tax Officer. The Full Bench held that S. 46, Indian Income-tax Act, 1922, was not a bar to the application made by the Income-tax Officer and that the executing court had power to order the payment out of the amount due to Government on mere application. At p. 363, the learned Chief Justice observed:

"This section, however, does not profess to be exhaustive and it cannot without express words to that effect take away from the Crown the right of enforcing payment by any other method open to it. Therefore, I do not regard S. 46 as imposing a bar to an application of the nature of the one we are now concerned with."

According to the Full Bench decision, the Crown, being entitled to prior payment over all unsecured creditors, can file an application under S. 151, Civil P. C., for the payment of the dues out of the sale proceeds in Court realised in execution of a decree by a third party.

Assuming that the Crown has such right, we fail to see how that decision supports the appellant. The Full Bench does not lay down that the Crown can file an application for the execution of decrees obtained by third parties for the purpose of realising its dues. The limited proposition accepted by the Full Bench also appears to us to be of doubtful validity but, being a Division Bench, we are bound by it. But we cannot extend its scope so as to abrogate all the procedural rules.

(9) The decision of the Rangoon High Court in — 'Panalal Jagannath v. Collector of Mandalay', AIR 1930 Rang 342 (C) bearing on the scope of O. 33, Rr. 13 and 14, Civil P. C. is relied upon by way of analogy. There, an application to file an appeal in forma pauperis was dismissed and the appellant was directed in the decree to pay Government the sum of Rs. 700 towards court-fee. As he made default in the payment of the court-fee, the Collector sent a letter to the District Judge before whom execution proceedings were pending asking him to reserve the said amount out of the sale proceeds in execution.

The learned Judges held that the Collector in recovering the amount acts on behalf of the Government and that the Collector may execute the decree like any other suitor. The reason of the decision is found at p. 343. The learned Judge said:

"As soon as the suit is completed, the plaintiff, if successful, suffers the disadvantage imposed by O. 33, R. 10. If he is unsuccessful, as in the present case, he comes within the purview of O. 33, R. 11. The Court then orders the unsuccessful plaintiff to pay the court-fees which he would have had to pay had he not been permitted to sue as a pauper.

This Court fee, therefore, becomes payable under the decree of the trying Court, the decree itself, to that extent, becomes a money decree in favour of the Collector, as is shown by O. 33, R. 13, which, for certain purposes, makes the Government a party to the suit. Further under R. 14, it is directed that a copy of the decree shall forthwith be sent to the Collector."

At P. 344 the learned Judges proceeded to state:

"He is the officer in charge of the collection of the Government revenue and the copy of the decree is merely sent to him to inform him that a money decree has been passed by a civil Court in his favour against someone. If he wishes to realise this money and fails to get payment, that decree is executable by a Civil Court which has jurisdiction, if he applies for execution."

(10) It is, therefore, clear from the aforesaid observations that the Collector in so far as there was a decree in favour of the Government for court-fees was held to be the holder of the decree and therefore was entitled to execute the decree. In this case, there was no decree in favour of the Collector representing the Government. He only functioned as if he were a Court for the purpose of attaching the decree now sought to be executed.

We therefore hold that the Collector, not being the holder of the decree, was not in law entitled to file an execution application for the execution of the decree attached. It follows that the execution application filed by him was not one made

in accordance with law and, therefore, it could not save the bar of limitation.

(11) The learned Counsel then contended that by reason of S. 15, Limitation Act, the present execution application would be in time. Section 15 (1), Limitation Act reads:

"In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order the day on which it was issued or made, and the days on which it was withdrawn, shall be excluded."

The Order of stay issued by the Collector to the District Munsif reads as follows:

"I have the honour to inform you that the decree obtained in your Court on 7-10-1938, by Messrs. Veerina Venkateswara and others in O. S. No. 95 of 1938, in which he was plaintiff and Boddu Appanna and others are defendants, has been attached by this Court on the application of the Income-tax Officer, Rajamundry, in the suit specified above.

You are therefore, requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor."

It is conceded that, if the time during which the stay order operated is excluded, the execution application would be within time. But it is contended that S. 15 has no application to a case where the execution is not completely and absolutely stayed. Section 15 was subjected to judicial scrutiny by various High Courts. Beasley C. J. and Bardswell J. in — 'Kadimcherja Raju v. Kondapi Ayyapa-raju', AIR 1935 Mad 352 (D) described the scope of S. 15 thus:

"In our view, the stay was a limited one. It was an order merely staying the Court. It did not put an end to the rights of either the judgment-creditor or the judgment-debtor to apply for execution which within the plain terms of the order they are entitled to do. The execution of the decree, therefore, remained stayed, for just so long as the judgment-creditor or the judgment-debtor chose not to apply for execution.

As soon as either of these parties applied for execution, then the stay would be removed. It was thus within the power of the execution petitioner at any time himself to remove the stay and under these circumstances, in our view, it is impossible to say that this is a case which comes within S. 15, Limitation Act."

(12) The learned Judges, therefore, confined the scope of S. 15 to an order putting an end to the rights of the judgment-creditor or judgment-debtor to apply for execution for a particular period but not to a case where the hands of the Court are stayed leaving intact the rights of the parties to execute the decree.

(13) So too, the Bombay High Court in — 'Chanbasappa Nagappa v. Holibasappa Basappa', AIR 1924 Bom 383 (E) confined the operation of the section to an absolute stay and not to a limited stay as would be ordered by a notice under O. 21, R. 53 (1) (b). At p. 384, the learned Judges observed—

"The stay does not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and that being the case, time must be taken as running against them."

The Calcutta High Court in — 'Saroj Ranjan Sinha v. Joy Durga Dassi', AIR 1934 Cal 140 (F) accepted and followed the view of the Bombay High Court At p. 142, the learned Judges stated:

".....the express words of O. 21, R. 53, as they now stand after amendment leave no room for doubt that it is open both to judgment-debtor and decree-holder in the present case to execute the decree which is the subject-matter of execution."

(14) It will be seen from the aforesaid decisions, that the scope of the provisions of S. 15, Limitation Act, is confined only to an absolute stay granted by Courts. The principle underlying the section is apparent. If the execution of the decree was stayed, it would be an unnecessary burden on the decree-holder and an empty formality if he should be compelled to file execution application at the risk of his decree otherwise getting barred. A decree, which has been stayed, cannot obviously be executed. So, under this section, the period covered by the stay order is allowed to be excluded from the period of limitation.

That reason cannot hold good if the decree-holder, or his representative, is not prevented from executing the decree. If he has a right to execute the decree and has failed to exercise that right, it can only be at his own risk. Under O. 21, R. 53, the attaching Court requests the Court which passed the decree attached to stay execution of the decree until the Court which passed the decree sought to be executed cancelled the notice, or, the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree. Under that rule, the Court's hands are stayed. But both the holder of the decree sought to be executed and the holder of the decree attached can, if they choose, execute the decree. Their right to execute the decree was not affected in any way by the stay order.

In the circumstances, following the aforesaid decisions, we hold that an order made under O. 21, R. 53, Civil P. C., by the attaching Court was not a stay order contemplated by S. 15, Limitation Act and therefore that period could not be excluded from the period of limitation prescribed for the filing of the execution application. The present execution application having been admittedly filed more than three years from the date of the final order, is barred by limitation under Art. 182, Limitation Act.

(15) The appeal fails and is dismissed with costs.

H.G.P. Appeal dismissed.

(S) AIR 1955 ANDHRA 232 (V 42 C 85 Oct.)

FULL BENCH

SUBBA RAO C. J., BHIMASANKARAM AND SATYANARAYANA RAJU JJ.

Abbireddigari Rami Reddi and others, Appellants v. Atla Rosamma and others, Respondents.

Appeal No. 599 of 1950, D/- 17-12-1954, against decree of Sub. J., Kurnool in O. S. No. 87 of 1938.

†Hindu Law — Widow's estate — Surrender — Relinquishment pursuant to arrangement that reversioner should give part of estate of widow's nominee — Validity — AIR 1953 Mad 551 — 10 Cal 1102 (FB) and 31 Mad 446, Dissented from.

A relinquishment made by a widow of the entire estate of her husband in favour of the next reversioner pursuant to an arrangement that the reversioner should give a part of it to a nominee of the widow is not valid in law. AIR 1953 Mad 551 — 10 Cal 1102 (FB) and 31 Mad 446, Dissented from. Case law reviewed.

(Law on surrender summarised). (Para 28)

CASES REFERRED: Paras

(A) (V40) AIR 1953 Mad 551: 1953-1 Mad LJ 167 1, 24, 29

(B) ('92) 19 Cal 236: 19 Ind App 30 (PC) 4

(C) ('13) 40 Cal 721: 19 Ind Cas 273 (FB) 4, 23
(D) ('84) 10 Cal 1102 (FB) 5, 7, 8, 13, 14
(E) (V5) AIR 1918 PC 196: 42 Mad 523 (PC) 6, 9, 10, 12, 15, 19, 21, 29
(F) (V6) AIR 1919 PC 75: 47 Cal 466 (PC) 9
(G) (V8) AIR 1921 PC 107: 48 Cal 100 (PC) 10
(H) (V39) AIR 1952 SC 109: 1952 SCJ 192 (SC) 12
(I) (V41) AIR 1954 SC 61: 1954 SCJ 34 (SC) 15, 23
(J) (V21) AIR 1934 Mad 535: 58 Mad 150 17
(K) ('08) 31 Mad 446 19
(L) (V11) AIR 1924 Mad 177: 77 Ind Cas 758 19
(M) (V31) AIR 1944 Mad 439: 1944-1 Mad LJ 443 20

C. Rangaswamy Iyengar, K. L. Srinivasa Rao, S. Malakonda Reddy, K. Jayachandra Reddy and K. V. Raghunatha Rao, for Appellants; M. S. Ramachandra Rao and M. Krishna Rao, for Respondents.

NOTE: The Full Bench was constituted to consider the following question:

"Whether a relinquishment made by a widow of the entire estate of her husband in favour of the next reversioner pursuant to an arrangement that the reversioner should give a part of it to a nominee of the widow is valid in law?"

The Court delivered the following judgments:

SUBBA RAO C. J.:

As the reference was necessitated by the decision of a Division Bench of the Madras High Court consisting of Mack and Krishnaswamy Nayudu JJ., in — 'Venkateswarlu v. Challaiya', AIR 1953 Mad 551 (A), it will be convenient, at the outset, to scrutinise the facts of that case and the principles enunciated therein. The proved facts of that case are: The last male-holder, Pichayya, died 60 years prior to the suit, leaving the 20th defendant, a childless widow.

Defendants 1 and 2 were the sister's sons of Pichayya. The widow surrendered her husband's estate in favour of defendants 1 and 2, the nearest reversioners. To effectuate the transaction, the widow, Pichayya's sister and the mother of defendants 1 and 2 jointly executed a surrender deed in favour of defendants 1 and 2 conveying all the properties of Pichayya subject to the condition that the reversioners should pay the widow a sum of Rs. 2,000/- towards her maintenance and for religious purposes.

Immediately after the execution of the surrender deed, the next reversioners and the remote reversioners divided the properties. On the same date, defendants 1 and 2 also executed a sale deed conveying 3 acres, 6 cents of land to the widow's brother D. W. 1 for a sum of Rs. 3,000/-. Out of this, Rs. 2,000/- was mentioned as having been received by defendants 1 and 2 to enable them to pay the widow the maintenance as provided under the surrender deed.

More than three years thereafter, D. W. 1 sold the said land to defendant 15, the widow's brother's son, for the same consideration. The learned Judges held, on the evidence, that the transfer in favour of D. W. 1 was for adequate consideration. On the aforesaid facts and on the findings of the learned Judges, the transaction might be supported on the basis of surrender, on the ground that the alienation by the next reversioners in favour of D. W. 1 was supported by consideration and, therefore, it was not a device to divide the estate between the widow and the reversioners.

But the learned Judges went further and made observations, which would appear to revolutionalise the law of surrender as understood prior to the decision. At page 553, Krishnaswamy Nayudu J., posed the question to be decided as follows:

"Could an arrangement entered into between the nearest reversioners and the other reversioners and even a relation of the widow whereby the properties are divided among them to which the widow might be a consenting party invalidate the surrender where the widow herself does not retain any interest?"

At page 554, the learned Judge proceeded to state:

"The fact that not only she desires to be free from the trouble of administering the estate but also desires to provide for a relation for whom she has some affection and where the reversioner who will be entitled to the estate accedes to her request in deference to her wishes to make such a provision, cannot characterise the surrender as not a 'bona fide' one."

The earlier decisions of the Madras High Court, when cited, were distinguished by the learned Judge on the ground that the finding in those decisions was that the transactions, which they were considering, were benami transactions in the sense that the transfer by the reversioners in favour of a near relation of the widow was really for her benefit and the effect of it was a retention of a portion of the property in the widow by adopting the transfer in favour of the relation as a device to divide the estate.

The learned Judge derived support for his conclusion from the Commentary of Jimutavahana on the text of Narada and also from the commentary of Sri Krishna Tarkalankara on Dayabhaga.

(2) In short, the learned Judge's conclusion was that, unless, at the time of the transaction, the property of the last male-holder was divided between the reversioners and the widow, it would not be a device to divide the estate. If there is a complete effacement of her interests in the property, according to the learned Judge, the fact that it was done pursuant to an arrangement to divide it between the reversioner and a nominee of the widow, would not affect the validity of the surrender, if the nominee was not a benamidar of the widow.

Mack J., in a short judgment accepted the reasoning and the conclusion of Krishnaswamy Nayudu J. The learned Judge's view was expressed in the following sentences:

"The one condition necessary for a surrender by a childless widow to be valid is, as my learned brother has pointed out, that it should be 'bona fide'. It must not be a division of the estate between the widow and a reversioner in order that each should have premature and absolute powers of alienation over a portion.

To cite an extreme case, if a young widow and an elderly reversioner without children should agree between themselves to divide the estate and this agreement is embodied in the form of a surrender deed with reservation for maintenance, it would clearly be a mala fide transaction with the object of defeating the other reversioners."

If the view expressed by the learned Judges was sound, the following transaction should be valid under Hindu law. A widow is in possession of her husband's estate to the extent of 100 acres. Pursuant to a previous arrangement between the widow the next reversioner and the widow's brother, a relinquishment deed is executed in respect of the entire 100 acres in favour of the next reversioner.

On the same day, the next reversioner makes a gift of 50 acres to her brother. This transaction, though in effect and substance is a device to divide the estate between the reversioner and the nominee of the widow, in the view of the learned Judges, it would be valid as a surrender as the widow effaces herself completely and her brother takes the property in his own right and not as a benamidar of the widow. The question is whether the said view is correct and whether such a view is supported by decided cases or by Hindu Law Texts.

(3) I shall, at this stage, notice the decisions cited at the bar forming landmarks in the development of the law of surrender to discover, if possible, the real principle underlying the doctrine.

(4) The first landmark of decisions bearing on this doctrine, is — 'Behari Lal v. Madho Lal', 19 Cal 236 (PC) (B), where in delivering the judgment of the Board, Lord Morris said:

"It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee."

'Debi Prosad v. Golap Bhagat', 40 Cal 721 (FB) (C) contains a learned discussion on the subject. The judgment of Mukerjee J., is rather instructive. Though the question there was whether an alienation by way of mortgage by a Hindu widow of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, who is not the heir of the consenting party, the entire subject was covered. Mookerjee J. summarised the legal position at page 781 in the following propositions:

"1. When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that the alienation was made by her for purposes of legal necessity.

2. When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that he made proper and bona fide enquiry as to the actual existence of legal necessity and did all that was reasonable to satisfy himself as to the existence of such necessity.

3. When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, with the consent of the reversionary heirs, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and 'bona fide' enquiries and had satisfied himself as to the existence of such necessity. The quantum of consent necessary to raise this presumption depends upon the facts of each particular case, and, in all cases, the presumption raised by such concurrence on the part of the reversioners, is rebuttable.

4. When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death."

(5) I find it difficult to appreciate the principle behind the fourth proposition laid down by the learned Judge. Indeed, the learned Judge himself in the course of his judgment finds it difficult to sustain it on principle but accepts it as settled by previous decisions, particularly that of — 'Nobokishore v. Harinath', 10 Cal 1102 (D) the learned Judge observed at p. 779:

"If the matter were 'res integra', I would without hesitation adopt the view that a sale by the widow of the entire inheritance to the then immediate reversioner does not possess the characteristics of a real relinquishment by her, as contemplated by Hindu Law-givers. A widow, who transfers the property for a consideration or retains an interest in the purchase-money, cannot, by any stretch of language, be deemed to have relinquished her interest in the estate of her husband; the estate by her action has, in essence, only undergone a transformation and the immoveable property has been converted into money, which may be shuffled out of sight as land can never be".

(6) If the alienation of the entire estate in favour of the reversioner for consideration was bad, I do not see how the alienation by a widow in favour of a third party, with the consent of the reversioner, would be in a better position. In that case also, the widow would only be converting immoveable property into cash. The transaction can only be supported on the principle that the widow and the reversioner together represent the estate and both of them can alienate it in favour of a third party.

But it is settled law that a reversioner has no interest except 'spes successionis' and that the widow only represents the entire estate. The Judicial Committee exhaustively considered the question in — 'Rangaswamy Goundan v. Nachiappa Goundan', AIR 1918 PC 196 (E). There, the mother of the deceased last male-holder executed a deed of transfer to one Ramaswamy Goundan, a nephew of her late husband, who was then the next reversioner to her son.

The transferee enjoyed the properties under the deed till his death, when they passed to his nephew, defendant 1. The appellant, who was the actual reversioner along with defendant 1, filed the suit for recovery of his share in the property. The suit was decreed. In that connection their Lordships reviewed the entire law on the subject and summarised it as follows:

"(1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances, the question of necessity does not fall to be considered. But the surrender must be a 'bona fide' surrender, and not a device to divide the estate with the reversioner.

(2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved 'aliunde' and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one."

(7) It will be apparent from the aforesaid observations that the Judicial Committee made a clear distinction between a surrender and an alienation for necessity. The widow should relinquish her entire interest in the whole estate in favour of the nearest reversioners and it should be 'bona fide' in the sense that it is not a device to divide

the estate. In regard to alienation, they rightly pointed out that the consent of the reversioners is only a presumptive proof of necessity. Adverting to the case of 'Nobokishore (D)' their Lordships observed at page 199:

"The judgment went upon the principle of surrender, and it might do so for the surrender there was of the whole estate, but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth."

(8) These observations indicate that the conclusion arrived at in the case of 'Nobokishore (D)' could be sustained on the second principle enunciated by the Judicial Committee.

(9) The Privy Council again reiterated the same principle in subsequent decisions. In — 'Mt. Bhagwat Koer v. Dhanukdhari Prasad Singh', AIR 1919 PC 75 (F) their Lordships after referring to AIR 1918 PC 196 (E), pointed out at pp. 78-79:

"In that case it is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from succession as effectively as if she has then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a 'bona fide' and total renunciation of the widow's right to hold the property."

They proceeded to state at page 79:

"It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist, but in substance and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate."

(10) It is, therefore, clear that once there is a complete renunciation of the widow's right to hold the property, the substance of the transaction, bringing about that result, is important and not its form. The same view was again repeated by the Judicial Committee in — 'Sureshwar Misser v. Mt. Maheshrani Misrain', AIR 1921 PC 107 (G). Lord Dunedin, after referring to AIR 1918 PC 196 (E) laid down the following two conditions for the validity of a surrender. The first is that the surrender must be total, not partial.

The second is that it must be a 'bona fide' surrender and not a device to divide the estate with the reversioners. Their Lordships also explained the words "a device to divide the estate" in the following manner:

"Now their Lordships do not doubt that to make an arrangement such a device, it is not necessary that the lady surrendering should take part of the property directly. An arrangement by which the reversioner as a consideration for the surrender promised to convey a portion of the property to a nominee or nominees of the lady surrendering, might well fall under the description of a device to divide the estate. It is here that the fact of the arrangement being a compromise becomes of importance".

(11) This decision, therefore, is authority for the position that a device to divide the estate need not necessarily be between the reversioner and the widow, or between the reversioner and a third party, who is a benamidar of the widow. But the words are comprehensive enough to take in a device to divide the properties between the reversioner and the nominee of the widow, though the widow does not get any direct benefit under it.

If the second arrangement mentioned in the decision was intended to refer only to an arrangement to divide the estate between the reversioner and the benamidar of the widow, the words "might well fall under the description of a device to divide the estate" would be inappropriate, for, in every case, such an arrangement would fall under the main head. The observations can certainly be supported on principle.

The surrender to be valid shall be in favour of the next reversioner or reversioners. The entire succession opens out. If the device adopted gives in substance to the next reversioner a portion of the entire estate of her last male-holder, this will be defeating the object of the surrender itself. Though the widow in law effaces herself, succession does not, in fact, open out in respect of the entire property.

(12) In 'Mumma Reddy v. Durairaja Naidu', AIR 1952 SC 109 (H), the properties belonged to one Narayanappa. Narayanappa died leaving him surviving his wife Chenchamma and a daughter Venkatanarasamma. Venkatanarasamma was married to one Rangayya. Before the death of Chenchamma she executed a release deed in favour of her daughter Venkatanarasamma and her son-in-law Rangayya under which the entire estate of Narayanappa was given to them. After the death of Venkatanarasamma, the next reversioners filed the suit for recovery of the properties alienated by Venkatanarasamma and Rangayya.

The question was whether release deed operated as a valid surrender. The Supreme Court held that the document did not operate as a valid surrender. At page 111 Mukherjee J., made the following observations:

"The effacement may be effected by any process and it is not necessary that any particular form should be employed. All that is required is that there should be a 'bona fide' and total renunciation of the widow's right to hold the property and the surrender should not be a mere device to divide the estate with the reversioners. (Vide — 'Rangaswamy Goundan v. Nachiappa Goundan', (E)).

It would be clear from the principle underlying the doctrine of surrender that no surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. It is true that no acceptance or act of consent on the part of the reversioner is necessary in order that the estate might vest in him; vesting takes place under operation of law. But it is not possible for the widow to say that she is withdrawing herself from her husband's estate in order that it might vest in somebody other than the next heir of the husband.

In favour of a stranger, there can be an act of transfer but not one of renunciation. The position is not materially altered if, as has happened in the present case, the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it might vest in both of them.

So far as the next heir is concerned, there cannot be in such a case a surrender of the totality of interest which the widow had, for she actually directs that a portion of it should be held or enjoyed by somebody else other than the husband's heir. As regards the stranger there can be no question of renunciation, the transaction at the most may be evidence of an intention to confer a bounty on him, though such intention is not clothed in proper legal form."

(13) It will be apparent from the aforesaid observations that a surrender can validly be made of the entire estate in favour of the next reversioners. A relinquishment of property by a widow in favour of a reversioner and a stranger is not valid in law because the entire estate was not relinquished in favour of the next reversioner. Reliance is also placed upon this decision in support of the proposition that a transfer in favour of a reversioner of the entire estate and a transfer by the reversioner thereafter of a part of the estate in favour of a stranger are valid. At page 112, the learned Judge made the following observations:

"It would be quite consistent with established principles of law if the widow relinquishes her interests in the husband's estate and the reversioner in whom the estate vests transfers the estate either in whole or in part to another person. If the transfer is of the entire estate, the two transactions may be combined in one document and the widow and the reversioner might jointly transfer the whole estate to a stranger but the implication in such cases must always be that the alienee derives his title from the reversioner and not the widow.

The extension of this doctrine in the class of cases of which '10 Cal 1102 (D)', may be taken as the type, seems to be rather far-fetched and somewhat anomalous. In these cases, the effect of the immediate reversioners giving consent to the alienation of the whole estate by the widow to a stranger has been held to import a double fiction; the first is the fiction of a surrender by the widow in favour of the consenting reversioner and the second is the fiction of a transfer by the latter to the alienee, although both fictions are contrary to the actual facts".

(14) The learned Judge then proceeds to criticise the view expressed in — 'Nobokishore v. Harinath', (D), but for the purpose of the decision, its correctness was assumed. His lordship left open the question with the remark:

"It may be necessary for this Court at some time or other to reconsider the whole law on this subject".

It is clear from the aforesaid observations that the Supreme Court doubted the correctness of the decision in — 'Nobokishore v. Harinath', (D). I have already expressed my view that the said decision cannot be sustained on any logical principle. Reliance was placed on the aforesaid observations by the learned counsel for the appellant in support of his contention that the Supreme Court endorsed the view that an alienation in favour of a reversioner and a subsequent alienation by him in favour of a stranger would be valid in law, irrespective of any other considerations.

It must be pointed out that the Supreme Court, in making the aforesaid observations, was not considering the question, whether if such alienations were part of a scheme to divide the estate between the reversioners and the widow's nominee, they would be valid or not. The observations, therefore, must be confined to a case where the alienations are not part of any scheme to divide the estate.

If there was a 'bona fide' relinquishment of the widow's interest in the entire property in favour of the next reversioner, the next reversioner, who becomes the owner would certainly be at liberty to alienate the said property to whomsoever he liked. The Supreme Court did not say anything more than that.

(15) Mukerjee J., again, in a subsequent decision in — 'Natwarlal v. Dadubhai', AIR 1954 SC 61 (I), considered the law of surrender elaborately and restated it in clear terms at page 66. The relevant part of his Lordship's observations may usefully be extracted:

"The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether.

If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living step in at once under the ordinary law of inheritance."

His Lordship then cited the following passage from Lord Dunedin in 'AIR 1918 PC 196 (E)', with approval.

"It is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all of the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death."

(16) Again in repudiating the suggestion that there could be any such thing as a partial surrender, his Lordship observed:

"As already pointed out, it is the effacement of the widow an effacement which in other circumstances is effected by actual death or by civil death — which opens the estate of the deceased husband to his next heirs at that date. Now, there cannot be a widow, who is partly effaced and partly not so".

(17) It is also well-settled that a surrender, if otherwise bona fide would not depend for its validity on the motives operating on the mind of the widow. Venkatasubba Rao J. in — 'Subbalakshmi v. Narayana Ayyar', AIR 1934 Mad 535 (J), brought out that idea in clear terms at page 536. The learned Judge observed:

"First, a surrender, to be valid, must be of the surrenderers whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation; a surrender being an effacement of the widow, and, it being impossible to conceive of a widow, who is partly effaced, and partly not so, a partial surrender, although absolute as to the part conveyed, cannot under the Hindu Law be effectual.

Secondly, a surrender must be 'bona fide', i. e., there must be no device to divide the property between the lady and the reversioner, it being equally fatal to the transaction whether the benefit is directly taken by the lady or by her nominees subject, however, to the proviso, that the giving of a small portion to the surrendering widow for her maintenance is unobjectionable; .....

The transaction must be "bona fide" in the sense that the widow retains no benefit either directly or indirectly, i. e., there must be a complete relinquishment; if in the guise of a surrender, the widow enlarges her own estate in regard to a part, the so-called surrender will not be upheld. I do not think there is any warrant for importing a third and further condition, namely, that the motives operating on the mind of the widow must be of a religious or spiritual character".

(18) With great respect, I entirely agree with the exposition of law so clearly made by the learned Judge. The argument of the learned counsel, if I may say so, mixes up the motives of the widow and the 'bona fide' nature of the transaction. There cannot be any dispute that the motives

of the widow are irrelevant. Yet a surrender cannot be 'bona fide' if the transaction is a cloak to divide the estate between the reversioners of the widow or her nominee.

Such a transaction is not a real effacement of the widow's interest in favour of the next reversioners. By that process, she would be giving some property to the reversioner and the rest to her nominee. Though the form was adopted, in effect it was a device to divide the estate.

(19) Another decision strongly relied upon by the learned counsel for the appellant requires consideration. It is a decision of a Division Bench of the Madras High Court in — 'Subbiah Sastry v. Pattabhiramayya', 31 Mad 446 (K). There, a widow conveyed the whole of her limited estate to the next reversioner in consideration of an undertaking by the reversioner that he would reconvey a portion of such property to a person named by the widow.

When the title of such reversioner and that of the person to whom the property was reconveyed in pursuance of such an agreement was questioned, the learned Judge held that the surrender was valid. This was a decision given prior to the decision of the Judicial Committee in 'AIR 1918 PC 196 (E)'. On the facts, it is manifest that the arrangement was really a device to divide the estate between the reversioners and the nominee of the widow.

In my view, the decision would have been otherwise if the learned Judges had dealt with it after the Privy Council decision. When a similar case arose after the Privy Council decision, another Division Bench of the Madras High Court, consisting of Ayling and Odgers JJ. held in — 'Kotayya v. Veerayya', AIR 1924 Mad 177 (L), that such an arrangement was bad, being a device to divide the estate.

There, a widow gifted all the immoveable properties left by her husband in equal shares to her own sister's son and the son of one of her husband's brothers; keeping for herself a right to enjoy a small portion for her maintenance and got a deed from her husband's brothers releasing their reversionary right in favour of the donee and gave in consideration therefor a pronote for Rs. 1,200/-.

The learned Judges held that it was a device to devide the estate between the reversioners and the widow, and as such, it was an arrangement, which cannot be held to be a 'bona fide' surrender with the assent of the reversioners, to which effect can be given.

(20) So too, in — 'Krishnamurthy v. Seshayya', AIR 1944 Mad 439 (M); Lakshmana Rao and Happel JJ. refused to accede to a similar argument now advanced before us. There, a transaction was brought about under the colour of a surrender by which the widow purported to surrender her entire estate in favour of her nearest reversioner and the said reversioner made alienations in favour of persons, who are found to be benamidars for her brother's son.

It was held that the surrender was not 'bona fide', but was a device to divide the estate by which the next reversioner gave part of the estate to another in order that the reversioner might get the remainder 'in praesenti' and therefore not valid.

(21) There are innumerable unreported decisions of the Madras High Court decided after 'AIR 1918 PC 196 (E)', wherein surrenders were held to be invalid when the parties resorted to such devices to divide the estate between the reversioners and the widow or her nominee.

(22) The settled law on the subject may, therefore, be summarised as follows: A widow can efface herself to accelerate succession. In that event, same legal consequences will flow as if she were dead. The succession opens and the next reversioners will inherit the property as they would on her death. It is, therefore, inherent in the doctrine that the relinquishment should be in respect of the entire property for the benefit of the entire body of next reversioners.

The said result can be effected by any process. The form is immaterial but the substance matters. Though in form the transaction purports to give the entire property to the next reversioners, if it is a cloak to cover a pre-arranged plan of partition between the widow and the reversioners, it would not be valid for the simple reason that the entire estate of her husband was not made available to the reversioners.

So too, if the surrender is effected pursuant to a scheme of partition between the reversioners and the nominee of the widow, it would be bad for two reasons. It was a device to divide the estate between the widow's nominee and the reversioner. It would also be invalid because in substance the entire property was not given to the reversioner but a part of it to the reversioner and the other part to her nominee.

This result would be inconsistent with her self-effacement, for, on her self-effacement, the reversioners should get the entire property. In either case, it would not be a 'bona fide' surrender of the entire estate to the nearest reversioners. If the surrender is 'bona fide', i. e., if it is in effect and substance a complete self-effacement of the widow in the sense that succession to the entire property opens to the reversioners, the motives operating on the mind of the widow would be irrelevant.

It may be the widow intends to escape the responsibility of her wordly affairs. It may be that she wants to favour some reversioners, who happen to be the next reversioners at the time of the surrender. It may also be that she prefers to live a peaceful life with maintenance, instead of troubling herself with the onerous duties of managing the properties.

There may be many other reasons for her self-effacement. But whatever her motive may be or whatever form she may adopt, there must be a real self-effacement of the widow. The argument of the learned counsel for the appellant that, if once the widow 'bona fide' goes out of the picture, whoever may take the property the surrender must necessarily be 'bona fide' if I may say so, only emphasises one aspect of the surrender. He ignores the correlative aspect that the relinquishment should be in favour of the nearest reversioner.

If a widow relinquishes all her interest in favour of a person other than the reversioners it is obviously invalid. It would equally be invalid if the relinquishment was in part in favour of the reversioner and in part in favour of a stranger. In this context the 'bona fides' of the transaction as distinguished from the motives of the widow would be relevant. If the widow, pursuant to an arrangement, relinquishes all her property in favour of the reversioner, under an arrangement that the reversioner should alienate a portion of it in favour of her nominee, though in form the transaction complies with the conditions of surrender, in substance it is not, for the entire property is not given to the reversioner but a portion of it was given to a stranger.

Nor is the fact that a reversioner may ignore the wishes of the widow after taking the property of much relevance, for we are only concerned with a case where the arrangement was given effect to. I, therefore, hold that the wide obser-

vations of Mack and Krishnaswamy Nayudu JJ., are not supported by precedent.

(23) Nor can I say that the view expressed by the learned Judges has any basis in textual authority. The doctrine of surrender has no basis in Hindu Law Texts. It is really a judge-made doctrine. The relevant texts are given by Mookerjee J., in '40 Cal 721 (FB) (C)'. They are the texts of Katyayana, Vyasa and Narada quoted by Jimutavahana in the Dayabhaga, Chapter XI S. 1, Paras. 56, 60 and 64: They are:

"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it".

Katyayana.

"For women, the heritage of their husband, is pronounced applicable to use. Let not women on any account make waste of their husband's wealth."

Mahabaratha.

"When the husband is deceased, his kin are the guardians of the childless widow. In the disposal of the property and care of herself, as well as in her maintenance, they have full power. But, if the husband's family be extinct or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a sapinda".

Narada.

To this may be added S. 1, para 59, Chap. XI of Dayabhaga wherein Jimutavahana says that the persons, who would be the next heirs on failure of prior claimants, succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never taken effect. As the words "if her right ceases or never takes effect" are comprehensive enough to take in also cases other than death when her interest ceases, it has been held that the principle of surrender has been fore-shadowed by Jimutavahana.

But the texts do not expressly give any specific indication of the doctrine of surrender. Indeed, Mookerjee J., in the case already cited 'AIR 1954 SC 61 (I), clearly states to the same effect at page 65:

"The law of surrender by a Hindu widow, as it stands at present, is for the most part, judge-made law, though it may not be quite correct to say that there is absolutely no textual authority upon which the doctrine could be founded, at least, impliedly. So far as the Dayabhaga law is concerned, its origin is attributed to Jimutavahana's commentary on the well known text of Katyayana, which describes the interests of a childless widow in the estate left by her husband and the rights of the reversioners after her death.

While commenting on Katyayana's text, Jimutavahana lays down that the persons who should be the next heirs on failure of prior claimants, would get the residue of the estate after her use on the demise of the widow in whom the succession had vested, as they would have succeeded if the widow's rights were non-existent or destroyed (in other ways)."

(24) Though Jimutavahana indicates that the right may be destroyed in other ways, he does not expressly state, as I have already pointed out, that a surrender is one of the modes by which her estate can be put an end to. In any view, even if the doctrine can impliedly be gathered from the commentary of Jimutavahana, the incidents of the surrender are not laid down in any of the texts. The decisions of the various High Courts and those of the Judicial Committee evolved the theory of surrender.

It is now firmly established that to be a valid surrender, there must be self-effacement of the widow, leaving open the succession in the same way as it would be if she were dead. The process of surrender is equated to that of her death. But, the learned Judges in 'AIR 1953 Mad 551 (A)', engrafted on that doctrine another theory which, according to them, was supported by the Hindu Law Texts.

Krishnaswamy Nayudu J., in his judgment, mentioned the following texts in support of his conclusion that a widow can make gifts with the consent of the reversioners and then proceeded to state that the relinquishment of her interest coupled with gifts to strangers with the consent of reversioners would, in law, amount to a valid surrender. At page 555, the learned Judge says:

"With reference to this text of Narada, his (Jimutavahana's) commentary is that 'in the disposal of property by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons and with their consent she may bestow gifts on the kindred of her own father and mother. Dayakrama-Sangraha, a commentary on the Dayabhaga of Sri Krishna Tarkalankara Chapter 1, S. 2, refers to Katyayana and Narada's texts and commenting upon them states in para 7:

"On these (Sapindas, daughter's sons, sister's sons, maternal uncles of her husband) and on the others should she bestow presents and not on the members of the family of her own father while these persons are living, for then the specification of paternal uncles' and the rest would be superfluous. With their consent however, she may make gifts to the kindred of her own father and mother, as declared by Narada. ..... In the disposal of property that is by gift etc., the wife is liable to the control of the family of her husband after the death of her husband and on failure of sons; so it is declared in the Dayabhaga."

"Emphasis is laid on the texts on the parental position occupied by the nearest reversioners, who are considered to be the guardians of the widow and are expected to protect her interests and guide and direct her in dealing with the properties of her husband".

(25) From the aforesaid passages, the learned Judges held that a widow can make gifts on her kindred with the consent of her reversioners. There has never been a decided case in this part of the country supporting gifts of immoveable property by a widow in favour of her kindred relying on the aforesaid texts. Under Hindu Law, a widow can alienate part of her estate for necessity, or for the benefit of the estate.

She is also permitted as a qualified owner to make gifts of reasonable extents of properties in connection with the marriage of her daughter. She is also authorised to make similar gifts for the spiritual benefit on her husband, or, in connection with the obsequies of her deceased husband. But, there is no decided case where a general power is given to a widow to make gifts of parts of her husband's estate with the consent of the reversioners.

Even in the case of alienations for necessity or for purposes binding on the estate, the reversioner's consent 'proprio vigore' does not validate the transaction but it raises a presumption that the alienation was for a purpose binding on the estate. In the words of Lord Dunedin, consent does not give force 'per se' but is only of evidentiary value. Mayne in his Treatise on Hindu Law, Edn. 11, at page 782, states:

"But where the alienation is without consideration and is therefore in form or in substance a gift, the reversioner's consent cannot possibly be held to be one in respect of an alienation for value for purposes of necessity and the transaction therefore cannot stand in spite of the consent."

(26) If in the case of alienations for consideration, consent was only of evidentiary value, it cannot validate gifts 'per se'. At the most, consent may be a presumptive proof that the gift was made for purposes binding on the estate. On principle, such a power cannot be recognised. It implies that the reversioners have a vested remainder, so that, with their consent, the widow can make a gift of property.

But, it is well-settled that a reversioner has only a 'spes successionis' and has no right 'in praesenti' to convey any interest to third parties. His consent, therefore, though it may estop him, cannot validate a gift if it is not within the power of the widow to make such a gift.

If such a power is recognised in the widow, it would be destructive of the doctrine of self-effacement involved in the process of surrender; she could make a gift of some properties to strangers and the rest to reversioners; she could make gifts of properties to her relatives with the consent of the presumptive reversioners for the time being and thus act to the detriment of the real reversioners.

I cannot, therefore, hold that a widow has got unrestricted power to make gifts of immoveable property forming part of her husband's estate in favour of her relatives with the consent of the presumptive reversioners.

(27) On authority, as well as on principle, the interpretation put on the word 'bona fide' by Mack and Krishnaswamy Nayudu JJ., is not supportable. If accepted, it will enable the widow and the reversioners in collusion to divide the estate between the reversioners and her nominees. It will destroy the whole doctrine of surrender.

(28) I, therefore, answer the question formulated in the negative. Such a relinquishment is not valid in law.

BHIMASANKARAM J.:

(29) I agree with the answer to the question referred to us should be in the negative. The doctrine of surrender, as I understand it, embodies the legal fiction by which an alienation by a Hindu widow of the totality of her estate in favour of the nearest reversioner then in existence is validated. Such an alienation is regarded as a voluntary self-effacement of the widow, renunciation of all worldly affairs by her being considered by Hindu society as proper and even commendable.

It should be remembered that in the normal course the estate goes to whosoever may happen to be the nearest heir of her husband at the moment of the widow's death. That being so, the effect of surrender may be and often is to vest the estate in somebody other than the person who, but for the surrender, would be the heir. The law, therefore, necessarily subjects an alleged act of surrender to zealous scrutiny.

The surrender cannot be of only a part of the widow's estate; nor can it be in favour of the actual reversioner for the time being and some other or others who, in the eye of law, are strangers.

Both the conditions are in the nature of guarantees that the widow is acting properly and that she is not trying to alter the normal course of devolution of the estates in order to benefit a particular reversioner or a relative or a favourite of her own. It is true, as has been pointed out by my Lord the Chief Justice that the motive of a widow as such is irrelevant; because where the effect of her act is total renunciation of her estate in favour of the nearest of her husband's heirs, the objective test of her 'bona fides' is satisfied.

The law is not interested in the processes of her mind but in the result of what she does. It is in this light that the requirement as to her 'bona fides' stressed by Lord Dunedin must be considered. If there is an agreement between the widow and the reversioner before the act of surrender that the latter should give a part of the estate given up by her to a nominee of hers, it is impossible to say that the surrender is 'bona fide', though there may be a deed evidencing a transfer of the whole of the estate in favour of the reversioner in the first instance followed later by a gift by the reversioner in favour of the widow's nominee.

What the widow is not permitted to do during the subsistence of her estate cannot be permitted to be done at the moment of the determination of her estate by a voluntary self-effacement. When the normal course of devolution of property is affected by a legal fiction equating the widow's voluntary withdrawal from worldly cares with her death, it is the duty of the Courts to see that the fiction is not extended to cases other than those coming within the four corners of the doctrine which is derived from the fiction.

The law should not be astute to validate a doubtful transaction. Except in cases decided before the ruling in AIR 1918 PC 196 (E) I cannot find any support for the view expressed in AIR 1953 Mad 551 (A).

I cannot agree that the requirement as to 'bona fides' on the part of the widow is satisfied when she herself reserves no further interest in the estate and that it does not matter if the renunciation so called results in a division of the estate between the reversioner and a favourite of hers. If that position is recognised as valid, it would, in most cases, be a mere matter of bargain between the reversioner and the widow as to how much out of the estate the latter is prepared to give to the object of her bounty.

It seems to me futile to go back to the ancient texts in support of any such inroad upon the doctrine of surrender. In the first place, there is no clear basis at all in the old texts for what has been described by the Supreme Court as Judge-made law. In the second place, as pointed out by my Lord the Chief Justice, it has never been recognised in this part of the Indian Union that the widow has power to make a gift, however small, to her kinsmen out of her husband's estate.

What the law prohibits directly cannot be permitted to be done indirectly. The invalidity of a transaction cannot be got over by resort to an expedient. It is of course conceivable that a reversioner, who has taken over the estate after an act of 'bona fide' self-effacement by the widow, may at some later point of time, at the request of the widow, be induced to make gift out of what is vested in him to one or more of the relatives of the widow. But that case would be entirely different from a case where the whole transaction is no more than a contrivance for parcelling out the estate between the husband's and the widow's kinsmen or favourites.

(30) SATYANARAYANA RAJU J.: I agree with my Lord the Chief Justice.

V.R.B. Answer in negative.

(S) AIR 1955 Andhra 240 (V. 42 C. 86 Oct.)

SATYANARAYANA RAJU J. (31-1-1955)

V. Tirupathirayudu and another, Petitioners v. M. Venkatacharyulu and another, Respondents.

Writ Petn. No. 802 of 1953, to quash order of the Estates Abolition Tribunal, Vizianagaram, D/- 17-9-1952.

(a) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 2(7) — Inam estate.

Vaddimukkal Agraharam is not an Inam estate within the meaning of S. 2(7) and as such the provisions of the Act do not apply to the Agraharam. (Para 6)

(b) Constitution of India, Art. 227 — Tribunals acting under Madras Estates Abolition Act — Duty to follow decisions of High Court — (Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) S. 8).

Tribunals acting under the provisions of the Madras Estates Abolition Act should, and are bound to follow, the decisions of the High Court, especially when those decisions determine the tenure of the very village which the Tribunal has to deal with. The tribunals are subject not only to the administative but also the judicial control of the High Court under Art. 227 and they are bound by the decisions of the High Court. (Paras 8 and 9)

Anno: Const. of India, Art. 227 N. 4.

CASES REFERRED: Paras

(A) (V42) AIR 1955 Mad 252: (SA Nos. 269, 295 to 307 and 646 of 1950 (Mad) 4

(B) (V40) AIR 1953 Mad 246: 1952-2 Mad LJ 202 10

(C) (V41) AIR 1954 Mad 415: ILR (1954) Mad 116 (FB) 10

K. Raghavarao for P. Srikantam and C. Vedagiri Rama Sastry, for Petitioners; D. V. Reddi Pantulu for Govt. Pleader (M. Seshachalapati,) M. Srinivasachari and K. Amareswari, for Respondents.

ORDER: This is a petition for the issue of a Writ of Certiorari calling for the records in A. S. No. 300 of 1950 on the file of the Estates Abolition Tribunal, Vizianagaram, and to quash the order therein.

(2) The Inam Settlement Officer, Vijiawada, acting under S. 9 of Madras Act 26 of 1948 took action suo motu for determining whether Vaddimukkala Agraharam in Bapatla Taluk of Guntur District is "an Inam Estate", as defined in S. 2(7), Madras Estates Abolition Act. On a consideration of the material evidence before him, the Inam Settlement Officer came to the conclusion that the Agraharam became an "Estate" only by virtue of Act 18 of 1936 and that it is not an Inam Estate within the meaning of S. 2(7), Madras Estates Abolition Act.

(3) Against this order, the ryots preferred an appeal to the Estates Abolition Tribunal, Vizianagaram. The Tribunal held that no one portion of the village is an "estate" within the meaning of S. 3(2)(d) of Madras Act 1 of 1908 and much less an "Inam Estate" within the meaning of S. 2(7) of Act 26 of 1948. The reasons which weighed with the Abolition Tribunal in reaching this conclusion were that the main grant was confirmed under T. D. No. 931 and the grants of other Inams were confirmed under separate title-deeds bearing T. D. Nos. 932, 934, 933 and 935 and that therefore the agraharam is not an Inam Estate within the meaning of S. 2(7). The ryots have filed this writ petition to quash the Order of the Tribunal passed in appeal.

(4) In — 'T. Seshayya v. Narsimhacharulu', AIR 1955 Mad 252 (A) on the file of the Madras High Court, Subba Rao J. (as he then was) and Panchapakesh Ayyar J. considered the question as to whether the self-same Vaddimukkala Agraharam is an estate before the Madras Estates Land Third Amendment Act (18 of 1936). In their judgment dated 6-5-1954, the learned Judges, on a very exhaustive review of all the material documents, held that the lands in the Agraharam were not ryoti lands before the Third Amendment Act, 1936. They observed as follows:

"Vaddimukkala Agraharam wherein these lands are situated, was only an inam village, not falling within the definition of an "Estate" till the Third Amendment to the Estates Land Act was passed in 1936."

(5) The learned Judges further held that the oral and documentary evidence on record showed that both the warams were granted to the Agraharamdars and not merely the melwaram and that they had no doubt whatever that the lands in Vaddimukkala Agraharam became ryoti lands in an "estate" only by virtue of the Third Amendment Act, 1936.

(6) Following this decision by a Bench of the Madras High Court, which has determined the tenure of Vaddimukkala Agraharam, which is also the subject-matter for decision in this writ, I hold that the Agraharam is not an "Inam Estate" within the meaning of S. 2(7), Madras Estates Abolition Act. If so, the provisions of the Madras Estates Abolition Act do not apply to the Agraharam.

(7) It is true that this decision of the Bench was not before the Estates Abolition Tribunal when they delivered judgment in A. S. No. 300 of 1950. But Courts can and should take note of subsequent events. This judgment of the Bench of the Madras High Court, apart from its being entitled to great weight, also confirms the view taken by the Estates Abolition Tribunal.

(8) Tribunals acting under the provisions of the Madras Estates Abolition Act should, and are bound to follow the decisions of the High Court, especially when those decisions determine the tenure of the very village which the Tribunal has to deal with.

(9) The Tribunals are subject not only to the administrative but also the judicial control of the High Court under Art. 227 of the Constitution of India and they are bound by the decisions of the High Court.

(10) The Tribunal held that the village is not an estate by reason of the fact that there were separate title-deeds issued in respect of the main Inam grant and the other inams evidently having in mind the decision of the Madras High Court in — 'Somasundaram v. State of Madras', AIR 1953 Mad 246 (B). A later Full Bench decision of the Madras High Court in — 'Bhavanarayana v. Venkatadu', AIR 1954 Mad 415 (C), took a contrary view.

But having regard to the decision of the Bench above referred to, the decision of the Tribunal must be held to be correct, even though the reasoning by which it arrived at that decision is not correct.

(11) This writ petition is, therefore, dismissed with costs. Advocate's fee Rs. 100/-.

Petition dismissed.

V.R.B.

AIR 1955 Andhra 241 (V. 42, C. 87 Nov.)

CHANDRA REDDY AND UMAMAHESWARAM JJ.

State of Andhra (Madras) represented by Dy. Commr. of Commercial Taxes, Kakinada Division, Kakinada, Petitioner v. Messrs. Shree Bajranga Jute Mills Ltd, Guntur, Respondent.

Tax Revn. Case No. 131 of 1953, D/- 18-3-1955, against order of Sales Tax Appellate Tribunal, D/- 15-11-1952.

Madras General Sales Tax Act (9 of 1939) (as amended by Andhra Act (13 of 1954), S. 2(1)) — 'Turnover' whether includes tax collected by seller — (Madras General Sales Tax (Turnover and Assessment) Rules (1939), R. 5) — (Words and Phrases — 'Turnover').

The turnover defined in S. 2(1) of the Act and the amount collected by the assessee by way of tax on the sale are two different things, and the expression 'turnover' is not of such a wide import as to include even taxes collected by the assessee. (Para 5)

The seller acts as an agent of the assessing authority in collecting the tax under R. 5(7) of the Turnover and Assessment Rules and he is under an obligation to make it over to the Government, and no part of this money belongs to him. The fact that this tax is first collected by the seller does not make the amount so collected lose its character as tax. (Paras 4, 5)

It is only the amount collected by way of the price of the goods sold that would come within the scope of 'turnover' in sub-s. (1). The tax which is in fact determined only on the price paid by the purchaser for the articles cannot form part of the purchase price because the question of tax arises only after the bargain is struck between the parties. AIR 1954 Mad 856, Foll. (Paras 3, 5)

The definition of 'turnover' as amended by the Andhra Legislature does not bring in sales tax collected by the dealer. AIR 1955 Andhra 245 Foll. (Para 7)

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 856: 1954-2 Mad LJ 151 5

(B) (V42) AIR 1955 Andhra 245 : (T.R.C. No. 214 of 1953, D/- 18-3-1955 — Andhra). 7

Advocate-General (Andhra) and Govt. Pleader (Andhra), for Petitioner; K. Rajah Ayyar, K. Ranganatha Sastri, M. V. Kapali Sastri and A. Bhujanga Rao, for Mr. D. R. Krishna Rao, for Respondent.

CHANDRA REDDY J:

The assessee is a manufacturer of gunnies and twine. The assessment year is 1950-51. This revision case relates to the amount collected by the assessee by way of sales tax from the purchasers under R. 5, sub-r. (7) of the Turnover and Assessment Rules. In the year of assessment, the assessee submitted a statement of gross-turnover of Rs. 40,82,555-4-3 claiming a deduction in respect of some sums with which we are not concerned. The assessing authority added to the turnover, a sum of Rs. 58,699-3-9 representing the taxes collected by the respondent on the goods sold by him. An appeal was preferred by the assessee against the order including the sales tax collected by him in his turnover for the year. But this appeal was rejected.

A further appeal to the Sales Tax Appellate Tribunal resulted in the exclusion of this sum from his turnover. It is this order of the Appellate Tribunal that is impugned by the State Government in this Revision case.

(2) It is urged in support of this case that the assessee is not entitled to deduct anything from the gross-turnover except those items that are specifically mentioned under R. 5(1)(a) to (k) and that the sales tax collected by the assessee is not included in them. We do not think we can give effect to this contention. The mere fact that this is not one of the items mentioned in R. 5(1) of the Turnover and Assessment Rules does not enable the assessing authority to levy a tax on the amounts collected by the assessee from the purchasers by way of payable on sales. The purpose of R. 5 (1) is to determine the net turnover and in assessing it certain amounts are deducted which are mentioned in cls. (a) to (k).

(3) The non-mention of this particular head in R. 5(1) will be significant if it could be treated as a part of the turnover. In our opinion, it cannot come within the ambit of the definition 'turnover'. Under S. 2(1) of the Act 'turnover' means the aggregate amount for which the goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person, of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover. It is thus seen that, it is only the amount collected by way of the price of the goods sold that would come within the scope of this sub-section.

The sales tax is not a part of the price or consideration paid by the purchaser. In fact the tax is determined only on the price paid by the purchaser for the articles purchased. The question of tax comes up only after the bargain is struck between the parties. As such, it cannot be a part of the purchase price. Therefore, tax on sale is outside the consideration paid by the consumer for the goods purchased by him

(4) The seller is authorised to collect the tax under the statute and required to pay it over to the Government. Although the main body of the Act does not contain any provisions to enable the seller to pass on the tax to the consumer, sub-rule (7) of R. 5 of the Turnover and Assessment Rules confers such an authority on the seller. In our opinion he acts as an agent of the assessing authority in collecting the tax and he in under an obligation to make it over to the Government, and no part of this money belongs to him. Any default in this regard involves him in prosecution under S. 15 of the Act. Under S. 8-B(2) of the Act,

"Every person who has collected or collects any amount by way of tax under this Act, on or after the 1st day of April 1947, shall pay over to the State Government within such time and in such manner as may be prescribed all amounts so collected by him, if they are in excess of the tax, if any, paid by him for the period during which the collections were made, and in default of such payment, the amounts may be recovered as if they were arrears of land revenue".

(5) The fact that this tax is first collected by by the seller does not make the amount so collected lose its character as tax. That such tax cannot form part of the turnover of the assessee, will become evident from a reference to form "A" prescribed for the return of income. That brings out the distinction between the two. Under Col. 10, the assessee has to show the net turnover, liable to be taxed, and under Col. 11, the amount actually collected by way of tax or taxes.

This emphasises the distinction between the turnover and the amount collected by the assessee by way of tax on the sale. It is thus clear that they are two different things, and the expression 'turnover' is not of such a wide import as to include even taxes collected by the assessee. If the contention of the Government is to be accepted, it will amount to permitting the depart-

ment to levy tax on tax. We do not think there is any basis for this interpretation in the relevant provisions in the Act. This point is also covered by authority.

In —'Deputy Commr. of Commercial Taxes, Coimbatore v. Messrs. M. Krishnaswamy Mudaliar and Sons,' AIR 1954 Mad 856 (A), a Bench of the Madras High Court held that the tax collected by the seller under sub-r. (7) of Rule 5 of the Turnover and Assessment Rules is not liable to be taxed against and cannot, therefore, be included in the net turnover of the assessee. With respect, we are in agreement with the principle laid down there. In our opinion the order under revision is correct and has to be affirmed.

(6) In the result, the revision case is dismissed with costs, only advocate's fee Rs. 125/-.

This case coming on for further order the Court made the following Order.

(7) We have taken the view in — 'State of Madras v. Messrs. Tungabhadra Industries Ltd., Kurnool', AIR 1955 Andhra 245 (B), that the definition of "Turnover' as amended by the Andhra Legislature does not bring in sales tax collected by the dealer. That being so, we do not find it necessary to alter our opinion with regard to the decision of this case.

M.K.S. Revision dismissed.

AIR 1955 ANDHRA 242 (V 42, C. 88 Nov.)

K. SUBBA RAO C. J. AND SATYANARAYANA RAJU J.

M. M. A. K. Mohiddin Thamby and Co., Eluru, Applicant v. Commissioner of Income-tax, Hyderabad, Respondent.

Case Referred No. 56 of 1953, D/- 15-4-1955.

Income-tax Act (1922), S. 34 (as it was before amendment in 1948) — Discovers in consequence of definite information — Interpretation of.

Unless the Income-tax Officer gets definite information, i. e., clear and unambiguous information not based on gossip, rumour or surmises, which in its turn leads him to arrive at a reasonable belief that the income escaped assessment, etc., he has no power to start an enquiry under Section 34. No doubt, the word 'discover' cannot in the context mean arriving at a final decision but it can be interpreted to mean only a reasonable belief on the part of the Income-tax Officer that the income had escaped assessment.

There is also an essential distinction between discovery based upon a new fact brought to the notice of the Income-tax Officer and a change of opinion arrived at by him on the facts that existed prior to the assessment; for, in the latter case, he does not receive any new information. All the facts were already within his knowledge. Case law Referred. (Para 13)

(Note — It was held in this reference that 'discovery' within the meaning of the section was made by the Income-tax Officer on the receipt of definite information from another Income-tax Officer, and therefore the action taken by the Income-tax Officer under S. 34 of the Act was right).

(Para 14)

Anno: AIR Man. I. T. Act, S. 34 N. 2.

CASES REFERRED: Paras

(A) (V31) AIR 1944 Pat 338: 1944-12 ITR 341 5

(B) (V36) AIR 1949 All 164 : 1946-14 ITR 431 6

(C) (V34) AIR 1947 All 153 : 1947-15 ITR 224 7

(D) (V39) AIR 1952 All 325 : 1951-19 ITR 114 8

(E) (V38) AIR 1951 Bom 299 : 1951-19 ITR 331 9

(F) (V39) AIR 1952 Pat 163 : 1951-19 ITR 476 10

(G) (V38) AIR 1951 Mad 994 : 1951-20 ITR 208 11

(H) (V40) AIR 1953 All 227 : 1952-22 ITR 539 12

M. R. Abdul Kareem and T. Narayana Chari, for Applicant; A. Kuppuswami, for Advocate General (D. Narasaraju) and M. Kondala Rao, for Respondent.

SUBBA RAO, C. J.:

The Income-tax Appellate Tribunal, Madras Bench "B" referred the following questions under S. 66 (1), Indian Income-tax Act to the High Court of Judicature, Madras.

(i) "Whether there was definite information in the possession of the Income-tax Officer in consequence of which he could have discovered that there was an under-assessment within the meaning of Section 34 as it stood before its amendment in 1948?

(ii) Whether the re-assessment of Rs. 11,185/- is valid?"

The said reference was transferred to this Court after its constitution.

(2) The facts that gave rise to the reference may be briefly stated. M. M. A. K. Mohiddin Thumby and Co., was a firm having four tanneries at Eluru and one at Guntur. Its head office was situated at Eluru. The following were the six partners of the firm:

1. M. M. Mohamed Mama Labbai.
2. M. K. A. S. Syed Mohammad.
3. Vavoo Mohammad Hasana Labbai.
4. O. M. Ahmed Mohideen Sadaktulla.
5. Velak Mohammed Shekna Labbai.
6. Velak Mohammad Mohideen.

Though they were carrying on business at Eluru, they were permanent residents of Kayalpatnam village in Tinnevelly District. For the assessment year 1940-41 the assessee filed a return showing a total income of Rs. 21,420/-. During the scrutiny of the accounts, the Income-tax Officer came across a transfer of Rs. 1,15,000/- from the account of V. Syed Mohamed Ali of Calcutta to the accounts of the following four partners of the assessee firm:

1. M. M. Mohammad Mama Labbai	Rs. 25,000/-
2. A. K. Mohamed Omar Sahib	Rs. 30,000/-
3. V. M. K. Dawood Labbai	Rs. 30,000/-
4. N. K. A. S. Syed Mohammad	Rs. 30,000/-

Though the Income-tax Officer suspected that the said amount represented the secret profits of the firm, he was not able to get any definite information to hold that the said sum also was part of the profits of the firm. Ignoring that item, he made an order of assessment dated 17-3-1941. On 31-3-1941, the said amount was spread over the accounts of the fourteen partners. The explanation of the assessee was that in October 1939, 14 persons contributed amounts totalling Rs. 1,15,000/- with the view of constituting a partnership, that the said amounts were remitted to Syed Mohamed Ali of Calcutta as the money was urgently required for purchasing skins for the partnership and that the money was subsequently adjusted on 31-3-1941 by transferring the same to the capital account of the four partners and thereafter to that of the 14 partners.

In addition to the enquiries started by the Income-tax Officer before 17-3-1941, he addressed the Income-tax Officer, Tuticorin, to make an enquiry in respect of the financial position of the said four partners. On 17-2-1942, he sent a report that none of the partners had any private interest of his own apart from his interest in the

business of the assessee. On receiving the said information, the Income-tax Officer issued a notice under S. 34, Indian Income-tax Act for the purpose of re-opening the assessment.

After following the procedure prescribed, he re-opened the assessment and found that the aforesaid amount of Rs. 1,15,000/- transferred from Syed Mohamed Ali's account to the credit of the four partners really represented the profits of the firm. He was satisfied that the financial position of the said four partners was not such as to enable them to advance such a large amount towards capital. On that basis, he assessed the company to tax.

(3) The Assessee filed an appeal to the Appellate Assistant Commissioner of Income-tax, Bezwada, but he accepted the view of the Income-tax Officer and confirmed the assessment. When an appeal was filed to the Tribunal, that was dismissed. Thereafter the present reference was made at the instance of the assessee.

(4) Learned counsel for the assessee contended that under S. 34, Indian Income-tax Act, the Income-tax Officer has jurisdiction only to re-open an assessment already made if he discovers that any income has escaped assessment in consequence of definite information which has come into his possession and that in the present case the Income-tax Officer did not re-open the assessment on any such basis but only because he changed his opinion on the facts, which were within his knowledge at the time the first assessment was made.

Section 34 reads:

"If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income profits or gains chargeable to income-tax have escaped assessment in any year ..... the Income-tax Officer may in any case which he has reason to believe that the assessee has concealed the particulars ..... serve on the person liable to pay tax on such income, profits ..... and may proceed to assess or re-assess such income, profits and gains and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section".

The necessary conditions for the application of the section are:

(i) Subsequent to the assessment, the Income-tax Officer comes into possession of information,
(ii) that information must be definite and
(iii) by reason of that information, he discovers that the income has escaped assessment.

The scope of these three conditions has been the subject of judicial scrutiny. It will be convenient at this stage to consider those decisions to ascertain the settled law on the subject.

(5) In — 'Fazal Dhala v. Commr. of Income-tax, B. and O.', AIR 1944 Pat 338 (A), the assessee was assessed for the year 1937-38 on 4-9-1937 but proceedings under Section 34 were started on 7-5-1938 on the ground that the income of the Madras Branch of the assessee had escaped assessment. In that case, the Income-tax Officer had in mind the existence of the Madras Branch of the business when the assessment was completed on 30-8-1938.

He did not come into possession of any new definite information subsequently which enabled him to reopen the assessment already made. As the conditions laid down in Section 34 had not been complied with, the learned Judges held that the assessment was invalid.

(6) In — 'Badar Shoe Stores, Agra v. Commr. of Income-tax, C. P. and U. P. Lucknow', AIR 1949 All 164 (B), the assessee a dealer in shoes returned gross profits varying between 5 and 5.6 per cent. of the gross turnover for the four years including the accounting year 1939-40. As the return for the accounting year 1939-40 aroused the suspicion of the Income-tax Officer, he examined the accounts of that year in detail and found that an item on the debit side of the accounts had been inflated by a sum of Rs. 5,000. His suspicion was also aroused in respect of the balance brought forward in 1939-40 accounts from previous years.

When the assessee was asked to produce accounts for the accounting years ending 31-3-1937, 31-3-1938 and 31-3-1939, he replied that they were sold away as waste paper. The Income-tax Officer thereafter issued a notice under Section 34. The learned Judges held that the Income-tax Officer had definite information in consequence of which he discovered that the assessee's income of 1938-39 had escaped assessment in the assessment year 1939-40. The learned Judges, at page 168, defined the crucial words as follows:

"Our conclusion from a consideration of these authorities is that, so far as the word 'discovers' in the amended Section 34 is concerned, it requires that the Income-tax Officer should have formed an honest and reasonable belief upon materials which could reasonably support such belief. In the nature of things, it cannot amount to a conclusion of certainty ..... We now come to the words 'definite information'.

These present less difficulty, but it has to be remembered that both what is a 'discovery' and what is 'definite information' must necessarily vary with the circumstances of the case. We think that the words 'definite information' are placed in Section 34, Indian Income-tax Act to protect the subject against an assault by the Income-tax Officer based upon mere suspicion. The definite information which is something more than mere gossip or rumour must lead to the discovery or belief as we have described it above.

But we are not prepared to engage ourselves to the view that, provided the information is definite and does lead to that belief, it need necessarily be information of fact, though in ninety-nine cases out of a hundred it would inevitably be information of fact".

(7) In — 'Kedar Nath v. Commr. of Income-tax, U. P. and C. P. and Berar, Lucknow', AIR 1947 All 153 (C), the assessee a practising Barrister was assessed for the assessment year 1940-41 by the Income-tax Officer on 28-1-1941 and, in the course of that assessment, it transpired that the assessee had purchased and sold shares in companies and suffered losses in the course of those transactions. But the Income-tax Officer did not allow any deductions on that account. Subsequently, on 12-2-1942, a new Officer started proceedings under Section 34 in respect of the year 1940-41 and enhanced the assessment.

He made the assessment in respect of the profits said to have been earned by the assessee in what was found to be a business in the purchase and sale of shares. The learned Judges held that the officer did not receive any new and definite information and that the assessment, having been based only on a change of opinion based on the same facts, was invalid. At page 155, the learned Judges observed:

"It still remains a fact that there is not an iota of material in this record to show that the Income-tax Officer re-opened, the matter in consequence of any information he had received, definite or otherwise, prior to the re-investigation ..... the Second Income-tax Officer was dissatisfied with

the view taken by the first and therefore decided to re-open the matter".

(8) In — 'Gaya Ram Gabbu Lal v. Commissioner of Income-tax', AIR 1952 All 325 (D), the Income-tax Officer gave notice under Section 34 of the Act for re-opening the assessment for the year 1940-41. When he found fictitious deposits during the course of the assessment for the year 1941-42, he made enquiries and found that the rates of purchase shown in the books of account of the assessee and supported by memoranda for the assessment year 1940-41 were much higher than the rate shown in the books of other dealers and that the assessee had a large sum of money which he showed in the accounts of the next year as deposits in the names of certain persons which entries were wrong.

On the basis of this new information, he issued a notice under Section 34. The learned Judges held that he had jurisdiction to do so. The reasons for so holding are found at page 326, in the following terms:

"Before notice can be issued, the Income-tax Officer must be satisfied and the satisfaction must be that of a reasonable man i. e., the definite information in his possession should lead to the conclusion that income has escaped assessment".

(9) In — 'Haji Ahmad Haji Esak and Co. v. Commissioner of Income-tax', AIR 1951 Bom 299 (E), it was contended that the books of account were present before the first officer and all the facts, which were elicited from those books, could have been elicited by the first officer, and, therefore, no fresh information came into the possession of the officer who decided to act under S. 34 of the Act. Chagla, C. J., and Tendolkar, J., observed at page 301:

"Does Section 34 or S. 15 contemplate that if information could have come into the possession of the officer by due diligence, then although in fact he had no knowledge of that information for the purposes of these two sections, it must be deemed that he had the information and he could not act on that information although in fact he came to know of it subsequently. In our opinion, the section does not and cannot bear that interpretation. 'Information' means something that the mind had acquired.

The mere fact of the presence of a book before a person does not give him the information or the contents of that book unless he opens the book and reads it. According to Sir Jamshedji, the mere fact that a book was placed before an officer is sufficient to give him information of its contents. That may be constructive notice of the contents, but Section 15 does not deal with constructive notice.

Section 15 deals with actual notice and in order that an officer should be incapacitated from acting under Section 34 or S. 15, he must have actual knowledge of certain facts which knowledge he is again using for the purpose of acting under these sections. If actual knowledge was absent — it is immaterial how that actual knowledge was absent — then when the actual knowledge does come about it confers jurisdiction upon the officer to act under those two sections".

These observations, therefore, support the view that the mere fact that an Income-tax Officer before the assessment could have discovered the facts which he came to know at a subsequent stage, if he acted with diligence even before the assessment, could not in law preclude him from acting under Section 34, if, as a matter of fact, he received definite information subsequently.

(10) In — 'Jitan Ram Nirmal Ram v. Commissioner of Income-tax', AIR 1952 Pat 163 (F), the learned Judges held that the phrase 'definite information' in Section 34 cannot be construed in an universal sense and its meaning must depend and must necessarily vary with the circumstances of each case. But they made it clear that it is necessary that the information should be more than mere gossip or rumour.

(11) In — 'Commissioner of Income-tax, Madras v. Janab S. Khaderwalli Sahib', AIR 1951 Mad 994 (G), the Madras High Court held that a mere change of opinion based on the same facts and figures, which were present to the mind of the Income-tax Officer at the time of the original assessment, does not amount to 'discovery' within the meaning of Section 34, Indian Income-tax Act, 1922. There the assessee was a partner in a registered firm consisting of three individuals.

During the course of assessment proceedings, the Income-tax Officer made enquiries as regards the acquisition of house property by the assessee during the year of account and he came to the conclusion that a sum of Rs. 16,000/- invested by the assessee on the purchase of house property came from his share of the profits of the partnership of which he was a member. On that basis, he added that sum to the income of the firm and the profits of the partnership were assessed on an estimate.

Against the assessment of the firm, an appeal was filed and the Assistant Appellate Commissioner held that the inclusion of Rs. 16,000/- in the firm's income was not justified. Thereafter, the Income-tax Officer purported to take proceedings under Section 34, Indian Income-tax Act and added the sum of Rs. 16,000/- to the income of the assessee and assessed him afresh. The learned Judges held that the assessment was invalid. At page 994, they observed:

'It is clear that a mere change of opinion based on the same facts and figures which were present to the mind of the Income-tax Officer at the time of the original assessment does not amount to discovery. The discovery must be the result of definite information, that is to say, new information that has come to the knowledge of the Income-tax Officer.

The Income-tax Officer cannot act under this section even though the tax-payer has escaped assessment if he is acting on information which was already in his possession and within his knowledge".

(12) In — 'Debi Prasad Malviya v. Commissioner of Income-tax', AIR 1953 All 227 (H), the Income-tax Officer, though he knew that the assessee had a one-third share in a partnership firm and the profits from that firm had to be included in his total income, finished the assessment and observed in the assessment order that as the assessment of the firm had not been completed, necessary action for revising the assessment by inclusion of the assessee's share of profit in the firm would be taken later on the receipt of the report from the Income-tax Officer assessing the firm.

Subsequently, the Income-tax Officer issued notice under Section 34 for including in the assessment the share of profits of the assessee from the firm. The learned Judges held that the notice under S. 34 was wrong and the Income-tax Officer had no authority to re-open the assessment already made by him. At pages 227-228, the learned Judges gave their reasons for so holding as follows:

"As regards the question referred to us under Section 66 (1) we find that the facts on the basis of which notice under Section 34 was issued were all known to the Income-tax Officer concerned except of course the actual amount of profits that had been made by the Kanpur Iron Supply and Co.,

in the two years in question ..... the Income-tax Officer knew that the assessee had a one-third share in the partnership firm, Kanpur Iron Supply Co., and that the profits of that concern had to be added to the total income of the assessee ..... Section 23, Indian Income-tax Act contemplates that the Income-tax Officer should make a complete assessment on the basis of the total income of an assessee.

It is not open to him to make assessments piecemeal and in a case where the Income-tax Officer has proceeded to assess one part of the income and has decided to assess the rest of the income on a later date, he cannot rely on the provisions of Section 34 for the purpose of re-opening the assessment ..... It cannot, therefore, be said that the fact was discovered later that the assessee had been under-assessed.

(13) From the aforesaid discussion of the case-law, the law on the subject may be summarised thus. Section 34 was enacted both in the interests of the State and the subject. If it is necessary to prevent evasion of tax, it is equally important to protect a citizen from undue harassment by over-zealous officers. The Act does not contemplate piecemeal assessment and ordinarily it is expected of an Income-tax Officer to complete his assessment for a particular year once and for all. He cannot resort to the method of piecemeal and compartmental assessment. But, at the same time, to detect evasion and to assess the escaped income, the section confers on an officer power conditioned by the provisions of the section itself.

Unless he gets definite information i. e., clear and unambiguous information not based on gossip, rumour or surmises, which in its turn leads him to arrive at a reasonable belief that the income escaped assessment etc., he has no power to start an enquiry under Section 34. No doubt, the word 'discover' cannot in the context mean arriving at a final decision but it can be interpreted to mean only a reasonable belief on the part of the Income-tax Officer that the income had escaped assessment.

There is also an essential distinction between discovery based upon a new fact brought to the notice of the Income-tax Officer and a change of opinion arrived at by him on the facts that existed prior to the assessment for, in the latter case, he does not receive any new information. All the facts were already within his knowledge.

(14) Applying the said principles, can it be said that in this case that the Income-tax Officer received definite information on the basis of which he came to a reasonable belief that the income of the assessee escaped assessment? From the statement of facts, it is clear that even before the first assessment, the Income-tax Officer had not only a doubt, but even a shrewd suspicion that some fraud was committed in respect of the item of Rs. 1,15,000/-. Though he made enquiries he did not get any definite information before the closing of the assessment to induce him to come to any reasonable belief that the said item represented the profits of the firm.

On receipt of the definite information from the Income-tax Officer, Tuticorin Circle to the effect that the said four partners had no income other than that which they got from the firm assessed and that they did not sell any properties of their own to advance large amounts towards the capital of the partnership, the lingering doubt in his mind was crystallised into a reasonable belief that the said sum represented the profits of the firm. The Income-tax Officer did not change his opinion on the facts, which were already before him at the time of the first assessment. The fact that the partners had no other resources for advancing large amounts towards the capital of the business was not before him.

It was communicated to him only subsequent to the assessment and that fact really and materially turned the scales against the assessee. We would, therefore, hold that 'discovery' within the meaning of the section was made by the Income-tax Officer on the receipt of definite information from the Income-tax Officer, Tuticorin Circle, and, therefore, the action taken by the Income-tax Officer under S. 34 of the Act was right.

(15) It was then contended that the information given by the Income-tax Officer was not of a fact but only based on his surmises. The report clearly shows that he made the enquiries and the enquiries convinced him that the partners had no other source yielding the required amount for making a deposit towards the capital of the business. We cannot, therefore, say that the communications made by the Income-tax Officer, Tuticorin was not "definite information" within the meaning of the section.

(16) Learned counsel then contended that the re-assessment under Section 34 was based upon pure surmises, ignoring the definite and direct evidence adduced by the assessee. This is not one of the questions referred to us. Further the question raised is one of fact. The Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal considered the entire material and came to the conclusion that the said item represented the profit of the firm and was therefore liable to assessment. We cannot in this reference question a finding of fact arrived at by them.

(17) No contention has been raised before us that when the assessment was re-opened, the Income-tax Officer had no jurisdiction to find out the other items that escaped assessment at the earlier stage. The Income-tax Officer added Rs. 11,185/- to the assessable income on account of undervaluation of stock discovered by him. The Assistant Commissioner and the Tribunal agreed with him.

When once it is not disputed that the Income-tax Officer has jurisdiction to reopen the other items, we cannot go into the correctness of the figures arrived at by the Tribunal. We accordingly answer the question referred to us. The applicant will pay the costs of the respondent which we fix at Rs. 200/-.

V.S.B. Answer accordingly.

AIR 1955 ANDHRA 245 (V 42, C. 89 Nov.)

CHANDRA REDDY AND UMAMAHESWARAM JJ.

State of Madras represented by the Dy. Commr. of Commercial Taxes, Madras Division, Madras, Petitioner v. Messrs. Tungabhadra Industries Ltd. Kurnool, Respondent.

Tax Revn. Case No. 214 of 1953, D/- 18-3-1955, against order of Sales Tax Appellate Tribunal, D/- 29-12-1952.

Sales Tax — Madras General Sales Tax Act (9 of 1939) (as amended by Andhra State in 1954), S. 2 (1) — Turnover — Scope.

The definition of 'turnover', as amended by the Andhra Legislature, is not comprehensive enough to include sales tax collected by the dealer. AIR 1955 Andhra 241, Affirmed. (Para 13)

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 856: 1954-2 Mad LJ 151 2, 4

(B) (V42) AIR 1955 Andhra 241: (T. R. C. No. 131 of 1953. D/- 18-3-1955 — Andhra) 2, 14

(C) ('48) 1948-1 STC 193 (Cal) 5

(D) (V29) AIR 1942 FC 33: 1942 FCR 90 (FC) 11

(E) (V40) AIR 1953 SC 252: 1953-1 Mad LJ 743 (SC) 11

Advocate-General (D. Narasaraju) for Govt. Pleader (M. Seshachalapathi), for Petitioner; K. Rajah Ayyar, for Messrs. M. Ranganadha Sastri, K. V. Kapali Sastri and A. Bhujanga Rao, for Respondent.

CHANDRA REDDY J.:

The interpretation of S. 2(1), Madras General Sales Tax Act as amended by the Legislative Assembly of the Andhra State in May 1954 is involved in this case. The assessment relates to the year 1949-50.

(2) In the return of turnover submitted by the assessee, the tax collected from the purchasers was excluded. The Sales Tax Department sought to levy tax on this tax on the ground that it formed part of the turnover. The Sales Tax Appellate Tribunal before whom the matter was carried in appeal by the assessee accepted the contention of the assessee and gave relief to him in that respect. The Government have preferred this revision petition against the order of the Appellate Tribunal. Pending this petition, the Andhra State Legislature amended the definition of turnover' by substituting the following:

"Turnover means the total amount set out in the bill of sale (or if there is no bill of sale, the total amount charged) as the consideration for the sale or purchase of goods (whether such consideration be cash or deferred payment or any other thing of value), including any sums charged by the dealer for anything done in respect of the goods sold at the time of or before delivery of the goods and any other sums charged by the dealer, whatever be the description, name or object there of".

(We are not concerned in this enquiry with the other provisions of the amended section).

Prior to the amendment, S. 2 (1) read thus:

" 'Turnover' means the aggregate amount for which goods are either bought by or sold by a dealer whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person, of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover".

Interpreting the definition of turnover as it stood prior to the amendment by the Legislature of the Andhra State a Bench of the Madras High Court in — 'Dy. Commr. of Commercial Taxes, Coimbatore v. Messrs. M. Krishnaswamy Mudaliar, AIR 1954 Mad 856 (A) declared that the tax collected by a dealer did not constitute part of the turnover and therefore was not liable to be taxed again. Recently, we took the same view in — 'State of Andhra v. Shree Bajranga Jute Mills Ltd., Guntur', AIR 1955 Andhra 241 (B). But subsequent to the rendering of the judgment in that case, the learned Government Pleader brought to our notice the amended definition and requested us to reconsider the matter in the light of this amendment.

(3) It is contended by the learned Advocate-General for the Government that the amended definition is of wider import and brings within its ambit the tax collected by the dealer and the judgment of the Madras High Court based on the unamended definition cannot govern this case. According to him, the clause "and any other sums charged by the dealer whatever be the description, the name or object thereof" takes in the tax collected by the seller. The expression, "whatever be the description, the name or object thereof", continues the Advocate-General, is significant and embraces every item mentioned in the bill or paid into the hands of the seller.

It is urged that the clause "including any sums charged by the dealer for anything done in respect of the goods sold at the time of or before the delivery of the goods and any other sums charged by the dealer whatever be the description, name or object thereof" has reference to "the total amount set out in the bill of sale". In our opinion, this construction is opposed to the plain and ordinary meaning of the language of the sub-section.

The total amount set out in the bill can have reference only to the consideration for sale and it is in the consideration that these sums, charges etc., are included. So what is made comprehensive is the consideration for sale. To adopt the other interpretation would be straining the language a bit too much. If so, could a tax collected by a dealer come within the meaning of consideration for sale?

(4) It has been pointed out by us in AIR 1955 Andhra 241 (B) and by the Bench of the Madras High Court in — 'Dy. Commr. of Commercial Taxes, Coimbatore v. M. Krishnaswami Mudaliar & Sons (A)' that the dealer collects tax as an agent on behalf of the taxing authority, and therefore, it could not be subject to taxation. While conceding this position to be correct, what is argued by the Advocate General is, that by deleting Ss. 8-B and 8-C from the Statute Book, the power given to a registered dealer to collect the tax was withdrawn.

(5) To appreciate this contention, it is necessary to refer to S. 8-B which is in the following words:

"Section 8-B(1): No person who is not a registered dealer shall collect any amount by way of tax under this Act, nor shall a registered dealer make any such collection except in accordance with such conditions and restrictions, if any, as may be prescribed:

Provided that the State Government may exempt persons who are not registered dealers from the provisions of this sub-section until such date, not being later than the 1st day of April, 1948, as the State Government may direct.

(2) Every person who has collected any amount by way of tax under this Act, on or after the 1st day of April, 1947, shall pay over to the State Government within such time and in such manner as may be prescribed, all amounts so collected by him if they are in excess of the tax, if any, paid by him for the period during which the collections were made; and, in default of such payment, the amounts may be recovered as if they were arrears of land revenue".

It is argued that it is by virtue of S. 8-B (1) that a dealer is entitled to collect tax under the Act from the purchaser, and S. 8-B (2) contemplates that liability of the registered dealer to pay to the State the tax collected by him, and that the moment the privilege granted under S. 8-B (1) is withdrawn, the liability under S. 8-B(2) ceases. By reason of the omission of these two sub-sections any collection made by the dealer will be unauthorised and therefore it will form part of the turnover, as evident from — 'Bata Shoe Co. Ltd. v. Board of Revenue, West Bengal', 1948-1 STC 193 (Cal) (C). We do not think we can accede to this proposition.

It is clear from S. 8-B(1) that it does not confer in specific terms authority on the dealer to collect the tax. It is only by implication that this power can be gathered. It contains express prohibitions in respect of matters contained therein. The positive authority in this behalf is given by the Turnover and Assessment Rules. Rule 5-A(7) of these rules runs thus:

"A registered dealer may collect amounts by way of tax or taxes under the Act subject to the following conditions: (1) He shall not collect any amount or amounts by way of tax or taxes under the Act at a rate or rates exceeding the rate or rates specified in

S. 3 or 5 or notified under S. 6(1). (2) He shall pay in full the amount or amounts collected by him by way of tax or taxes to the State Government on or before the 30th April of the year succeeding that in which such collection is made".

Thus, this rule contains a provision authorising a registered dealer to collect tax subject to the conditions mentioned therein and also imposes a liability on him to pay in full the amount so collected by him. This rule performs the same function as S. 8-B(1) of the Act in regard to the right of a dealer to collect the tax on the sales effected by him and the repeal of that sub-section does not, in our opinion, affect the rights in any way. Despite the disappearance of S. 8-B(2), the liability of the dealer to make over the payment to Government still continues under sub-rule (7) (2).

Sub-rules (8) and (9) proceed on the footing that the registered dealer retains the right to collect the tax and is under an obligation to pay it in full to the Government. Rule 8 says:

"The assessing authority may call for and examine the accounts of the registered dealer for the purpose of satisfying himself that the dealer has paid in full the amount or amounts collected by him by way of tax or taxes, as required by condition (ii) in sub-rule (7):

Provided that this power shall be exercised before the expiry of two years next succeeding that in which the collections were made.

(9) If the assessing authority is satisfied that any amount or amounts collected by the dealer by way of tax or taxes have not been paid by him to the State Government in any year as required by condition (ii) in sub-r. (7), the assessing authority shall issue a notice to the dealer in Form B-2 specifying therein the total sum withheld by the dealer and the dealer shall pay such sum at the time and in such manner specified therein".

Before it can be said that the whole tax structure which has been in vogue for several years has been altered, something more is necessary than the mere omission of a provision in the Act which performs the same function by implication as the rules extracted above. Further, Form A prescribed for the return of turnover contains two columns 10 and 11, one for net turnover liable to be taxed and the other for the amount actually collected by way of tax or taxes and it is still in force. So long as it is there, the dealer has to follow this form. Under this form he has to show the amount collected by him by way of sales-tax and which he has to make over to the Government.

(6) It was then argued by the Advocate-General that by repealing S. 8-B the Legislature must be understood to have repealed the rules mentioned supra because when the main section under the authority of which the rules are framed is deleted, the rules must also be deemed to have been repealed. We do not think we can give effect to this contention. The rules extracted above were not issued under S. 8 of the Act. The rulemaking authority is derived from S. 19 and it is to carry out the purposes mentioned in S. 3. sub-ss. (4) and (5) that the rules have been framed.

(7) Section 3, sub-ss. (4) and (5) read thus:

Section 3(4): for the purposes of this section and the other provisions of this Act, turnover shall be determined in accordance with such rules as may be prescribed; Provided that no such rules shall come into force unless they are approved by a resolution of the Legislative Assembly. (5) The taxes under sub-ss. (1) and (2) shall be assessed, levied and collected in such manner and in such instalments, if any as may be prescribed".

(8) It is thus clear that it is to carry out the intendment of sub-rr. (4) and (5) that the rules came into existence. Their existence is 'de hors' S. 8-B (1), and consequently the result contended for by the Advocate-General does not follow.

(9) It was next maintained by the Advocate-General that since these rules are repugnant to S. 2 (1) of the Act and both cannot stand together, a repeal must be inferred. To support this argument he called in aid some passages from "Maxwell on Interpretation of Statutes" and "Craies on Statute Law". At p. 160 of 'Maxwell on Interpretation of Statutes' (Edn. 10) the following passage occurs:

"An author must be supposed to be consistent with himself, and, therefore, if in one place he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect, the work of the Legislature is treated in the same manner as that of any other author, and the language of every enactment must be construed as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of statute by construction when the words may be capable of proper operation without it.

It cannot be assumed that the Parliament has given with one hand what it has taken away with another. But it is impossible to construe absolute contradictions. Consequently, if the provisions of a later Act are so inconsistent with, or repugnant to, those of an earlier Act that the two cannot stand together, the earlier stands impliedly repealed by the later".

Again at p. 164, it is stated:

"When the later of two general enactments is couched in negative terms, it is difficult to avoid the inference that the earlier one is impliedly repealed by it. For instance, where a general Act exempted from licensing regulations the sale of a certain kind of beer and a subsequent one enacted that "no beer" should be sold without a licence, it would obviously be impossible to save the former from the repeal implied in the later".

These passages do not really advance the case of the petitioner. It is clear from these statements that consistency and not repugnancy must be presumed as far as possible and each enactment or a provision in it should be read so as to reconcile it with other provisions of the enactment. It is only in cases where it is not possible to adopt such construction and the language of one section is so inconsistent with or repugnant to those of the other and the two cannot stand together, the earlier stands impliedly repealed by the later. The rule is stated in similar terms in "Craies on Statute Law" at p. 337:

"Where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the earlier. The Court leans against implying a repeal unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied."

This passage has very succinctly summed up the principle applicable to implied repeals. Such a situation does not arise here.

(10) It is only if it is assumed that the turnover as defined under the amended section is comprehensive enough to take in sales-tax, the question of repugnancy between that and Rr. 7 and 8 will arise. As already stated, the Courts should as far as possible, read two provisions of an enactment so as to harmonise them and not readily read repugnancy between them. Instead of assuming repugnancy between the definition and the rules, the former must be read in the light of the latter.

(11) It was then contended that the Legislature must be presumed to have intended that turnover

should include tax collected also. In considering whether the content of the definition could include tax, it is well to remember that under the Sales Tax Act, tax is levied on the occasion of sale. It has been pointed out both in — 'Madras Province v. Boddu Paidanna & Sons', AIR 1942 FC 33 (D) and by the Supreme Court in — 'State of Bombay v. United Motors (India) Ltd.', AIR 1953 SC 252 (E) that the liability to tax under the Sales Tax Act arises only on the occasion of sale which means that only after the sale is completed the tax would be levied.

How then can tax be levied on a tax collected on the occasion of sale? The interpretation suggested for the petitioner is opposed to the very concept of tax on sales. The tax-structure should conform to the scheme of the Act which only provides for levy of tax on sale of goods as the very conception underlying the Act implies. To accept the connotation given to it by the Advocate-General would be to unduly enlarge the scope of the definition of turnover.

(12) We must also observe that, if, as argued by the Advocate-General, the authority given to the dealer to collect the tax from the purchaser was withdrawn by the omission of S. 8-B (1) there is no need for including tax collected by the dealer within the definition of turnover. The question of levying tax on the tax collected by the dealer would only arise if he is permitted to collect the tax.

(13) In our view, the definition of 'turnover' as amended by the Andhra State Legislature, is not comprehensive enough to include sales tax collected by the dealer. It follows that the conclusion of the Appellate Tribunal is unassailable. In this view of the matter, it is not necessary for us to go into the larger question relating to the competence of the Provincial Legislature to define 'turnover' embracing sales tax while legislating under the aforementioned entry.

(14) In the result, the petition is dismissed with costs. Advocate's fee is fixed at Rs. 250/-.

(In the view taken above, our judgment in AIR 1955 Andhra 241(B) is correct and does not require re-consideration or review).

D.S.P. Petition dismissed.

(S) AIR 1955 ANDHRA 248 (V 42 C 90 Nov.)

FULL BENCH

SUBBA RAO C. J., VISWANATHA SASTRI AND BHIMASANKARAM JJ.

Vedulapalli Satyanarayana Murthy & Brothers and others, Petitioners v. State of Madras represented by the Commercial Tax Officer, East Godavari, Respondent.

T. R. C. Nos. 83, 273, 284, 285, 148 and 192 of 1953, D/- 31-3-1955.

Constitution of India, Art. 286, Cl. (1)(a), Explanation and Cl. (2) — Art. 286(2) applies only to cases not covered by Explanation to Art. 286(1)(a).

Clause (1)(a) of Art. 286 read with the Explanation enacts a prohibition of taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are actually delivered as a direct result of such sales or purchases, for consumption in that State. Article 286(2) banning the imposition of tax by a State on sales or purchases taking place in the course of inter-State trade or commerce applies only to cases not covered by the Explanation, such as inter-State sales or purchases where goods are imported into the State, not for consumption therein, but for re-export to other States.

Article 286(2) does not affect the power of a State where goods are actually delivered as a direct result of sales or purchases, for consumption in that State to tax inter-State sales or purchases. AIR 1953 SC 252, Foll. (Para 8)

CASES REFERRED: Paras

(A) ('54) 1954-2 Mad LJ 585: AIR 1955 NUC Mad 1561: 1954-5 STC 269 3, 13

(B) (V42) (S) AIR 1955 Andhra 87: 1955 ALT Cr 53 (FB) 3, 4

(C) (V40) AIR 1953 SC 252: 1953-1 Mad LJ 743 (SC) 8, 11, 12, 13, 15

(D) (V40) AIR 1953 SC 333: 1953-2 Mad LJ 123 (SC) 11

(E) (V41) AIR 1954 SC 403: 1954 SCJ 445 (SC) 12

G. Chandrasekhara Sastri, G. Ramachandraiah, N. Rajeswara Rao and M. S. R. Sastry, for Petitioners; Addl. Govt. Pleader (M. Seshachalapati), for the State.

SUBBA RAO C. J.:

I agree.

VISWANATHA SASTRI J.:

(2) The petitioners in these revision petitions are merchants carrying on business, mainly in cocoanuts, in several places in the East Godavari and Krishna Districts, which during the relevant period formed part of the State of Madras. They sold cocoanuts to merchants mostly in Madhya Pradesh and also in a few other places outside the State of Madras. The goods were delivered outside the State to the several buyers.

The petitioners were assessed to tax under the Madras General Sales Tax Act for assessment years 1949-50 and 1950-51 on sales of the nature described above. The assessees, petitioners in these revision petitions, objected to the levy of tax on sales effected by them after 26-1-1950 and before 31-3-1951, on the ground that such levy is illegal, as a result of Art. 286(1) of the Constitution which came into force on 26-1-1950.

(3) The revision petitions first came on for hearing before Chandra Reddy and Umamaheswaram JJ., who could not reach an agreed decision. Chandra Reddy J., was of the opinion that the assessments objected to, were valid under the proviso to Cl. (2) of Art. 286 and the Order of the President made thereunder. Umamaheswaram J., was inclined to the view that cl. (1) of Art. 286 and the explanation to that clause would govern the cases and that the assessments would be illegal if the facts were such as to warrant the application of the Explanation.

Chandra Reddy J. was for dismissing the revision petitions, but directed the cases to be placed before the Chief Justice for being posted before a third Judge on the footing that there was a difference of opinion between him and Umamaheswaram J. Under S. 12-B, Madras General Sales Tax Act, 1939, read with S. 98, Civil P. C. and Cl. 36 of the Letters Patent, it is only if there is a difference in opinion between the two Judges of a Division Bench, the point on which there is a difference between them should be referred to a third Judge.

Umamaheswaram J., though inclined to a contrary opinion, did not in terms dissent from the view of Chandra Reddy J., but suggested the reference of the cases to a Full Bench. In — 'East India Match Factory v. State of Madras', 1954-2 Mad LJ 585 (A) a Division Bench of the Madras High Court, which had to construe Art. 286 of the Constitution, was of the opinion that cl. (2) of Art. 286 applied to cases like the present.

In — 'Subbarayudu v. The State', (S) AIR 1955 Andhra 87 (B) a Full Bench of this Court laid down that decision of the Madras High Court

given prior to the establishment of this Court, should be followed by this Court in the same manner in which the Madras High Court followed its own decisions and that if a Division Bench of this Court doubted the correctness in law of a decision of a Division Bench of Madras High Court rendered before 5-7-1954 the proper course was to refer the matter for the decision of a Full Bench.

Chandra Reddy J., followed the decision of the Madras High Court above referred to, while Umamaheswaram J., doubted its correctness and decided that the revision petitions should, in accordance with the rule of practice laid down by the decision of the Full Bench of this Court, be heard by a Full Bench. These cases were then directed to be posted before us.

(4) In the course of his Judgment, Umamaheswaram J., felt bound to enter a caveat against the opinion of the Full Bench in '(S) AIR 1955 Andhra 87 (B)'. With due respect to the learned Judge, the working rules formulated by the Full Bench serve to minimise the uncertainty and confusion arising from conflicts of judicial opinion, and the resulting disturbance of settled titles and transactions and at the same time, afford reasonable scope for the progressive and orderly development of Judge-made Law.

(5) Section 3 of the Madras General Sales-tax Act, 1939, imposes a tax on the total turnover of every dealer for each year, subject to certain exemptions not now material. Explanation 2 to S. 2 of the Act which defined the term 'sale' runs as follows:

"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made (a) if the goods were actually in this State, at the time when the contract of sale or purchase in respect thereof was made or (b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this State at any time after the contract of sale or purchase in respect thereof was made".

The localisation of a sale was, in many cases, a difficult problem when different stages of the transaction of sale were reached in different places, as for example when the contract of sale was made in one State, the transfer of ownership in the goods took place in another, the payment of the price in a third State and the delivery of the goods in yet another State.

In such cases, there was a real danger of different states claiming to tax the same transaction on the basis of a sufficient territorial connection between the State and what it sought to tax. The Constitution enacted provisions designed to keep the taxing power of the States within bounds and to preserve freedom of trade & commerce with foreign countries as well as between the States of the Union. Art. 286 of the Constitution, so far as it is now material, runs as follows:

"Article 286 (1). No Law of a State, shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase has taken place.....

(a) Outside the State, or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Explanation: For the purposes of sub-cl. (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has, by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide no law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-state trade or commerce; provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty first day of March 1951".

It is the interpretation of this Article that is now in controversy between the parties.

(6) After the Constitution came into force the Madras General Sales-tax Act was adopted under the Adaptation of Laws Order, IVth Amendment, 1952, and S. 22 was added and given retrospective effect from 26-1-1950 on which date the Constitution came into force. S. 22 really adapted the language of Art. 286 (1) and (2) and also incorporated an Explanation in the same terms as the Explanation to Art. 286 (1) (a) of the Constitution.

(7) The contention of the assessees is that though the sales sought to be charged to tax took place in the course of inter-State trade or commerce, being sales of goods by merchants in Madras to traders in Madhya Pradesh, still under Art. 286 (1) (a) read with the Explanation such sales are taken out of Cl. (2) and its proviso and treated as if they were sales made only in Madhya Pradesh where the goods were actually delivered for consumption in that State.

Consequently such sales are liable to tax by the State of Madhya Pradesh in the same manner as local sales effected within that State. The levy of tax on sales of the above nature transgresses the prohibition in Cl. (1) of Art. 286 and is therefore illegal. Reliance was placed in support of this contention on a recent decision of the Supreme Court to which reference will presently be made. The opposite point of view may be stated thus: Art. 286 (1) (a) deals only with sales or purchases of goods taking place outside the State and debars a State from taxing such outside sales.

The Explanation is statedly an Explanation only to Cl. (1) (a) and merely fixes the place where such outside sales have to be taxed. In view of the provision in Cl. (1) (a) that outside sales shall not be taxable by a State, the Explanation appended to that sub-clause has to be construed as fixing the locus of an outside sale by providing that though under the general law a sale might be regarded as having taken place in an outside State, say A, still if the goods are actually delivered as a result of such sale in an outside State say B, for consumption in that State, the sale should be regarded as one outside State A.

Clause (1) of Art. 286 does not deal with sales or purchases in the course of inter-State trade or commerce for which special provision is made by Cl. (2) of Art. 286. It is not legitimate to construe the Explanation to Cl. (1) (a) as an exception to Cl. (2) so as to effect an abrogation 'pro-tanto' of the immunity from tax conferred on sales or purchases in the course of inter-State trade or commerce by Cl. (2).

The only exception to Cl. (2) is found in the proviso to that clause. We are here concerned with sales effected in the course of inter-State trade or commerce falling within Cl. (2) and as a result

of the proviso to Cl. (2) and the President's order thereunder, tax was properly levied on the sales now in question under the Madras General Sales-tax Act.

(8) Whatever might be our view, if the matter were 'res integra', we are bound by the decision of the Supreme Court in — 'State of Bombay v. United Motors (India) Ltd.', AIR 1953 SC 252 (C). The judgment of the majority of the Court was delivered by Patanjali Sastri C. J., and the conclusions reached by him after an elaborate discussion of the topic may be summarised as follows:

(1) Clause (1) (a) of Art. 286 read with the Explanation enacts a prohibition of taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are actually delivered as a direct result of such sales or purchases, for consumption in that State.

(2) Article 286 (2) banning the imposition of tax by a State on sales or purchases taking place in the course of inter-State trade or commerce applies only to cases not covered by the Explanation, such as inter-State sales or purchases where goods are imported into the State, not for consumption therein, but for re-export to other States.

(3) Article 286 (2) does not affect the power of a State where goods are actually delivered as a direct result of sales or purchases, for consumption in that State to tax inter-state sales or purchases.

(9) The following passages from the Judgment would bear out the substantial accuracy of the summary we have attempted to make.

"Thus all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transactions. It should be remembered here that the Explanation deals only with inter-State sales or purchases and not with purely local or domestic transactions. That these are subject to the taxing power of the State has never been questioned".

"We are therefore of opinion that Art. 286 (1) (a) read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein in the wider sense explained above. The latter State is left free to tax such sales or purchases".

"The sale by a trader in one State to a user in another would be a sale "in the course of inter-State trade" according to the natural meaning of those words, and we can see no reason for importing the restriction that the transaction should be one between two traders only. This is, however, not to say that the ban under Cl. (2) extends to the taxing power which the delivery State is left free, under the Explanation to exercise.

We are of opinion that the operation of Cl. (2) stands excluded as a result of the legal fiction enacted in the Explanation, and the State in which the goods are actually delivered for consumption can impose tax on inter-State sales or purchases. The effect of the Explanation in regard to inter-State dealings is, in our view, to invest what in truth, is an inter-State transaction with an intra-State character in relation to the State of delivery, and Cl. (2) can therefore, have no application.

It is true that the legal fiction is to operate "for the purposes of sub-cl. (a) of Cl. (1)", but that means merely that the Explanation is designed to explain the meaning of the expression 'outside the State' in Cl. (1) (a). When once, however, it is determined with the aid of the fictional test that a particular sale or purchase has taken place within the Taxing State, it follows 'as a corollary' that the transaction loses its inter-State character and falls outside the purview of Cl. (2), not because the definition in the Explanation is used for the purpose of Cl. (2) but because such sale or purchase becomes in the eye of the law a purely local transaction."

(10) It was sought to be argued by the learned Government Pleader that the case before the Supreme Court did not call for the application of the proviso to Art. 286 (2) and that if the Supreme Court had to interpret Art. 286 in the light of the proviso, it is possible that a different conclusion might have been reached. The entire Art. 286 was before the Supreme Court and was even quoted in extenso in its judgment. We see no force in the contention of the Government Pleader.

(11) It is next argued that the decision of the Supreme Court in — 'State of Travancore-Cochin v. Shunmugha Vilas Cashew Nut Factory', AIR 1953 SC 333 (D), put a different interpretation on Art. 286 (2) of the Constitution from that adopted in the earlier case. The assessees in this case were dealers in cashew-nuts in the State of Travancore-Cochin. They imported cashew-nuts from the neighbouring districts of Madras State for export to foreign countries and claimed exemption from sales tax, but the assessing authorities rejected their claim.

The matter was taken to the Supreme Court and the arguments before that Court turned mainly on the scope of the ban imposed by Art. 286 (1) (b) of the Constitution, a question with which we are not now concerned. As regards the taxability of the purchases of cashew-nuts made by the assessees in the State of Madras, Patanjali Sastri C. J., speaking again for the majority of the Supreme Court observed:

"The respondents' contention was that the purchases were effected and the deliveries taken by their own paid servants outside the State of Travancore-Cochin, and it was thus a case of a person buying goods and taking delivery thereof outside the State and bringing them across the border after the transaction was completed in all respects outside the State.

On the other hand, the contention on behalf of the State was that though the purchases were made outside the State in the neighbouring districts of Madras, deliveries were effected through the ordinary commercial channels by employing commission agents who made the purchases and arranged for the deliveries at the respondents' depots at Trichur and Quilon.

All that can be said here is that, if the transactions took place in the manner alleged by the respondents in these two appeals, they would be exempt under Cl. (1) (a). This indeed was not disputed by the Advocate-General of the Appellate State. On the other hand if, as claimed by the Advocate-General, the purchases were effected by the employment of firms doing business as commission agents outside the State, and the deliveries were made through normal commercial channels, the transactions would partake of an inter-State character and fall under Cl. (2).

In that case, it would be unnecessary to enquire further whether they would be covered by the Explanation to Cl. (1) (a), as they would clearly be taxable under the President's order G. O. No. 7 of 1950 to which reference has been made already, as it was admitted that sales-tax was validly levied on such purchases before the commencement of the Constitution. As the taxability of such purchases on either view of the facts was not disputed, no

arguments were addressed to us on the scope of Cl. (2) and the Explanation to clause (1) (a)".
The penultimate sentence in the above quotation appears to have some support to the contention of the Government Pleader. In the earlier decision of the Supreme Court in 'AIR 1953 SC 252 (C). Patanjali Sastri C. J., had laid down quite clearly and unambiguously that the Explanation to Art. 286 (1) (a) dealt with what really were inter-State sales and purchases and invested them with an intra-state character if the conditions specified in the Explanation were satisfied.

It is difficult, therefore, to regard the observations of the learned Chief Justice in the Travancore case as having overruled the earlier and explicit pronouncement in the Bombay case, particularly when the question was not argued on the later occasion.

(12) In 'Himmatlal Harilal v. State of Madhya Pradesh', AIR 1954 SC 403 (E), Mahajan C. J., in delivering the Judgment of the Supreme Court to the effect that Explanation II to S. 2 (g) of the Central Provinces and Berar Sales-tax Act was ultra vires the State Legislature, observed as follows:

"As pointed out above, the High Court held that the new Explanation II was ultra vires the State Legislature and that the mere production of goods was not enough to make the tax payable unless the goods were appropriated to a particular contract. The correctness of this view can no longer be questioned by reason of the majority decision of this Court in 'AIR 1953 SC 252 (C)', wherein it was held that Art. 286 (1) (a) of the Constitution read with the Explanation thereto and construed in the light of Art. 301 and Art. 304 prohibits the taxation of sales or purchases involving inter-state elements, by all States except the State in which the goods are delivered for the purpose of consumption therein and that the view that the Explanation does not deprive the State in which the property in the goods passed of its taxing power and that consequently both the State in which the property in the goods passes and the State in which the goods are delivered for consumption have the power to tax, is not correct".
The learned Chief Justice evidently regarded the earlier decision of the majority of the Supreme Court in 'AIR 1953 SC 252 (C)', as an authority which remained in full force even after the Travancore case.

(13) In a recent case '1954-5 STC 269 (A)', the Madras High Court was of the opinion that the judgment of the Supreme Court in the Travancore case limited the scope of the observations of that Court in the earlier case of 'AIR 1953 SC 252 (C)'. In the Madras case, the assessees were manufacturers and dealers in matches in the State of Madras.

They sold matches to buyers outside the State and despatched the goods from Madras. They were assessed to tax on such sales for the period 1950-51. They claim exemption from sales-tax on the ground that the sales came within the purview of the Explanation to Art. 286 (1) (a) of the Constitution.

(14) No evidence had been placed before the Appellate Tribunal that the goods sold were actually delivered in an outside State for consumption in that State. The Tribunal held and the High Court agreed that there was not enough evidence to attract the operation of the Explanation to Art. 286 (1) of the Constitution.

(15) A request was made on behalf of the assessees to the High Court to remit the cases for further enquiry on the points relevant to the applicability of the Explanation of Cl. (1) (a) of Art. 286. The High Court was of the opinion that such an enquiry would be unnecessary in view of the decision of the Supreme Court in the Travancore case, which, according to the High Court, marked a departure from the earlier decision of the Supreme Court in 'AIR 1953 SC 252 (C)'.

The High Court held that 'in view of the clear pronouncement of the Supreme Court in the Travancore case', the sales in question should be regarded as having taken place in the course of inter-State trade and were therefore governed by Art. 286 (2) of the Constitution unaffected by the Explanation to Art. 286 (1) (a). In this view, the Proviso to Cl. (2) of Art. 286 and the order of the President thereunder were held to justify the levy of sales-tax on the assessees.

With due respect to the learned Judges of the Madras High Court, we are unable to construe the decision in the Travancore case as an authority for the position that inter-State sales and purchases dealt with in Cl. (2) of Art. 286 remain unaffected by the Explanation to Art. 286 (1) (a). Any other interpretation of the Travancore case would mean that in the Travancore case the Supreme Court overruled its previous decision in 'AIR 1953 SC 252 (C)', without even hinting that it was doing so.

The judgments of the majority in both the cases were delivered by the learned Chief Justice and if we are to uphold the contention that the Travancore case upset the view of the Supreme Court in the earlier Bombay case, we should have a clear pronouncement to that effect from the Supreme Court in the later case.

Having given full considerations to the arguments of the Government Pleader, we are of the opinion that the authority of the decision in 'AIR 1953 SC 252 (C)', remains unshaken by the Travancore case and that we must follow the decision in the former case wherever the facts call for its application.

(16) If the assessees in these revision petitions are able to prove facts entitling them to invoke the aid of the Explanation to Art. 286 (1) (a) the sales would be exempt from taxation. In the absence of such proof, the sales would fall within Art. 286 (2) of the Constitution and would be liable to Sales-tax under the proviso to Art. 286 (2) and the order of the President made thereunder.

It is not disputed that the turnover in these cases was liable to Sales-tax under the Madras General Sales-tax Act before 26-1-1950. The president's Order under the proviso to Art. 286 (2) of the Constitution would save the right of the Madras State to tax such sales up to 31-3-1951 if the Explanation to Art. 286 (1) (a) is found, on the facts, to be inapplicable to the sales in question.

In order to give an opportunity to the petitioners to adduce evidence as to whether the sales sought to be charged to tax fall within the Explanation to Art. 286 (1) (a), we remit the petition to the Appellate Tribunal with our opinion on the points of law raised before us. There will be no order as to costs.

(17) BHIMASANKARAM J.: I agree.

D.S.P. Answered accordingly.

(S) AIR 1955 ANDHRA 251 (V 42 C 91 Nov.)

SUBBA RAO C. J. AND KRISHNA RAO J.

Adabala Satyanarayana, Appellant v. Damisetty Nagaraju and others, Respondents.

A. A. O. No. 474 of 1952, D/- 8-3-1955, against order of Sub-J., (Principal) Kakinada, dated 20-3-1952.

Civil P. C. (1908), Ss. 48, 2(2), O. 34, R. 6 — **After sale of mortgaged properties, personal decree for balance passed under O. 34, R. 6 — Execution of personal decree — Starting point of limitation under S. 48.**

A personal decree is a decree within the meaning of its definition in S. 2 (2). Instead of driving the parties to a separate suit, O. 34, R. 6 prescribes a procedure for adjudicating conclusively the rights of the parties. Under S. 48, the terminus a quo is the date of the decree. (Para 11)

In this view where an application for execution of the personal decree is filed more than 12 years from the date of the final decree but within 12 years from the date of the personal decree; the application to execute the personal decree is not barred under S. 48; AIR 1950 Pat 491, Rel. on; AIR 1927 PC 73, Expl. and Disting; Case law Discussed. (Para 11)

Anno: AIR Com. Civil P. C., S. 2 (2) N. 6, 7; S. 48 N. 10; O. 34 R. 6 N. 6.

CASES REFERRED: Paras

(A) (V6) AIR 1919 Mad 709 : 42 Mad 52 4

(B) (V5) AIR 1918 Mad 1187 : 40 Mad 989 (FB) 5, 6

(C) (V13) AIR 1926 Mad 20 : 48 Mad 846 6

(D) (V4) AIR 1917 PC 85 : 22 Cal WN 145 (PC) 6

(E) (V13) AIR 1926 Mad 954 : 50 Mad 5 7

(F) (V37) AIR 1950 Pat 491 8

(G) (V14) AIR 1927 PC 73 : 26 Mad LW 180 9

M. C. V. Ramanujachari, for Appellant; C. Rama Rao, for Respondents.

SUBBA RAO C. J.:

The question raised in this Civil Miscellaneous Appeal is what is the starting point of limitation for executing a personal decree made in a suit on a mortgage.

(2) The appellant executed a mortgage deed for himself and as guardian of his minor son in favour of respondents 2 and 3 for a sum of Rs. 4,500/-. The mortgagees filed O. S. No. 59 of 1935 in the Court of the Subordinate Judge, Kakinada on the foot of that mortgage and obtained a preliminary mortgage decree on 9-3-1936. A final decree followed on 17-9-1937. After the mortgaged properties were exhausted, the decree-holders filed I. A. No. 549 of 1944, for a personal decree and obtained the same on 29-9-1944. Thereafter, they transferred the decree in favour of the 1st respondent.

On 20-11-1951, the transferee-decree-holder filed E. P. No. 481 of 1951 for executing the said personal decree. That application was filed more than 12 years from the date of the final decree but within 12 years from the date of the personal decree. The judgment-debtor, inter alia, contended that the application, having been filed more than 12 years from the date of the final decree, was barred by limitation. The learned Subordinate Judge rejected the contention and directed execution to proceed. The Judgment-debtor preferred the above appeal.

(3) Learned counsel contends that an application to execute a personal decree will be barred under Sec. 48, C. P. C., if it is filed more than 12 years from the date of the final decree. The relevant provisions governing the period of limitation may now be read.

Section 48: "(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from

(a) the date of the decree sought to be executed..... ..

* * * *

(2) Nothing in this section shall be deemed

* * * *

(b) to limit or otherwise affect the operation of Art. 183 of the First Schedule to the Indian Limitation Act, 1908".

The provisions of this section are clear and unambiguous. The starting point for computing the period of 12 years is the date of the decree. If a personal decree is a "decree" within the meaning of S. 48 (1) (a), an execution application filed within 12 years from the date of that decree would not be barred under the express terms of that section. Section 2 (2), Civil P. C. defines a decree to mean the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

To come under that definition, there shall be an adjudication which conclusively determines the rights of the parties. The scope of any enquiry, which culminates in the passing of a preliminary-decree, is governed by the provisions of O. 34, R. 6, C. P. C. Order 34, R. 6 says:

"Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the court on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance".

(4) Under that rule, before a court passes a personal decree, it must adjudicate upon the rights of the parties in respect of the following matters, (i) what is the amount still payable to the decree-holder after the hypothecated properties are sold and the sale proceeds are credited towards the decree, and (ii) whether the said amount is legally recoverable from the defendant. The first question is one of fact and the second is one of law. The court is called upon to decide the said question. If there is no balance still outstanding or if the application for a personal decree is barred or otherwise not maintainable, it dismisses the application.

If there is a balance outstanding and the application is legally maintainable, it passes a personal decree. It is, therefore, manifest that under Or. 34, R. 6, C. P. C., the court conclusively determines the rights of the parties in regard to the matters in controversy. An order dismissing an application for a personal decree in a mortgage suit has been held to be a "decree" within the meaning of the definition under Section 2 (2), C. P. C. See 'Subbalakshmi Ammal v. Rama Linga Chetty', AIR 1919 Mad 709 (A). If so, it cannot be contended that when a court passes a personal decree, it is not a "decree" within the meaning of the said definition.

(5) In — 'Ajayasamier v. Venkatachala Mudali', AIR 1918 Mad 1187 (B) a Full Bench of the Madras High Court held that where a mortgage decree provides for recovery of any balance from the other properties of the mortgagor in case the sale proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount, the decree-holder has, under Section 48, C. P. C., 12 years for the recovery of such balance reckoned from the time when it is ascertained to be due. In that case, no separate personal decree was passed but the mortgage decree itself provided for the recovery of the balance from the other properties

of the mortgagor if the sale proceeds of the mortgaged properties were insufficient to pay off the decree debt.

The learned Judge construed that decree as embodying two decrees and held that the period of 12 years should be reckoned from the date when the sale proceeds were found to be insufficient. At page 1191, Abdur Rahim, Offg. C. J., gave the reason for his conclusion as follows:

"When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then for purposes of execution, there is in fact, more than one decree though embodied in one document".

Though this decision in so far as it held that a mortgage decree could be split up into two separate decrees for the purpose of computing the period of limitation is no longer good law in view of the later decision of the Judicial Committee, the principle accepted by this decision viz., that, in the case of a personal decree, the period should be computed from the date of the decree, has not been overruled.

(6) Phillips J., to whom the question,

"where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after 12 years from the date of the decree as provided by Section 48, C. P. Code?"

was referred on a difference of opinion between Devadoss and Wallace JJ., brings out the distinction between such a decree and a separate personal decree in — 'Nawab Shuja Ul-Mulk v. Umir-Ul-Umra Bahadur' AIR 1926 Mad 20 (C). The learned Judge held, relying upon the decision of the Judicial Committee in — 'Khulna Loan Co. v. Jnanendra Nath', AIR 1917 PC 85 (D) and differing from that of the Full Bench in — 'AIR 1918 Mad 1187 (B)', that an application filed after 12 years from the date of the decree was barred by limitation. At page 28 he made the following observations:

"Therefore in a mortgage decree and other decrees like the present, it may well be open to the court to pass a subsequent order declaring that the second portion of the decree had become executable and directing execution to proceed, and such an order world come within the meaning of the subsequent order referred to in Section 48 (1) (b)".

These observations imply that Phillips J., recognised that, if a separate personal decree was made, that would give a starting point for executing that decree.

(7) So too, another Division Bench of the Madras High Court in — 'Swaminatha Odayar v. Thiagarajaswamy Odayar', AIR 1926 Mad 954 (E) brought out the distinction between a combined decree and a separate personal decree vis-a-vis the application of the provisions of Section 48, C. P. C. After holding that, in the case of a combined decree, the 12 years period should be computed from the date of that decree, the learned Judges made the following pertinent remarks at page 955:

"If an order was passed after the property had been sold that, for the balance, other properties of the mortgagors should be proceeded against, the present application would be in time, but no such order was passed and therefore the application is barred by S. 48 of the Civil Procedure Code".

(8) A Division Bench of the Patna High Court in — 'Nagendra Pratap v. Joharmal', AIR 1950 Pat 491 (F) had considered the question now raised in some detail. There, after the mortgaged properties had been sold under Or. 34, R. 5, a decree was passed according to terms of O. 34 R. 6 directing that, for the realisation of the balance the decree-holder could proceed against the personal and other properties of the defendants. It was contended before the learned Judges, as it is contended before us, that the execution application filed within 12 years from the date of the personal decree but beyond 12 years from the date of the final decree was barred by limitation.

The learned Judges negatived that contention and held that the application was not barred. At page 492, the learned Judges made the following observations:

"Such a decree can undoubtedly be executed by the mortgagee against the person of the mortgagor or by attachment or sale of his other properties. The object of such a rule is undoubtedly to obviate the necessity of a fresh suit to recover the balance. Because the language is "pass a decree for such balance", there is no reason why the decree-holder should not be allowed a period of 12 years from the date of the decree for the purpose of execution".

We respectfully agree with the above observations.

(9) The only case that remains to be considered is that of the Judicial Committee in — 'Banku Behari Chatterji v. Naraindas Dutt',' AIR 1927 PC 73, (G) on which strong reliance is placed by the learned counsel for the appellant in support of his contention. It is, therefore, necessary to state the facts of that case in some detail. There, one Sarat Chunder Dutt effected four mortgages upon his various properties. The first encumbered two properties only; the second and third encumbered the same two properties and thirty four others; the fourth which has given rise to the appeal, encumbered all thirty six and nominally at any rate some three others.

In 1901, the first mortgagee brought a suit on the original side of the High Court of Calcutta, making the three subsequent mortgagees and the mortgagor parties and obtained the usual preliminary decree on 27-8-1902 in respect of his mortgage and other mortgages and a final decree on 4-2-1905. The first three mortgagees were fully paid off. In regard to the fourth mortgage, there was still a large amount outstanding. In 1919, the fourth mortgagee made an application that satisfaction of his judgment might be entered in respect of a sum of Rs. 35,000/- and that he might be at liberty to execute the decree for Rs. 82,725/- being the balance of principal and interest against the legal representatives of the mortgagor.

(10) It will be seen from the aforesaid facts that the mortgage final decree was made in 1905 and the application to execute the decree by the fourth mortgagee was only made in the year 1919 i. e., long after 12 years from the date of the final decree. It will further be seen that between the passing of the final decree and the making of the application for execution, no personal decree was made in favour of the mortgagee. Another fact to be noticed is that the mortgage decree was passed by the High Court of Calcutta on its Original Side. On those facts, the appropriate Article of the Limitation Act is Article 183, which reads:

183. To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of (The Supreme Court).	12 years.	When a present right to enforce the judgment decree or order accrues to some person capable of releasing the right.

The period of 12 years under that Article would be computed from the date when the right to enforce the decree accrues to the applicant. The Judicial Committee held that the right to enforce the mortgage-decree by obtaining a personal decree or otherwise accrued to the mortgagee when the final decree was passed. At page 75, their Lordships made the following observations:

"His right to a personal decree accrued (to use the words of the Act) along with his other rights, when the final decree was made. If he wished to exercise it in time, he must also take timely steps for those proceedings which were a necessary preliminary".

The argument of the learned counsel is, in our view, based upon a misapprehension of the scope of the aforesaid observations. Their Lordships did not say that the right to execute a personal decree accrued when the final decree was made. But they designedly observed that the right to a personal decree as distinguished from a right to enforce a personal decree or execute a personal decree accrued to the mortgagee when the final decree was made. A superficial reading of those observations led to some confusion, of thought. But, to our mind, it is clear that the judicial Committee did not lay down that, if a personal decree was made, it could not be executed within 12 years from the date of that decree.

Further, that decision turned upon the express provisions of Art. 183 of the Limitation Act, which made the starting point the date when the right to enforce a decree accrues to some person capable of releasing the right whereas under Section 48, C. P. C., and Art. 182 of the Limitation Act, the starting point is the date of the decree. That decision, therefore, has no bearing upon the question raised in the present case.

(11) To summarise, a personal decree is a decree within the meaning of its definition in Section 2 (2), C. P. C. Instead of driving the parties to a separate suit, O. 34, R. 6 prescribes a procedure for adjudicating conclusively the rights of the parties. Under Section 48, the terminus a quo is the date of the decree. As the execution application was filed within 12 years from the date of the decree, it is clearly within time. The conclusion arrived at by the lower court is right.

(12) The appeal fails and is dismissed with costs.

V.B.B. Appeal dismissed.

(S) AIR 1955 ANDHRA 254 (V 42 C 92 Nov.)

SUBBA RAO C. J.

Gandavarapu Venkata Subba Rao, Defendant-Appellant v. Vavilala Kesavayya, Plaintiff-Respondent.

A. A. A. O. No. 73 of 1954, D/- 9-3-1955, against order of Dist. Court, Guntur, D/- 26-4-1954.

Civil P. C. (1908), O. 34, R. 5 — Suit on mortgage — Preliminary decree — Modification of, in appeal — Its effect on final decree and sale held in pursuance thereof — AIR 1947 All 83, Not foll.

An appellate decree supersedes the decree of the lower Court. Where in an appeal preferred from the preliminary decree in a mortgage suit the appellate decree modifies, confirms or reverses the first court decree, the appellate decree is the only enforceable decree. If in the meanwhile a final decree is passed by the lower Court, then as the final decree only carries out the directions given in the preliminary decree, the appellate decree automatically operates on the final decree passed pursuant to the original preliminary decree. So long as the final decree is kept alive, it is the duty of the Court to incorporate the amendments in the final decree. The decree-holder also may bring to its notice the modifications made by the appellate Court in execution or by a separate application. No limitation is prescribed for such an application.

Further, if in pursuance of the final decree of the lower Court a sale is held in execution thereof and the preliminary decree happens to be modified by the appellate Court before the sale is so held, the modifications must be deemed to have been automatically incorporated in the final decree, and therefore the sale held in execution thereof will be valid. And if the property would have been sold even after the amendments were incorporated in the decree, there will be no reason or justification for setting aside the sale on the technical ground that the decree amount would be different if the amendments were incorporated in the decree. AIR 1946 Mad 383, Foll.; AIR 1947 All 83, Not foll. (Para 14)

Anno: AIR Com., C. P. C., O. 34 R. 5 N. 6.

CASES REFERRED: Paras

(A) (V6) AIR 1919 Mad 938: 35 Mad LJ 507 7
(B) (V21) AIR 1934 Mad 65: 66 Mad LJ 24 8
(C) (V30) AIR 1943 Mad 449: ILR (1943) Mad 804 9
(D) (V4) AIR 1917 All 163: 39 All 641 (SB) 9
(E) (V33) AIR 1946 Mad 383: ILR (1947) Mad 132 10, 12
(F) (V38) AIR 1951 Mad 381: 1950-2 Mad LJ 537 12
(G) (V41) AIR 1954 Mad 170: 1953-2 Mad LJ 185 12
(H) (V34) AIR 1947 All 83: ILR (1947) All 40 13

R. Subramanyam, Ch. Sankara Rao and A. Ramachandraiah, for Appellant; A. Raghavaiah, for Respondent.

JUDGMENT: This is a judgment-debtor's appeal against the order of the District Judge, Guntur in C. M. A. No. 20 of 1953 confirming that of the District Munsif in Execution Petition No. 153 of 1952.

(2) The respondent instituted O. S. No. 194 of 1950 in the Court of the Subordinate Judge, Guntur to enforce the mortgage deed executed by the appellant. He obtained a preliminary decree on 1-9-1951. In due course, a final decree was made on 16-7-1952. The defendant filed an appeal in respect of a portion of the decree amount and the plaintiff filed cross-objections against that part of the decree disallowing interest. On 25-3-1953, the District Court dismissed the appeal filed by the defendant and allowed the cross-objections of the plaintiff. Meanwhile on 26-7-1952, the decree-holder filed Execution Petition No. 153 of 1952 for realising the decree amount by sale of hypotheca.

The sale was held on 10-8-1953 and the hypotheca was sold for Rs. 4,060/-. It may be mentioned at this stage that the preliminary decree was for the recovery of Rs. 5,000/-. By reason of the decree made by the appellate Court on 25-3-1953, the defendant had to pay another sum of Rs. 332-5-2 and also the costs of the appeal. After the appellate decree, neither the final decree was amended nor was the correct figure included in the execution petition.

(3) The judgment-debtor contended in the courts below that the final decree was a dependent decree and as the preliminary decree on which it was based was varied by the appellate Court, unless a fresh final decree was made or the existing decree amended, so as to bring it in confor-

mity with the appellate decree, the original decree could not be executed, and, therefore, the sale held pursuant thereto was void. This contention was negatived by both the courts. The judgment-debtor also raised before the lower court the plea that the reduction of the upset price from Rs. 18,000/- to Rs. 4,000/- was wrong. The learned District Judge held, agreeing with the court below that the sale was valid. Hence the appeal.

(4) Mr. Ramachandraiah, learned counsel for the appellant relies upon the two points which his client unsuccesfully raised in the courts below.

(5) Taking the second point first, some of the relevant facts may be stated. The suit property is a house in Guntur. It is subject to a mortgage of Rs. 18,000/-. It was fetching a monthly rental of Rs. 90/-. If the portion occupied by the Judgment-debtor was also let out, it might have fetched another sum of Rs. 25/- per month. In the first instance, the learned Subordinate Judge fixed the upset price at Rs. 15,000/- but there were no bidders. Having regard to the aforesaid facts, he reduced the upset price to Rs. 4,000/- subject to the prior mortgage. The learned District Judge also accepted, in the circumstances, that the reduction of the upset price was correct. There are, therefore, no permissible grounds for interference in a Civil Miscellaneous Second Appeal with the discretion exercised by the Subordinate Judge, having regard to all the facts placed before him and particularly when his conclusion was accepted by the appellate court.

(6) The first point of the learned counsel may be put thus: The final decree is a dependent decree, depending for its validity on the preliminary decree. When the preliminary decree was superseded by the appellate decree, unless the final decree is suitably amended to bring it in conformity with the appellate decree or a fresh final decree is made, the hypotheca cannot be brought to sale. As in this case, the property was sold pursuant to the final decree, which lost its legal force, the sale held in execution of that decree was void. This argument was subject to judicial scrutiny resulting in a conflict of views. It is, therefore, convenient at this stage to consider the cases cited at the Bar.

(7) In — 'Subbarayulu Nayudu v. Sundararaja Naidu', AIR 1919 Mad 938 (A), Abdur Rahim and Oldfield JJ., held that an application for a final decree for sale under O. 34, R. 5(2), C. P. C., is governed by Art. 181 of Limitation Act, and where there has been an appeal from the preliminary decree, time begins to run from the date of the decree on appeal, even though the appellate decree merely confirms the decree of the first court. The reason for the decision was expressed in the following terms at page 938:

"There having been an appeal and a decree of the appellate court, it is that decree which is to be enforced. The appellate decree, ordinarily speaking, must be taken to supersede the decree of the first court."

The said proposition is unexceptionable.

(8) Krishnan Pandalai J.: in — 'Ramaswamy Ayyar v. Pakkiri Pathar', AIR 1934 Mad 65 (B) had to consider the question whether the decree-holder had a right to apply for a fresh final decree after the preliminary decree was confirmed by the appellate Court. Where, there was a final decree pending an appeal filed against the preliminary decree. The appellate court on a judicial determination confirmed the preliminary decree and dismissed the appeal. The learned Judges held that the decree-holder had the right which he might exercise within three years from the date of the decree to obtain a final decree in conformity with the appellate decision, or if that is the proper way of expressing it, amending the old final decree so as to bring it into such conformity. At page 66, the learned Judge made the following observations:

"Far from it being the case that an application for a second final decree is illegal, the true doctrine is that the right to ask for a final decree arises where the preliminary decree has been under appeal from the date of the judgment in appeal. In cases where there has been a final decree in pursuance of the preliminary decree of the lower court pending the appeal, that final decree is valid and binding to the extent, but only to the extent to which it is not altered by the appellate decree, and a decree of the appellate court confirming after judicial consideration, the preliminary decree of a lower court is for this purpose one altering it".

According to this decision, a decree-holder has a right to apply for a fresh final decree or to get that decree amended suitably within three years from the date of the appellate decree. This view did not find favour with the later Bench decisions.

(9) A Division Bench of the Madras High Court consisting of Krishnaswamy Ayyangar and Kunhi Raman JJ., in — 'Balakrishnayya v. Linga Rao', AIR 1943 Mad 449 (C) made observations, though obiter, much to the same effect as follows at page 450:

"It is difficult to maintain the proposition that the decree of the High Court can be regarded as a final decree capable of execution. The correct view in a case where an appeal has been preferred from the preliminary decree is, as held in — 'Gajadhar Singh v. Kishen Jiwanlal', AIR 1917 All 163 (SB) (D), that the decree passed by the appellate court should be deemed to be the preliminary decree which has to be made final under O. 34, R. 5, C. P. C. before it can be regarded as executable. It is not necessary for the present purpose to consider whether the right course for the decree-holder is to apply for a fresh final decree or to have the final decree already passed suitably amended by incorporating the modifications as he had done neither".

(10) The learned Judges did not pursue further this line of reasoning as they disposed of the case on the question of res judicata. But another Division Bench of the same High Court in — 'Periakaruppan v. Venugopal', AIR 1946 Madras 383 (E) directly tackled this problem and expressed a definite opinion on the same. There a preliminary mortgage decree was passed on 4-5-1929. An appeal was filed against it by one of the defendants. Pending the appeal, as further proceedings in the suit had not been stayed, the trial court passed a final decree on 23-9-1933, on the basis of the preliminary decree passed on 4-5-1929.

On 26-11-1934, the appeal was allowed in part, which had the effect of reducing the decree amount. No fresh final decree was passed on the basis of the appellate decree. After the decision of the High Court, the decree-holder filed an execution petition on 23-9-1936 to execute the final decree passed on 23-9-1933, again another execution in 1939 and finally another on 31st March 1942. Along with the last execution petition he filed an application for amendment of the execution petition by substituting the amount awarded by the appellate decree in place of the amount awarded by the final decree dated 23-9-1933. The District Judge allowed the application for amendment and adjourned the execution petition for further steps.

(11) It will be seen from the aforesaid facts that the only distinguishing features of that case from the present were that the execution application was filed after the appeal against the preliminary decree was disposed of, that the sale had

not been held at the time the objections were taken, that the correct figure was embodied by way of amendment in the execution application and that the application for execution was filed three years after the appellate decree. But as in the present case, neither a fresh final decree was made nor was the final decree amended, so as to bring it in conformity with the appellate decree. The learned Judges held that the final decree was capable of execution. At page 386 Rajamannar J., (as he then was) gave the reason for his decision as follows:

"The final decree passed in the case, if it was passed before the disposal of the appeal against the preliminary decree would, in our opinion, automatically operate on the preliminary decree as affected by the decision of the appellate court. It might be affected to a greater or lesser degree. The alterations which may be necessary if they have to be made formally in the final decree already passed, would be practically the same, whether the appellate decree is one of affirmance or of variation.

In fact, the words "preliminary decree passed in this suit" which occur in any final decree for sale ought to be understood to mean the preliminary decree as affected by any appellate decision in cases where the preliminary decree is the subject of an appeal. So read, we do not see any difficulty in holding that whether the preliminary decree is affirmed in toto or is varied to any extent or in any particular the final decree could be executed, with such modifications as may be necessary in the circumstances, which might as well be made in the execution petition filed after the appellate decree." The learned Judge proceeded to state:

"We do not think that so long as the decree itself has been kept alive, there can be the bar of limitation to an application of this sort. Such application really calls upon the court to carry out modifications which in law automatically take place in the final decree already passed before the decree of the appellate court.....This clearly suggests that there is nothing in the Code which makes it incumbent on a decree-holder to make an application which would be governed by Art. 181 of Sch. I to the limitation Act to obtain any fresh relief".

Apart from the fact that I respectfully agree with the observations in this decision, being of a Division Bench, is binding on me. This decision lays down that a decree made by an appellate court automatically operates on the final decree and so long as the execution of the final decree is not barred by limitation, proper amendments can be made even in the execution application. The final decree, despite the fact that the preliminary decree was modified, continues to have legal force and remains executable as such.

(12) Another Division Bench of the Madras High Court, of which I was a member, considered the aforesaid decision and followed the same in — 'Paddaraju v. Mattapalli Raju', AIR 1951 Mad 381 (F). In that case, sale was held in execution of a final decree in a mortgage suit. Thereafter, on appeal the preliminary decree was modified by the appellate court—Whereas under the decree of the Subordinate Judge all the mortgaged properties were directed to be sold in the order mentioned in the mortgage deed, in the appeal the High Court directed that the properties purchased by the defendants 3 and 15 should be sold last. With this modification, the appeal was dismissed. It was contended before us that the sale was void, as it was held in execution of a final decree made pursuant to a preliminary decree, which was subsequently varied by the appellate Court. We repelled the contention following the decision in AIR 1946 Mad 383 (E). In — 'Kunjammal v. Krishna Chettiar', AIR 1954 Mad 170 (G) Rajamannar, Chief Justice and Venkatarama Ayyar J., held that when a decree is taken in appeal to a higher court, the decree passed in appeal supersedes that of the court below and becomes a decree in the suit itself, and thereafter it is the only decree which is capable of execution and that the period of limitation for execution would run from the date of the decree. No exception can be taken to this proposition, for it is a wellsettled principle that an appellate decree supersedes the decree of the original court.

(13) A Division Bench of the Allahabad High Court in — 'Ram Nath v. Deoki Nandan Krishna', AIR 1947 All 83 (H) took a different view from that of the Madras High Court. There, the learned Judges held that the preliminary decree passed by the trial court having been varied by the appellate court, the final decree fell to the ground and it could not be executed until it was made consistent with the preliminary decree passed by the appellate court or a fresh final decree was prepared in accordance with it, and that the application made by the decree-holder that the said decree be amended, so as to bring it in accordance with the decree passed by the appellate court, having been made after lapse of three years, was barred by Art. 181 of the Limitation Act. I would prefer to follow the Madras view to the Allahabad view.

(14) From the aforesaid discussion of the case-law, the law on the subject may be summarised thus: The appellate decree supersedes the original decree. Whether the appellate decree modifies, confirms or reverses the first court decree, the appellate decree is the only enforceable decree. As the final decree only carries out the directions given in the preliminary decree, the appellate decree automatically operates on the final decree passed pursuant to the original preliminary decree. So long as the fianl decree is kept alive, it is the duty of the court to incorporate the amendments in the final decree.

The decree-holder also may bring to its notice the modifications made by the appellate court in execution or by a separate application. No limitation is prescribed for such an application, for by that application the decree-holder only asks the court to make express what has already been automatically incorporated in the final decree. The final decree, therefore, even after the preliminary decree was varied by appellate decree continues to have legal force and validity.

The sale held in execution of that decree is not void. But difficulties might arise where a property was sold in execution of a finial decree and thereafter the entire basis of the preliminary decree was disturbed. Such sales perhaps may be set aside on the ground, not because they were void, but because there was a material irregularity and the judgment-debtor sustained substantial injury by reason of that irregularity.

But in a case where the sale would have been held even if the modifications made by the appellate decree were incorporated in the final decree, there is no reason why the sales should be set aside at all. In a case where the preliminary decree was modified by the appellate Court before the sale was held, the modifications must be deemed to have been automatically incorporated in the final decree, and therefore the sale held in execution thereof would certainly be valid. But even in such cases, where the property is sold for a large amount on the basis of the final decree, though as a matter of fact, by reason of the appellate decree, the amount has been substantially reduced, the courts might set aside the sale on the ground of an irregularity in an appli-

ction filed by the party affected by the sale, if he had no knowledge of such reduction.

But where the property would have been sold even after the amendments were incorporated in the decree, there will be no reason or justification for setting aside the sale on the technical ground that the decree amount would be different if the amendments were incorporated in the decree.

(15) In the present case, by the appellate decree, an additional amount representing interests and costs were added to the decree amount. It cannot be suggested that the properties now in question would not have been sold if those amounts were also incorporated in the decree. The sale proceeds did not even cover the amount shown in the original preliminary decree. In the circumstances, there are no grounds for setting aside the sale.

(16) In the result, the appeal fails and is dismissed with costs. No leave.

V.S.B. Appeal dismissed.

(S) AIR 1955 ANDHRA 257 (V 42 C 93 Nov.)

CHANDRA REDDY AND UMAMAHESWARAM JJ. (11-2-1955)

Tungabhadra Industries Ltd., Kurnool, Petitioner v. Commercial Tax Officer, Kurnool, Respondent.

T. R. C. No. 120 of 1953.

(a) Sales Tax — Madras General Sales-tax Act (9 of 1939) — Turnover and Assessment Rules, R. 5(1) (g) — Effect of Rule.

The effect of R. 5(1) (g) is that if railway-freight, which is payable by the buyer separately, i. e. independent of the sale considerations, is paid by him into the hands of the seller who has undertaken to transport goods, it will not be regarded as part of the turnover though it is included in the bill and would be permissible deduction. If on the other hand, the price stipulated for a commodity, is inclusive of the freight on the understanding that the goods would be delivered at the place of the buyer free of freight, it will form an integral part of the turnover. The fact that the assessee has maintained a separate railway freight katha does not bring the case within the scope of that clause. (Paras 6 and 7)

(b) Sales Tax — Madras General Sales-tax Act (9 of 1939) S. 2(i) — Turnover — Essential element of.

The essential element of turnover is that the sums collected should be towards the price stipulated or agreed to be paid by the buyer or sold as the case may be. If any discount is given by a trader by way of trade discount, that could be excluded from the turnover under Cl. (a). Otherwise, the aggregate amount collected by the dealer will be the basis of the assessment. (Para 7)

(c) Sales Tax — Madras General Sales-tax Act (9 of 1939) — Turnover and Assessment Rules, R. 18 (2) — Hydrogenated oil — Deduction under Rule.

What happens by the process of hydrogenation is, the unsaturated oleic acid present in the raw oil is converted into saturated compound, namely, stearic acid by the chemical combination of two atoms of of hydrogen with oleic acid. It is clear that there is some alteration in chemical characteristics and contents of the oil. Therefore the chemical composition of the hydrogenated oil to some extent differs from that of the groundnut oil. Therefore, the ground-nut oil subjected to the process of hydragenation is a different product because its physical qualities differ from that of the original oil and chemical composition is altered and the exemption extended to manufacturers of groundnut oil does not extend to the hydrogenated groundnut oil. (Paras 12, 13, 18 and 22)

(d) Interpretation of statutes — Fiscal enactment — Benefit of doubt — Exemption from taxation — (Civil P. C. (1908) Preamble).

It is no doubt true that in interpreting the fiscal enactment if there is any doubt or ambiguity in the expression of the legislative intent the benefit of such doubt should go to the subject, but it is equally true that when exemption from taxation or deduction is claimed they should not be extended beyond the express requirements of the language of the provision. It is for the person claiming a benefit under a provision granting exemption to establish the conditions which attract the applicability of such exemption. (Para 32)

Anno: AIR Com. C. P. C., Pre. N. 7.

CASES REFERRED: Paras

(A) ('52) 1952-3 STC Rev. 463. 16

(B) (V41) AIR 1954 Assam 170: 1954-5 STC 365 16, 17

(C) (1868) 3 Ex 71: 37 LJ Ex 73 20

(D) (1896) 1896 AC 457: 65 LJ QB 486 21

K. Rajah Ayyar, M. Ranganatha Sastri and V. Suresham, for Petitioner; Govt. Pleader (M. Seshachalapathi), for Respondent.

CHANDRA REDDY J.:

The interpretation of Rr. 18(2) and 5 (1) (g), Turnover and Assessment Rules framed by the Government in exercise of the powers conferred by R. 3, Sub-rr. 4 and 5, Madras General Sales Tax Act is involved in this Revision Case. The dispute relates to the assessment year 1949-50. The petitioner is registered as a manufacturer under R. 18. The assessee-company purchases ground-nuts and converts them into oil both refined and hydrogenated. A deduction was claimed both under R. 18(2) and R. 5 (1) (g). The department declined to grant the deduction under both the heads on the ground that in the first case the oil sold by the petitioners was not the same commodity which was obtained by pressing the kernel and in regard to the second that the freight was not included in the price of the commodity as contemplated in R. 5(1) (g).

(2) On appeal, the Sales Tax Tribunal allowed the deduction in respect of refined oil but refused it with regard to the hydrogenated oil and freight charges. The Tribunal held that the hydrogenated oil otherwise called Vanaspathi was not the same thing as the oil obtained from crushing the groundnut and therefore fell outside the scope of the R. 18(2). As regards the freight charge, it was decided that the benefit under R. 5(1)(g) was not available to the petitioners at it was not shown as something different from the price of the goods sold.

(3) The view of the Tribunal on both the matters is canvassed before us in this Revision case.

(4) We will first deal with the claim for deduction under R. 5(1)(g). Turnover and Assessment Rules, as it can be disposed of easily. The contention of Mr. Rajah Ayyar in this behalf is that deduction is allowable in the case of freight charges as they are shown as separate items in the bills.

(5) In order to appreciate this argument, it is necessary to refer to the relevant rule:

"(5) (1) The tax or taxes under S. 3 or 5 or the notification or notifications under S. 6 (1) shall be levied on the net turnover of a dealer. In determining the net turn-over the amounts specified in cls. (a) to (k) shall, subject to the conditions specified therein, be deducted from gross turn-over of a dealer—

o o o

(g) all amounts falling under the following two heads, when specified and charged for by the dealer

separately, without including them in the price of the goods sold:

(i) freight:

(ii) charges for packing and delivery and other such like services:"

(6) The point for consideration is whether freight charges in this case are covered by cl. (g). This rule requires that the freight should not be included in the price of the goods sold. In this case, undeniably, the petitioners have charged a price inclusive of the railway freight and then gave a deduction in respect of the railway freight. The effect of this rule is that if railway-freight which is payable by the buyer separately i.e., independent of the sale consideration is paid by him into the hands of the seller who has undertaken to transport goods, it will not be regarded as part of the turn-over, though it is included in the bill, and would be a permissible deduction. If, on the other hand, the price stipulated for a commodity is inclusive of the freight on the understanding that the goods would be delivered at the place of the buyer free of freight, as seems to be the case here, it will form an integral part of the turn-over.

(7) On the admitted facts of this case, it is difficult to apply cl. (g) to this case. The fact that the petitioner has maintained a separate railway freight katha does not bring the case within the scope of that clause. Mr. Rajah Ayyar, the learned counsel for the petitioner, then submitted that the sums collected from the buyer constituted only gross turn-over and to arrive at the turn-over as defined in the Act the freight deducted out of the sale-price should be excluded from it. We do not think this can be accepted. For one thing, it was not on this ground that the deduction was claimed. Secondly, we are unable to see how the definition of turn-over could be invoked in favour of the petitioner. Section 2, cl. (i), Madras General Sales Tax Act says that "turn-over" means

"the aggregate amount for which the goods are either bought or sold by a dealer whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise shall be excluded from his turn-over".

We are not concerned in this enquiry with the change introduced into this definition by the recent amendment by the Andhra Legislature. It is seen that whatever money is realised by way of consideration for the sale of goods or paid for the purchase of goods forms part of the turn-over. The essential element of turn-over is that the sums collected should be towards the price stipulated or agreed to be paid by the buyer or sold as the case may be. If any discount is given by a trader by way of trade discount, that could be excluded from the turn-over under cl. (a). Otherwise, the aggregate amount collected by the dealer will be the basis of the assessment. From what precedes, it follows that the taxing authorities rightly disallowed the claim under this head and the petition to that extent is dismissed.

(8) But, the more difficult and substantial question relates to the construction of R. 18(2), Turnover and Assessment Rules. This Rule recites:

"18 (1) Any dealer who manufactures ground-nut oil and cakes from ground-nut and/or kernel purchased by him may, on application to the assessing authority having jurisdiction over the area in which he carried on his business, be registered as a manufacturer of ground-nut oil and cake.

(2) Every such manufacturer shall be entitled to a deduction under cl. (k) of sub-r. (1) of R. 5 equal to the value of the ground-nut and (or) kernel purchased and converted by him into oil and cake provided that the amount for which the oil is sold is included in his turn-over".

(9) It is seen that but for R. 18, a dealer who buys ground-nuts for the purpose of manufacturing them into oil, will not get the benefit of any deduction. Under R. 4(2) in the case of ground-nuts, the taxation is at the purchase point. Therefore, the purchaser is allowed to deduct the price by him out of the sales both of the ground-nut or kernel thereof or oil extracted from the kernels.

(10) The point for decision is whether the exemption granted to manufacturers of ground-nut oil extends to the hydrogenated ground-nut oil popularly known as Vanaspathi. This in its turn depends upon whether the expression "oil" is comprehensive enough to include hydrogenated oil as contended by Mr. Rajah Ayyar, counsel for the petitioner or confined to oils which have not undergone the process of hydrogenation as maintained by the Advocate General. It is not necessary in this context to deal with the extreme contention of the Advocate General that the rule contemplates only relief in respect of oil so extracted from the kernels i.e., in a crude form, by oil mills, though we do not feel that this construction is warranted by the plain words of the rule.

(11) Mr. Rajah Ayyar submitted that sub-r. (2) of R. 18 was framed to give effect to sub-s. (5) of S. 3 of the Act which is in these terms:—

'Provided that—

(i) ...

(ii) Where a dealer has been taxed in respect of the purchase of any goods in accordance with the rules referred to in cl. (i) of this proviso, he shall not be taxed again in respect of any sale of such goods effected by him".

It is argued that the proviso embodies the principle that there should be no double taxation and in interpreting R. 18, this concept should be borne in mind. It may be that the object of the rule is to give effect to the conception underlying the proviso, but that is not decisive of the matter. The question for consideration is whether the interdment of the rule as gathered from its language is the one suggested for the petitioner.

We have, therefore, to consider whether the hydrogenated ground-nut oil is ground-nut oil for the purpose of sub-r. (2). To understand the relative view-points, it is necessary to ascertain the meaning and the process of hydrogenation. The meaning of the word "hydrogenate", as given in Chambers 20th Century Dictionary, is

'to cause to combine with hydrogen, as in the hardening of oils by converting an olein into a stearin by addition of hydrogen in the presence of catalyst such as nickel or palladium".

In Schmidts Organic Chemistry, it is stated:—

"Thus when oleic acid is treated with hydrogen at ordinary temperature in the presence of colloidal palladium, it yields stearic acid".

(12) In para. 6 of the affidavit filed by the petitioner's expert, it is described thus:—

'By a process of passing hydrogen into the heated oil in the presence of catalyst, the oil is hardened to a melting point of 37 degrees 'c'".

In the Chapter dealing with hydrogenation of fats in "Industrial and Manufacturing Chemistry, Part I, Organic" at page 110-a it is stated:

"Oleic acid is an unsaturated acid only differing from stearic acid by the absence of two hydrogen atoms. Several processes have been proposed for making oleic acid take up these two hydrogen atoms and become stearic acid

This fuming hydriodic acid reduces oleic acid to stearic acid so does heating with iodine other

attempts to reduce oleic acid to stearic acid have also been successful

Recently, it has been shown that when oleic acid is treated with nickel powder in the presence of hydrogen, it takes up hydrogen and gives an almost theoretical yield of hard stearic acid".

Thus what happens by the process of hydrogenation is, the unsaturated oleic acid present in the raw oil is converted into saturated compound, namely, stearic acid, by the chemical combination of two atoms of hydrogen with oleic acid.

(13) It is clear that there is some alteration in chemical characteristics and contents of the oil. Therefore the chemical composition of the hydrogenated oil to some extent differs from that of the ground-nut oil. It is argued by the learned counsel for the petitioners that the purpose of hydrogenating the oil is only to convert it into a semi-solid substance, to remove the rancidity and to give it a preserving quality and by hardening the oil it does not transform itself into a different product.

In spite of the chemical process the oil does not lose its form or its original properties. Some emphasis was laid by the counesl for the petitioners on the admission of the Government Analyst that the catalyst which was utilised in the process of hydrogenation was subsequently removed from the hardened substance. On the basis of this it is maintained that as no foreign matter exists in the hydrogenated oil it should be treated as the same substance as original ground-nut oil.

(14) We are unable to assent to this proposition. It is not the presence or absence of catalyst that determines the question. As already stated what has to be considered is whether there is a change in the chemical composition in the substance as a result of the chemical process.

(15) The position for the petitioner is summed up thus in paras 8 and 9 of the affidavit filed by its expert :

"In the language of the chemist, the fat might have undergone an intermolecular or configurational chemical change but commercially it still remains an edible fat with all the energy-giving and other properties of original oil. This is also confirmed by various other data such as digestive co-efficient, calorific value etc of the vegetable product, which is practically the same as that of the oil. Digestive co-efficient is the percentage of the fat which is absorbed by the system during digestion".

(16) In support of this contention, Mr. Rajah Ayyar called in aid a ruling of the Madhya Pradesh Board of Revenue in 'Tomco sales Department, kingsway, Nagpur v. The State', 1952-3 STS Rev. 463 (A) and another of the Assam High Court in Kapildeoram Baijnath Prasad v. J. K. Das AIR 1954 Assam 170 (B). Neither of these decisions is of any assistance to the petitioner. The first one is a case of cocogem.

Exemption was claimed from taxation for cocogem on the ground that it was a vegetable oil within the meaning of Sch 2 Central Provinces and Berar Sales Tax Act, 1947 which exempted, inter alia, from sales tax vegetable oils except hydrogenated oil. The contention of the assessee that cocogem was not a hydrogenated oil and therefore qualified for exemption found favour with the Board of Revenue. The position is different when the hydrogenated oil is sought to be brought within the purview of the rule granting deduction.

(17) In AIR 1954 Assam 170 (B) the controversy was whether Chira and Muri were forms of rice within the meaning of item 1 to Sch 3, Assam Sales Tax Act, 1947 which exempts from taxation all cereals and pulses including all forms of rice. The learned Judges there had only to consider whether these two commodities could be included in the expression "all forms of rice."

The opinion expressed by the Bench was that these articles had not lost their character as cereals. The conclusion of Sarjoo Prosad C. J. is summarised thus at P. 172:

"I am, however, inclined to think that there is much substances in the view taken by the learned Commissioner of Taxes. It has been contended on behalf of the petitioner that Chira and Muri do not require any real mechanical or chemical process for their preparation; because Chira is rice beaten and Muri is rice parched; and as such, they are simply different forms of rice".

(18) These observations cannot give rise to an argument that despite complicated chemical process, the substance subjected to that process still retains its original character. In our opinion, notwithstanding that the properties in the original oil substantially remain the same, it is difficult to regard it as oil within the connotation of R. 18 (2). The chemical contents of ground-nut oil undergo a change.

There is a difference in chemical structure between the two substances although all the chemical contents do not disappear. We, therefore, think that the ground-nut oil subjected to the process of hydrogenation is a different product because its physical qualities differ from that of the original oil and chemical composition is altered.

(19) Another argument addressed to us is that for mercantile and commercial purposes, hydrogenated ground-nut oil is ground-nut oil and is therefore oil within the intendment of R. 18 (2). It may be that the ordinary and popular sense of a commodity might furnish a test in judging whether the commodity is the same. But, we do not think that either in common parlance or for merchantable purposes hydrogenated oil is regarded as ground-nut oli.

It is popularly called Vanaspathi. In the market, it does not pass of as one of the forms of ground-nut oil. In fact, very few of the consumers are aware of the substance of the oil from which it is prepared.

(20) The Advocate General drew our attention to some passages in — 'Stanley v. Western Insurance Co.', (1868) 3 Ex 71 (C), in which the word "gas' in the clause "for such loss or damage as shall arise from explosion by gas" in an insurance policy fell to be considered. In that connection Kelly C. B., remarked thus :

"The words of the policy are to be construed not according to their strictly philosophical or scientific meaning, but in their ordinary and popular sense. Now in the ordinary language, not only of men of business, and the owners of property (the subject of insurance) but even of scientific men themselves the explosion in the present case would not be said to have been caused by gas. It was not therefore within saving to the exception, which, indeed, was obviously intended by the parties only to refer to gas in the more limited sense of ordinary illuminating gas".

To a similar effect are the remarks of Martin B..

" .... we should not be justified in adding words to give it the most artificial meaning which Mr. Quain contended for. Next, what is the meaning of "gas"? I apprehend it means gas as ordinarily understood by mankind, and not as the word may be used in works of art."

On the basis of these passages, it is argued by the Commercial Tax Department that a connotation should be given to the word "oil" as ordinarily understood in the market or by the consumers. According to the learned Advocate General a restricted meaning should be given to the

word 'oil' in the rule and should not be given a wider import than that warranted by that expression.

This case can only be used for the limited purpose, namely, as furnishing one of the criteria in judging the nature of the hydrogenated oil.

(21) The Advocate General next relied on — 'Cotton v. Vogan & Co.', 1896-AC 457 (D). There under the Metage on Grain (Port of London) Act 1872, (C.C.) S. 4 of the Corporation of London could demand a duty in respect of grain brought into the port of London for sale. The respondents brought into the port of London with the view of their being subjected to a process of grinding and crushing & then selling the meal resulting from such crushing and also the crushed grain after mixing it in certain proportion with beans, peas, oats, etc.

The respondent company opposed the levy of duty on these articles on the plea that the grain was not imported for sale and the only sale was of articles manufactured by the firm which were not subjected to duty. This contention found favour with their Lordships who opined that it was only grain that was brought in to be sold as grain that was leviable to duty and if the grain was imported for the purpose of being turned into a thing and being sold not as grain, it could not attract the relevant provisions of the Act. In our view, the doctrine of this case is not quite applicable to the instant case.

(22) In the ultimate analysis, the question has to be answered with reference to the language of the rule and with reference to the chemical changes that have been effected by the process of hydrogenation. The Advocate General particularly called in aid the following passage in the speech of Lord Herschell, who delivered the leading opinion:

"Mr. Danckwerts half argued that the thing sold might come within the definition of 'grain' contained in this statute; but I do not think that that contention is really a possible one.

The Legislature was dealing with Commercial matters in the City of London with imports the nature of which was wellknown, and if it had intended to include what had been always regarded and terated as manufactured articles, such as flour and meal, as distinguished from the natural products of earth untreated except by gathering, the language would have been altogether to that which is to be found in this statute.

Therefore, I think it is impossible to construe these words as including such products as those which were sold in the present case."

On the basis of these observations, it is contended that the Legislature was aware of the manufacture of Vanaspathi and if it were the intention to include that commodity, it would have defined the oil in a comprehensive way so as to bring within its scope Vanaspathi also. According to him, the omission is significant. We do not think that the failure to mention hydrogenated oil is decisive of the matter.

It could equally be argued that if the intendment of the section was to exclude this commodity, the Legislature would have stated so in express terms. So we cannot speculate on the presumed intentions of the Legislature in this respect. We have to give effect to the intention of the Legislature as expressed in the language of the enactment. It is not necessary for us to pursue this matter any further.

We have already expressed the opinion that hydrogenated oil is a product of ground-nut oil and it is difficult to construe the word "oil" as including such products. The answer to this question, in our opinion, seems to be clearly in the negative.

(23) Lastly Mr. Rajah Ayyar relied on the Notification issued by the Government of India on 30-7-1949 directing the containers of Vegetable oil product commonly known as Vanaspathi should bear among other things the words "hydrogenated groundnut oil or hydrogenated groundnut and cocoanut oil" as the case may be, marked in capital letters not less than half an inch high in English and the equivalent of the same in one or more vernacular languages in such a manner as to be plainly visible to any purchaser.

(24) Subsequently, the following Notification dated 14-11-1949 was issued by the Government of India :

"The question of banning the use of the words "Vanaspathi" and "Vegetable product" on the containers in which hydrogenated oil is packed has been examined and it has been since decided by Government of India not to ban the use of these words on the containers.

As there would now be no ban on the use of these words on the containers the temporary concession allowed to the industry to affix a separate label showing the words "hydrogenated groundnut oil" and its equivalent in Hindi along with their old labels is therefore being withdrawn from 1-1-1950.

All the manufacturers will be required from 1-1-1950 onwards to incorporate the words "Hydrogenated ground-nut oil" or "hydrogenated groundnut and cotton seed oil" or "hydrogenated groundnut and cocoanut oil" as the case may be and its Hindi equivalent "Mughaphali Aur Narial ka Jamaya tel" on the main approved labels.

As prescribed in the notification, the letter containing the description must be in capital letters not less than half an inch high in English. The word "Vanaspathi", "Vegetable product" and "Vegetable oil product" whenever it appears on the labels shall, however, not be more than 1/8th of an inch high in English."

(25) We fail to see how these notifications support the contention of the petitioner merely because the Government desired that it should be described as hydrogenated oil. On the other hand, it shows that hydrogenated ground-nut oil commonly known as Vanaspathi is a product of the ground-nut oil.

It should be remembered that these notifications were issued under Cl. 5(1), Vegetable Oil Product Control Order which was promulgated in exercise of the powers conferred by sub-s. (1) of S. 3, Essential Supplies (Temporary Powers) Act, 24 of 1946 and in supersession of the Vegetable Oil Product Control Order, 1946.

(26) It is useful to turn to the definition of "Vegetable Oil Product" in this order. Section 2(e) says "Vegetable Oil Product" means

"any vegetable oil subjected to a process of hydrogenation in any form or any preparation thereof for cooking purposes containing not less than 50 per cent. hydrogenated vegetable oil."

(27) This definition makes it clear that when once a vegetable oil undergoes a process of hydrogenation, it is transformed into a product of that oil. It was contended by Mr. Rajah Ayyar that on the language of the sub-section, it is only hydrogenated oil containing not less than 50 per cent. of hydrogenated vegetable oil that could be called a vegetable oil product.

We find no basis for this construction. This interpretation would deprive the definition of a good portion of its content. It contemplates two categories of the product :

(i) Vegetable Oil subjected to a process of hydrogenation in any form;

(ii) any preparation of the vegetable oil for cooking purposes with not less than 50 per cent. of hydrogenated vegetable oil.

(28) We may also refer to S. 5(1) of this Order, which is in the following words :

"Every producer and every recognised dealer comply with such directions regarding the sales, stocks and distribution of vegetable oil products as may from time to time be given to him by the controller."

As already stated it is under this provision that the two notifications mentioned above have been issued. It is manifest that hydrogenated oil is only a product of the oil from which it is prepared. The scheme of all the notifications and orders is only in accordance with this concept. The Vegetable Oil Products Control Order of 1946 also proceeds on the same assumption.

(29) Mr. Rajah Ayyar next called in aid S. 2, Vegetable Oils and Oil-cakes (Forward Contracts Prohibition) Order, 1944 :

"2. In this order.....

(i) 'article to which this Order applies' means any of the vegetable oils (whether raw, refined, or solidified) or oil-cakes specified in column 1 of the schedule to this odrer....."

It was argued that since the expression "vegetable oil" used in this section is inclusive of solidified oil which is synonymous with hydrogenated oil, we have to understand the word "hydrogenated oil" in the same sense. We doubt very much whether this reasoning is acceptable. The object of that Order was the prohibition of forward contracts inclusive of all kinds of oils, whether raw, refined or solidified.

In that context, it was not necessary for the Legislature to clarify the position and to draw a distinction between vegetable oil and vegetable oil product as nothing turned upon such a distinction. This vegetable oil product is also called hydrogenated oil and its inclusion in S. 2 is not an index to the meaning of the word "hydrogenated oil" in whatever context and in whatever enactment it occurs.

This order was issued under R. 81, sub-cl. (1), Defence of India Rules which regulated the production, distribution and maintenance of supplies of essential commodities for effective prosecution of the war.

(30) All vegetable oils, which were also essential to the life of the community, had to be controlled, among other things, in accordance with the requirements of the community. That being the only purpose of that order the essential distinction between the two commodities has not been brought out in that Order.

(31) Mr. Rajah Ayyar next invited our attention to the schedule annexed to R. 81-D in which only vegetable oils are mentioned and argued that if really hydrogenated oil was not a kind of vegetable oil, specific mention of it would have been made, for hydrogenated oils are as essential as ordinary vegetable oil for the life of the community.

This argument can be disposed of by remarking that the list is not exhaustive and is only illustrative. As is seen from the definition of essential article in R. 81-D(aa) essential article means an article which the Provincial Government or the District Magistrate, being of opinion that the maintenance of the supply thereof is essential to the life of the community, declares by order in writing to be an essential article. Under this, it is left to the Provincial Government or the District Magistrate to declare any article to be an essential article within the purview of the sub-rule.

We, therefore, feel no assistance can be derived by the petitioner by any of the notifications referred to above. On the other hand, they clearly indicate that hydrogenated oil is not oil in its original shape and therefore cannot get the benefit of R. 18(2), Turnover and Assessment Rules.

(32) Mr. Rajah Ayyar finally submitted that this being a fiscal enactment it should be construed in favour of the subject whenever there is any doubt, and as the connotation of this term is not free from any doubt, the benefit of the doubt may be given to the assessee.

It is no doubt true that in interpreting the fiscal enactment if there is any doubt or ambiguity in the expression of the legislative intent the benefit of such doubt should go to the subject, but it is equally true that when exemption from taxation or deduction is claimed they should not be extended beyond the express requirements of the language of the provision.

It is for the person claiming a benefit under a provision granting, exemption to establish the conditions which attract the applicability of such exemption. In this case, as remarked by us, it would be straining the language of the word 'oil' and enlarging the definition if we should uphold the plea of the petitioner. In our opinion, the petitioner is not entitled to invoke R. 18(2) and the decision of the appellate tribunal is correct.

(33) In the result, the petition is dismissed with costs which we fix at Rs. 250/-.

V.R.B. Petition dismissed.

AIR 1955 ANDHRA 261 (V 42 C 94 Nov.)

SUBBA RAO C. J. AND SATYANARAYANA RAJU J.

A. Ramacharlu, Appellant v. Archakam Ananthacharlu and another, Respondents.

A. A. O. No. 267 of 1952, D/- 6-4-1955 against order of Dist. Court Chittoor, D/- 4-10-1951.

Lunacy Act (1912), S. 67 (2) — Manager of Mitakshara family lunatic — Appointment of manager — (Hindu law — Joint Family) — AIR 1929 Nag. 93 Not foll.

Where the manager of a Mitakshara family is a lunatic, a manager of the joint family property cannot be appointed because such a manager will obtain no right of management over the joint property. AIR 1929 Nag 93, Not foll., 23 Mad LJ 706, Applied. (Paras 6 and 8)

Anno: AIR Man. Lunacy Act, S. 67 N. 1.

CASES REFERRED: PARAS

(A) ('12) 23 Mad LJ 706 : 17 Ind Cas 473 6, 7, 8

(B) (V16) AIR 1929 Nag 93 : 116 Ind Cas 663 7

E. Venkataramana Rao, for Appellant.

JUDGMENT: This is an appeal against the order of the District Judge of Chittoor dismissing an application filed by the appellant under Section 67 of the Lunacy Act, to adjudge his father the 1st respondent as a lunatic and to appoint him as the manager.

(2) The appellant is the son of the 1st respondent who is the alleged lunatic, and the 2nd respondent is his mother. It was alleged by the appellant in his petition that the properties mentioned in the schedule attached to the petition are the joint family properties of the appellant and the 1st respondent, that one Venkata Gowdu had taken advantage of the unsoundness of mind of the 1st respondent, brought respondents 1 and 2 under his influence and was managing the properties and appropriating the income from them.

(3) As the 1st respondent was residing at a place more than 50 miles from the District Court,

the District Judge directed the District Munsif of Madanapalle to hold an inquisition under Section 66 of the Lunacy Act. Accordingly the District Munsif made an enquiry and submitted a report, which was to the effect that there was no adequate proof of the unsoundness of mind, but that the 1st respondent was unable to manage his affairs by reason of feebleness of mind and mental infirmity. The District Judge held that the 1st respondent was unable to manage his affairs by reason of unsoundness of mind though he was in a position to manage himself.

But he held that the appointment of a manager of the property of the 1st respondent would be of no use because such a manager would obtain no right of management over the joint family properties.

(4) Section 67 (2) of the Lunacy Act runs as follows:

"When upon the inquisition it is specially found that the person to whom the inquisition relates is of unsound mind so as to be incapable of managing his affairs, but he is capable of managing himself and is not dangerous to himself or to others, the Court may make such orders as it thinks fit for the management of the estate of the lunatic including proper provisions for the maintenance of the lunatic and of such members of his family as are dependent on him for maintenance, but it shall not be necessary to make any order as to the custody of the person of the lunatic".

(5) In his petition, the appellant specifically alleged that the properties mentioned in the schedule attached to the petition are the joint family properties of himself and the 1st respondent. From the record it does not appear that the 1st respondent has any separate property.

(6) In — 'Govindan Nair v. Narayanan Nair', 23 Mad LJ 706 (A), Sundara Ayyar and Sadasiva Ayyar, JJ., had to deal with an application for the adjudication of a Karnavan of an undivided Malabar tarwad as a lunatic, and for the appointment of a manager. The learned Judges held that the property of a tarwad was not the individual property of the Karnavan and a manager appointed for a lunatic under the old Lunacy Act (XXXVIII of 1858) would obtain no right of management over the property of the tarwad but over the individual property of the lunatic for whom he was appointed and therefore the appointment of a manager would be of absolutely no use.

The learned Judges took the view that the rule that a guardian could not be appointed under the Guardians and Wards Act for an undivided member of a Mitakshara family would be equally applicable to the appointment of a manager for a lunatic of a Mitakshara family. Following the above decision, the District Judge dismissed the petition.

(7) In appeal, the counsel for the appellant relied upon a decision of the Nagpur High Court in — 'Dada v. Chandrabhaga Bai', AIR 1929 Nag 93 (B), where it was held that if a member of a joint Hindu family under the Mitakshara law was a lunatic, the courts have power to appoint a manager of the lunatic's share under the Lunacy Act where it is shown that his property is being wasted. This decision followed the view of the Calcutta High Court in preference to that of the Madras High Court. No decision of the Madras High Court which has taken a view at variance with the above decision has been placed before us. We are bound by the decision of the Madras High Court in — 'Govindan Nair v. Narayanan Nair (A)',.

(8) It is not disputed that the 1st respondent is the manager of the family and that the properties mentioned in the schedule annexed to the petition are joint family properties and there is no individual property of the 1st respondent. If so, the decision in — 'Govindan Nair v. Narayanan Nair (A)', applies to the facts of the case. In this view there are no grounds for interference with the decision of the District Judge rejecting the application.

(9) The appeal, therefore, fails and is dismissed.

V.R.B. Appeal dismissed.

AIR 1955 ANDHRA 262 (V 42 C 95 Nov.)

SUBBA RAO C. J. AND SATYANARAYANA RAJU J. (15-4-1955)

Commissioner of Income-tax, Madras, Applicant v. Krishnamma and Co., Gudur, Respondent.

Case Referred No. 107 of 1953.

Income-tax Act (1922), Ss. 23 (4) and 26A — Tribunal holding firm genuine — Refusal of registration under S. 26A.

Under S. 26A of the Act, if the Income-tax Officer is satisfied that the firm is in existence as shown in the partnership deed and the application has been properly made, he is bound to register it. He can only refuse it if he is not satisfied in regard to the aforesaid particulars. But S. 23 (4) gives him an overriding power to refuse registration notwithstanding the fact that the conditions laid down in R. 4 of the Income-tax Rules have been complied with if he assesses the firm under S. 23 (4) of the Act. Section 23 (4) does not, however, purport to prescribe an automatic refusal of registration.

Under that section discretionary power is conferred on the Income-tax Officer to refuse registration in case an assessment is under that section and where he does not purport to exercise his discretion one way or other the order refusing registration must be deemed to have been made under S. 26-A(1) having regard to the provisions of R. 4 of the Income-tax Rules. Though the procedure prescribed for the registration of a firm is the same, whether the order is made under R. 4 of the Income-tax Rules or under S. 23(4), an assessee cannot be made to suffer the penal consequences of an order of the Income-tax Officer unless an express order is made under that section. (Paras 5 and 7)

Consequently it is not open to the Income-tax Officer, after holding that a firm is genuine to pass an order refusing registration under the provisions of S. 26-A, Income-tax Act purporting to be under S. 23 of the Act but without passing any order under S. 23 (4). (Para 1)

Anno: Income-tax Act, S. 23 N. 7; S. 26A N. 7.

A. Kuppuswami, for Advocate-General and M. Kondala Rao, for Applicant; M. J. Swami, for P. S. Rama Rao, for Respondent.

SUBBA RAO, C. J.:

The Income-tax Appellate Tribunal, Madras Bench "B" has referred the following question under Section 66 (1), Income-tax Act to the High Court of Judicature, Madras:

"Whether it is open to the Income-tax Officer, after holding that a firm is genuine, to pass an order refusing registration under the provisions of S. 26-A, Income-tax Act purporting to be under Section 23 of the Act".

The reference has been transferred to this Court after its constitution.

(2)The assessee firm had five partners, one of whom was a minor represented by his father and guardian. The partnership was reduced to writ-guardian. The partnership was reduced to writing and it was registered under S. 26-A of the Act for the assessment year 1949-50. For the assessment year 1950-51, an application for the renewal of registration of the firm was filed under Section 26-A of the Act on 30-9-1950. As objection was taken to that deed on the ground that one of the partners was a minor, a fresh deed of partnership was executed on 12-10-1950 by all the partners including the quondam minor as by that time he also became a major.

For the assessment year 1950-51 as the assessee made default under Section 22 (4) of the Act, he made the assessment under S. 23 (4). On the same day, he passed an order on the application made under Section 26-A refusing registration on the ground that the deed was illegal as the minor was made liable to share the losses. He also made an observation at the end of the order to the following effect:

"At any rate I am unable to register the firm now inasmuch as the assessment of the firm is made under S. 23 (4) of the Act".

When the assessee preferred an appeal against that order, it was dismissed by the Assistant Appellate Commissioner. The assessee preferred an appeal to the Tribunal. The Tribunal held that the partnership deed was valid on the ground that the document should be viewed as conferring only the benefits of the partnership on the minor. Indeed the correctness of this position was not canvassed on behalf of the Income-tax Officer before them. They further held that the order refusing registration was not made under Section 23 (4) of the Act, and as the said deed was otherwise valid, it should have been registered under Section 26-A of the Act.

On the aforesaid facts, at the instance of the Commissioner of Income-tax the aforesaid question was referred to the High Court.

(3) Learned Counsel for the Commissioner contended that the order was made under Section 23 (4) of the Act, and therefore, though the application was properly made and though he was satisfied that the firm was in existence and was validly constituted, the' Income-tax Officer was within his rights in refusing registration.

(4) To appreciate the contention of the learned Counsel, the relevant provisions of the Act may be read:

"Section 26-A. Application may be made to the Income-tax Officer on behalf of any firm contituted under an instrument of partnership specifying the individual shares of the partners, for regisration for the purposes of this Act and of any other enactment for the time being in force relating to Income-tax or Super-tax.

(2) The application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such form and be verified in such manner as may be prescribed, and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed."

The manner of disposal of such an application is prescribed by Rr. 2 to 6-B of the Income-tax Rules. Rule 4 says:

"If on receipt of the application referred to in R. 3 the Income-tax Officer is satisfied that there is or was a firm in existence constituted as shown in the instrument of partnership and that the application has been properly made, he shall enter in writing at the foot of the instrument or certified copy as the case may be, a certificate in the following form, namely:

"This instrument of partnership—certified copy of an instrument of partnership — has this day been registered with me, the Income-tax Officer .... in the province of ..... under Section 26-A, Income-tax Act, 1922, and this certificate of registration shall have effect for the assessment for the year ending 31st March 19....."

Sub-rule 2 of R. 4 states:

"If the Income-tax Officer is not satisfied, he shall pass an order in writing refusing to recognise the instrument of partnership or the certified copy thereof and furnish a copy of such order to the applicant",

The said order is made appealable.....

Section 23 (4):—

"If any person fails to make the return required by any notice given under sub-section (2) of Section 22 and has not made a return or a revised return under sub-section (3) of the same section or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or having made a return, fails to comply with all the terms of a notice issued under sub-s. (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assesment and in the case of a firm, may refuse to register it or may cancel its registration if it is already registered.....

Provided that the registration of a firm shall not be cancelled until fourteen days have elapsed from the issue of a notice by the Income-tax Officer to the firm intimating his intention to cancel its registration."

(5) Under the said provisions, a firm for the purpose of assessment can apply for its registration. Under S. 26-A of the Act, if the Income-tax Officer is satisfied that the firm is in existence as shown in the partnership deed and the application has been properly made, he is bound to register it. He can only refuse it if he is not satisfied in regard to the aforesaid particulars. But S. 23 (4) gives him an overriding power to refuse registration notwithstanding the fact that the conditions laid down in R. 4 have been complied with, if he assesses the firm under S. 23 (4) of the Act.

Though it was suggested before us, that as one of the partners was a minor, the partnership deed was invalid, this objection was not raised before the Tribunal. The Tribunal proceeded on the basis that the deed should be construed as one whereunder the minor had only been given the benefit of the partnership. We, therefore, proceed on the basis that the partnership deed originally filed was valid and that the conditions laid down in R. 4 were satisfied.

If so, the Income-tax Officer was bound to register the same, unless he exercised his powers under S. 23 (4) of the Act.

(6) The order made by the Income-tax Officer does not disclose that he exercised his discretion to refuse registration under S. 23 (4) of the Act. He refused registration under S. 26-A on the ground that one of the partners was a minor, though he added the following rider to his order:

"At any rate, I am unable to register the firm now inasmuch as the assessment of the firm is made under S. 23 (4) of the Act."

(7) A perusal of the entire order clearly shows that the Income-tax Officer refused registration as, in his view, the provisions of R. 4 of the Income-tax Rules were not complied with. He did not

exercise his discretion under S. 23 (4), but made only a casual observation in regard to his power under that section. Section 23 (4) does not purport to prescribe an automatic refusal of registration. Under that section discretionary power is conferred on the Income-tax Officer to refuse registration in case an assessment is under that section and in this case, he did not purport to exercise his discretion one way or other.

The order must, therefore, be deemed to have been made under S. 26-A (1) having regard to the provisions of R. 4 of the Income-tax Rules. Though the procedure prescribed for the registration of a firm is the same, whether the order is made under R. 4 of the Income-tax Rules or under S. 23 (4) an assessee cannot be made to suffer the penal consequences of an Order of the Income-tax Officer unless an express order is made under that section. There is no such order in this case. We answer the question accordingly.

(8) The aplicant will pay the costs of the respondent which we fix at Rs. 200.

R.G.D. Answer accordingly.

AIR 1955 ANDHRA 264 (V 42 C 96 Nov.)

CHANDRA REDDY AND UMAMAHESWARAM JJ.

Raja V. V. Muvva Gopalakrishna Yachendra and others, Appellants v. Raja V. V. Sarvagna Krishna Yachendra and others, Respondents.

S. T. Appeals Nos. 83, 119 to 121, 85 to 88, 90 and 91 of 1954, D/- 4-3-1955, against order of Estates Abolition Tribunal, Chittoor, D/- 18-2-1954.

(a) Madras Impartible Estates Act (2 of 1904) — Inclusion of estate in schedule — Effect.

The statutory recognition of an estate as an impartible one by reason of its inclusion in the schedule to the Act precludes the parties from going behind it and finality attaches to it. The estate being impartible, the maintenance-holders cannot be deemed to be coparceners with the right to a share in the property. AIR 1954 Mad 19, Rel. on. (Paras 9, 10)

(b) Impartible Estate — Conversion into money — Effect.

The custom of impartibility does not cease with the acquisition of the estate by Government and the money equivalent of the property is impressed with the same character and therefore the maintenance-holders have no right to share along with the principal land-holder in the compensation paid. AIR 1953 Mad 185 — AIR 1948 PC 47 and AIR 1922 PC 80, Rel. on. (Para 13)

(c) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 45(3) — Creditor — Maintenance-holder.

Where the right to get the maintenance allowance is not based on a right to a share, but is obviously claimed as an incident of impartible estate, the maintenance-holder is not in the position of creditor wthin the operation of S. 45(3). Case law discussed. (Para 14)

(d) Impartible Estate — Maintenance allowance — Nature of — (Tenancy Laws — Madras Estate (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 45(3)).

Maintenance allowance does not cease to be such merely because that right is conferred under a compromise or the payment of it is charged upon the estate. AIR 1925 PC 176 and AIR 1947 PC 143, Foll. (Para 23)

(e) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 45 — Maintenance-holders — Compensation.

All cases of Maintenance payable for any reason are covered by S. 45 and maintenance-holders can only get a portion of the compensation as stated in the Act. The maximum that is allowed under the Act is 1/5th of the total compensation. (Para 25)

(f) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 41, 45(3), 46 — Deduction of peishkush.

The Act does not contemplate the Government approaching the Tribunal for adjudication upon the binding nature of the moneys due to them from the estate under S. 45(3). It is within the right of the Government to deduct all amounts due to them. Section 46 of the Act would come into play only in the case of individual creditors of either the principal land-holder or of the maintenance-holders who are excluded from the purview of S. 45(3).

If a debt is payable out of the income of the estate, that falls within the scope of S. 45(3). So far as Peishkush is concerned, apart from the proviso to S. 41, it is a debt due by the estate as it is charged upon the estate. (Para 26)

(g) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 54A — Apportionment — Extent of.

What should be apportioned is the amount deposited by the Government after making such deductions as are envisaged in sub-s. (2). It is not open to the maintenance-holders to contest the right of the Government to make the deductions mentioned in sub-section (2). (Para 26)

(h) Constitution of India, Art. 14 — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 45(4) — Validity.

Unlike members of an ordinary Hindu Mitakshara family, junior members have no interest in an impartible estate except a right to receive maintenance on account of the custom as developed in course of time. There is no question of Act 26 of 1948 depriving the junior members of any right possessed by them prior to the Act or the Act making a discrimination between one class of persons and another. Even otherwise, a law based on classification which is reasonable having regard to the object to be attained cannot be said to contravene Art. 14 of the Constitution. (Paras 27, 28)

Anno: AIR Com., Const. of India, Art. 14 N. 30.

(i) Constitution of India, Arts. 31A(2)(b), 31B — Applicability.

The definition in Art. 31A(2)(b) does not exclude the rights conferred upon the citizens by the Articles of the Constitution. It is also clear from the language of Art. 31B that it applies to any right conferred by Part III, a Chapter relating to the fundamental rights. (Para 29)

Anno: AIR Com., Const. of India, Arts. 31, 31A and 31B N. 35, 37.

(j) Constitution of India, Art. 31B — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) — Validity.

Where it is alleged that S. 45(4) of Act 26 of 1948 takes away the right conferred by Art. 14. namely, equality before the law and equal protection of the laws, it is the alleged repugnancy between Art. 14 which forms part of Part III and S. 45(4) of the Act that forms the basis of the contention and to give effect to this contention would amount, inter alia, to overlook the words "is inconsistent". Hence either S. 45(4) or the other

provisions of the Act cannot be impeached by reason of Art. 31B of the Constitution. (Para 29)

Anno: AIR Com., Const. of India, Arts. 31, 31A and 31B N. 37.

(k) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Ss. 44, 45 — Distribution among principal holder and maintenance-holder.

It cannot be said that S. 44 enjoins the tribunal to distribute the compensation in the ratio of the income from the estate enjoyed by each of the groups — The principal land-holder and his descendants as one category and all the maintenance-holders as another. Section 44(2) enacts that the values of the interests of the various groups enumerated in sub-s. (1) have to be ascertained in the manner specified in S. 45. So the machinery for working out the rights of the group is provided in S. 45. (Para 31)

(l) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 45(5) — Scope.

Section 45(5) is general in terms and will apply to all the maintenance-holders irrespective of whether their maintenance has already been fixed either under the provisions of the Impartible Estates Act or otherwise or has not been fixed. (Para 33)

(m) Interpretation of Statutes — Identical expressions (Civil P. C. (1908), Pre.).

The identical expressions used in an enactment will ordinarily carry the same meaning. (Para 37)

Anno: AIR Com., C. P. C., Pre., N. 7.

(n) Tenancy Laws — Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), S. 50 — Interim payment — Distribution.

The basis to be adopted even in regard to the apportionment of interim payments under S. 50 is the same as under S. 45(5). (Para 37)

CASES REFERRED: Paras

(A) (V41) AIR 1954 Mad 19: 66 Mad LW 231 10, 17
(B) (V19) AIR 1932 PC 216: 59 Cal 1399 (PC) 11
(C) ('88) 10 All 272: 15 Ind App 51 (PC) 11
(D) ('99) 22 Mad 383: 26 Ind App 83 (PC) 11
(E) (V5) AIR 1918 PC 81: 41 Mad 778 (PC) 11
(F) (V8) AIR 1921 PC 62: 43 All 228 (PC) 11
(G) (V40) AIR 1953 Mad 185: 65 Mad LW 756 11, 12, 13
(H) (V35) AIR 1948 PC 47: 1948-1 Mad LJ 181 (PC) 12
(I) (V9) AIR 1922 PC 80: 45 Mad 320 (PC) 13
(J) (V26) AIR 1939 Mad 614: 1939-1 Mad LJ 831 15
(K) (V29) AIR 1942 PC 3: 1942-1 Mad LJ 132 (PC) 15
(L) (V2) AIR 1915 Mad 639: 27 Mad LJ 656 16
(M) (V7) AIR 1920 Mad 242: 43 Mad 688 (FB) 16
(N) (V15) AIR 1928 Mad 713: 109 Ind Cas 872 (FB) 18
(O) (V12) AIR 1925 PC 176: 47 All 385 (PC) appeal against AIR 1921 All 120: 43 All 617 20
(P) (V34) AIR 1947 PC 143: 1947-2 Mad LJ 574 (PC) 22
(Q) ('72) 18 Suth WR 359: IA Sup Vol. 47 (PC) 24
(R) ('13) 35 All 9: 17 Ind Cas 672 32
(S) (V25) AIR 1938 Cal 740: 178 Ind Cas 913 32
(T) ('72) 18 Suth WR 91 32

Venkatarama Ayyar, V. Suresham, B. Srinivasamurthy and B. Seshachalla Ayyar, for Appellants: V. Vedantachari, T. Rangaswamy and S. C. Venkatapathy Raju, for Respondents.

CHANDRA REDDY J.:

These appeals raise a question pertaining to the Madras Estates (Abolition and Conversion into the apportionment of compensation deposited under Ryotwari) Act, 1948. The compensation was deposited in respect of the Venkatagiri Estate which was taken over by the Government after notification on 7-9-49. The estate of Venkatagiri has been in existence since Muhammadan times. On the disruption of the Moghul Empire, it owned allegiance to the Nawab of Arcot.

In addition to the payment of peishkush they had to maintain an armed force for the assistance of Government in times of disorder or rebellion. As a result of the treaty between the East India Company on the one side and the Nawab of Arcot on the other, the administration of that part of the country under the suzerainty of the latter was made over to the British. Under this treaty, the Zamindari of Venkatagiri was recognised and the Rajah had to pay to the East India Company what he was paying before to the Muhammadan rulers.

Some time later, in accordance with the arrangement entered into between the zamindars in Western Arcot and Lord Clive, the East India Company took over the responsibility for the preservation of law and order and the zamindars were relieved of the task of maintaining armed forces and in its stead they undertook to pay an additional revenue on their estates, which was added to the peishkush. It was assured that the fixed peishkush would remain unalterable.

In pursuance of this arrangement, a Sanad was granted in 1802 to the Zamindar of Venkatagiri and other zamindars embodying the terms agreed upon. Ever since, successive zamindars held the estate paying peishkush which has been invariable. In the latter half of the 19th century, the then Zamindar, Rajah Velugoti Kumara Yachama who had seven sons of whom three were given in adoption, handed over his estate to his eldest son, Rajah Gopalkrishna.

A decade thereafter, two of his sons, Muttukrishna and Venkatakrishna claimed that the father had no right to make the eldest son his successor to the estate and the property was divisible among the four sons, who remained in the family in equal shares. It may be mentioned that at that time Venugopal, the last of the sons, was a minor. Consequent upon the advice given by the father and mutual friends the claim was withdrawn and a settlement arrived at which was embodied in a document marked as Ex. A-1 in these cases.

Under the terms of this document, the Venkatagiri Estate was recognised as an impartible one with the right of primogeniture, that the other three sons should receive amounts specified therein besides a provision being made for the marriages of Venkatakrishna and Venugopal who were then unmarried and the Rajah Gopalakrishna and his successors to the estate should pay to the three brothers and to their male descendants a sum of Rs. 1,000/- by way of allowance. The purport of the clause in Ex. A-1 as regards maintenance is as follows:

Venkatagiri Estate being impartible, Sri Muttukrishna, Sri Venkatakrishna and Sri Venugopalakrishna and their Purusha Santhathi (male issue, progeny or descendants) are entitled to get allowances from the said estate. The four brothers, the last being a minor, by his father and guardian Kumar Yachama Nayudu Bahadur, appointed the Rajah of Bobbili as mediator to determine the amount of allowance to be given to the three above-named brothers and to their Purusha Santhathi. The mediator taking fully into consideration the

status of all the parties, the condition and respectability of the estate and all other matters fit to be considered, decided that Sri Rajah Gopalakrishna, Raja of Venkatagiri and those that succeeded him should pay the allowances in the manner fixed hereinbelow: "

(2) In pursuance of that decision, the Rajah and those that succeeded him undertook and accepted to pay allowance every year from the income of the estate from 6-4-1889. The three brothers should be paid at the rate of Rs. 1,000/- per month for the rest of their lives. The Rajah and his successors should pay the Purusha Santhathi and the three persons mentioned above in perpetuity in the manner aforesaid the same allowance. If, at any time, in any of the branches any male should die without any male descendant either by way of aurusa or by way of adoption the amount of allowance should go to the gnatis in his own branch according to Hindu Law. Should any of the said three branches of the family become extinct by the total absence of Purusha Santhathi either by way of aurusa or by way of adoption, the allowance being paid to their branch should be stopped subject to the condition that if there be a widow or widows left of the last male who died in that branch, one half of the allowance of Rs. 1,000/- should be paid to the widow or widows of the person who so died without Purusha Santhathi as maintenance for life. But, if there be female Santhati in that branch it shall not be paid to that female Santhati. Nor should it be paid to the Purusha Santhati of the other two branches or to either of the branches or in any other manner.

(3) In 1890, a suit was filed on behalf of Venugopal who was still a minor impeaching the settlement and repeating the claim that the estate was partible. On his attaining majority, he withdrew the suit and recognised the validity of the document. Thus, the settlement became final as regards all the brothers.

(4) In the beginning of this century, the Impartible Estates Act was passed. It contained a list of estates to be governed by the Act and this included the Venkatagiri Zamindari.

(5) In the year 1948, the Madras Legislature enacted the Madras Estates (Abolition and Conversion into Ryotwari) Act (hereinafter called the Act) for the repeal of the permanent settlement for the acquisition of the rights of the landholders in permanently settled and certain other estates in the province and for the introduction of the ryotwari estates in such estates. It provided for the payment of compensation for the acquisition of these rights. The compensation payable for the estate was determined by capitalising the net income arrived at on the principles stated in the Act.

As this compensation represented the different interests, the aggregate amount was to be apportioned as provided in S. 45 of the Act by a Tribunal appointed under the Act for the various purposes mentioned therein. The total amount of compensation payable was arrived at Rs. 38,79,839/- in the year 1950, the Government deposited Rs. 12,11,419/- as representing half the compensation under Sec. 54(a)(1) of the Act after deducting Rs. 7,28,500/- towards arrears of peishkush and land cesses etc.

(6) Petitions were filed before the Tribunal on behalf of the principal land-holder and his sons, the brothers of the principal land-holder and the appellants for the division of these amounts. In the present appeals, we are not concerned with the petitions filed on behalf of the brothers of the Rajah.

The appellants in these appeals are Krishna Bahadur, the adopted son of Venkatakrishna referred to above and his three sons. While Krishna Bahadur claimed that he was entitled to half of the advance compensation as a sharer his three sons each claimed 1/4th or 1/5th of the entire compensation. The Tribunal decided that the appellants were maintenance-holders along with the two brothers of the Rajah and that 1/5th of the compensation should be set apart for distribution among the maintenance holders under S. 45(4) of the Act.

In the apportionment of the compensation amongst the maintenance-holders, the branch of Krishna Bahadur was given Rs. 75,000/-.

(7) Against the above judgment all the parties concerned excepting the 2nd brother of the Rajah called the Maharaj Kumar who has compromised with the Rajah, have filed appeals. At present, we are only concerned with those filed by Krishna Bahadur and his three sons.

(8) The decision of the Tribunal is impugned by the appellants on various grounds: (1) the Venkatagiri estate having been constituted an impartible estate by agreement of parties under Ex. A. 1, and the Impartible Estates Act having been repealed, the compensation payable for the acquisition of the estate has become partible and therefore the appellants are entitled to an equal share with the principal landholder and his descendants as a coparcener; (2) as the allowance was agreed to be paid in lieu of a share they are in the position of creditors and not maintenance-holders; and it ought to have been capitalised by 33.1/3 years' purchases; (3) at any rate the peishkush and land cess deducted from half the total compensation should have been debited to the share of the principal landholder and 1/5th of the compensation set apart for the maintenance-holders should have been out of the aggregate amount and not out of the deposit as made; (4) the provision in S. 45(1) limiting the amount payable to all the maintenance-holders as 1/5th of the total compensation is ultra vires as it offends against Art. 14 of the Constitution.

(9) On the first point, the argument was that the Venkatagiri estate was a partible one till the year 1889, when Ex. A. 1 came into existence and it is only by virtue of the arrangement between the parties that the estate was converted into an impartible one. It was urged that this estate was being partitioned among the various branches till that date. The purpose for which the document had been brought into existence being to preserve the integrity of the estate by making it impartible, having failed, the parties are relegated to the original position, and the petitioners are therefore entitled to a share as coparceners along with the principal landholders.

The basis of the contention that the estate was made impartible by contract in 1889 is the recital in Ex. A. 1, that the three brothers of Rajagopalakrishna claimed an equal share along with him and that they were given a 1/4th share each in the moveable properties, and secondly, a passage in the Nellore District Manual which shows that there were two instances of division in the family in the 19th century.

We think there is no foundation for this argument either on the terms of Ex. A. 1 or in general law. It is categorically stated in the document that the estate was impartible and the brothers were entitled to get allowance from the estate. The mere fact that a claim was put forward for a share does not indicate that the estate was partible before and the impartible estate was the result of contractual consensus.

The whole document proceeds on the assumption that it was an impartible estate from the beginning. It should also be borne in mind in this context that the estate was of a military tenure. The letter written by Lord Clive at the time of the issue of the sanad bears this out. Having regard to the nature of the tenure, it must be taken to be an impartible one. Excepting the two instances referred to in the District Manual, which look like political events more due to the intervention of the Nawab of Hyderabad, who by that time seems to have obtained suzerainty over this area, there has been no case of division of this estate for nearly two centuries.

That apart, the statutory recognition of the estate as an impartible one by reason of its inclusion in the schedule to the Impartible Estates Act 2 of 1904 precludes the parties from going behind it and finality attaches to it.

(10) As pointed out in — 'Lalithakumari Devi v. Rajah of Vizianagaram', AIR 1954 Mad 19 (A) by Rajamannar C. J., the inclusion in the schedule was as a result of an enquiry by the authorities concerned and therefore finality attached to it. The estate being impartible, the appellants cannot be deemed to be coparceners with the right to a share in the property.

(11) The nature and incidents of an impartible estate have been summed up by Sir Dinshaw Mulla in — 'Shiba Prasad v. Prayaga Kumari Debee', AIR 1932 PC 216 (B), in the following words:

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property the members of the joint family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral in the very nature of the estate.

The second is incompatible with the custom of impartibility as laid down in — 'Sartaj Kuari v. Deoraj Kuari', 10 All 272 (C), and the first Pittapur case, — 'Venkata Surya Mahipathi Rama Krishnarao v. Court of Ward', 22 Mad 383 (D), and so also the third as held in the second Pittapur case, — 'Gangadara Rama Rao Bahadur v. Raja of Pittapur', AIR 1918 PC 81 (E). To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property.

But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains, and this is what was held in — 'Baijnath Prasad v. Tej Bali Singh', AIR 1921 PC 62 (F). To this extent, the estate still retains the character of joint family property, and is devolution is governed by the general Mitakshara law applicable to such property.

Though the other rights, which a 'coparcener acquires by birth in joint family property no longer exist, the birth-right of the senior member to take by survivorship still remains."

The law as declared in this case was affirmed in the subsequent decisions of the Privy Council. In a recent decision of the Madras High Court — 'Janardhana Krishna Rangarao v. State of Madras', AIR 1953 Mad 185 (G), the case law on the subject was reviewed. Rajamannar C. J., and Venkatarama Ayyar J., expressed the opinion that a junior member had no interest in the impartible estate at the time of the notification, the material time for the purpose of determining the rights of the paries being the date of the notification, by virtue of which the estate is statutorily transferred to the Government.

We express our respectful accord with the doctrine laid down in that case. That was a case filed by a junior member of the Bobbili estate under Art. 226 of the Constitution claiming an equal share along with the principal land-holder in the compensation deposited under S. 54(A). In the view taken by the learned Judges, the petition was dismissed.

(12) Does the fact that the estate was converted into money change the character of the money equivalent? The answer to this is contained in some of the pronouncements of the Privy Council and the Madras High Court in AIR 1953 Mad 185 (G), referred to supra.

In — 'Kochunni v. Kuttanunni', AIR 1948 PC 47 (H), the question that arose for consideration there was whether the properties attached to the Sthanam of the Muppil Nair of Kavallappara estate were Tarwad or joint family properties and whether the holding was converted into ryotwari tenure by the levy of land-revenue and if a conversion had taken place whether the other members of the Tarwad had an interest in the Sthanic properties.

After negativing the contentions of the members of the Tarwad that the properties were those of the Tarwad and the levy of land-revenue had resulted in the conversion of the Sthanam properties into ryotwari tenure, their Lordships proceeded to observe

"that even if any conversion did take place it was so, as the High Court observes in one part of the judgment, (at page 176, line 38 of the record) only in relation to the Government and not in relation to the other members of the family, with reference to whom the lands continued to enjoy the benefits of the incidents which were previously attached to them."

(13) A contention similar to the one raised in these cases was repelled by the Bench in AIR 1953 Mad 185 (G). It was argued that with the taking over of the impartible estate under the Act and the conversion of the impartible estate into money the incidents of impartibility attached to the estate had ceased and consequently compensation amount should be regarded as the property of the joint family consisting of all the members of the family.

This argument did not find favour with the learned Judges. It was held that the incident of impartibility continued even after the estate was acquired by the Government and compensation paid therefor. The learned Judges remarked:

"It is obvious that only persons who have interest in the property which is acquired are entitled to a share in the compensation awarded on the acquisition of the property by the Government." Following the view enunciated in this case, we hold that the custom of impartibility did not cease with the acquisition of the estate and the money-equivalent of this property was impressed with the same character and therefore the appellants had no right to share along with the principal land-holder in the compensation paid. As pointed out in the latter case, conversion of this nature would not alter its quality and its essential characteristics will attach themselves to the money equivalent. Vide — Ramachandra Rao v. Ramachandra Rao', AIR 1922 PC 80 (I). This issue is therefore found against the appellants.

(14) The next point is whether the appellants are in the position of creditors and their claim falls within the operation of S. 45(3) of the Act. It was argued that the allowance of Rs. 1,000/- a month to each of the brothers was stipulated to be paid in lieu of a share in the estate, that

it came into existence only from the date of Ex. A-1 and that the fact this money payment was described as an allowance established such a claim. We do not think that the recitals in this document are fatal to this contention. Nowhere in Ex. A-1 is it stated that the allowance of Rs. 1,000/- was agreed to be paid in lieu of a share. In fact, in cl. 5 of the document, it is stated that the brothers were entitled to get the allowance because Venkatagiri was impartible. It is therefore clear that the right to get this allowance is not based on a right to a share, but it is obviously claimed as an incident of impartible estate. In fact, the sum of Rs. 1,000/- was not the amount mentioned by one party and accepted by the other. This was fixed by the Rajah of Bobbili as a mediator who arrived at the figure after taking into consideration several factors mentioned therein.

(15) It may also be mentioned that the parties, namely, the appellants always treated this allowance as maintenance allowance. In I. P. No. 27 of 1930, Nellore, Krishna Bahadur claimed that this was maintenance and it could not be attached by creditors. This was upheld by the Subordinate Judge. In 1945 the same claim was put forward as is evident from the judgment in A. S. No. 195 of 1946 on the file of the Madras High Court. Giving evidence in O. S. No. 24 of 1945 out of which the abovementioned appeal arose, Krishna Bahadur said that a sum of Rs. 1,000/- was being paid to him by way of maintenance which he utilised for maintaining himself and his family. This long course of conduct shows that the parties understood it only as maintenance. In fact in — 'Maharaja Sahib of Venkatagiri v. Raja Rjeswara Rao', AIR 1939 Mad 614 (J) and — 'Kumar Krishna Yachendra v. Rajeswara Rao', AIR 1942 PC 3 (K), the High Court of Madras and the Privy Council, respectively proceeded on the footing that this allowance was maintenance allowance.

We therefore think that the allowance agreed to be paid under Ex. A-1 was only maintenance allowance and the agreement did not give rise to any higher rights and the position of a debtor and creditor was not created thereunder. The word 'allowance' used in the document is a neutral expression not connoting anything by itself. It can acquire a particular meaning only when the purpose is ascertained. In the context of Ex. A-1 it could have reference only to maintenance.

(16) There are difficulties in the way of regarding this claim as a debt. It is provided in the document that this allowance would lapse on the failure of the male descendants, and the collaterals could not get it. If it is debt, it could be transferable, but under the terms of the document, such a course is not permissible. In — 'Venkatappa Nayanim Bahadur Varu v. Rajah Thimminayanim Bahadur Varu', AIR 1915 Mad 639 (L), a Bench of the Madras High Court ruled, inter alia, that an allowance agreed to be paid under similar circumstances was a maintenance allowance and that persons in enjoyment of it would not be regarded as creditors of the estate. It is true that this case was overruled in — 'Poovvanay Ayissa v. Kundron Chokru', AIR 1920 Mad 242 (M), by a Full Bench on the question of registration of a charge over property not involved in the suit. But, nothing is said against the principle stated above.

(17) To substantiate the contention on this branch of the case Mr. Venkataramana Ayyar relied on the observations made by Rajamannar C. J. in AIR 1954 Mad 19 (A), as to the nature of the provision for payment of a monthly allowance of Rs. 5,000/- made by Chitti Babu, the then Rajah of Vizianagaram, to his younger son, Vizia, in a trust deed executed in the year 1912. The learned Judge stated that this amount of Rs. 5,000/- was not liable to variation particularly by way of diminution. The reasoning in support of this conclusion was that the settlor was conveying practically all his properties to the trustee for the benefit of the eldest son, the second son at that time being a minor, that the result of the conveyance to the eldest son would mean leaving the younger son with nothing, that there was no reason for the settlor to treat the second son in an unfair way and the latter must have thought of making some provision to the younger son. The learned Judge added that if Chitti Babu had died intestate all the properties other than the impartible estate would have become divisible amongst both the sons. It may be mentioned that the other learned Judge expressed a different opinion on this aspect of the matter. His view was that this allowance was liable to be reduced under S. 14, Impartible Estates Act. Be that as it may, the remarks of Rajamannar C. J. can have no operation in the instant case. In the case cited, the benefit conferred under the trust deed on the elder son was burdened with certain obligations and when the beneficiary elects to take the benefit, he must also bear the burden created thereby. Moreover, the question for decision in this case is not whether the allowance could be varied but relates to the distribution of compensation and it is the criterion furnished by the provisions of S. 45 of the Act that should be applied.

(18) Reliance was next placed on — 'Thimmannayanim v. Venkatappa Nayanim', AIR 1928 Mad 713 (FB) (N). What was called in aid by the counsel for the appellants is the principle stated by Odgers J. at page 722 that where the right of maintenance is made the subject of a compromise which has been incorporated in a decree, the Court has no power to alter it without consent or override the decree. That doctrine has no application to this case as the allowance fixed is not the subject of a compromise which has been incorporated in a decree.

(19) It was argued for the appellants that as the allowance was agreed to be paid by reason of a claim having been put forward for a share and as this allowance was made a charge on the estate as seen from the recital in Ex. A-1 that the zamindar could enjoy the impartible estate only subject to the payment of it, this could not partake of the character of maintenance, but it is only an annuity. This argument lacks force. As regards the first part of the argument we have already stated that the terms of Ex. A-1 show that the reason for agreement to pay allowance is not the claim for a share but the parties thought that the junior members of the family were entitled to maintenance by virtue of the estate being an impartible one. Even otherwise, the two circumstances relied on by the appellants will not change the character of the allowance.

(20) In this context, two of the pronouncements of the Privy Council may be usefully noticed. In — 'Rajindra Narain Singh v. Mt. Sundar Bibi', AIR 1925 PC 176 (O), a creditor sought to attach and sell the right and interest which a judgment-debtor had in sixteen zamindari villages, which he was put in possession of in a compromise of a suit brought by him to eject his brother from a zamindari estate. The deed provided, inter alia, that the plaintiff therein (i.e., the judgment-debtor) and after his death his male issue in the male branch should hold and possess the villages yielding a profit of Rs. 8000/- a year in lieu of maintenance without power of transfer during the life-time of his brother etc. The execution petition

was resisted on the ground that the judgment-debtor's interest was a right to future maintenance within S. 60(1), Civil P. C. and therefore not liable to attachment and sale. This objection found acceptance with the Subordinate Judge. The High Court of Allahabad on appeal disagreed with the trial Court on the legal position as to the nature of the judgment-debtor's interest in the property. The learned Judges remarked:

"It is not easy to define in legal terminology the precise interest of the judgment-debtor, Rajindra Narain Singh, in the fund provided by this compromise. Perhaps the nearest definition would be that he is an annuitant subject to certain defined charges, with a reversionary interest in the corpus upon the death of his brother Lal Bahadur Singh."

Further down in the judgment, it is stated:

"We are unable to take the view that an arrangement of this kind is in any way contemplated by or covered by the expression 'a right to future maintenance'."

We are not concerned here with the further directions issued by the High Court in remitting the application to be dealt with according to law in the light of their decision.

(21) On appeal by the judgment-debtor, the Privy Council differed from the High Court on this aspect of the matter and made the following observations:

"Their Lordships do not agree with the High Court on the subject of the actual legal position of the right of maintenance conferred upon the judgment-debtor. That right of maintenance arose under a compromise which was made between the judgment-debtor and his brother. The compromise agreement is not produced, but its terms are said by the parties to be recorded in a decree pronounced by the Subordinate Judge of Janpur on 20-5-1915.

The substance of this agreement is that the judgment-debtor, one of the two brothers parties to the compromise, was declared to have a right of maintenance in certain villages enumerated, the right being conferred expressly without power of transfer."

(22) A similar view was also taken by the Privy Council in — 'Commr. of Income Tax, Central and United Provinces v. Mt. Bhagwati', AIR 1947 PC 143 (P). A Hindu widow claimed that she was entitled to a share of her husband contending that her husband died as a separate member of the family. Ultimately, she and the surviving members of the family entered into a compromise, the terms of which, inter alia, were that the widow was not entitled to a share in the estate that she should be paid as maintenance allowance a sum of Rs. 1,000/- every month and a charge created over all the immoveable properties for the payment of this money.

This allowance was sought to be taxed by the Income-tax Department while the widow claimed exemption on the ground of its being maintenance. The contention of the Income-tax Department having been negatived by the High Court, the matter was taken in appeal to the Privy Council with no better result. Their Lordships rejected an argument put forward on behalf of the appellants that by a deed of agreement the widow had surrendered her right to maintenance from the joint family income, and got substituted in its place the money allowance which, on account of its character as such, had become taxable in their hands.

It was remarked that the respondent by virtue of that document "effectively secured her maintenance right which was an inchoate one by getting a charge to safeguard it".

(23) The principle that can be deduced from these two rulings is that maintenance allowance does not cease to be such merely because that right is conferred under a compromise or the payment of it is charged upon the estate.

(24) It was further contended on behalf of the appellants that as this allowance is payable from generation to generation, it is a heritable annuity and not a maintenance which is payable in an impartible estate and limited to a particular degree. Being an annuity, argues the learned counsel, it should be capitalised by 33.1/3 years' purchase. He cited to us cases of land acquisition where the value was arrived at by capitalising the net annual income by a number of years' purchase.

We do not think that there is any scope for claiming the allowance in this case as a heritable annuity. Every person who receives the benefit under the document is a direct object of bounty and he does not claim it through his predecessor or his ancestor. There are also difficulties in the way of treating it as a heritable estate. If it is so regarded, the restriction of this rights to male descendants would create an estate called tail male unknown to Hindu Law and would offend against the doctrine of Tagore's case, — 'Jotendromohun Tagore v. Ganendromohun Tagore', 18 Suth WR 359 (Q).

Nor would the principles applicable to land acquisition cases bear on the instant case, because it is not an absolute or heritable interest. As already pointed out, when a branch became extinct, by total absence of male issue or descendants the allowance would be stopped. So, it is an interest contingent upon each branch having a male issue and it is difficult to see by how many years' purchase the allowance would be capitalised. We have already stated that this allowance is a maintenance allowance traceable to the custom.

Further, if the maintenance has become payable either under an instrument in writing or a contract or a family arrangement out of the income of the estate, it will be governed by the provisions of the Act. The claim in this case is put forward on the basis of a contract or family arrangement evidenced by Ex. A. 1, whatever might be the description of the payment to be made to the parties. Consequently, it falls, in our opinion, under S. 45. The Act itself provides a complete Code for the determination of the aggregate compensation and the apportionment thereof amongst the various interests and the parties will have to seek their rights and remedies within the four corners of the Act.

Section 45 recites:

"45(1): In the case of an impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto immediately before the notified date, the following provisions shall apply:

(2) The Tribunal shall determine the aggregate compensation payable to all the following persons, considered as a single group:

(a) the principal landholder and his legitimate sons, grandsons and great grandsons in the male line living or in the womb on the notified date, including sons, grandsons and great grandsons adopted before such date (who are hereinafter called 'sharers'): and

(b) other persons who immediately before the notified date, were entitled to maintenance out of the estate and its income either under S. 9 or S. 12 Madras Impartible Estates Act, 1904 or under any

decree or order of a Court, award, or other instrument in writing or contract or family arrangement which is binding on the principal landholder (who are hereinafter called 'maintenance holders')".

(25) It is seen that for purposes of apportionment of the compensation all the maintenance holders are regarded as a single group and what is to be set apart for this group is specified in cl. (4) thus:

"The portion of the aggregate compensation aforesaid payable to the maintenance-holders shall be determined by the Tribunal and notwithstanding any arrangement already made in respect of maintenance whether by a decree or order of a Court, award or other instrument in writing or contract or family arrangement, such portion shall not exceed one-fifth of the remainder referred to in sub-s. (3) except in the case referred to in the second proviso to S. 47, sub-s. (2)".

It is therefore clear from the provisions of the section that all cases of maintenance payable for any reason are covered by that section and that they can only get a portion of the compensation as stated in the Act. The maximum that is allowed under the Act is 1/5th of the total compensation. In these cases, the Tribunal has allowed the maximum compensation. Therefore this contention also fails.

(26) Coming now to the third submission, the case of the appellants is that firstly since no application was filed by the Government as contemplated under S. 45(3) and therefore no adjudication by the Tribunal as regards the binding nature of the debt, the Government was not entitled to deduct any sum towards arrears of peishkush or land-cesses, and, secondly, that since this is a debt payable by the zamindar personally, the peishkush and land-cess deducted by the Government can only be dealt with under S. 46 of the Act.

We do not think that we can accede to either of the two propositions. Under the proviso to S. 41, the Government is given the right to deduct from the amount to be deposited all moneys due to them in respect of peishkush and any other claim which was secured immediately before the notified date by mortgage or charge on the estate or any portion thereof. The Act does not contemplate the Government approaching the Tribunal for adjudication upon the binding nature of the moneys due to them from the estate under S. 45(3).

It is within the right of the Government to deduct all amounts due to them. Section 46 of the Act would come into play only in the case of individual creditors of either the principal landholder or of the maintenance-holders who are excluded from the purview of S. 45(3). If a debt is payable out of the income of the estate, that falls within the scope of S. 45(3). So far as peishkush is concerned, there can be no doubt that apart from the proviso to S. 41, it is a debt due by the estate as it is charged upon the estate.

It was urged that the land-cess payable by the zamindar cannot be deducted under S. 41(1) as it cannot be said to be a claim secured immediately before the notified date by a mortgage, or charge on the estate or any portion thereof. On the other hand, it was contended for the respondents that the land-cess alone forms a claim which was secured by a charge on the estate by reason of the Madras Revenue Recovery Act. We feel there is more force in the argument addressed by the Government Pleader.

However, it is not necessary for us to adjudicate on the merits of the relative contentions in view of the provisions of S. 54A of the Act. It is advance payment of compensation that is sought to be apportioned amongst the various interests. This was deposited under S. 54-A and the mode of distribution must be in the manner provided by that section. Section 54-A is in these terms:

"Sec. 54A(1): In the case of every estate not governed by S. 38, the Government shall estimate roughly the amount of the compensation payable in respect of the estate, and deposit one-half of the amount within six months from the notified date in the office of the Tribunal, as advance payment on account of compensation:

Provided that in the case of an estate notified before the commencement of the Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950, the deposit may be postponed to a date which is not later than the 30th day of June, 1950.

(2) From the amount to be deposited under sub-s. (1) the Government shall be entitled to deduct

(a) one half of all money referred to in the proviso to S. 41(1) and

(b) one half of the basic annual sum referred to in sub-s. (3) of S. 50, if the deposit in pursuance of this section is made in the fasli year in which the estate is notified but after the interim payment in respect of that fasli year has been deposited under S. 50.

3. On the making of a deposit in pursuance of this section, the Government shall be deemed to have been completely discharged in respect of all claims to, or enforceable against, the amount deposited.

4. The Tribunal shall, after such inquiry, if any, as it thinks fit apportion the amount deposited in pursuance of this section among the principal land-holder and the other persons referred to in S. 42, as far as possible in accordance with the value of their respective interests; and the provisions of Ss. 42 to 46 (both inclusive), 48, 49, 51, 52 and 53 shall apply mutatis mutandis in respect of the amount deposited."

It is clear from sub-s. (4) that what should be apportioned is the amount deposited by the Government after making such deductions as are envisaged in sub-s. (2). It is, therefore, not open to the maintenance-holders to contest the right of the Government to make the deductions mentioned in sub-s. (2), In the circumstances, no exception could be taken to the deduction made by the Government, and the maintenance-holders could claim only a share in the deposit as made under that section. We, therefore, agree with the view of the Tribunal on this point also.

(27) There remains the issue on the constitutional validity of the Act limiting the share of the maintenance-holders to a maximum of 1/5th. Section 45(4) which contains the relevant provisions is impugned as offending against Art. 14 of the Constitution. It is complained that this sub-section makes a discrimination against the junior members of zamindari families.

Another ground of attack is that while a junior member of an ordinary Mitakshara family is entitled to an equal share along with the managing member of such a family that right is denied to junior members in an impartible estate and in its stead a very meagre share is given to persons in the position of the appellants in the compensation which represents the value of the estate. We think this is an untenable contention.

For one thing, unlike members of an ordinary Hindu Mitakshara family, junior members in the position of appellants have no interest in an impartible estate except a right to receive maintenance on account of the custom as developed in course of time. There is no question of the Act

depriving the junior members of any right possessed by them prior to the Act or the Act making a discrimination between one class of persons and another.

(28) Even otherwise, a law, based on classification which is reasonable having regard to the object to be attained, cannot be said to contravene Art. 14 of the Constitution. That Article does not mean that law must be general in character and universal in application. The State Legislatures of the country have certainly powers to classify persons who could be governed by particular laws and in making those classifications they have wide latitude and discretion. The only thing is that the classifications must be reasonable having regard to the object of the legislation.

(29) But, this controversy need not detain us any further in view of Art. 31-B of the Constitution, which precludes an attack on the constitutional validity of any of the enactments included in Sch. 9. In this context, it is essential to set out the terms of Art. 31-B:

"Without prejudice to the generality of the provisions contained in Art. 31-A none of the Acts and Regulations specified in Sch. 9 nor any of the provisions thereof shall be deemed to be void or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any Court, or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."

It is not disputed that the Madras Act 26 of 1948 is specified in Sch. 9. But Mr. Venkataramana Ayyar sought to exclude the operation of this Article on the ground that the word 'right' taken away or abridged by virtue of the acts impugned is only confined to that defined in Art. 31-A(2)(b) which says that the expression 'rights' in relation to an estate shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediary and any rights or privileges in respect of land revenue.

This definition does not bear out the contention of the counsel for the appellants. It does not exclude the rights conferred upon the citizens by the Articles of the Constitution. It is also clear from the language of Art. 31-B that it applies to any right conferred by Part III, a Chapter relating to the fundamental rights. In fact, it is the argument of the learned counsel that the material provision of Act 26 of 1948 takes away the right conferred by Art. 14, namely, equality before the law and equal protection of the laws.

Again, Art. 31-B says that the constitutionality of Acts or any of the provisions thereof enumerated in Sch. 9 cannot be attacked on the ground of inconsistency with any provision of Part III. It is the alleged repugnancy between Art. 14 which forms part of Part III and S. 45(4) of the present Act that forms the basis of this contention & to give effect to this argument would amount, inter alia, to overlook the words "is inconsistent". It follows that either S. 45(4) or the other provisions of the Act cannot be impeached by reason of Art. 31-B of the Constitution, and therefore the argument founded upon Art. 14 has to be rejected.

(30) In the result all the appeals are dismissed.

S. T. A. Nos. 85, 86, 87 and 88 of 1954.

(31) We will now deal with the appeals filed by the Rajah against the judgment of the Tribunal allotting 1/5th of the compensation to the maintenance-holders. The judgment of the Tribunal is assailed on behalf of the Rajah on the contention that effect is not given to S. 44 which directs the Tribunal to apportion the compensation amongst the principal land-holder and other persons referred to in that section as far as possible in accordance with the value of their respective interests in the estate.

According to the appellants, this section enjoins the Tribunal to distribute the compensation in the ratio of the income from the estate enjoyed by each of the groups — the principal land-holder and his descendants as one category and all the maintenance-holders as another. What is argued is that the three branches of the maintenance-holders were paid an annual maintenance of Rs. 36,000/- out of a net income of Rs. 6,00,000/- derived from the estate and the balance enjoyed by the zamindar and his sons and grandsons.

It is in this proportion that the compensation deposited by the Government has to be divided. It is further submitted by Mr. Vedanthachari that it is not in every case that 1/5th of the compention should be set apart for the maintenance-holders. What is envisaged by S. 45(4) is only cutting down the amount to a 1/5th in cases where the calculation on the basis suggested by him exceeds 1/5th and does not empower the Tribunal to set apart 1/5th if the valuation of the maintenance-holders in the manner indicated above falls far short of the 1/5th.

Any mode other than the one suggested by him for determining the value of the principal-holder on the one hand and that of the maintenance-holders on the other is repugnant, argues the learned counsel, to the principle embodied in S. 44. We do not think we can assent to this contention. Section 44(2) enacts that the values of the interests of the various groups enumerated in sub-s. (1) have to be ascertained in the manner specified in S. 45. So, the machinery for working out the rights of the group is provided in S. 45

(32) Mr. Vedanthachari placed before us three rulings, namely, — 'Hirde Narain v. Mrs. M. J. Powell', 35 All 9 (R); — 'Surendranath Sarkar v. Pyari Charan', AIR 1938 Cal 740 (S) and — 'Bhageeruth Moodee v. Rajah Jabur Jummah Khan', 18 Suth WR 91 (T), to support his argument. All these cases relate to the division of compensation paid under the Land Acquisition Act and they laid down that the amount should be divided between persons interested therein in proportion to the value of the interests enjoyed by them.

These rulings would have been of some guide if the method of valuation of the respective interests of each of the groups enumerated in the Act is not indicated therein. As the manner of computation is specified in S. 45, it is not open to us to look to other methods of evaluating the interests of those persons. In the circumstances, these cases cannot have much of bearing on the decision of the point involved in these cases.

(33) If the meaning attributed by Mr. Vedanthachari to the clause "as far as possible in accordance with the value of their respective interests in the estate" is to be accepted as correct, the Legislature would not have enacted S. 45(a) which reads:

"The Tribunal shall, in determining the amount of the compensation payable to the maintenance-holders and apportioning the same among them, have regard, as far as possible, to the following considerations, namely:

(i) the compensation payable in respect of the estate;

(ii) the number of persons to be maintained out of the estate;

(iii) the nearness of relationship of the person claiming to be maintained;

(iv) the other sources of income of the claimant; and
(v) the circumstances of the family of the claimants.'

The last three considerations bear on the principle to be adopted in working out the rights of the maintenance-holders inter se while the first two apply to the aggregate to be set aside for the group of maintenance-holders as a whole. If really the criterion to be adopted in evaluating the interests of the maintenance-holders is the mathematical formula suggested by Mr. Vedanthachari, there can be no place for the considerations embodied in S. 45(5)(a). Mr. Vedanthachary argued that S. 45(5) came into play in cases of maintenance-holders whose maintenance has not been fixed prior to this enactment and he sought support for his argument from S. 10, Impartible Estates Act.

We are unable to see what assistance S. 10 of the latter Act can render us in construing S. 45 (5). We do not think there is any warrant for reading a restriction to S. 45(5). There can be little doubt on the language employed in the sub-section that it is general in terms and will apply to all the maintenance-holders irrespective of whether their maintenance has already been fixed either under the provisions of the Impartible Estates Act or otherwise or has not been fixed.

Section 45(5) covers the group of maintenance-holders envisaged in S. 45(2)(b). Further sub-cl. (2) of cl. (a) of sub-s. (5) talks of a number of persons to be maintained out of the estate and thus, can leave us in no doubt that it is all the maintenance-holders that are grouped in the sub-section and cannot be confied to persons whose maintenance has to be fixed in future. This need not be elaborated as in our opinion, the import of the sub-section is wide enough to include every class of maintenance-holders. If S. 45(5) applies to all the maintenance-holders, then it is difficult to give effect to the theory sought to be evolved by Mr. Vedanthachary.

His formula which is a mechanical one is consistent with the conceptions underlying Ss. 3 to 5 which direct the Tribunal to bear in mind the considerations pointed above. How could they be reconciled to the mode of apportionment suggested by Mr. Vedanthachary. Under sub-s. (5) of S. 45, some discretion is vested in the Tribunal—of course, a judicial one—in determining the amount payable to each of the maintenance-holders and it is not cut and dry process which according to the counsel for the appellants is enacted in S. 44(1) of the Act.

We do not therefore think the Tribunal has violated any of the mandatory provisions of either S. 44 or S. 45 of the Act. We think the principle followed by it is a sound one.

(34) It was lastly urged by the counsel for the appellants that in any event the maximum of 1/5th should not have been given to the maintenance-holders on equitable considerations. We fail to see what equity there is in reducing the amount given to each of the branches of the maintenance-holders. There can be no justification to vary the amount as what is got by each of the branches has to be further sub-divided amongst the branches of that family.

For instance, Krishna Bahadur has three sons, and each one of them has several children, we are told, and the sum of Rs. 75,000/- directed to be paid to that branch has to be distributed amongst the various persons, thus each branch getting only Rs. 18,775/-. We do not think it just to cut down the amount to a smaller figure and deprive them of bare maintenance. We think the Tribunal exercised a sound judicial discretion and it does not call for interference .

(35) These appeals are therefore rejected

(36) There remains Appeals Nos. 90 and 91 of 1954 which relate to interim payments to Krishna Bahadur's branch for Faslis 1359 and 1360. Under S. 50 of the Act, some payments are made by the Government from the income derived from the estate after the date of the notification. The amount is divisible again between the land-holder and his sons and grand-sons on the one hand and the maintenance-holders on the other.

With regard to those payments, the Tribunal applied the same principle as in the case of advance compensation and directed 1/5th of these payments to the maintenance-holders as a group. This part of the judgment is attacked by Mr. Vedanthachary, on behalf of the Rajah on the ground that at least so far as these interim payments are concerned the doctrine of S. 45(5) could not be extended and in this regard at least his theory referred to already in the other appeals should be given effect to.

(37) In order to appreciate his contention it is useful to refer to the relevant terms of S. 50:

"S. 50(1):.....

(2) After the notified date and before the compensation has been finally determined and paid in pursuance of this Act, interim payments shall be made by the Government every fasli year, to the principal land-holder and to the other persons referred to in S. 44, sub-s. (1) as follows:

(3) In respect of the fasli year in which the estate is notified, they shall together be entitled to such amount as the Government may on a rough calculation determine etc.,

o o o

(5) The Government shall deposit all such amounts in the office of the Tribunal and the Tribunal after such enquiry if any, as it thinks fit, apportion the amounts amongst the principal landhold and the other persons referred to in sub-s. (2) in accordance with the value of their respective interests.

o o o

(7) After compensation has been finally determined and apportioned among the persons referred to in sub-s. (2) all interim payments made under this section to each of them shall be adjusted on the basis that together they are entitled in respect of each of the fasli years, to the basic annual sum as finally determined and that each of them separately is entitled to the same share of the basic annual sum as the share of the compensation to which he is finally held to be entitled under S. 44".

In support of his case, the counsel for the appellants called in aid sub-s. (5) which directs the apportionment of the amounts paid in accordance with the value of the respective interests of the two categories as far as possible. It is argued that the rule to govern the determination of the share of each group in this behalf is not the same as in regard to advance compensation in the ratio of the annual allowance received by him to the net income of the estate.

We do not think that the contention can be maintained. We cannot give different meanings to same words in this section. It is a well-settled canon of interpretation of statutes that the identical expressions used in an enactment will ordinarily carry the same meaning. That no different principle could be applied in regard to the apportionment of the interim payments is clear from sub-s. (7) which lays down that the basis to be adopted in this regard is the same as for the purpose of S. 45 (sic). Therefore, the conclusions of the Tribunal on this part of the case have to be affirmed and the appeals dismissed.

(38) In the circumstances of the case, all the appeals are dismissed without costs.

Appeals dismissed.

D.H.Z.

AIR 1955 Andhra 273 (V 42 C 97 Dec.)

SUBBA RAO C. J. AND BHIMASANKARAM J.
(12-1-1955)

Boddu Seetharamaswamy, Applicant v. Commr. of Income-tax, Madras, Respondent.

Case Ref. No. 35 of 1952.

Income-tax Act (1922), Ss. 18-A(6) and 30 — Order imposing penal interest under S. 18A(6) — Not appealable under S. 30 — (Interpretation of Statutes.)

An appeal to the Appellate Assistant Commissioner against the levy of penal interest under the provisions of S. 18-A(6) is not competent.

(Para 9)

Section 30 which regulates the right of appeal conferred under the Act does not in express terms provide for an appeal against an order imposing penal interest under S. 18-A(6) of the Act. The omission is designed rather than accidental.

(Para 4)

Under S. 30 an assessee may appeal to the Appellate Assistant Commissioner objecting to the amount of income assessed under S. 23. Section 23 prescribes a particular procedure for assessing the total income of the assessee. The imposition of penal interest mentioned in S. 18-A(6) is not a part of the process of assessment of the income of the assessee. Penal interest is imposed only to compel an assessee not to underestimate his income during the current year.

A special procedure is prescribed for imposing it and that is regulated by S. 18-A(8) of the Act. The adding of interest to the tax under S. 18A(8) is only for the purpose of facilitating the collection of the entire amount found due from the assessee. This will not make the penal interest the amount of income assessed under S. 23. As the order imposing penal interest is not an order assessing the income under S. 23, it follows that no appeal lies under S. 30.

(Para 4)

The contention that, if an appeal does not lie against an order imposing penal interest, it would cause irreparable hardship to an assessee cannot be accepted. When the provisions of the Statute are clear and unambiguous, there is no scope for invoking equitable doctrines. The scheme of the provisions of S. 18-A of the Act, on the other hand clearly shows that there cannot be any prejudice to the assessee. AIR 1953 All 482, Rel. on.

(Paras 5, 6)

Anno: I. T. Act, S. 30, N. 1.

CASE REFERRED: Para

(A) (V40) AIR 1953 All 482: 1953-23 ITR 226 9

K. Srinivasan and M. J. Swami, for Applicant; Advocate-General and M. Kondala Rao, for Respondent.

SUBBA RAO C. J.:

The Income-tax Appellate Tribunal, Madras Branch referred for the opinion of this Court the following questions:

"Whether an appeal to the Appellate Assistant Commissioner against the levy of penal interest under the provisions of S. 18-A(6) is competent?"

(2) The facts are in a small compass and they are: The assessee carried on business in the manufacture and sale of groundnut oil and cake. In making the assessment for the year 1945-46, the Income-tax Officer arrived at an assessable income of Rs. 40,739/- as the assessee gave a wrong estimate of the income, he directed him to pay penal interest at 6 per cent. under S. 18-A(6) of the Act upon the amount by which the tax already paid by him fell short of 80 per cent. of the tax imposed on the basis of the regular assessment.

The assessee preferred an appeal against the order of assessment to the Appellate Assistant Commissioner and contended, inter alia, that the order imposing penal interest was wrong, but the appeal was dismissed. When he carried on appeal the said matter, the Income-tax Appellate Tribunal confirmed the order of the Appellate Assistant Commissioner on the ground that no appeal lay against an order under S. 18-A of the Act. The aforesaid question was referred under the said circumstances.

(3) The learned counsel for the assessee contended that an order imposing penal interest is part of the order of assessment and therefore an appeal lies under S. 30 of the Act. To appreciate his argument, the following provisions may be read:

Sections 18-A(6):

"Where in any year an assessee had paid tax under Sub-s.(2) or Sub-s. (3) on the basis of his own estimate and the tax so paid is less than 80 per cent. of the tax determined on the basis of the regular assessment.....simple interest at the rate of 6 per cent. per annum from the 1st day of January in the financial year, in which the tax was paid, up to the date of the said regular assessment shall be payable by the assessee upon the amount by which the tax so paid falls short of the said eighty per cent."

Section 18-A(8):

"Where on making the regular assessment, the Income-tax Officer finds that no payment of tax has been made in accordance with the foregoing provisions of this section, interest calculated in the manner laid down in sub-s. (6) shall be added to the tax as determined on the basis of the regular assessment."

Section 23(3):

"On the day specified in the notice issued under sub-s. (2) or as soon afterwards as may be, the Income-tax Officer, after hearing such evidence as such person may produce, and such other evidence as the Income-tax Officer may require, on specified points, shall, by an order in writing, assess the total income of the assessee and determine the sum payable by him on the basis of such assessment".

Section 29:

"When any tax penalty or interest is due in consequence of an order passed under or in pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest, a notice of demand in the prescribed form specifying the sum so payable."

Section 30:

"Any assessee objecting to the amount of income assessed under S. 23 or S. 27 or the amount of loss computed under S. 24 or the amount of tax determined under S. 23 or S. 27 or denying his liability to be assessed under this Act, or objecting to the cancellation by an Income-tax Officer of the registration of a firm under sub-s. (4) of S. 23 or to a refusal to register a firm under sub-s. (4) of S. 23 or S. 26-A or to make a fresh assessment under S. 27 or objecting to any order under sub-s. (2) of S. 25 or S. 28-A or sub-s. (2) of S. 26 or S. 28 made by an Income-tax Officer or objecting to any penalty imposed by an Income-tax Officer under sub-s. (6) of S. 44-E or sub-s. (5) of S. 44-F or sub-s. (1) of S. 46 or objecting to a refusal of an Income-tax Officer to allow a claim to a refund under S. 48, 49 or 49-F or to the amount of the refund allowed by the Income-tax Officer under any of those sections, and any assessee being a company objecting to an order made by an Income-tax Officer under sub-s. (1) of S. 23-A, may appeal to the Appellate Assistant Commissioner against the assessment or against such refusal or order."

(4) It is common-place that a right of appeal must expressly be conferred by statutes. Section 30 which regulates the right of appeal conferred under the Act does not in express terms provide for an appeal against an order imposing penal interest

under S. 18-A(6) of the Act. Though the section enumerates in detail the orders made under different sections which are subject to an appeal S. 18-A(6) is omitted. If the Legislature intended that the order imposing penal assessment under S. 18-A(6) was also subject to an appeal, they would have said so in clear terms.

The omission, in our view, is designed, rather than accidental. It is, therefore argued that the order imposing penal assessment is part and parcel of an order of assessment made under S. 23, and, therefore, is appealable as if it is an order of assessment. But a careful scrutiny of the aforesaid provisions does not lead to that result. Under S. 30, an assessee may appeal to the Appellate Assistant Commissioner objecting to the amount of income assessed under S 23.

Section 23 prescribes a particular procedure for assessing the total income of the assessee. The imposition of penal interest mentioned in S. 18-A(6) is not a part of the process of assessment of the income of the assessee. Penal interest is imposed only to compel any assessee not to underestimate his income during the current year. A special procedure is prescribed for imposing it and that is regulated by S. 18-A(8) of the Act.

Under that section, the penal interest imposed under S. 18-A(6) is added to the tax determined under S. 23. The fact that the interest is added to the tax determined under S. 23 brings out the distinction between the tax determined and the penal interest imposed. Section 29 enables the Incom-tax Officer to collect the total amount, i.e., the tax and the penal interest in the same manner.

To put it shortly, the adding of interest to the tax is only for the purpose of facilitating the collection of the entire amount found due from the assessee. This will not make the penal interest the amount of income assessed under S. 23. As the order imposing penal interest is not an order assessing the income under S. 23, it follows that no appeal lies under S. 30.

(5) Then it is contended that, if an appeal does not lie against an order imposing penal interest, it would cause irreparable hardship to an assessee. When the provisions of the statute are clear and unambiguous, there is no scope for invoking equitable doctrines. Section 30 does not either expressly or by necessary implication confer a right of appeal on the assessee against an order under S. 18-A(6) and we cannot add any words to that section which are not there.

(6) We are also satisfied from the scheme of the provisions of S. 18-A that there cannot be any prejudice to the assessee. The provisions of S. 18-A (1), (2), (3) and (6) may be summarised thus: The section deals with what is popularly called the advance payment of income-tax in the case of income in respect whereof no deduction is made at the source. It applies only to an assessee whose total income is over the full taxable income of Rs. 2,500/-.

In the case of an old assessee the Income-tax Officer takes the initiative on the basis of the assessment of the previous year and directs the assessee to pay the tax during the current year in quarterly instalments on or before the prescribed dates to be adjusted later when the final adjustment in that year is made. The assessee has no option to submit an alternative estimate.

But, if the estimate turns out to be less than 80 per cent. of the tax determined, he would be bound to pay the varying rates of interest upon the amount by which the tax so paid falls short of the said 80 per cent. So too, in the case of a person who has not hitherto been assessed, he is given liberty to estimate his income but subject to similar penalty in the case of a fall or shortage of the tax paid by him on the basis of the said estimate turns out to be less than 80 per cent. of the tax ultimately determined as payable by him.

But in either case, if the amount is reduced by the competent authority in appeal or revision there will be a proportionate reduction of interest and an order for refund. These provisions clearly show that no hardship would be caused if ultimately the assessment is reduced. But it is said that, if no appeal is provided, the assessee will not have an opportunity to contend that interest should not have been ordered to be paid.

There is no scope for this argument for the simple reason that under S. 18-A(6) there is no option but to award interest in the contingency contemplated by the section. The words used are 'shall be payable" and the assessee is ,therefore, bound to pay interest on the deficiency found below 80 per cent. of the actual amount and that order canot be modified unless the tax itself is reduced.

(7) The learned counsel for the assessee brought to our notice that Indian Income-tax Rules have been amended, conferring a power on the Income-tax Officer to reduce or waive interest payable under S. 18-A under certain circumstances and if a right of appeal is not conferred against the order of the Income-tax Officer under S. 18 A, any wrong order of his made under the rules cannot be corrected or otherwise modified.

But the rules were only made on 14-12-1953 i.e., long after the order imposing penal interest was made in the instant case.

(8) Further, as we have already stated, such consideration cannot override the express provisions of the Statute.

(9) A similar question was raised in — 'Deo Sharma v. Commr. of Income-tax, U. P.', AIR 1953 All 482 (A) where in the learned Judges held that no appeal lies under S. 30(1) against an order of an Income-tax Officer under S. 18-A(6) of the Act. It is true that there is no discussion of the point raised in the judgment, but we respectfully agree with the conclusion of the learned Judges. We, therefore, answer in the negative the question propounded for our decision. The petitioner will pay the respondent costs which we fix at Rs. 250/-.

K.S.B. Answer in the negative.

(S) AIR 1955 Andhra 274 (V 42 C 98 Dec.)

VISWANATHA SASTRI J.

Gorrela Venkata Satteyya and others, Appellants v. Mulibai and others, Respondents.

Appeal No. 620 of 1950, D/- 7-4-1955, against decree of Subordinate J., Amalapuram, in O. S No. 20 of 1948.

(a) Transfer of Property Act (1882), S. 72(b) — Preservation of mortgaged property from forfeiture or sale.

The Government brought to sale a portion of the mortgaged properties for realisation of penal assessment levied on the mortgagor, in respect of lands not comprised in the mortgage. The mortgagee made payment to the Government, to avert the sale.

Held (i) the sale by Government would have extinguished the title of the mortgagor and the mortgagee in the portion of the mortgaged property brought to sale by the Government. AIR 1942 Mad 244, Ref. (Para 8)

(ii) The mortgagee had, therefore, a right under S. 72(b) to pay, and avert the sale for the preservation of the mortgage security and he was entitled to add the amount so expended with interest to the principal money. (Para 8)

Anno: AIR Com. T. P. Act, S. 72 N. 8.

(b) Transfer of Property Act (1882), S. 72(c) and (d) — Costs of supporting title of mortgagor or mortgagee.

The mortgagee paid monies to Government to avert a sale of a portion of the hypotheca for realisation of the penal assessment levied by the Government on the mortgagor on the land not comprised in the mortgage. The mortgagor thereafter filed a suit against the Government for refund of the monies so paid on ground that the Government had no right to bring to sale the hypotheca, and for injunction restraining the Government from such sales in future.

Held that as the Government had a paramount right to realise the amount of penal assessment levied by them on the mortgagor there was no question of protecting the title of the mortgagor or the mortgagee in the suit; and the expenses of such suit could not, therefore, be added to the mortgage amount. (Para 4)

Anno: AIR Com. T. P. Act, S. 72 N. 4, 5.

(c) Transfer of Property Act (1882), Ss. 69A and 72 — Expenses of Receiver appointed in mortgagee's suit at mortgagee's instance — If recoverable, by mortgagee — (Civil P. C. (1908), O. 40 R. 1).

In his suit on the mortgage, the mortgagee got a Receiver appointed for collection of rents and profits to be paid into Court, in discharge of the mortgage amount. The Court did not fix the remuneration of the Receiver. The mortgagee paid monies to this Receiver outside Court. No sanction or approval of Court was obtained for these payments.

Held that it is not the law that a Receiver should always be remunerated; a Receiver may with his consent be appointed without remuneration or the Court may fix such fee or commission on the realisations from the property by way of remuneration as it thinks fit; a receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties; but payments made by the mortgagee to the Receiver privately outside Court, without the sanction or approval of the Court cannot be added to the mortgage amount and recovered by the mortgagee. (Para 5)

Anno: AIR Com. T. P. Act, S. 69A N. 2, 9; S. 72 N. 2; C. P. C., O. 40 R. 1 N. 4, 35.

(d) Transfer of Property Act (1882), S. 72(b) — Separate suit by mortgagee for moneys recoverable under S. 72(b) — Maintainability of — Res Judicata — (Civil P. C. (1908), S. 11).

After the passing of the final decree in his mortgage suit, the mortgagee made payments to avert sale of hypotheca for arrears of revenue due to Government. He applied to have this amount included in the decree when the mortgagor got the decree amount scaled down under Madras Act 4 of 1938. The mortgagee was referred to a separate suit.

Held (i) that a separate suit was maintainable and the order referring the mortgagee to a separate suit operated as res judicata against the mortgagor; (Para 7)

(ii) that a separate suit lies for the monies recoverable under S. 72(b), T. P. Act: AIR 1919 Mad 1102, Rel. on. (Para 7)

Anno: AIR Com. T. P. Act, S. 72 N. 8; C. P. C., S. 11 N. 40.

(e) Limitation Act (1908), Art. 132 — Payment by mortgagee of revenue payable to Government by mortgagor — Charge — Suit to enforce — (Madras Revenue Recovery Act (2 of 1864), S. 35).

Section 35, Madras Revenue Recovery Act specifically provides that a mortgagee paying the arrears of revenue in order to obtain a release of the mortgaged property attached for arrears of revenue, has a charge upon the land for the amount so paid. A suit to enforce such a charge is governed by Art. 132, Limitation Act. 26 Mad 686 (FB) Ref. (Para 8)

Anno: AIR Com. Lim. Act, Art. 132 N. 8.

CASES REFERRED: Paras

(A) (V29) AIR 1942 Mad 244: 54 Mad LW 702 3
(B) ('39) S. A. No. 508 of 1939 (Mad) 4
(C) (V6) AIR 1919 Mad 1102: 34 Mad LJ 177 7
(D) (V18) AIR 1931 P.C. 226: 61 Mad LJ 343 (P.C.) 7
(E) (V2) AIR 1915 Cal 369 : 28 Ind Cas 571 7
(F) ('03) 26 Mad 686 (FB) 8

B. V. Subramanyam, V. V. Khishnamurthy and T. K. Narayanachari, for Appellants; M. Konda Kotayya, for Respondents.

JUDGMENT: The defendants are the appellants. The suit was filed for the recovery of a sum of Rs. 6,433-3-9. The plaintiffs represented the interest of the mortgagees under two mortgages dated 10-1-1920 and 6-3-1920 executed by the father of defendant 1 as well as by defendant 1 and his undivided sons, defendants 2 and 3. The mortgagees sued to enforce their mortgages in O. S. No. 70 of 1932 on the file of the Subordinate Judge's Court of Amalapuram.

A preliminary decree was passed on 29-3-1935 and it was followed by a final decree dated 30-3-1936. It appears that the decree amount was scaled down to about Rs. 16,000/- in C. M. P. No. 211 of 1938 on 3-11-1938. The bulk of the scaled down amount had been paid by the mortgagors before the date of the present suit which was instituted on 26-1-1948. The plaintiff's claim in the suit, now under appeal falls under four heads: (1) Rs. 2396-0-6 consisting of sums paid by the mortgagees in order to avert a revenue sale of a portion of the hypotheca, R. S. No. 336 in Kottalanka.

The principal amount of the sums paid by the mortgagees and the interest thereon till the date of plaint amount to Rs. 2,396-0-6; (2) Rs. 1,646-3-4 representing the costs paid by the mortgagees to the Government and incurred by themselves in connection with a suit filed by them against the Government for a refund of the amounts paid by them for averting the revenue sale referred to above and for an injunction against the Government.

The sum of Rs. 1,646-3-4 is inclusive of interest on the amounts paid as costs by the mortgagees; (3) Rs. 1,311-5-0 representing amounts paid by the mortgagees to receivers appointed in the mortgage suit O. S. No. 70 of 1932 and the interest on the sums so paid up to the date of suit; and (4) Rs. 1085-10-9 representing amounts deposited by the mortgagees for setting aside sales of portions of the hypotheca for arrears of revenue due to the Government, together with interest on the amounts so paid till the date of suit.

The Court below decreed the claim of the mortgagees under all the above four heads, overruling the objections of the mortgagors. On this appeal, the mortgagors again object to the decree in respect of these items. It is argued that the claim in respect of the four items is barred by limitation and that the remedy of the mortgagees was to have claimed and recovered these amounts in the mortgage suit O. S. No. 70 of 1932.

(2) It is also urged that the four payments made by the mortgagees and now sought to be recovered from the mortgagors were in the nature of voluntary payments and therefore not recoverable. It is convenient to deal with the four items separately.

(3) As regards the first item, the amount of Rs. 2,396-0-6 represents the principal and interest of the sums paid by the mortgagees to set aisde the revenue sale of a portion of the mortgaged property

for realisation of the penal assessment due from the mortgagors in respect of lands other than those comprised in the mortgage. The sale was fixed for 25-9-1936 and on the previous day the mortgagees paid Rs. 1,419-3-0 to avert the sale.

This sum with subsequent interest amounts to Rs. 2396-0-6. The argument of the appellants is that this payment was made not in respect of the revenue due from the mortgaged property, but for the purpose of satisfying a penal assessment levied on the mortgagors in respect of lands not comprised in the mortgage, but on which the mortgagors had trespassed or encroached. Therefore, it is argued that the mortgagees are not entitled to recover this money from the mortgagors.

This argument proceeds on a fallacy. Though the penal assessment was levied in respect of an encroachment by the mortgagors on lands other than those comprised in the mortgage, still it was open to the revenue authorities to realise the amount of penal assessment from the lands of the mortgagor other than those encroached upon. Acting under this power, the revenue authorities brought to sale an item of the mortgaged property.

As pointed out by the decision of the Madras High Court in — 'Secy. of State v. Jodhraj Dupajee, AIR 1942 Mad 244 (A) the revenue sale would have extinguished the title of both of the mortgagee and the mortgagor to the item brought to sale for realisation of the penal assessment. In such circumstances, the mortgagees had a right to spend such money as was necessary for the preservation of the mortgaged property from destruction or sale under S. 72(b), T. P. Act.

Consequently, the mortgagors would be liable to reimburse the amounts expended by the mortgagees for the purpose of averting the revenue sale and the mortgagees would be entitled to add the amounts so expended with interest to the mortgage money.

(4) The second item of Rs. 1,646-3-4 is in respect of costs paid to Government and expenses incurred by the mortgagees in connection with the prosecution of a suit O. S. No. 42/37 on the file of the District Munsif's Court, Amalapuram and an appeal to the Court of the Subordinate Judge and a second appeal to the High Court. After paying the sum of Rs. 1419-13-0 for averting the revenue sale referred to above, the mortgagees sued the Government for refund of the said sum and also for an injunction restraining the Government from bringing other items of mortgaged property to sale, for the realisation of the penal assessment levied on the mortgagors in future.

The suit was dismissed by the District Munsif, decreed on appeal by the Subordinate Judge and again dismissed on Second Appeal by the High Court on 1-9-1941. The expenditure incurred by the mortgagees in connection with these proceedings as well as the costs paid to the Government in connection therewith were not expenses incurred for supporting the mortgagor's title to the property or making good the title of the mortgagees against the mortgagors.

It is only in such cases that a mortgagee is allowed all proper costs, charges and expenses incurred by him. Expenses incurred for the realisation of the mortgage debt or the preservation of the mortgage security, including the costs of litigation properly undertaken by the mortgagee for the aforesaid purposes can be added to the mortgage money.

The mortgagee is also entitled to add to his security the costs of all proceedings to which he is properly made a party in his capacity as a mortgagee. The suit O. S. No. 42 of 1937 was instituted by the mortgagees and the appeals therefrom were conducted on the footing that the Government had wrongfully sold a portion of the hypotheca for arrears of revenue due under penal assessments levied on the mortgagors in respect of their encroachment on properties not comprised in the mortgage.

It was found by the High Court that the Government was entitled to realise the arrears of penal assessment from the portion of the hypotheca attached and brought to sale by the Government. According to the mortgagees the action of the Government was wrongful and they sought their remedy against the Government, but in truth the Government was acting within its legal rights.

The costs of the litigation concerning the mortgaged property arising out of a wrongful act of a third person would not be allowed to a mortgagee, unless they were incurred in protecting the title to the mortgaged property; here the suit was for refund of money alleged to have been wrongfully realised by a threatened illegal sale of the hypotheca.

In view of the paramount right of the Government to sell the property and thereby extinguish the title of both the mortgagor and the mortgagee, it was futile for the mortgagees to sue the Government on the basis that they had committed a tort. It was so held by the High Court of Madras in S. A. No. 508 of 1939 (Mad) (B), and the mortgagee's suit was dismissed with the costs of the Government.

In these circumstances, there was no question of the mortgagees protecting either their own title as mortgagees or the mortgagors' title to the property and the costs incurred by them in the litigation conducted against the Government could not be added to the mortgage security or recovered from the mortgagors. The costs incurred by the mortgagees in the litigation against Government stand on wholly different footing from the amounts paid by them to avert the revenue sale.

(5) The third item of the mortgagees' claim relates to a sum of Rs. 1311-5-0 representing two payments of Rs. 400/- and Rs. 420/- to the Receivers appointed in the mortgage suit O. S. No. 70 of 1932 and interest on such payments up to the date of suit. It may be mentioned that the Receiver was appointed at the instance of the mortgagees in order to realise the rents and profits and pay them into Court for being applied in reduction of the mortgage debt. It is no doubt open to the Court to grant to the Receiver such fee or commission on the collections of the property by way of remuneration as the Court thinks fit. It is not the law that a Receiver should always be remunerated and a Receiver may be appointed with his consent to act without a salary. This is usually the case where a party to the suit is appointed as Receiver or a trustee or other person interested in the property proposes himself as a Receiver.

A receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties. The Receiver is an officer of Court and the Court has to fix his remuneration and direct payment of the same by one or other of the parties to the suit or from the rents and profits realised by the Receiver. In the present case, it is not shown that the order appointing the Receiver fixed any salary or remuneration as payable to him; nor is it shown that the payments alleged to have been made to the Receiver by the mortgagees were sanctioned or approved by the Court either before or after the payments were made.

There is nothing to show that the Court's attention was drawn to such payment and the Court accorded its sanction, express or implied therefor. In these circumstances, it is not possible to charge the mortgagors with payments made by the mortgagees to the Receivers privately outside the Court.

(6) The fourth and last item of claim relates to monies deposited by the mortgagees for setting aside revenue sales of portions of the hypotheca

from time to time. The total amount of such payment with interest amounts to Rs. 1089/-. It was settled law even before the Transfer of Property Act, that payments made by a mortgagee in discharge of the revenue due on the mortgaged properties, which the mortgagor had defaulted to pay could be added to the mortgage money and realised by sale of the mortgaged property.

Section 72, Cl. (b) merely enacts the previous law and clearly entitles the mortgagee to add the amounts of revenue paid by him to the mortgage money.

(7) In the present case, the payments made by the mortgagees in order to prevent a sale of the mortgaged property for arrears of revenue, were made after the passing of a final decree in the mortgage suit. An application was made by the mortgagees at the time when the amount due under the mortgage decree was scaled down for inclusion of the amounts paid by them for avoiding the revenue sales of the hypotheca in determining the amount due and payable by the mortgagors to the mortgagees.

The Court, however, held that on a scaling down application, it had jurisdiction merely to determine the amount of the original mortgage debt and subsequent interest payable under Madras Act 4 of 1938 and that it could not entertain a prayer for other reliefs: Vide Ex. A-77. This order was confirmed by the High Court in C. M. A. No. 149/39. During the course of the execution proceedings, the mortgagees applied to the Court for adding these amounts to decree amount realisable in execution.

The mortgagees were referred to a separate suit: See Ex. A-11 dated 12-8-1941. In these circumstances, it is not open to the mortgagors to contend that the remedy of the mortgagees for realising the amounts now sued for lay in taking appropriate steps in the mortgage suit O. S. No. 70 of 1932. Apart from this, there is some authority for the view that a separate suit for the sums which the mortgagee is entitled to recover from the mortgagor under S. 72, T. P. Act, would lie: — 'Venkataswamy Naicker v. Muthuswamy Pillai', AIR 1919 Mad 1102 (C).

The final decree in the mortgage suit having been passed and the payments made by the mortgagees to avert the revenue sales having been made thereafter it would be open to them to institute a separate suit particularly when the Court refused to award them relief in respect of such payments in the mortgage suit itself. In — 'Manohar Das v. Hazari Mull', AIR 1931 PC 226 (D) it was held by the Judicial Committee that the holder of a final decree for sale of mortgaged property was entitled to maintain a separate suit to enforce a further charge against such property for payments made by him under S. 9, Bengal Revenue Sale Act to prevent a sale for arrears of Revenue which fell due after the passing of the final decree and while execution proceedings were pending.

It was no doubt held by the Allahabad High Court that a charge for expenses incurred and payments made by the mortgagee in order to avert a sale for arrears of land revenue or in order to protect the title of the mortgagor or mortgagee to the mortgaged property, could be recovered on the security of the mortgaged property only in the mortgage suit. In — 'Ambikacharan v. Ramagati Guha', AIR 1915 Cal 369 (E) it was held by the Calcutta High Court that where a mortgagee after obtaining a preliminary decree on his mortgage deposited a certain amount to set aside a sale of the mortgaged property in execution of a rent decree, he could maintain a suit to enforce the lien against the property.

The reason given by their Lordships was that the lien acquired by the mortgagee by reason of his deposit for setting aside the rent sale was not discharged by the payment and satisfaction of the preliminary decree. In the present case, however, we have got the fact that the application of the mortgagees to include the amounts paid by them for averting the revenue sales as part of the decree amount and for realisation of the said sum in execution of the mortgage decree, was rejected on the ground that the proper remedy of the mortgagees was by way of a separate suit. This decision operates as res judicata and the contention of the appellants is unsustainable.

(8) Lastly, on the question of limitation, the appeal is devoid of merits. As early as — 'Rajah of Vizianagaram v. Setrucherla Somasekhararaz', 26 Mad 686 (F) it was held by a Full Bench of the Madras High Court that where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save, and so does save, the estate from liability to be sold by Government for realising the arrears of revenue, he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of the revenue. Bhashyam Ayyangar J. held that the suit was governed by Art. 132, Limitation Act in so far as it related to the enforcement of a charge.

Section 35, Madras Revenue Recovery Act (Act 2 of 1864) specifically provides that a mortgagee paying the arrears of revenue in order to obtain a release of the mortgaged property attached for arrears of revenue, has a charge upon the land for the amount so paid. In these circumstances, the appellants' contention that the claim of the mortgagees is barred by limitation must be overruled. The contention of the appellants that the payments made by the mortgagees to avert revenue sales of the hypotheca were voluntary payments is frivolous.

(9) The result is that the appeal is allowed in respect of items 2 and 3 referred to above. The decree passed by the Court below in favour of the mortgagees in respect of items 1 and 4 representing the amount paid by them for averting revenue sales of the hypotheca will stand. The appeal is allowed in part to the extent indicated above and the parties will pay and receive proportionate costs both here and in the lower Court.

K.S.B. Appeal partly allowed.

AIR 1955 Andhra 277 (V 42 C 99 Dec.)

SUBBA RAO C. J. AND KRISHNA RAO J.

In re, Palakurthi Venkata Rao, Petitioner-Appellant.

Writ Appeal No. 11 of 1955, D/- 11-3-1955, against order of Bhimasankaram, J. in W. P. No. 85 of 1955 D/- 2-3-1955.

Motor Vehicles Act (1939), Ss. 60 and 123 — Permit for stage carriage to ply only on particular route — Carriage used for trip on another route — Permit can be suspended.

If the conditions of the permit are contravened, the owner of the vehicle can either be prosecuted under S. 123 or his licence may be suspended under S. 60. Section 60 is conceived to enforce effective and strict administrative control. There is no conflict between departmental action and criminal prosecution. (Para 5)

Hence where there is a permit for a stage carriage to ply only on a particular route and the owner of the carriage uses it for a trip on another route, it is a breach of the condition of the

permit and the Regional Transport Authority has power to suspend the permit under S. 60(1). (Para 6)

N. K. Acharya, for Appellant.

ORDER: This is an appeal against the order of our learned brother Bhimasankaram J., dismissing the application filed by the appellant to quash the order of the Government of Andhra refusing to interfere with the order of the Secretray, Central Road Traffic Board, Andhra State, made in an appeal against the order of the Regional Transport Authority, Krishna, suspending the permit for a period of 15 days.

(2) The facts are: The petitioner is the owner of a stage carriage MDK. 921 now re-registered as ADK. 205 with a permit to ply on the route Bandar to Gudiwada. One of the conditions of the permit was that the stage carriage shall be used only on the route or area on which the permit is issued. Admittedly on 3-2-1954 the stage carriage was used for an unauthorised trip on the Bandar — Manginapudi road. Purporting to act under S. 60(1)(a) of Act IV of 1939 the Regional Transport Authority suspended the permit for a period of 15 days. That order was confirmed on appeal by the Central Road Traffic Board and on revision from that appellate order by the Government.

(3) The appellant filed an application under Art. 226 of the Constitution of India for quashing that order on the ground that the Regional Transport Authority has no power to suspend the permit under S. 60(1) in the circumstances of the case, but should have only prosecuted the appellant under S 123. This argument was rejected by Bhimasankaram J.

(4) The relevant provisions read:

Section 60:

"The Transport Authority which granted a permit may cancel the permit or may suspend it for such a period as it thinks fit (a) on the breach of any condition specified in sub-section (3) of Sec. 59 or of any condition contained in the permit."

Section 123 (1):

"Whoever drives a motor vehicle or causes or allows a motor vehicle to be used or lets out a motor vehicle for use in contravention of the provisions of sub-sec. (1) of Section 42, shall be punishable for a first offence with a fine which may extend to five hundred rupees and for a subsequent offence if committed within three years of the commission of a previous similar offence, with a fine which shall not be less than one hundred rupees and may extend to one thousand rupees."

Section 42:

"No owner of a transport vehicle shall use or permit the use of the vehicle in any public place, save in accordance with the conditions of a permit granted or counter-signed by a Regional or Provincial Transport Authority authorising the use of the vehicle in that place in the manner in which the vehicle is being used."

(5) It will be seen from the aforesaid provisions that, if the conditions of the permit are contravened, the owner of the vehicle can either be prosecuted under S. 123 or his licence may be suspended under S. 60. Section 60 is conceived to enforce effective and strict administrative control, whereas S. 123 is intended to prosecute the owner or any other person using the motor vehicle in contravention of the rules for the offence. There is no conflict between departmental action and criminal prosecution. It is open to the authorities concerned, instead of taking departmental action to resort to Criminal Court.

(6) It is then contended that there is no breach of the condition of the permit and therefore the provisions of S. 60(1) are not attracted. This argument, if we may say so, is in the teeth of the conditions extracted above. When the condition says that the carriage shall be used only on the route or area on which the permit is issued, it cannot be said that the user of the carriage on a different route or area is not a breach of the condition. The word 'only' clearly implies that he is prohibited from using that carriage on the route or area other than that in regard to which the permit is given. As there is a clear breach of the condition, we agree with Bhimsankaram J., that the authority concerned can suspend the permit under S. 60(1) of the Act.

(7) In the result the appeal fails and is dismissed with costs.

D.S.P. Appeal dismissed.

AIR 1955 Andhra 278 (C 12, C. 100 Dec.)

CHANDRA REDDY AND BHIMASANKARAM JJ.

(8-2-1955)

Duvvuri Lakshminarasimham and others, Appellants v. Garimella Rajeswari, Respondent.

Appeal No. 671 of 1950, against decree of S. J., Amalapuram in O. S. No. 58 of 1949.

(a) Hindu Law — Will — Simultaneous disposition of property and power to adopt given to widow — Effect.

In a case where under the same instrument of will the testator confers upon his widow the power to adopt and at the same time makes certain dispositions, the adoption cannot operate to invalidate the bequest made under the will. The adopted son, whose adoption is subsequent to the will coming into force, cannot question the dispositions made by the testator, who under the same instrument has authorised his wife to adopt. The adoption has not the effect of invalidating the legacies given under the will. AIR 1927 PC 139, Foll (Paras 6, 7)

(b) Limitation Act (1908), Art. 109 — Possession not being wrongful.

The sine qua non of the application of Art. 109 is the wrongful receipt of the profits by the person that has to account for the profits. If the possession of immoveable property from which the profits are derived is not wrongful, the suit will be outside the purview of this Article. (Para 12)

Anno: AIR Com.. Lim. Act. Art. 109 N. 2, 2a.

CASES REFERRED: Paras

(A) (V14) AIR 1927 PC 139: 50 Mad 508 (PC) 7, 8, 9, 10

(B) (V15) AIR 1928 Mad 271: 108 Ind Cas 202 8, 9

(C) (V15) AIR 1928 Mad 118: 109 Ind Cas 5 9

P. S. Sarma and K. V. Rangachari, for Appellant; Advocate-General (D. Narasaraju) and Sithikanta Sastri, for Respondents.

CHANDRA REDDY J.:

This appeal is filed by defendants 1 to 3, against the decree and Judgment of the Subordinate Judge of Amalapuram. The suit, which has given rise to this appeal, was instituted by one Rajeswari for recovering possession of the plaint "A" schedule lands and a house site, and for directing the defendants to render an account of the profits for the years 1942 to 1949.

The plaintiff is one of the three daughters of one Akella Subrahmanyam, the other two daughters being Vyaghreswari and Sugunavati. This Subrahmanyam executed a will on 15-9-1938. bequeathing 10 acres and 78 cents of his land to his wife Subbamma with absolute rights, and also con-

ferring a power upon the latter to take one of his maternal grandsons in adoption. The testator died three months later.

On 6-3-1942, Subbamma executed a Will in respect of the properties she got from the will of her husband and also what she acquired with the income from the properties given to her by the husband. Under this document, she gave a life estate to the plaintiff of 5 acres and 20 cents of land and a house site with a vested remainder to her male issue. We are not concerned with other dispositions in the will.

Under the terms of this Will, the 1st defendant, the husband of the eldest daughterVyaghreswari was to be in possession of this property disposed of under the will for a period of two years after the lifetime of the testatrix, manage them to the benefit of the legatees, arrange for the marriage of the last daughter Sugunavati, who was at the time of the will unmarried, and to do such other things as were directed by the testatrix, under the will. Subbamma died on 11-3-1942.

(2) It is alleged in the plaint that subsequent to the death of Subbamma, the 1st defendant continued to manage the properties by mutual understanding. Later on, when requested by the plaintiff to put her in possession of the properties bequeathed to her under the will of her mother, the 1st defendant refused to do so, and thus obliged the plaintiff to seek the reliefs mentioned above in the suit. The 2nd defendant is the son of Vyaghreswari who is married to the 1st defendant, the 3rd defendant being his step-brother.

In the plaint, it was recited that none of the maternal grandsons of Subrahmanyam was adopted by the latter's widow i. e., the plaintiff's mother.

(3) The suit was resisted by the defendants on various grounds, that the 2nd defendant was adopted by Subbamma in accordance with the wishes of Subrahmanyam, that the will of Subbamma was inoperative for the reason that the adoption of the 2nd defendant by Subbamma had operated to divest her of all the properties which she got by way of bequest from her husband under the will, and that in any event, the defendants are not liable to account for the profits, as under the terms of the will of Subbamma, the 1st defendant could not be made liable for the income from these properties, and that lastly, the suit was barred by limitation so far as the accounting is concerned.

(4) The Subordinate Judge found on the factum of adoption in favour of the defendants. However, in his opinion, the adoption of the 2nd defendant did not have the result contended for by the defendants, and that the 1st defendant was liable to render an account of the profits from 1944 till the date of delivery of possession, and that the suit in that respect was within time.

He also held that the 2nd defendant was not liable to account as the 1st defendant had admitted that it was he that was in management of the properties subsequent to the death of Subbamma.

(5) In this appeal filed by the aggrieved defendants against the decision of the Subordinate Judge, the main point debated relates to the effect of the adoption of the 2nd defendant on the bequest in favour of Subbamma under the last will and testament of Subrahmanyam. It is urged by Mr. Sarma on the theory of relation back that the moment the adoption took place, the widow was divested of all her estate.

According to him, since the will of Subrahmanyam could take effect only after the death of the last male-holder; and the adoption relates back to the death of the adoptive father, the adoptive father must be deemed to have had no testamentary capacity.

(6) We do not think that we can give effect to this contention. It is true that in certain cases. adoption has the effect of divestment, but the theory of relation back is not an absolute one applying in all respects. We do not think that it can be extended to a case where a man empowers his wife to make an adoption, and under the same 'effect' makes certain dispositions.

In such a case, the adoption cannot affect the properties demised under the will of the last male-holder as they are already carried away. The right of the adopted son springs only in such an eventuality only from the moment of his adoption. The situation is different, if the adoption had preceded the will taking effect that is, if the adoption was made by the last male-holder himself.

But in a case where under the same instrument the testator confers upon his widow the power to adopt and at the same time makes certain dispositions, the adoption cannot operate to validate the bequest made under the will.

(7) The position in this respect is summed up by their Lordships of the Privy Council in — 'Krishnamurthy v. Krishnamurti', AIR 1927 PC 139 (A). After noticing the divergence of the judicial opinion in regard to the power of a natural father to enter into ante-adoption agreements, and after examining the question on first principles, their Lordships summed up the position thus:

"When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt.

For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect.

The rights which flow from adoption are immediate and the disposition, if given effect to, is inconsistent with these rights and cannot of itself vi propria affect them."

The law bearing on the subject is crystallised in this passage. What follows from these observations is that the adopted son whose adoption was subsequent to the will coming into force, cannot question the dispositions made by the testator who under the same instrument has authorised his wife to adopt. The adoption has not the effect of invalidating the legacies given under the will.

(8) Mr. Sarma, the learned counsel for the appellants contended that the observations of the Judicial Committee with regard to the effect of will are merely obiter, and that the Madras High Court in several decisions had refused to give effect to them. In support of this submission, he relied on a Judgment of a Bench of the Madras High Court in — 'Erran Reddy Chenchu Krishnamma v. Maram Reddy Lakshminarayana', AIR 1928 Mad 271 (B).

We do not think this ruling really helps the appellants. In that case, the testator after giving an absolute right to his wife in all his properties, added that if his wife desired at any time to

adopt a boy, she could adopt any boy whom she liked. Construing this will, the learned Judge decided that the bequest to the wife with absolute rights was by a necessary intendment only a provisional one. Option was given to her, according to the learned Judges, under the will either to keep the property that was given to her absolutely or to make an adoption, in which event, she would be divesting herself of the estate that was vested in her under the terms of the will.

The learned Judges observed that the testator could not have contemplated that the widow should adopt a boy to perform the spiritual duties enjoined on him, and at the same time, he would not get anything. In such a situation, their Lordships said that the adoption had the effect of defeating the dispositions in favour of the adopting mother. There is nothing in the judgment to indicate that the learned Judges were not prepared to accept the concept underlying the passage in 'AIR 1927 PC 139 (A)'.

On the other hand, 'AIR 1927 PC 139 (A)', is referred to and the principle enunciated therein is adopted by the learned Judges.

(9) Another case cited by Mr. Sarma as supporting his contention is — 'Sukhdevdoss v. Mt. Choti Bai', AIR 1928 Mad 118 (C). There a Hindu made a will in favour of his wife leaving his whole estate to his wife with absolute rights. There was no prohibition in the will against his wife adopting a boy. His widow adopted a boy, and she executed a deed settling all the properties she got under the will on the adopted son.

When disputes arose between the parties, the adopting mother sought a declaration that the adoption was not valid for the reason that the last male holder had left no estate that could devolve upon the adopted son. This prayer was not granted as the learned Judges had come to the conclusion that despite the fact that there was no estate which could pass on to the adopted son, the adoption was valid.

It was also held that the estate had vested in the adopted son by reason of the deed executed by the adopting mother. Reilly J., one of the Judges constituting the Bench, held that the adoption by the widow did not divest her of the absolute estate, but it was the settlement made by the widow that entitled the adopted son to get the property. The other learned Judge, Phillips, Offg. C. J., while agreeing with this conclusion of Reilly J., remarked that he was inclined to think that although the widow held an absolute estate from her husband, the adoption of 1st defendant would have the effect of vesting that estate in him.

We do not think that any observations made by the learned Judge in the course of his judgment were calculated to throw any doubt on the validity of the observations in — 'Krishna Murthi v. Krishnamurthi (A).' It is remarked by the learned Judge thus:

"The exception grafted on to the Hindu theory of adoption that bequests to other people by will are not affected by the subsequent adoption appears to be based upon the theory that the father before the adoption was in a position to make effective gifts and bequests and that such dispositions should not be disturbed by the intervention of the widow in making an adoption, that is to say, that the rights properly obtained by third parties are not to be defeated by the mere will and pleasure of the widow.

This is quite different from saying that a widow shall not divest herself of her own free will. She can make an adoption,or she can refuse to make an adoption, and this is entirely a question of her own will and pealsure. If she wishes to make an adoption and thereby divest herself of her estate, is there any principle of law which would prevent her from doing so?".

In our opinion, the learned Judge has merely stated the rule that was stated in AIR 1928 Mad 271 (B) to which he was a party, and he was not attempting to lay down any new doctrine. No decision has been brought to our notice, which either expressly or by implication has cast any doubt on the rule stated in Krishnamurthi v. Krishnamurthi (A).

(10) Mr. Sarma then fell back upon some passages in Mayne on Hindu Law Usage, 11th edition, at page 258. We do not think that the passages referred to by the learned counsel have any bearing on the present enquiry. The learned author far from disapproving the statement of law contained in Krishnamurthi v Krishnamurthi (A) has quoted with approval that is extracted above and has also stated that certain decisions resting on the older view are inconsistent with the decision in Krishnamurthi v. Krishnamurthi (A).

We therefore think that it is now too late in the day for the appellants to contend that the adoption of the 2nd defendant operates to defeat the rights of the widow Subbamma, conferred on her by her husband under the will of Subrahmanyam, under which the power to adopt the 2nd defendant is derived. The finding of the learned Subordinate Judge in that behalf is therefore confirmed.

(11) This leads us to the question whether the 1st defendant was under a liability to render an account to the plaintiff as directed by the lower court. It is argued by Mr. Sarma that under the will of Subbamma, no liability was cast on his client, the 1st defendant, to give an account of the profits and that he had every right to enjoy the income as long as he liked.

We do not think that there is any warrant for this contention either under the terms of the will or in general law. It is not disputed that he was in possession and enjoyment of the properties till the filing of the suit. By and under the said will, he could only continue to be in possession of the property for two years after the death of Subbamma. His subsequent management of the properties can be traced only to the understanding that was reached between the parties after the death of Subbamma as spoken to by P. W. 1, the plaintiff.

It is true that the 1st defendant deposed that there was no arrangement as pleaded and spoken to by the plaintiff, but the Subordinate Judge who had the advantage of seeing the witnesses has chosen to rely on the testimony of the plaintiff, and we cannot see our way to differ from him in this respect. The 1st defendant having had the advantage of the income for these years has to disgorge himself of it and there is no justification for his refusing to render an account of the profits received by him during the period.

(12) There remains the controversy centering round the issue of limitation as regards accountability. Mr. Sarma relied on Art. 109 of the Limitation Act according to which the suit for the profits of immovable property belonging to the plaintiff has to be filed within three years of the receipt of the profits. It is argued by the learned counsel that the accounting should be confined only to three years in view of the terms of this article. We find it difficult to give effect to this argument.

The sine qua non of the application of Art. 109 is the wrongful receipt of the profits by the person that has to account for the profits. In this

case, if the possession of immovable property from which the profits are derived is not wrongful, the suit will be outside the purview of this Article. The 1st defedant got into possession of the property in pursuance of the directions contained in the will of Subbamma.

Subsequently, he was authorised to manage the properties by all parties concerned. At no time, therefore, his possession could be said to be wrongful. All that the 1st appellant can ask for is that he should not be made liable for mesne profits, but only for the profits. The Subordinate Judge has only given a decree in respect of the profits. We think that the present suit is not governed by Art. 109 and, in our opinion, the Subordinate Judge was right in his conclusion even in regard to this matter, and his finding is unassailable.

(13) We may have to mention here that the finding of the Subordinate Judge with regard to the factum of adoption was not disputed by the learned Advocate General appearing for the 1st respondent. The learned Advocate General stated that it was not necessary for him to try to displace that finding as all that his client asked for is only for the "A" schedule properties which the plaintiff got under the will of her mother.

(14) In the result. the decision of the Subordinate Judge is confirmed. The appeal fails and is dismissed with costs.

D.H.Z. Appeal dismissed.

AIR 1955 Andhra 281 (V 42 C 101 Dec.)

SUBBA RAO C. J. AND BHIMASANKARAM J.
(12-1-1955)

Subba Raju and another, Applicants v. Commr. of Income-tax, Madras, (Now Hyderabad), Respondent.

Case Referred No. 67 of 1952.

Income-tax Act (1922), S. 28(1)(c) — Amount of penalty.

When the Income-tax Officer finds that particulars of income are concealed or that inaccurate particulars of income have been deliberately furnished, he acts under Sub-s. (3) of S. 23 in making the assessment. Just as the estimate under S. 23(3) is not limited to the amount actually proved to have been concealed, the penalty under S. 28(1)(c) is to relate to the actual tax assessed on the income as finally estimated, which need not be confined to the income shown to have been concealed. Once an assessment under S. 23(3) has become final, the basis of the levy of penalty is finally settled.

The finding that there was concealment of particulars by itself is sufficient to justify the levy of penalty and the penalty is to be computed with reference to the tax actually paid, and the tax that might have been payable if the assessee's original return had been accepted as correct. AIR 1937 PC 133 and (S) AIR 1955 SC 65, Foll. (Para 4)

Anno: I. T. Act, S. 28 N. 5.

CASES REFERRED: Paras

(A) (V42) (S) AIR 1955 SC 65: (Civil Appeal No. 217 of 1953 — SC) 4

(B) (V24) AIR 1937 PC 133: 1937-5 ITR 170 (PC) 4

K. Srinivasan and M. J. Swami, for Applicants; The Advocate General and M. Kondala Rao, for Respondent.

BHIMASANKARAM J.:

The question referred to us in this case is:

"Whether on the facts and circumstances of the case, the imposition of the penalty of Rs. 4,000/- was justified under S. 28(1)(c) of the Act?".

(2) The assessee is described as a firm of Military contractor doing business at Tadepalligudem, West Godavari District. For the assessment year 1944-45, the firm returned an income of Rs. 19,639/- on the basis of their accounts. The Income-tax Officer called for their accounts and on examination found that they were defective. So, rejecting their estimate, he added a sum of Rs. 54,455/- to the income returned.

There was an appeal to the Appellate Assistant Commissioner and a further appeal to the Income Tax Appellate Tribunal, as a result of which the sum to be added was resulted to Rs. 35,354/-. Three reasons for rejecting the account books were assigned by the Income Tax Authorities:

(1) There was evidence that out of the coal supplied by the Government to enable the assessee to perform a contract. the assessee sold to a private party the two waggon-loads of coal for Rs. 1,000/- and this sale was not disclosed in the accounts:

(2) The muster rolls produced by the assessee for wages paid did not seem to have been maintained in the usual course of business:

(3) No vouchers were produced in some cases of the purchase of materials and of payment of cartage.

The Income Tax Officer considered that the assessee had deliberately concealed the income and made a false return. He, therefore, held that the firm was liable to a penalty under S. 28(1)(c) of the Act and levied a sum of Rs. 4,700/- as penalty. That imposition was confirmed on appeal to the Appellate Assistant Commissioner.

On further appeal to the Income Tax Appellate Tribunal, they confirmed the levy though they reduced the amount to Rs. 4,000/-. An application under S. 66(1) of the Act to the Tribunal to refer the question of law arising out of this Order to this Court was rejected, but the Madras High Court which at that time had jurisdiction in the matter directed a reference to be made under the provisions of S. 66(2) of the Act. The aforesaid question has now come up before us for decision.

(3) In order to appreciate the argument of the learned Counsel for the assessee, it is necessary to extract the material portion of S. 28, Income-tax Act, S. 28(1) reads:

"(28)(1): If the Income Tax Officer, the Appellate Assistant Commissioner (or the Appellate Tribunal) in the course of any proceedings under this Act, is satisfied that any person xx xx

(b) has without reasonable cause failed to comply with a notice under sub-s. (4) of S. 22 or sub-s. (2) of S. 23, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

(he or it may direct) that such person shall pay by way of penalty xx xx xx

In the cases referred to in cls. (b) and (c) in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income tax and super tax, if any, which would have been avoided, if the income as returned by such person had been accepted as the correct income."

(4) It is contended for the assessee that the finding recorded by the Income Tax Appellate Tribunal related only to the non-disclosure in the accounts of the sale of two waggon-loads of coal and that the penalty could be levied in respect only of the amount of concealed income. This contention seems to us manifestly unsound. It ignores the express language of the Section. The finding necessary, in our opinion, for the liability to penalty in a case like this, is concealment of particulars of

income or deliberately furnishing of inaccurate particulars of such income.

Once that finding is recorded, it seems to us that it was open to the appropriate authority to levy by way of penalty a sum not exceeding one and a half times the difference between the amount of the income tax and super tax, if any, actually imposed and the amount of such tax as would have been payable if the original return had been accepted as correct. When the Income Tax Officer finds that particulars of income are concealed or that inaccurate particulars of income have been deliberately furnished he acts under sub-s. (3) of S. 23 of the Act in making the assessment.

It is true as pointed out in the yet unreported Judgment of the Supreme Court in — 'Dhakeshwari Cotton Mills Ltd. v. Commr. of Income Tax, West Bengal', since reported in (S) AIR 1955 SC 65 (A), that the Income Tax Officer is not entitled to make a pure guess. He cannot make an assessment without reference to any evidence or material at all. There must be something more than mere suspicion to support the assessment.

Where the assessee suppressed particulars the Officer, as their Lordships of the Privy Council stated in — 'Commr. of Income Tax, U. P. and C. P. v. Badridas Ramrai shop, Akola', AIR 1937 PC 133 at p. 138 (B), can only make an honest guess, though he should have reference to some material — not necessarily material that would be evidence in a Court of law. He is not compelled to limit the estimate of the assessee's income to the amount which may have been deliberately suppressed. On other materials, the suppression of which can be reasonably suspected, he can make an addition to the income returned.

Just as the estimate under S. 23(3) is not limited, to the amount actually proved to have been concealed, the penalty leviable under S. 28(1) (c) is to relate to the actual tax assessed on the income as finally estimated, which as shown above, need not be confined to the income shown to have been concealed. We are not now concerned with the legality of the actual assessment.

Once an assessment under S. 23(3) has become final, the basis of the levy of the penalty is finally settled. In this case, there is a clear finding by the Appellate Tribunal that there was concealment, of particulars in regard to the two waggon-loads referred to above. That finding by itself is, in our opinion, sufficient to justify the levy of penalty and the penalty is to be computed with reference to the tax actually paid, and the tax that might have been payable if the assessee's original return had been accepted as correct.

(5) We have, therefore, no doubt that the answer to the question referred to us should be in the affirmative. The assessee will bear the costs of this reference, which we fix at Rs. 250/-.

D.H.Z. Answer in the affirmative.

AIR 1955 Andhra 282 (V 42 C 102 Dec.)

SUBBA RAO C. J.

Vissavajjula Mahadeva Sastri, Appellant v. Pothula Sreeramamurty, Respondent.

Second Appeal No. 2362 of 1950, D/- 25-2-1955, against decree of Sub.-J. (Addl.) Eluru, in A. S. No. 120 of 1949.

Civil P. C. (1908), S. 11 — Heard and finally decided — Suit dismissed — Adverse finding against defendant.

In a suit for eviction the Court recognised the joint rights of the plaintiff and the defendant but dismissed that suit on the ground that it was not one for partition as it should be, but gave only half the costs to the defendant as it found title to only half the property in his favour.

Held that finding that the defendant was entitled to an equal right in the suit property was the basis for disallowing half the costs to the defendant. The defendant could have preferred an appeal against that part of the decree. The finding, therefore, certainly operated as res judicata against him. (Para 11)

Held further that the subsequent suit by the plaintiff for partition and for separate possession on the basis that the plaintiff and the defendant were co-owners was not barred. The cause of action for the subsequent suit was different from that in the earlier suit, for the present suit was based upon the joint rights declared in the earlier suit. (Para 12)

Anno: AIR Com., Cr. P. C., S. 11 N. 109, 100, 7.

CASES REFERRED: Paras

(A) (V9) AIR 1922 PC 241: 48 Cal 460 (PC) 5, 7, 8

(B) (V6) AIR 1919 Mad 212: 9 Mad LW 84 6

(C) (V19) AIR 1932 Mad 541: 139 Ind Cas 197 7

(D) (V24) AIR 1937 Mad 114: 168 Ind Cas 306 8

(E) (V11) AIR 1924 Mad 626: 46 Mad LJ 515 11

(F) (V22) AIR 1935 Mad 701: 1935 Mad WN 871 11

(G) (V11) AIR 1924 Mad 711: 78 Ind Cas 1055 12

Ch. Sankara Sastry and T. Veerabhadrayya, for Appellant; B. V. Ramanarasu, for Respondent.

JUDGMENT: This is an appeal against the decree and judgment of the Court of the Subordinate Judge, Eluru, confirming that of the District Munsif, Eluru, in O. S. No. 303 of 1947, a suit filed by the respondent for partition and separate possession of his 1/2 share in the plaint schedule property.

(2) Krishnamacharyulu and Ramanujacharyulu were brothers. They jointly owned the plaint schedule property. Krishnamacharyulu sold the said property to the plaintiff on 12-7-1939 representing that he was the full owner thereof. Ramanujacharyulu, in his turn, sold the same property to the defendant on 5-8-1939 representing that he was the full owner thereof. The plaintiff filed O. S. No. 174 of 1944 on the file of the Court of the District Munsif, Eluru, for evicting the defendant, who was the 6th defendant in that suit.

The District Munsif held that the property was the joint property of Krishnamacharyulu and Ramanujacharyulu and decreed the suit in respect of half the suit property. The defendant preferred an appeal to the District Court West Godavari, A. S. No. 413 of 1945. The suit was remanded for fresh disposal and sent to the District Munsif's Court, Narasapur. It was numbered as O. S. No. 282 of 1946.

That Court also found that the suit property was the joint property of the two brothers and the plaintiff must be deemed to have purchased only the equity of enforcing partition as against the co-owner in possession. The plaintiff was advised to file a separate suit for partition. With that observation, the suit was dismissed. Thereafter the plaintiff filed O. S. No. 303 of 1947 for partition and separate possession of his half share.

The defendant, apart from raising the plea that the suit property was the absolute property of Ramanujacharyulu, pleaded that the plaintiff's

earlier suit for the recovery of the entire property having been dismissed, he was barred by res judicata from filing the present suit for half of it. The learned District Munsif held that the decree in the previous suit constituted res judicata and the defendant could not in the present suit, reopen the question of title.

In the result the suit was decreed as prayed for. On appeal, the learned Subordinate Judge expressed the same view on the question of res judicata and dismissed the appeal. Hence this Second Appeal.

(3) The only question in the Second Appeal is whether the Judgment in A. S. No. 282 of 1946 operates as res judicata against the defendant in the suit on the question of title. The learned Counsel for the appellant raised before me the following two points (i) the earlier suit, which was filed for the recovery of the entire property having been dismissed, the plaintiff cannot file the present suit for recovery of half of the property, the subject-matter of the earlier suit, and (ii) though the defendant was given only half the costs of the suit on the basis of the finding that the plaintiff and defendant jointly owned the property in equal shares, the finding would not operate as res judicata.

(4) I shall take the second point first. Before adverting to the cases cited, it may be convenient to notice the finding given by the District Munsif in the earlier suit. The learned District Munsif found that the plaintiff's vendor and the defendant's vendor were entitled to the suit land in two equal shares at the time of the sales by them and that the plaintiff's vendor had only joint possession of the suit land.

On that basis he held that the plaintiff had only a right to a half share in the suit land and joint possession of it and that he would not be entitled to exclusive possession of it and that he would not be clusive possession until his share was separated in a suit for partition. As the learned District Munsif was of the view that a suit in ejectment could not be converted into a suit for partition, he dismissed the suit with the observation that his right was merely to file a separate suit for partition. He awarded only half the taxed costs to the defendant and gave the following reason for doing so :

"I am awarding the 6th defendant only half the taxed costs in both the trial courts, for the reason that he too has taken the sale deed for the entire suit land from defendants 3 to 5 in a speculative manner and knowing full well that the suit land is the joint property of the 3rd defendant and both plaintiff and 6th defendant have knowingly purchased the entire suit land from their respective vendors in a speculative manner and out of mutual ill-will."

It is, therefore, apparent from the Judgment that the learned District Munsif recognised the joint rights of the plaintiff and the defendant, but dismissed the suit on the graund that it was not one for partition as it should be, but he gave only half the costs to the defendant as he found title only to half the property in his favour.

Both the plaintiff and the defendant could have preferred appeals against that decree, the plaintiff in so far as he was not given a decree for partition and the defendant in so far as he was deprived of half costs in the suit. But both parties were satisfied with the decree and did not prefer any appeal against it. The only question under those circumstances is whether the finding that the plaintiff is entitled to half of the suit property would be res judicata, in the present suit.

It would be res judicata within the meaning of S. 11, Civil P. C., if the issue on the question of title was directly and substantially in issue in the former suit and had been heard and finally decided by that court. Mr. Sankara Sastri, learned counsel for the appellant, contends that though the question of title was directly and substantially in issue, in the previous suit, it was not finally decided against the defendant, as it is said that the defendant could not have preferred an appeal against that finding inasmuch as the suit was dismissed in his favour.

In regard to the said contention, a number of decisions have been cited at the Bar. All of them need not be noticed. It would be enough if I consider the leading decision on the subject.

(5) The leading case on the subject is that of the Judicial Committee in — 'Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy', AIR 1922 PC 241 (A). There the Zamindar filed a suit against his tenant claiming possession of certain Chur Land. That suit was compromised and a fresh patta and Kabuliyat fixing a yearly rent for a term of 8 years were executed. After the expiry of the term a fresh patta and Kabuliyat were to be given at a fair rate to be then settled. One of the terms of the compromise was that if he did not pay the fair rent as settled between them, the Zamindar could evict him from possession.

Subsequently, the Zamindar sued the tenant for possession. The tenant pleaded that he had occupancy rights and that the suit was premature. The trial court held that there was no occupancy right and that the suit was premature. The High Court affirmed the said Judgment. Thereafter, the Zamindar brought another suit for possession of the land after giving the necessary notice to terminate the tenancy. The tenant again claimed occupancy rights. The Judicial Committee held, on a construction of the lease deed, that he had no right of occupancy.

They also found that the finding on the question of occupancy rights in the earlier suit was not res judicata in the latter suit, for the tenant having succeeded on the preliminary point, he had no occasion to go further as to the finding against him. At page 243, the Judicial Committee observed :

"Their Lordships do not consider that this will be found on actual plea of res judicata for the defendants having succeeded on the other plea, had no occasion to go further as to the finding against them."

This decision is, therefore, authority for the position that a finding against a defendant is not res judicata in a subsequent suit if the suit is dismissed against him in toto, for, in that event, the defendant had no opportunity to file an appeal questioning that finding.

That finding, therefore, cannot be held to be a final decision. This proposition is accepted as sound by the learned counsel for the respondent also. But his contention is that a decree depriving the defendant of half the costs would make all the difference, for that circumstance would have enabled him to prefer an appeal if he had chosen to do so. Anticipating this objection, the learned counsel for the appellant attempted to point out that in the case before the Judicial Committee also, the High Court on the earlier occasion did not give costs.

That fact is not clear from the judgment. But, it is sought to be inferred from the cryptic statement at page 242 of the report, which reads :

"Appeal was taken to the High Court and they in affirming the judgment said as follows after expressing the view that the action was premature. 'If the respondents (defendants) had been satisfied with this Judgment, we would have been inclined to dismiss the appeal with costs, but notwith-

standing the suggestion of the Court, the Government Pleader who appears for the tenants thought it advisable to lay before us a cross-appeal'."
From this, it is argued that because a cross-appeal was filed, the appeal was dismissed without costs. The emphasis in the extract was not on costs, but on the dismissal of the appeal.

Anyhow, the argument that the appeal was dismissed without costs and therefore it was not res judicata was not raised before the Judicial Committee and I cannot extend the proposition laid down by the Judicial Committee to a case which was not placed before them.

(6) In 'Kelu Nambiar v. Chathu Nambiar', AIR 1919 Mad 212 (B), a Division Bench of the Madras High Court consisting of Ayling and Krishnan JJ., ruled that a finding against a party not necessary for the disposal of a suit and not embodied in the decree will not operate as res judicata where the decree in the suit is in favour of that party. The facts there were: The plaintiff, one Kelu Nambiar sought to recover as Karnavan of one Meethala Veeti Tavazhi certain lands and arrears of rent from the tenant in possession. The tenant denied the existence of any such tavazhi and pleaded that the lands belonged to the main tarwad of which one Chathu Nambiar was Karnavan.

He also pleaded that he paid rent to the said Chathu Nambiar. Both the parties contended that the question whether the tavazhi existed as a separate entity was res judicata by reason of previous decision between the parties. O. S. No. 3 of 1895 was brought by Sankaram Nambiar, a junior member of the family, to remove one Ambu Nambiar from the karnavanship for alleged misconduct and for recovery from the tarwad certain properties. The plaintiff had asserted in that suit that Ambu Nambiar was the karnavan of the tavazhi.

The defendants who were allowed to appear in a representative capacity, denied the existence of the said tavazhi. The court held that such a tavazhi existed, but in spite of that finding, the suit so far as it prayed for the removal of the karnavan was dismissed and Ambu Nambiar was not removed from the karnavanship of either the tarwad or the tavazhi; nor was the finding embodied in the decree. On these facts, it was held that the finding was not necessary for the disposal of the suit and, therefore, it could not be held to have the force of res judicata against the tarwad.

This is also a case similar to that of the Privy Council quoted above. The suit was dismissed in spite of the finding in favour of the tarwad. The tarwad obviously could not have preferred any appeal against that finding.

(7) So too, Waller and Pandalai JJ., in — 'Subbier v. Ramaswami', AIR 1932 Mad 541 (C), accepted and applied the said principle to the facts before them. The learned Judges held that where a decree was in favour of the plaintiff, an adverse finding on an issue that in no way affects the decree, cannot be treated as res judicata in a subsequent litigation between the same parties which raises the same issue. At page 541 the learned Judges gave the following reason for their conclusion:

"Not only was there no necessity for the respondent to appeal, there was also nothing that he could appeal against, the decree being in his favour."
The principle recognised and adopted by the aforesaid decisions can only apply to a case where a suit is dismissed or decreed in toto without reference to a finding given against a party in whose favour the said decree is made, for in that case there is no final adjudication, as the party against whom that finding is given cannot prefer an appeal against that finding. The Judicial Committee in — AIR 1922 PC 241 (A), clearly brought out that distinction.

(8) In — 'Kotayya v. Subbayya', AIR 1937 Mad 114 (D), Venkataramana Rao J., has discussed this aspect of the question at some length with reference to the case law on the subject. There a landlord instituted a suit against R's tenant for ejectment and for recovery of possession. The tenant denied the lease and the title of the landlord and claimed adverse possession. In the previous litigation between them, the Court found in favour of the landlord as regards the lease, title and adverse possession, but dismissed the suit and appeal therefrom on the ground that the landlord failed to serve a notice on the tenant to quit, but disallowed costs of defendant.

The tenant's appeal as to costs was also dismissed as he set up false pleas. The learned Judge held that the tenant by his appeal invited the appellate court to give decision on the question of title and of the lease and that the finding as regards title, lease and adverse possession and the order relating to costs were related to each other as cause and effect and hence the finding in the previous suits operated as res judicata in the subsequent suit by the landlord against the tenant for ejectment and for recovery of possession.

At page 116, the learned Judge, after referring to the decisions of the Judicial Committee, made the following observations:

"But in both these cases, it will be seen that there was a decision in favour of the defendant and against the plaintiff who was entitled to prefer an appeal. In this case, though the ultimate decision of the suit was in favour of the defendant, there was a decree disallowing costs to the defendant. The defendant chose to prefer an appeal, invited the appellate court to give a decision on the question of title and of the lease and the Appellate Court did not go into them and gave findings.

It seems to me that these findings will be res judicata against the defendant and would clearly come within the principle of the decision in — AIR 1922 PC 241 (A)."

(9) The learned counsel contends that that case is distinguishable from the case on hand as there the defendant preferred an appeal against the order disallowing costs and questioned the correctness of the findings of the first court. The appellate court confirmed the finding. The fact that the defendant against whom a finding was given, though the suit was dismissed against him, preferred an appeal, should not make any difference if the finding of the first court did not operate as 'res judicata'.

The dismissal of the appeal only left the parties in the same position where they were before the appeal was filed. The principle behind the decision, therefore, is that there was an appealable decree even against the defendant in so far as the first court dis-allowed the costs against the defendant. When the decree disallowed costs against the defendant, on the basis of a finding against him, it will be a final adjudication to that extent as he can in law prefer an appeal against that part of the decree. That there is no distinction between the two classes of cases is also made out clear by the learned Judge when he states:

"Here there was an order of the first court disallowing costs against which he did prefer an appeal. There was also the decree of the appellate court giving costs to the plaintiff against the defendant and the defendant could have preferred an appeal against the said decree."

(10) That statement also clearly implies that the appellate decree was also appealable and, therefore, it was a final adjudication between the parties.

(11) The same view was expressed by another Division Bench of the Madras High Court, Ayling and Odgers JJ., in — 'Veeraswamy Mudali v. Palaniappan', AIR 1924 Mad 626 (E). In that case also the suit was dismissed on the ground that there was no notice to quit. But there was a finding against the defendant in regard to the question of occupancy right and the plaintiff was awarded costs. The defendant preferred an appeal as to costs. The District Judge confirmed the Judgment of the first court, but directed the defendant to bear his own costs. Odgers J., in holding that the finding on the question of occupancy rights operated as 'res judicata' in a subsequent suit observed:

"Moreover the defendants might have appealed against the decree in so far as costs were awarded against them, which award was expressly made on the ground that the finding as to title was against them. This is as much a part of the decree as anything else".

In — 'Venkatachalla Padayachi v. Velayudha Padayachi', AIR 1935 Mad 701 (F), the Officiating Chief Justice explained the scope of 'Veeraswamy Mudali v. Palaniappan (E)', in the following words:

"The distinction is important, for the principle of the decision in 'Veeraswamy Mudali v. Palaniappan (E)', is that the defendant could have attacked the adverse finding by filing an appeal against the Order as to costs. But in this case that requisite is wanting, the adverse finding and the Order regarding the costs not being related to each other as cause and effect."

From the aforesaid discussion of the case law, the following principle emerges. Though a suit is dismissed the adverse finding against the defendant would be 'res judicata' in a subsequent suit between the same parties, if on the basis of that finding, costs in whole or in part were disallowed to the plaintiff or awarded to the defendant, (sic) for, in such a case, there is a decree against the defendant and it becomes final unless he prefers an appeal against the same.

In the present case, the finding that the defendant was entitled to an equal right in the suit property was the basis for disallowing half the costs to the defendant. The defendant could have preferred an appeal against that part of the decree. The finding, therefore, certainly operates as 'res judicata' in the present case.

(12) Now coming to the first question, the argument of the learned counsel is that in the earlier suit, the plaintiff claimed recovery of the entire property and that having been dismissed in toto, he could not file a suit for recovering half of it. To illustrate, if A files a suit for recovering of 10 acres and that is dismissed, he cannot thereafter file a suit for recovery of five or more of those 10 acres.

In the same way, the argument proceeds that whatever might be the ground on which the plaintiff was non-suited in reagrd to his entire claim, he cannot file another suit for recovery of the suit property, or part of it. In support of this contention, reliance is placed upon the judgment of Spencer, Officiating C. J., in — 'Mahomed Esuf Rowther v. Abdul Khader', AIR 1924 Mad 711 (G). There the plaintiffs were the widow and children of one Sheick Mahomed Bava Rowther.

Sheick Mahomed Rowther had one brother, who was the first defendant, and four sisters. Sheick Mahomed brought a suit O. S. No. 15 of 1905 to recover the suit lands from the 1st defendant on a plea of trespass, in which he alleged that the properties were in plaintiffs' possession. Another suit O. S. No. 38 of 1915 was brought by the daughters of the Isabibi Ammal, one of the sisters of Sheick Mahomed and the first defendant. That suit was dismissed on a finding that the property was the exclusive property of Sheick Mahomed.

The result of the said suit was to negative the right of the sisters to any share in the property and to enhance the shares of Sheick Mahomed and the first defendant. In the third suit, the subject-matter of the appeal in that case, the courts below gave a preliminary decree for partition. The learned Judge held that, as regards the plaintiffs' title to sole possession of the property, the decision in O. S. No. 15 of 1905 was 'res judicata' as between them and the defendant. At page 712, the learned Judge observes:

"The present suit, if it be regarded as a suit to obtain possession against a trespasser, is barred by reason of the prior suit O. S. No. 15 of 1905 upon the same title. If it is to be alleged that in the prior litigation the plaintiff asked for too much, and therefore his suit was dismissed and his representatives are now at least entitled to 6/8 or some other smaller share of the property, then they are equally barred because Sheick Mahomed should have pleaded in that suit, that if he was not entitled to a decree for the whole property, he should at least be given a decree for his 6/8 share."

It will be seen from the aforesaid facts that, in the first suit, the plaintiff's predecessor Mahomed Rowther claimed the entire property on the ground that he was the owner of the property.

No question was raised in that case, either by the plaintiff or the defendant, that the defendant was entitled to half the property and was in joint possession with the defendant. A party who filed a suit for the entire property cannot, when his title is denied, obviously filed a suit for a portion of it, and the learned Judge did not lay down anything more than that self-evident proposition. Indeed, he makes it clear at an earlier stage of the Judgment that the suit did not purport to be a suit for partition of property between co-owners.

But that principle cannot apply to a case where the plaintiff claimed the entire property, the defendant set up title to half the property in himself and the court recognised that title and deprived the defendant of half the costs. In O. S. No. of 1946 the learned District Munsif held that vendor had right only to a half share in the land and joint possession of it. On that finding, he rejected the claim for exclusive possession and in view of that finding he disallowed half costs.

The effect and substance of that judgment was that joint title and possession was declared and the suit so far as it asked for exclusive possession was dismissed. As I have already stated that finding was the basis of the decree for costs and the defendant could also have preferred an appeal, if he had chosen to do so. The present suit was filed for partition and for separate possession on the basis that they were co-owners. It cannot, therefore, be held in this case that previous suit was dismissed in toto. The cause of action for the present suit is different from that in the earlier suit, for the present suit is based upon the joint rights declared in the earlier suit. There is, therefore, no point in this contention either.

(13) In the result, the appeal fails and is dismissed with costs. No leave.

D.H.Z. Appeal dismissed.

AIR 1955 ANDHRA 286 (V 42 C 103 Dec)

SUBBA RAO C. J. AND BHIMASANKARAM J.

Doredla China Kotayya, Appellant v. Sub-Collector of Bezwada, Referring Officer, Respondent.

Appeals Nos. 223 and 337 of 1950 D/- 15-12-1954, against order of Sub. J., Vijiawada, D/- 21-3-1949.

(a) Land Acquisition Act (1894), S. 23 — Capitalisation — Evaluation of market value of portion of structure.

The evaluation of the market value of a portion of a structure on the basis of the capitalisation of the proportionate rate of rent is altogether inappropriate. (Para 4)

Anno: AIR Man., L. A. Act, S. 23 N. 13.

(b) Land Acquisition Act (1894), S. 23 — Market value of building — Determination of.

The ascertainment of the market price merely with reference to the actual rental value may not always lead to a proper result. For instance a newly built building in a pucca condition cannot be assessed at the same market value as an old building fetching the same rent. Therefore, where the value of a building is to be determined, regard must also be had to what may be called the expectation of life of the building in question. (Para 7)

(However, in the instant case, as no evidence was let in to show the condition of the building acquired, the normal rule as laid down in AIR 1938 Mad 33, was applied.)

Anno: AIR Man., L. A. Act, S. 23 N. 12.

CASES REFERRED: Paras

(A) (V25) AIR 1938 Mad 33: ILR (1938) Mad 431 — 4, 5, 7, 8

(B) (V28) AIR 1941 Mad 684: 1941-2 Mad LJ 75 — 5, 7, 8

(C) (V29) AIR 1942 Mad 739: ILR (1943) Mad 127 — 7

(D) (V31) AIR 1944 Mad 271: 1944-1 Mad LJ 142 — 7

(E) (V36) AIR 1949 Mad 171: ILR (1949) Mad 497 — 7, 8

In A. No. 223 of 1950:

G. Venkatarama Sastri, for Appellant; Govt. Pleader and M. V. Srinivasa Rao, for Respondent.

In A. No. 337 of 1950:

Govt. Pleader and T. J. M. Wilson, for Appellant; G. Venkatarama Sastri, for Respondent.

BHIMASANKARAM J.:

These are two appeals under S. 54, Land Acquisition Act (1 of 1894) against the awards passed by the learned Subordinate Judge of Vijiawada on reference under Ss. 18 and 19 of the said Act.

(2) Appeal No. 223 of 1950 is an appeal by the second petitioner in O. P. No. 38 of 1942 (Sub-Court, Vijiawada) while Appeal No. 337 of 1950 is an appeal arising out of the same O. P. and filed by the respondent therein (Sub-Collector, Vijiawada Referring Officer). There is also a Memorandum of Cross Objections by respondents 1 and 3 to 5 in the same O. P. filed in Appeal No. 337 of 1950. Appeal No. 223 of 1950 is concerned with the acquisition of N. T. S. No. 339/6-A and 339/6-B.

These acquisitions have been made at the instance of the Commissioner of Vijiawada Municipality for widening what is known as the Tammanavari lane. Out of 339/6-A, 93 square feet have been acquired. It is a vacant site without a structure. Out of 339/6-B which consists of a site and a structure with three floors, only a portion has been acquired. In this portion the site of only ground floor have been acquired leaving the first and second floors overhanging the lane after the acquisition.

With reference to 339/6-A, the Sub-Collector Vijiawada awarded a sum of Rs. 40/- per square yard, while the learned Subordinate Judge granted Rs. 100/- per square yard, but the appellant claims compensation on the basis of Rs. 1-1-0 being the annual net income, per square feet. In regard to 339/6-B, the market value was fixed at Rs. 30/- per square yard by the Sub-Collector, while the learned Subordinate Judge awarded a sum equal to twenty five years purchase on the basis of the capitalisation of the annual net income.

(3) Now, as regards 339/6-A the value of the neighbouring sites is evidenced by Exs. D-4, A-1, A-3, A-12 and A-16. The claimant seeks Rs. 225/- per square yard. According to Ex. D-4, a sale deed dated 2-12-1939 for a site to the south of Sivalayam street and 70 yards away from the site acquired, a square yard works out at Rs. 47/-. The claimant alleged that the site was the subject matter of a civil dispute, and, therefore, did not fetch a good price.

Exhibit A-1 dated 28-4-1941 shows a price of Rs. 168/- per square yard. According to Exs. A-12 and A-16, a square yard in the neighbourhood works out at Rs. 250/- to Rs. 300/-. It is difficult to see on what basis the learned Subordinate Judge proceeded in fixing Rs. 100/- per square yard. On the evidence available, it seems to us that a price of Rs. 150/- per square yard would be reasonable, having regard to the values as disclosed by the sale deeds above referred to.

In regard to 339/6-B the appellant attacks the mode of valuation. He says that though the learned Judge found that Government gilt-edged securities were found to fetch an interest of 3 per cent. per annum in the year of acquisition instead of capitalising the income on the basis of 33.1/3 times the rental value, he gave only on the basis of 25 years' purchase. Again it is objected that the learned Judge was wrong in deducting five months' rental value in arriving at the net annual income instead of three months' rental value which is stated to be the usual practice.

In doing this, the learned Judge seems to have thought that the income-tax payable by the parties on the rental should also be deducted. It is stated that there is no evidence before the Court that the appellant is an income-tax assessee. However it may be, it seems to us that there are no adequate reasons for deducting five months' rental out of the gross annual income to arrive at the net rental value.

(4) In regard to the other branch of the arguments as regards the mode of capitalising the income, reliance is placed by the learned counsel for the appellant on the decision in — 'Collector of Kistna v. Zamindar of Challapalli', AIR 1938 Mad 33 (A) and it is contended that the learned Judge having come to the conclusion that gilt-edged securities fetched an interest of 3 per cent. per annum in the relevant year, ought to have fixed the value at 33.1/3 times the annual rental.

Before we proceed to deal with this argument, we would like to observe that the evaluation of the market value of a portion of a structure on the basis of the capitalisation of the proportionate rate of rent seems to us altogether inappropriate. Our attention has not been drawn to any case where the market value was determined with reference to the proportionate rent derivable from a

portion of the structure when such a portion had been acquired.

It is one thing to assess the value of a building with reference to the annual rental realised thereon. It is quite another thing, we think, to assess the value of a part of a building with reference to the proportionate rate of rent. But this mode of approach has not been objected to by the parties and we do not, therefore, propose to adopt a different method in this case. The earliest of the cases to which reference has been made in the course of the argument is the decision in AIR 1938 Mad 33 (A).

There the Court was concerned with the proper method of valuing the melwaram interest in the land which was the subject matter of the acquition. Newsam J., stated what according to him were the principles which should be applied in assessing the capital value of that interest. He says :

"It is necessary to start with the one known fact —the gross income of the Zamindar from the land which is being acquired. The next step should be to ascertain the net income.... Neither calculation presents any real difficulty. We think that it would be fair and equitable to make a deduction of ten per cent. of the gross income towards the expenses of a Revenue collecting and administrative staff.

Having thus ascertained the net annual revenue of the Zamindar from the land being acquired, it must be capitalised by computing the number of years' purchase. Twenty times the net revenue from property has in the past been commonly taken to be the capital value of any property or interest in property and the true justification for this was that approximately five per cent. was the prevalent rate of interest.

But it is clear that the number of years' purchase must depend upon the rate of interest prevailing on gilt-edged securities at the time of the acquisition, i.e., on the date of the Notification under S. 4 of the Act. The higher the rate of interest on that date, the fewer will be the number of years' purchased."

Venkatasubba Rao, in his concurring judgment put the matter thus :

"The only real question that these appeals raise is what is the number of years' purchase at which the rental of the lands acquired should be capitalised? The contention of the learned Government Pleader that there prevails a rule to be rarely departed from, that no more than twenty years' purchase should be followed does not rest upon any sound principle. What does the twenty years' purchase rule imply?

It means that the value of the property might be taken to be a capital sum, which if invested at the rate of five per cent. per annum, would yield an income equivalent to the rent.

x x x

Therefore, the twenty years' purchase rule rests upon this assumption; the owner of the property compulsorily acquired if paid twenty times the annual rental, would get a five per cent. return upon his money (five per cent. of any given amount being the 1/20th of it).

There is another assumption upon which this rule rests, namely that the return expected from immoveable property is five per cent. and that, therefore, if the rental is capitalised at twenty years' purchase, the owner would be properly compensated for the acquisition. It will thus be seen that the rule of the number of years' purchase is not a theoritical or legal rule but depends upon economic factors, such as, the prevailing rate of interest."

He also agreed that a deduction of 10 per cent of the gross income towards the expenses of collection and administration should be made to arrive at the net income.

(5) The next case to which reference was made is a decision of their Lordships King J. and Patanjali Sastri J., (as he then was) in — 'Land Acquisition Officer, Calicut v. Subba Rao', AIR 1941 Mad 684 (B). The subject matter of the acquisition there was a plot of land with a building standing upon it. The learned Subordinate Judge calculated the net rate of rental and capitalised the sum at 33 1/3 years' purchase purporting to follow and apply the decision quoted above. The learned Judges in upholding his view say this :

"It is clearly laid down in the case already cited that it has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities. x x x

We are of opinion that the learned Subordinate Judge was right in following the authority of 'Collector of Kistna v. Zamindar of Challapalli (A)', and in view of the fact that there was evidence before him that the rate of interest obtainable on Government securities in 1935 was only 3 per cent. The method of capitalisation by taking 33 1/3 years' purchase is mathematically correct."

Dealing with the Memorandum of Cross Objections in the case, the learned Judges proceeded to say :

"The main question raised in the Memorandum of Cross Objections is an objection to the procedure of Land Acquisition Officer and to a leser extent the procedure of the learned Subordinate Judge in refusing to recognise that the true rental value of the property acquired might not be something higher than the rent actually received by the claimant."

(6) Now it is plain that the word 'not' occurring in the passage extracted above is a misprint. The learned Judge evidently meant to say that the real rental value of a property may be something higher than the rent actually received by the claimant. Applying that principle to the facts of the case before them in which the evidence disclosed that in the building acquired the upper storey and one of the rooms below had collapsed, the learned Judge went on to say :

"There is evidence that the reason for the collapse of the upper storey and of one of the rooms below was not any structural defect in the building itself, but the fact that a neighbouring building fell upon it, and this evidence has not been subjected to any cross-examination.

We think, therefore, that although this aspect of the case has not been dealt with in any detail in the evidence it is reasonably certain that a purchaser by expending whatever is necessary to put the building once again into proper order and restoring it to its original size, could obtain a rental considerably higher than Rs. 15/-.

Of course, to do this, he would have to incur considerable expenditure, but we feel certain that the net result would be to his advantage. It is conceded that if in fact the present owner of the property has neglected it in such a way as not to derive the true economic rent from it, he should not be penalised on this account by his not being awarded the true market price. The true market price is what a purchaser would give with all possibilities of the purchase present to his mind."

(7) We are of opinion that the principle underlying this passage ought to be borne in mind in all such cases and that the ascertainment of the market price merely with reference to the actual rental value may not always lead to a proper result. For instance a newly built building in a pucca condition cannot be assessed at the same market value as an old building fetching the same rent. It seems to us, therefore, that where the value of a building is to be determined, regard must also be had to what may be called the expectation of life of the building in question.

We must notice, however, that this method of valuation has not always been accepted without demur. In — 'Sub-Collector v. Parthasarathy', AIR 1942 Mad 789 (C), also a Bench decision, Krishnaswamy Ayyangar J., observed that the number of years' purchase must vary with individual cases and would have to be determined on the material placed before the Court and thought that a basis of twenty years' purchase should be adopted in the case before him, which related to the acquisition of a site. In doing so, he observed:

"This is ordinarily adopted as the basis and we see no reason to depart from the rule of ordinary practice."

The practice mentioned in this case is clearly at variance with that referred to in the 'Chellapalli case (A)'. Again, in a subsequent ruling — 'Revenue Divisional Officer, Trichinopoly v. Varadachari', AIR 1944 Mad 271 (D), to which the Krishnaswamy Ayyangar J. was a party and in which the judgment of the Court was delivered by Horwill J., it was remarked:

"It is difficult to accept the current rate of interest on gilt-edged securities as a safe guide to the multiple to be applied to the annual profits on ryotwari land."

The next case to which our attention was drawn is the decision of — 'Radhakrishna Chettiar v. Province of Madras', AIR 1949 Mad 171 (E). There the property acquired was a site with a building thereon and wells and trees. After discussing the rulings above quoted, their Lordships concluded as follows:

"After a consideration of all these cases, it appears to us that both on principle and on account of the similarity of facts, the valuation in this case should follow the basis adopted by King and Patanjali Sastri JJ. in 'Land Acquisition Officer, Calicut v. Subba Rao (B)'. There as here, the property acquired was land with building thereon. The number of years' purchase was arrived at by taking into account the interest yielded by the Government securities at the time of the Notification under S. 4(1) of the Act.

In the present case, it appears from the judgment of the Lower Court that it was not disputed, that guilt-edged securities were carrying interest at 3 per cent. at the time of the acquisition. The annual rental value must, therefore, be capitalised at 33 1/3 years' purchase."

(8) Though, as according to us, as stated above, in all such cases the condition of the building and not merely its rental values should be taken into account as no evidence has been let in about it in the present case, we propose to apply the normal rule as laid down in 'Collector of Kistna v. Sivarama Prasad (A), and adopted and followed in 'Land Acquisition Officer, Calicut v. Subba Rao (B)' and 'Radhakrishna Chettiar v. Province of Madras (E)', because of the similarity of facts.

We may observe, however, that it is not to be applied as an invariable rule to all cases of valuation of immovable property of whatever description and condition.

(9) In the result, we are of the view that the value of the property must be assessed at 33 1/3 years' purchase on the basis of the yield from gilt-edged securities in the year of acquisition having been 3 per cent. We also think that from the gross annual of Rs. 400/- in regard to 369/6-B rent deductions should be made only of three months' and not five months' rental as has been done by the learned Subordinate Judge.

This method of valuation will also apply to the plot and buildings of the other claimants who have filed the Memorandum of Cross Objections Appeal No. 337 of 1950. The award of the lower Court will stand modified accordingly. The claimants will of course be entitled to the statutory hancement of 15 per cent. to the value as al re determined.

Mr. Venkatarama Sastry for the appellant in Appeal No. 223 of 1950 also urged that the learned Subordinate Judge's direction that the parties should pay and receive proportionate costs is erroneous and that his client is entitled to full costs as the Acquisition Officer's determination of the compensation payable to him had been substantially modified by the learned Subordinate Judge. We see however no reason to interfere with the order as to costs.

(10) But the costs awarded by the lower Court will be worked out on the basis of the amount as modified by the above directions.

(11) In A. S. No. 223 as also in the Memorandum of Cross Objections in Appeal No. 337 of 1950, the parties will pay and receive proportionate costs. A. S. No. 337 of 1950 will be dismissed with costs.

V.R.B. Award modified.

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remove trees which he has himself planted and buildings which he has himself erected, provided he leaves the property in the state in which he received it. The prohibition in regard to the felling of timber and pulling down of buildings in Cl. (o) does not limit the right declared in Cl. (h). It is subject to that right; that is, the lessee must not fell timber or pull down buildings unless the timber had been planted or the buildings erected by the lessee and he must leave the property in the state in which he received it".

At page 56, the learned Judges further observed:

"We do not, however, wish to suggest that the Transfer of Property Act of its own force, applies directly to the present case, but the rules in the Act to which we have referred are, we think, founded on reason and equity, and may properly be adopted as a statement of the law which ought to apply to the case before us".

(7) When other decisions were cited before the learned Judges, they distinguished them on the ground that many of them related to trees not planted by the tenant which of course, stand on a footing totally different from that of trees planted by the tenant himself. This decision, therefore, is authority for the position that a tenant can remove the trees planted by him and that neither the provisions of the Transfer of Property Act nor the principles underlying the said provisions entitle a tenant to cut or sell trees not planted by him.

(8) In — 'Gangamma v. Bhomakka', 33 Mad 253 (D), a Division Bench of the Madras High Court, consisting of Benson C. J., and Krishnaswamy Ayyar J., held that mulgeni lessee is not entitled to cut trees standing at the date of the grant. The learned Judges applied the provisions of the Transfer of Property Act by analogy. In — 'Krishnacharya v. Anthakki', AIR 1916 Mad 939 (E), another Division Bench of the Madras High Court consisting of Spencer and Kumaraswamy Sastry JJ., held that a mulgeni tenant is entitled to cut and appropriate the trees on the holding, whether planted by him or of spontaneous growth, so long as the trees growing on the land at date of the lease are not interfered with, and the nature of the holding is not changed. The learned Judges at pp. 939, 940 stated as follows:

"The observations in 'Ruttonji Edulji Shet v. The Collector of Tanna (A)', that the trees upon the lands were part of the lands and the right to cut down and sell them was incidental to the proprietorship of the land had reference to trees standing in the land when the lease was made..... In this country it may well be that on leasing land capable of growing timber, the lessee may intend to raise and cut timber for sale as firewood, etc., and so long as the trees growing on the land at the date of the lease are not interfered with, and the nature of the holding is not changed, it is difficult to see why the tenant should not be entitled to any benefit conferred on him by nature".

(9) The observations are very wide and general. But they must be confined to the mulgeni tenure for the learned Judges ignored the principles embodied in the Transfer of Property Act, which are summarised by the Full Bench in 'Vasudevan Nambudripad v. Valia Chathu Achan (C)', to the effect that a lessee must not fell timber or pull down buildings unless the timber had been planted or the buildings have been erected by him. The Full Bench decision clearly lays down that a lessee can only cut down timber trees planted by him, whereas the Division Bench indicates that timber trees other than trees that were in existence at the time of the lease could be removed by the tenant.

(10) In — 'Surya Rao v. The Chairman, Municipal Council, Cocanada', AIR 1936 Mad 919 (F), it was held that, in the case of a pathway vested in the Municipality, the Zamindar would continue to be the owner of the soil of the pathway and trees spontaneously growing on it. This can only be on the principle that trees of spontaneous growth belong to the owner of the soil.

(11) To summarise, the general and accepted principle is that the trees on a land belong to the owner. They are part of the land and the right to cut and sell them is incidental to the proprietorship of the land. This general principle is subject to the law of fixtures. Under the Roman Law, a tenant is entitled to remove all fixtures which he has attached to the lease-hold property, whereas under English Law, whatever is fixed to the soil subject to some exceptions becomes part of it. The Transfer of Property Act practically adopted the principles of Roman Law and embodied them in S. 108 of the Act. Under the said provisions, the lessee must not fell timber or pull down buildings unless the timber had been planted or the building had been erected by the lessee and he must leave the property in the state in which he received it.

(12) There is no provision enabling a tenant to remove trees of spontaneous growth in his lease-hold property. The principles embodied in the said Act are founded on reason and equity and, therefore, they are also applied to analogous cases which are not governed by the express provisions of other Acts, or regulated by custom. It follows that unless there is an established practice or statutory rule, trees of spontaneous growth on a land belongs to the owner.

(13) In the present case, as I have already stated, though the tank bed is in an estate, it is not a ryoti land and is not governed by the provisions of S. 12, Madras Estates Land Act. No custom has been established enabling a tenant to cut trees of spontaneous growth. No contract to that effect has been pleaded. In the circumstances, applying the aforesaid principles, I hold that the babul trees, which were of spontaneous growth belong to the plaintiff and that the defendants have no right to cut them or otherwise remove them. The conclusion arrived at by the lower court is correct.

(14) The appeal fails and is dismissed with costs. No leave.

D.R.R. Appeal dismissed.